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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 253

[FNS–2009–0006]

RIN 0584–AD95

Food Distribution Program on Indian Reservations: Amendments Related to the Food, Conservation, and Energy Act of 2008

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends Food Distribution Program on Indian Reservations (FDPIR) regulations to conform FDPIR policy to the requirements included in the Food, Conservation, and Energy Act of 2008 (the Farm Bill) for the Supplemental Nutrition Assistance Program (SNAP). The provisions of this rulemaking are intended to improve program service to applicants and participants and promote consistency in the eligibility determination processes of FDPIR and SNAP. Specifically, this rule permanently excludes combat pay from being considered as income and eliminates the maximum dollar limit of the dependent care deduction. The rule also excludes from resource consideration household funds held in qualified education savings accounts identified in the Farm Bill and excludes any other education savings accounts for which an exclusion is allowed under SNAP. This rule also clarifies that the current resource exclusion for retirement accounts is restricted to the qualified retirement accounts identified in the Farm Bill, and that a resource exclusion will be allowed for any other retirement account for which an exclusion is allowed under SNAP. Finally, the rule clarifies that the FDPIR regulations regarding income eligibility refer to the SNAP net monthly income standard, not the SNAP gross monthly income standard.

DATES: *Effective Date:* This rule is effective May 6, 2011.

FOR FURTHER INFORMATION CONTACT: Laura Castro, Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, 3101 Park Center Drive, Room 506, Alexandria, Virginia 22302, or by telephone (703) 305–2662.

SUPPLEMENTARY INFORMATION:

I. Procedural Matters

A. Executive Order 12866

Executive Orders 12866 and 13563 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 non-significant under section 3(f) of Executive Order 12866.

B. Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). It has been certified that this action will not have a significant impact on a substantial number of small entities. While Indian Tribal Organizations (ITOs) and State Agencies that administer FDPIR will be affected by this rulemaking, the economic effect will not be significant.

C. Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector of $100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

D. Executive Order 12372

The program addressed in this action is listed in the Catalog of Federal Domestic Assistance under 10.567. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

E. Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

1. Prior Consultation With State Officials

The programs affected by the regulatory proposals in this rule are all Tribal or State-administered, Federally-funded programs. The FNS National Office and Regional Offices have formal and informal discussions with State officials on an ongoing basis regarding program issues relating to the distribution of donated foods. FNS meets annually with the National Association of Food Distribution Programs on Indian Reservations (NAFDPIR), a national group of Tribal and State agencies, to discuss issues relating to FDPIR.

2. Nature of Concerns and the Need To Issue This Rule

This rule is intended to provide consistency between FDPIR and SNAP. The rule was prompted by provisions contained in the Farm Bill, enacted on June 18, 2008. Section 4101 of the Farm Bill permanently excludes combat pay (i.e., additional pay earned because of deployment to or service in a combat zone) from income when determining eligibility for SNAP. Section 4103 removes the maximum limit on the dependent care deduction and Section 4104 excludes from resources any household funds held in qualified tuition program or retirement accounts when determining eligibility for SNAP.

3. Extent to Which We Meet Those Concerns

FNS has considered the impact of this rule on ITOs and State agencies that participate in FDPIR. The overall effect is to improve the administration of FDPIR by simplifying and streamlining the eligibility determination process and improve program service to low-income applicants and participants.

F. Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This final rule will not have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

G. Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with the Department Regulation 4300–4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce the ability of participants to receive the benefits of donated foods in food distribution programs on the basis of an individual's or group's race, color, national origin, sex, age, or disability. FNS found no factors that will negatively and disproportionately affect any group of individuals.

H. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; *see* 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Information collections related to the provisions in this final rule were previously approved under OMB No. 0584–0293.

This rule will affect the reporting and recordkeeping burden for ITOs and State agencies under OMB No. 0584–0293 due to an expected change in number of households participating in FDPIR because of this rule. Documentation supporting the eligibility of all participating households must be maintained by the ITOs and State agencies.

The approved information collection estimates under OMB No. 0584–0293 are as follows:

Estimated total annual burden: 1,079,172.41.

Estimated annual recordkeeping burden: 746,400.42.

Estimated annual reporting burden: 332,771.98.

Changes resulting from this proposed rule will result in the following changes to OMB No. 0584–0293:

Estimated total annual burden: 1,079,172.92.

Estimated annual recordkeeping burden: 746,400.42.

Estimated annual reporting burden: 332,772.49.

These information collection requirements will not become effective until approved by OMB. Once they have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

I. E-Government Act Compliance

FNS is committed to compliance with the E-Government Act of 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

J. Executive Order 13175

E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the affect of this and other rules on tribes or Indian Tribal governments, or whether this rule may preempt Tribal law. In regard to this rule, no adverse comments were offered at those sessions. Further, the policies contained in this rule would not have Tribal implications that preempt Tribal law.

Reports from the consultative sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will offer future opportunities, such as Webinars and teleconferences, for collaborative conversations with Tribal leaders and their representatives concerning ways to improve rules with regard to their affect on Indian country.

II. Background and Discussion of the Proposed Rule

On April 27, 2010, FNS published a proposed rule in the **Federal Register** (75 FR 22027) to amend the regulations for FDPIR at 7 CFR part 253. The rule contained proposed amendments to 7 CFR 253.6 to align FDPIR with the Supplemental Nutrition Assistance Program (SNAP) relative to the requirements set forth in the Food, Conservation, and Energy Act of 2008 (Farm Bill). The proposed changes were intended to improve program service by: (1) Permanently excluding combat pay from income when determining eligibility for FDPIR (Section 4101 of the Farm Bill); (2) eliminating the maximum limit to the dependent care deduction (Section 4103 of the Farm Bill); (3) excluding household funds held in education savings accounts specified in Section 4104 of the Farm Bill and any other education accounts for which a resource exclusion is provided under the SNAP; (4) clarifying that the current FDPIR resource exclusion for retirement accounts is limited to qualified retirement accounts specified in Section 4104 of the Farm Bill and any other retirement accounts for which a resource exclusion is provided under SNAP; and (5) clarifying that the FDPIR regulations regarding income eligibility are referring to the SNAP net monthly income standard, rather than the SNAP gross monthly income standard. A full discussion of the proposed changes is contained in the April 27, 2010, proposed rulemaking.

Comments were solicited through June 28, 2010, on the provisions of the proposed rulemaking. FNS received 235 comment letters on the proposed regulatory changes, not counting four duplicate comment letters received from the same commenters. All of the comment letters are available for review at *http://www.regulations.gov.* Enter

"FNS–2009–0017" in the box under "Search Documents" and click on "Go" to view the comments received. One of the comment letters was received after the comment period expired, but we are considering this comment letter nonetheless.

Three of the comment letters were submitted by elected Tribal officials of ITOs that administer FDPIR. Two comment letters were from Tribal/State FDPIR administrators, and one comment letter was from a Tribal health provider. Five comment letters were submitted by national non-profit/advocacy organizations, and five comment letters were from state non-profit/advocacy organizations. One letter was submitted by a private company, and 218 letters were submitted by private citizens.

Four comment letters addressed the provisions of the proposed rule. All four commenters expressed agreement with the provisions of the proposed rule. One commenter stated: "Aligning FDPIR eligibility requirements and income exclusions to be consistent with those allowed by the SNAP (Food Stamps) will allow a greater number of Tribal people to receive benefits through our program, particularly elders and disabled individuals living on fixed incomes * * *." That commenter also stated: "It is the Tribe's opinion that this regulatory change is equitable and corrects the former disparity in eligibility requirements to receive benefits for our most needy community members * * *."

The comment letters also addressed issues beyond the scope of the proposed rulemaking. Below is a summary of these other issues and the number of commenters that addressed each issue:

1. Most commenters wrote in regards to the FDPIR resource limit or "asset test." On January 28, 2010, USDA published a final rulemaking in the **Federal Register** (75 FR 4469) that aligned the FDPIR resource limit with SNAP's standard policy for the resource limit, i.e., $3,000 for households with at least one elderly/disabled member and $2,000 for all other households. However, SNAP regulations at 7 CFR 273.2(j)(2)(ii) allow SNAP State agencies the option to expand categorical eligibility (commonly referred to as Broad-Based Categorical Eligibility or BBCE) to certain households, which effectively eliminates an asset test for these households because household assets are not considered in the eligibility determination of households that are categorically eligible. Under BBCE, State agencies may consider households categorically eligible for SNAP if all household members receive means-tested non-cash benefits from a program that is funded with over 50 percent of Temporary Assistance for Needy Families Program (TANF) or Maintenance of Effort (MOE) money. SNAP also allows State agencies, with FNS approval, to make households categorically eligible if all members receive a non-cash benefit from a program that receives less than 50 percent funding from TANF or MOE sources, as long as the household's gross income does not exceed 200 percent of the Federal Poverty Guidelines. Non-cash benefits could include such services as employment assistance, childcare, or transportation assistance (*i.e.,* "hard" BBCE); or receipt of an informational brochure or toll-free 1–800 number about other available programs *(i.e.,* "soft" BBCE). As of 2009, 15 SNAP State agencies had implemented "hard" BBCE and 26 SNAP State agencies had implemented "soft" BBCE. Eleven SNAP agencies had not implemented BBCE (*http://www.fns.usda.gov/snap/rules/Memo/Support/State_Options/8–State_Options.pdf*).

Many of the comment letters received in response to the April 27, 2010, proposed rulemaking supported the alignment of FDPIR and SNAP policy in regard to the asset test and BBCE (226 commenters). Many commenters proposed that the FDPIR programs be allowed to follow the SNAP BBCE policy implemented in the state where the FDPIR program is located (225 commenters). Most of these commenters remarked that families living in states that have adopted BBCE under SNAP should not be subject to an asset test under FDPIR (220 commenters). Eight commenters stated that Tribal members should not be subject to stricter asset standards under FDPIR than SNAP, while two commenters wrote in support of eliminating the asset test in FDPIR.

Many commenters requested that USDA adopt their comments on the FDPIR asset test and BBCE in this final rulemaking (225 commenters). We do not feel it is appropriate to include the BBCE option in this final rulemaking. To do so would circumvent the public comment process since that provision was not included in the proposed rulemaking and made available for public comment along with the other provisions contained in this rulemaking. However, these comments are being considered for future rulemaking.

2. Two commenters supported the alignment of SNAP and FDPIR regulations, but the commenters did not specify which provisions should be aligned.

3. One commenter supported the alignment of FDPIR and SNAP in regards to the standard deduction. The commenter stated that SNAP allows a standard deduction that is not allowed under FDPIR. In actuality, SNAP and FDPIR use the same standard deductions, which vary by household size. Under SNAP, the standard deductions are applied as income deductions that are subtracted from the household's gross monthly income as part of the net monthly income test. Under FDPIR, the standard deductions are added to the SNAP net monthly income standards to simplify the income eligibility determination. For example, in fiscal year 2011, the SNAP standard deduction for a four-person household is $153 and the SNAP net monthly income standard is $1,838 for that same sized household. Under FDPIR, the $153 standard deduction is added to the net monthly income standard (i.e., the FDPIR net monthly income standard for a four-person household is $1,991 ($1,838 + $153)).

4. One commenter supported the alignment of FDPIR and SNAP in regards to using gross income to determine eligibility. The commenter remarked that SNAP determines eligibility based on gross income, whereas FDPIR uses net income. In actuality, both SNAP and FDPIR determine eligibility by starting with a household's gross income. Both SNAP and FDPIR determine eligibility by subtracting allowable income deductions from a household's gross monthly income to determine the household's net monthly income, which is then compared to the applicable net monthly income standards, which vary by household size. A household with net monthly income that is higher than the applicable net monthly income standard is ineligible under both SNAP and FDPIR. However, SNAP employs a prescreening test for households without elderly or disabled members prior to calculating the household's net monthly income. SNAP compares the household's gross monthly income to the applicable SNAP gross monthly income standard, which is set at 130 percent of the Federal Poverty Guidelines. If the SNAP household's gross monthly income is higher than the applicable gross income standard, the household is determined ineligible, without conducting the net monthly income calculation. If the SNAP household's gross monthly income is below the gross income test limit, then the certifier conducts the net monthly income test to determine if the household is eligible based on its net monthly income. FDPIR does not use the gross income test to prescreen

households without elderly or disabled members; only the net income test is used under FDPIR.

5. One commenter remarked on the perceived disparity between FDPIR and SNAP in regards to income eligibility guidelines. The commenter stated that SNAP income eligibility guidelines are higher than those used under FDPIR. Both SNAP and FDPIR use 100 percent of the Federal Poverty Guidelines for the net monthly income standard. As discussed above, SNAP uses 130 percent of the Federal Poverty Guidelines for a prescreening test (*i.e.,* the gross income test) that is applied to all households without elderly or disabled members. However, the SNAP gross income test does not determine eligibility. Households that pass the gross income test are then subject to a net income test, which is the same test used under FDPIR.

6. One commenter recommended that the income standard for all Federal programs be raised to 200 percent of the Federal Poverty Guidelines. FDPIR and SNAP use 100 percent of the Federal Poverty Guidelines as the net monthly income standard.

7. One commenter recommended that all Federal programs adopt a fairer measure of need than the Federal Poverty Guidelines. The commenter suggested the Census Bureau's "Supplemental Poverty Measure" or "Self Sufficiency Standard."

8. One commenter recommended the appropriation of funding to support Section 4211 of the Farm Bill. Section 4211 authorized USDA to purchase bison meat, as well as traditional Native American foods and locally-grown foods, subject to the availability of appropriated funds. While funds have not been specifically appropriated for this purpose, FNS has made a limited purchase of frozen ground bison meat for program recipients in fiscal year 2011.

9. One commenter suggested that an increase in appropriations for FDPIR food purchases to allow for the purchase of bison and other traditional Native American foods would rectify the inequity that resulted when SNAP benefits were increased by 13.6 percent under the American Recovery and Reinvestment Act of 2009 and FDPIR did not receive a corresponding increase.

10. One commenter suggested an increase in the SNAP asset limit. As discussed above, SNAP's standard policy sets the asset limit at $3,000 for households with at least one elderly/disabled member and $2,000 for all other households.

11. One commenter advocated for the return of lands to the first Americans.

In the following discussion and regulatory text, the term "State agency," as defined at 7 CFR 253.2, is used to include ITOs authorized to operate FDPIR and the Food Distribution Program for Indian Households in Oklahoma (FDPIHO) in accordance with 7 CFR parts 253 and 254. The term "FDPIR" is used in this final rule to refer collectively to FDPIR and FDPIHO.

A. Excluding Combat Pay From Income

The April 27, 2010, rulemaking proposed an amendment to FDPIR regulations at 7 CFR 253.6(e)(3)(xi) to permanently exclude combat pay from income when determining eligibility for FDPIR. The proposed change was intended to align FDPIR regulations with current FDPIR and SNAP policy. Combat pay is defined as additional payment that is received by or from a member of the United States Armed Forces deployed to a combat zone, if the additional pay is the result of deployment to or service in a combat zone, and was not received immediately prior to serving in a combat zone. Based on the comments received on the proposed rulemaking, no changes have been made to the proposed amendatory language.

This provision was implemented by policy memorandum on July 16, 2008, so this amendment will not affect current policy. It will simply ensure that current policy is codified in the regulations.

B. Amending the Dependent Care Deduction

The April 27, 2010, rule also proposed an amendment to FDPIR regulations 7 CFR 253.6(f)(2) to remove language that imposed a maximum limit on dependent care deductions. This proposed revision was intended to align FDPIR regulations with current FDPIR and SNAP policy. Based on the comments received on the proposed rulemaking, no changes have been made to the proposed amendatory language.

This provision was implemented by policy memorandum on July 16, 2008, so this amendment will not affect current policy. It will simply ensure that current policy is codified in the regulations.

C. Excluding Household Funds Held in Education Savings Accounts From Consideration as a Resource

The April 27, 2010, rulemaking proposed an amendment to FDPIR regulations at 7 CFR 253.6(d)(2) to allow a resource exclusion for the value of funds held in a qualified education savings program described in section 529 of Internal Revenue Code of 1986 or in a Coverdell education savings account under section 530 of that Code, and any other education savings program or account for which a resource exclusion is allowed under SNAP. This amendment was intended to ensure consistency in the treatment of these resources in determining FDPIR and SNAP eligibility. Based on the comments received on the proposed rulemaking, no changes have been made to the proposed amendatory language.

D. Clarification Regarding the Resource Exclusion for Qualified Retirement Accounts

FDPIR regulations at 7 CFR 253.6(d)(2) allow the exclusion of pension funds. The April 27, 2010, rulemaking proposed an amendment to FDPIR regulations at 7 CFR 253.6(d)(2) to specify that the FDPIR resource exclusion applies to the value of funds held in retirement accounts described in sections 401(a), 403(a), 403(b), 408, 408A, 457(b), and 501(c)(18) of the Internal Revenue Code of 1986; the value of funds held in a Federal Thrift Savings Plan account as described in 5 U.S.C. 8439; and any other retirement program or account for which a resource exclusion is allowed under SNAP. This amendment does not materially change current FDPIR regulations or policy. It simply revises the regulatory language to mirror section 4104 of the Farm Bill. Based on the comments received on the proposed rulemaking, no changes have been made to the proposed amendatory language.

E. Clarifying the Application of SNAP Net Income Standards to FDPIR

The April 27, 2010, rulemaking also proposed an amendment to FDPIR regulations at 7 CFR 253.6(e)(1)(i), to clarify that FDPIR applies the SNAP net monthly income standard, not the gross monthly income standard in the FDPIR income eligibility determination. This amendment is for clarification purposes only and does not change current FDPIR policy, nor does it revise current FDPIR income guidelines or eligibility criteria. Based on the comments received on the proposed rulemaking, no changes have been made to the proposed amendatory language.

List of Subjects in 7 CFR Part 253

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Reporting and Recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR part 253 is amended as follows:

PART 253—ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM FOR HOUSEHOLDS ON INDIAN RESERVATIONS

■ 1. The authority citation for 7 CFR part 253 continues to read as follows:

Authority: 91 Stat. 958 (7 U.S.C. 2011–2036).

■ 2. In § 253.6:
■ a. Revise paragraph (d)(2)(i);
■ b. Redesignate paragraphs (d)(2)(ii) through (d)(2)(iv) as (d)(2)(iii) through (d)(2)(v), respectively;
■ c. Add new paragraph (d)(2)(ii);
■ d. Add new paragraph (d)(2)(vi);
■ e. Revise the second sentence of paragraph (e)(1)(i);
■ f. Add new paragraph (e)(3)(xi); and
■ g. Remove the second sentence of paragraph (f)(2).

The revisions and additions read as follows:

§ 253.6 Eligibility of households.

* * * * *

(d) * * *

(2) * * *

(i) The cash value of life insurance policies and the first $1,500 of the equity value of one bona fide pre-paid funeral agreement per household member. The equity value of a pre-paid funeral agreement is the value that can be legally converted to cash by the household member. For example, an individual has a $1,200 pre-paid funeral agreement with a funeral home. The conditions of the agreement allow the household to cancel the agreement and receive a refund of the $1,200 minus a service fee of $50. The equity value of the pre-paid funeral agreement is $1,150.

(ii) The value of funds held in retirement accounts described in sections 401(a), 403(a), 403(b), 408, 408A, 457(b), and 501(c)(18) of the Internal Revenue Code of 1986; the value of funds held in a Federal Thrift Savings Plan account as described in 5 U.S.C. 8439; and any other retirement program or account for which a resource exclusion is allowed under the Supplemental Nutrition Assistance Program (SNAP).

* * * * *

(vi) The value of funds held in a qualified education savings program described in section 529 of Internal Revenue Code of 1986 or in a Coverdell education savings account under section 530 of that Code, and any other education savings program or account for which a resource exclusion is allowed under SNAP.

* * * * *

(e) * * *

(1) * * *

(i) * * * The income eligibility standards shall be the applicable SNAP net monthly income eligibility standards for the appropriate area, increased by the amount of the applicable SNAP standard deduction for that area.

* * * * *

(3) * * *

(xi) *Combat pay.* Combat pay is defined as additional payment that is received by or from a member of the United States Armed Forces deployed to a combat zone, if the additional pay is the result of deployment to or service in a combat zone, and was not received immediately prior to serving in a combat zone.

* * * * *

Dated: April 1, 2011.

Julia Paradis,

Administrator Food and Nutrition Service.

[FR Doc. 2011–8153 Filed 4–5–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0323; Directorate Identifier 2011–SW–005–AD; Amendment 39–16651; AD 2011–08–01]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron, Inc. Model 212 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing emergency airworthiness directive (EAD) for the Bell Helicopter Textron, Inc. (Bell) Model 212 helicopters with a certain main rotor hub inboard strap fitting (fitting) installed. That EAD requires, before further flight, removing certain serial-numbered fittings and replacing them with airworthy fittings. It also requires performing a magnetic particle inspection (MPI) on fittings with certain serial numbers (S/Ns) to inspect for a crack. If a crack is found, the cracked fitting must be replaced with an airworthy fitting, and certain data must be reported to the FAA. This airworthiness directive (AD) retains the requirements of that EAD and expands the applicability to require performing an MPI for a crack on additional serial-numbered fittings. This AD is prompted by the determination that certain fittings were not manufactured in accordance with the approved manufacturing processes and controls. In total, eight fittings have been found that have cracks. We are issuing this AD to prevent failure of a fitting, loss of a main rotor blade, and subsequent loss of control of the helicopter.

DATES: This AD is effective April 21, 2011.

We must receive any comments on this AD by June 6, 2011.

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

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

For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101, telephone (817) 280–3391, fax (817) 280–6466, or at *http://www.bellcustomer.com/files/.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Michael Kohner, Aerospace Engineer, Rotorcraft Directorate, Rotorcraft Certification Office, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137, *phone:* (817) 222–5170; *fax:* (817) 222–5783; *e-mail: mike.kohner@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

This AD supersedes EAD 2010–25–51, issued November 24, 2010 (EAD 2010–25–51), which superseded EAD 2010–24–52, issued November 19, 2010 (EAD 2010–24–52). EAD 2010–24–52 superseded EAD 2010–24–51, issued November 12, 2010 (EAD 2010–24–51). EAD 2010–24–51, EAD 2010–24–52, and EAD 2010–25–51 were all issued for the Bell Model 212 helicopters with a certain fitting installed.

EAD 2010–24–51, the initial EAD, was issued for all Bell Model 212 helicopters with a fitting, part number (P/N) 212–010–103–007, S/Ns 9956 through 10005 with a prefix of "A". That EAD required, before further flight, removing any affected fitting and replacing it with an airworthy fitting. That EAD also prohibited installing any affected fitting on any helicopter. That EAD was prompted by an accident that resulted in several fatalities. During the investigation of the accident, a crack was found on a fitting. Subsequently, four additional fittings from the same manufacturing lot were inspected, and two were found to exhibit the same type of cracking. We issued EAD 2010–24–51 to remove this lot from service to prevent failure of a fitting, loss of a main rotor blade, and subsequent loss of control of the helicopter.

After we issued EAD 2010–24–51, additional fittings from a different manufacturing lot were found to have the same type of crack as that found on the fitting involved in the accident. Therefore, we issued superseding EAD 2010–24–52 to require the same actions as EAD 2010–24–51, and to expand the applicability to include additional fittings. In addition to S/Ns 9956 through 10005 with a prefix of "A", EAD 2010–24–52 added S/Ns 52, 54, 55, 57 through 65, 67, 69, 70, 71, 73, 103, 112, 113, 137, and 139 with a prefix of "SH" to the applicability. EADs 2010–24–51 and 2010–24–52 were issued as interim actions to address a known unsafe condition, and Bell continued to investigate the cause of the cracking.

Because the root cause of the cracking had not been determined, and due to the severity of a fitting failure, we issued superseding EAD 2010–25–51 to require the same action as EAD 2010–24–52 and to also require performing an MPI on fittings with S/Ns 9911 through 9955, 10006 through 10049, 10075 through 10174, 10455 through 10460, 10581 through 10655, 10742 through 10791, and 10862 through 10946 with a prefix of "A" to detect a crack on those fittings. If you find a crack, you are required to replace the cracked fitting with an airworthy fitting, and within 24 hours, report the information specified in Appendix 1 of the EAD to the Manager, Rotorcraft Certification Office. If you do not find a crack, you are required to reidentify and refinish the fitting in accordance with the specified portion of Alert Service Bulletin (ASB) 212–10–142, dated November 24, 2010 (ASB 212–10–142).

Actions Since AD Was Issued

Since we issued EAD 2010–25–51, additional fittings with cracks were found using the MPI process. In response to these findings, Bell issued ASB 212–10–142, Revision A, dated March 21, 2011, that specifies performing an MPI for a crack on all serial-numbered fittings with the same part number in stock or in service. We have determined that certain fittings were not manufactured in accordance with the approved manufacturing processes and controls. Due to the severity of a fitting failure, this superseding AD is being issued to continue to require replacing certain serial-numbered fittings, and to expand the applicability to require performing an MPI for a crack on the remaining serial numbers of the fittings with the same part number. Serial-numbered fittings affected by this superseding AD are listed in Table 1 of the Applicability section of this AD. This superseding AD is being issued to prevent failure of a fitting, loss of a main rotor blade, and subsequent loss of control of the helicopter.

Relevant Service Information

We reviewed Bell Alert Service bulletin (ASB) No. 212–10–141, dated November 11, 2010 (ASB–212–10–141), which specified the immediate removal of the affected fittings, S/Ns A–9956 through A–10005, from service. We also reviewed ASB No. 212–10–141, Revision A, dated November 18, 2010 (ASB 212–10–141 Rev. A), which incorporates additional S/Ns of the affected fittings and specifies removing the affected serial-numbered fittings from service. In ASB 212–10–141, Bell states that they have determined that the fittings may not have been manufactured in accordance with the engineering design requirements and may fracture as a result of the nonconformance.

We have also reviewed Bell ASB 212–10–142, initial release, dated November 24, 2010 (ASB 212–10–142) which specifies performing an MPI on fittings with certain S/Ns to detect a crack on those fittings.

Finally, we have reviewed Bell ASB 212–10–142, Revision A, dated March 21, 2011 (ASB 212–10–142 Rev. A), which includes all serial-numbered fittings except those already inspected and marked with "FM". ASB 212–10–142 Rev. A specifies 1) within 25 hours time-in-service (TIS) or 15 days, whichever comes first, for all fittings with less than 400 hours TIS; or 2) within 100 hours TIS or 30 days, whichever comes first, for all fittings with 400 or more hours but less than 800 hours TIS; or 3) at the next main rotor teardown inspection or next tension-torsion strap replacement, whichever comes first, for all fittings with more than 800 hours TIS, performing a one-time MPI of the fitting, P/N 212–010–103–007, with all S/Ns in stock or in service. Finally, ASB 212–10–142 Rev. A states that all fittings, S/Ns A–11021 and subsequent, SH–053, SH–066, SH–072, SH–074 through SH–102, SH–104 through SH–111, SH–114 through SH–136, SH–138, and SH–140 and subsequent are not affected by ASB 212–10–142 Rev. A. Bell states that a one-time MPI of the affected fittings is required to ensure continued airworthiness of the fittings.

FAA's Determination

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

AD Requirements

This AD supersedes EAD 2010–25–51 and requires the following:

- Before further flight, for any helicopter with a fitting, S/N 9956 through 10005, with a prefix of "A", and S/N 52, 54, 55, 57 through 65, 67, 69, 70, 71, 73, 103, 112, 113, 137, and 139 with a prefix of "SH", replace the fitting with an airworthy fitting. Any fitting with a S/N identified in this paragraph is no longer eligible for installation on any helicopter.
- Before further flight, for any helicopter with a fitting, S/N 9911 through 9955, 10006 through 10049, 10075 through 10174, 10455 through 10460, 10581 through 10655, 10742 through 10791, and 10862 through 10946, with a prefix of "A", perform an MPI of each fitting for a crack. If the fitting is cracked, replace it with an airworthy fitting. If the fitting is not cracked, reidentify and refinish the fitting.
- For any fitting with a serial number identified in paragraph (h) in the Compliance section of this AD, perform an MPI of each fitting for a crack:
  - For any fitting with 400 or less hours TIS, perform an MPI within 25

hours TIS or 15 days, whichever comes first.

○ For any fitting with more than 400 hours but less than 800 hours TIS, perform an MPI within 100 hours TIS or 30 days, whichever comes first.

○ For fittings with 800 hours or more TIS, perfrom an MPI at the next main rotor hub teardown inspection or tension-torsion strap replacement, whichever comes first.

○ If a fitting is cracked, replace it with an airworthy fitting. If a fitting is not cracked, reidentify and refinish the fitting.

• If a crack is found on any fitting, within 24 hours, report the information requested in Appendix 1 of this AD to the Manager, Rotorcraft Certification Office, FAA, 2601 Meacham Blvd, Fort Worth, Texas 76137, or e-mail *7–AVS–ASW–170@faa.gov.*

Differences Between the AD and the Service Information

This AD differs from ASB 212–10–142 Rev. A as follows:

• We do not require returning parts to Bell.

• We require performing an MPI before further flight on certain S/N fittings included in the initial release of ASB 212–10–142.

• We require sending information to the Rotorcraft Certification Office and not to Bell.

• Bell uses the term "total time-in-service" to describe compliance times, and we use the term "time-in-service."

• We specify S/Ns in our AD, and Bell does not specify S/Ns in ASB 212–10–142 Rev. A.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA finds that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because we evaluated all the available information and determined the unsafe condition described is likely to exist or develop in other helicopters of this same type design. Therefore, we find that notice and opportunity for prior public comment are impracticable because of the short compliance times, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the Docket Number FAA–2011–0323 and "Directorate Identifier 2011–SW–005–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 84 helicopters of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per helicopter	Cost on U.S. operators
(a) For any fitting, S/N 9956 through 10005 and a prefix of "A"; or a S/N of 52, 54, 55, 57 through 65, 67, 69, 70, 71, 73, 103, 112, 113, 137, 139 with a prefix of "SH"; replace the fitting with an airworthy fitting (assumes action affects 72 fittings).	40 work-hours × $85 per hour = $3,400.	$2,367	$5,767	$415,224
(c) For any fitting affected by this AD with a S/N not identified in paragraph (a) of this table, perform an MPI on each fitting for a crack unless documentation exists of any previous MPI performed during regularly scheduled maintenance (assumes action affects 12 fittings).	40 work-hours × $85 per hour = $3,400.	0	3,400	40,800

We estimate a total cost of $456,024 to do the actions required by this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction,

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends Part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2011–08–01 Bell Helicopter Textron, Inc. (Bell): Amendment 39–16651; Docket No. FAA–2011–0323; Directorate Identifier 2011–SW–005–AD.

Effective Date

(a) This AD is effective on April 21, 2011.

Other Affected ADs

(b) This AD supersedes Emergency AD 2010–25–51, issued on November 24, 2010, Directorate Identifier 2010–SW–096–AD.

Applicability

(c) This AD applies to Model 212 helicopters certificated in any category, with a main rotor hub inboard strap fitting (fitting), part number (P/N) 212–010–103–007, installed, with the serial numbers (S/Ns) listed in the following Table 1:

TABLE 1

Serial numbers with a prefix of:
"A" or "A–FS": 7 through 10946.
"A1": 430 through 7606.
"DI": 22296 through 22681.
"EA": 333 through 381.
"LK": 4619 through 4631.
"MB": 11908 through 11916.
"SH": 52, 54, 55, 57 through 65, 67, 69, 70, 71, 73, 103, 112, 113, 137, and 139.
"WR": 275 through 319.

Unsafe Condition

(d) This AD is prompted by a recent accident that resulted in several fatalities. During the investigation of the accident, a crack was found on a fitting. We have determined that certain fittings were not manufactured in accordance with approved manufacturing processes and controls. Due to the severity of a fitting failure, we are requiring replacing certain serial-numbered fittings, and we are expanding the applicability to require performing a magnetic particle inspection (MPI) for a crack on the remaining serial numbers of the fittings with the same part number. The actions specified by this AD are intended to prevent failure of a fitting, loss of a main rotor blade, and subsequent loss of control of the helicopter.

Compliance

(e) Required as indicated, unless accomplished previously.

(f) Before further flight, for any helicopter with a fitting, serial number (S/N) 9956 through 10005 with a prefix of "A", and S/N 52, 54, 55, 57 through 65, 67, 69, 70, 71, 73, 103, 112, 113, 137, and 139 with a prefix of "SH" installed, replace the fitting with an airworthy fitting. Any fitting with a S/N identified in this paragraph is no longer eligible for installation on any helicopter.

(g) Before further flight, for any helicopter with a fitting, S/N 9911 through 9955, 10006 through 10049, 10075 through 10174, 10455 through 10460, 10581 through 10655, 10742 through 10791, and 10862 through 10946 with a prefix of "A", perform an MPI of each fitting for a crack. If a fitting is cracked, replace it with an airworthy fitting. If a fitting is not cracked, reidentify and refinish the fitting using a vibrating stylus (not to exceed 0.005 inch depth nor to extend within 0.10 inch of part edge) by adding "FM" at the end of the P/N. Touch up the reworked area with brush cadmium plating or zinc chromate primer. Reidentify the historical service records with "FM" at the end of the P/N.

Note 1: The Bell Model 212 Component, Repair, and Overhaul Manual, which is not incorporated by reference, contains additional information about MPI procedures.

(h) For any fitting with a S/N identified in Table 1 of the Applicability section of this AD, and not identified in paragraph (f) or (g) of this AD, perform an MPI of each fitting for a crack as follows:

(1) For a fitting with 400 or less hours time-in-service (TIS), perform an MPI within 25 hours TIS or 15 days, whichever comes first.

(2) For a fitting with more than 400 but less than 800 hours TIS, perform an MPI within 100 hours TIS or 30 days, whichever comes first.

(3) For a fitting with 800 or more hours TIS, perform an MPI at the next main rotor hub teardown inspection or tension-torsion strap replacement, whichever comes first.

(4) If a fitting is cracked, replace it with an airworthy fitting.

(5) If a fitting is not cracked, reidentify and refinish the fitting in accordance with the instructions in paragraph (g) of this AD.

(i) Within 24 hours after finding any cracked fitting, report the information requested in Appendix 1 of this AD to the Manager, Rotorcraft Certification Office, to the address, fax number, or email specified in the Appendix.

Paperwork Reduction Act Burden Statement

(j) A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid Office of Management and Budget (OMB) Control Number. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.),* the OMB has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, *Attn:* Information Collection Clearance Officer, AES–200.

Subject

(k) The Joint Aircraft System Component/Air Transport Association of America Code is 6220: Main rotor hub.

Alternative Methods of Compliance (AMOCs)

(l) The Manager, Rotorcraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the "Additional Information" section of this AD.

Note 2: Before using any approved AMOC, we request that you notify your appropriate principal inspector, or if you have no principal inspector, your local Flight Standards District Office.

Additional Information

(m)(1) For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101, telephone (817) 280–3391, fax (817) 280–6466, or at *http://www.bellcustomer.com/files/.*

(2) You may review copies of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas.

(3) Bell Helicopter Alert Service Bulletin No. 212–10–141, Revision A, dated November 18, 2010, and Alert Service Bulletin No. 212–10–142, Revision A, dated March 21, 2011, contain additional guidance pertaining to the subject of this AD but are not incorporated by reference. A picture of a crack indication on an actual fitting is shown in Figure 1 of Bell Alert Service Bulletin 212–10–142, Rev. A.

Appendix 1 to AD 2011–08–01

AD Compliance Inspection Report (Sample Format)

Provide the following information and mail, fax, or e-mail report to: Manager, Rotorcraft Certification Office, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137, fax (817) 222–5783, e-mail *7–AVS–ASW–170@faa.gov.*

Aircraft Registration No.	
Helicopter Serial No.	
Helicopter Owner/Operator.	
Contact Phone No.	
Fitting Part Number.	
Fitting Serial Number.	
Hours Time-in-Service on Fitting at Time of Inspection.	
Description of Findings.	
Who Performed the Inspection?	
Date and Location the Inspection was Performed.	
Describe the crack size, location, orientation (provide a sketch or pictures with the fitting part and serial numbers).	
Provide any other comments.	

Issued in Fort Worth, Texas, on March 29, 2011.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2011–8133 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–13–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans

CFR Correction

In Title 29 of the Code of Federal Regulations, Part 1927 to End, revised as of July 1, 2010, on page 1007, in the table in Appendix B, in the entry for July 1994, the fourth column is corrected to read ".0525".

[FR Doc. 2011–8325 Filed 4–5–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0166]

RIN 1625–AA00

Safety Zone; Chicago Harbor, Navy Pier East, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier East Safety Zone in Chicago Harbor from 9:20 p.m. through 9:40 p.m. on May 7, 2011. This action is necessary and intended to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after fireworks events. This rule will establish restrictions upon and control movement of vessels in a specified area immediately prior to, during, and immediately after fireworks events. During the enforcement period, no person or vessel may enter the safety zone without the permission of the Captain of the Port, Sector Lake Michigan.

DATES: The regulations in 33 CFR 165.933 will be enforced from 9:20 p.m. through 9:40 p.m. on May 7, 2011.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail BM1 Adam Kraft, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at 414–747–7154, e-mail *Adam.D.Kraft@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone; 33 CFR 165.933–Chicago Harbor, Navy Pier East, Chicago, IL for the following event:

(1) *Alexian Brothers Foundation Fireworks;* on May 7, 2011 from 9:20 p.m. through 9:40 p.m.

All vessels must obtain permission from the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative to enter, move within or exit the safety zone. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.933 Safety Zone, Chicago Harbor, Navy Pier East, Chicago IL and 5 U.S.C. 552 (a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port, Sector Lake Michigan, will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended. If the Captain of the Port, Sector Lake Michigan, determines that the safety zone need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the safety zone. The Captain of the Port, Sector Lake Michigan, or his or her on-scene representative may be contacted via VHF Channel 16.

Dated: March 24, 2011.

L. Barndt,

Captain, U.S. Coast Guard, Captain of the Port, Sector Lake Michigan.

[FR Doc. 2011–8214 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

Requirements for Preparation, Adoption, and Submittal of Implementation Plans

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 50 to 51, revised as of July 1, 2010, on page 265, in § 51.166, paragraph (b)(49)(vi) is added to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(49) * * *

(vi) Particulate matter (PM) emissions, $PM_{2.5}$ emissions, and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures. On or after January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods), such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, $PM_{2.5}$ and PM_{10} in PSD permits. Compliance with emissions limitations for PM, $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particular matter unless required by the terms and conditions of the permit or the applicable implementation plan. Applicability determinations made prior to this date without accounting for condensable particular matter shall not be considered in violation of this section unless the applicable implementation plan required condensable particular matter to be included.

* * * * *

[FR Doc. 2011–8334 Filed 4–5–11; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2005–AL–0002–201047; FRL–9290–3]

Approval and Promulgation of Implementation Plans: Alabama: Final Disapproval of Revisions to the Visible Emissions Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to amend an October 15, 2008, final rulemaking on two State Implementation Plan (SIP) revisions regarding the State of Alabama's rules for visible emissions from certain stationary sources. EPA has now determined upon reconsideration that Alabama's SIP revisions, dated September 11, 2003, and August 22, 2008, are not approvable pursuant to the Clean Air Act (CAA or Act) section 110(l). Accordingly, EPA is disapproving the two SIP revisions provided to EPA by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), dated September 11, 2003, and August 22, 2008 (Submittals). No further action is required by Alabama because the SIP revisions were not required by the CAA. As a result of this action, Alabama's visible emissions rule that was in the SIP prior to the October 15, 2008, final action will be the current SIP-approved rule as of the effective date of this action. EPA urges Alabama to undertake rulemaking that will bring its State-effective rule into conformance with its SIP-approved rule.

DATES: *Effective Date:* This rule will be effective May 6, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2005–AL–0002. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9040. Ms. Benjamin can also be reached via electronic mail at *benjamin.lynorae@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What is the background for this action?
II. What action is EPA taking and what is EPA's rationale for disapproving the submittals?
III. Response to Comments
IV. Final Action
V. Statutory and Executive Order Reviews

I. What is the background for this action?

This action follows three key EPA actions regarding Alabama's request for approval of the two visible emissions SIP revisions. The first was an October 15, 2008, final rule (73 FR 60957) approving revisions to the Alabama SIP embodied in two submittals dated September 11, 2003, and August 22, 2008 (Submittals). The second was an April 3, 2009, action granting a February 25, 2009, petition for reconsideration on the October 15, 2008, final action which had approved the SIP revisions. The third was an October 2, 2009, proposed rule (74 FR 50930) identifying two alternative options being considered by EPA as part of the reconsideration process (the alternative proposals were either to affirm the October 15, 2008, rulemaking, thereby approving Alabama's Submittals or to amend the October 15, 2008, rulemaking, thereby disapproving Alabama's Submittals). EPA has now determined that Alabama's Submittals are not approvable pursuant to CAA section 110(l). Detailed background information for this action is available in the proposed rulemaking published on October 2, 2009. 74 FR 50930.

In relevant but brief part, on September 11, 2003, ADEM submitted a voluntary [1] request for EPA approval of a SIP revision (2003 Submittal) containing proposed revisions to the existing EPA-approved visible emissions portion of the Alabama SIP, found at Alabama Administrative Code (AAC) 335–3–4–.01, "Visible Emissions," and pertaining to sources of particulate matter (PM) emissions.[2] In

[1] The request was "voluntary" because it was not specifically required by the CAA or its implementing regulations, rather, ADEM chose to revise its rules and submit the SIP revision.

[2] PM particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers are referred to as PM_{10}; PM particles with an aerodynamic diameter less than or equal to a

an action published on April 12, 2007 (72 FR 18428), EPA proposed to approve the 2003 Submittal contingent upon the State of Alabama submitting a revised SIP submittal addressing EPA's concerns regarding impacts of the rule changes on attainment of the National Ambient Air Quality Standards (NAAQS), as set forth in 72 FR 18428–18434. EPA's proposal notice explained that the State would have to provide EPA with a revised SIP submittal consistent with certain changes described by EPA in the April 12, 2007, notice of proposed rulemaking before EPA could approve the revisions. The proposal notice also described EPA's rationale for requesting the additional submittal. Specifically, EPA noted that the 2003 Submittal was not approvable because the revision "would allow a source to emit at a higher allowable average opacity percent level (as measured by a COMS—Continuous Opacity Monitoring System—in six-minute increments) on a quarterly basis as well as allowing higher short term excursions than the current approved SIP allows." 72 FR at 18430/3. EPA further explained that "in the absence of a supporting demonstration of compliance with the CAA requirements from the State, we believe that the 2003 SIP submittal is not approvable as submitted." *Id.*

On August 22, 2008, Alabama, through ADEM, provided EPA with an amended submittal (2008 Submittal). After further evaluation, EPA determined that it could approve the Submittals (i.e., the 2003 Submittal as amended by the 2008 Submittal). On October 15, 2008, EPA took final action to incorporate into the Alabama SIP, the revisions to Alabama's visible emissions rule included in the Submittals. 73 FR 60957. EPA's rationale for its approval is discussed in that final action. In order to approve the Submittals in 2008, EPA relied on two main findings: "(1) The revision would not increase the allowable average opacity levels; and (2) the relationship between changes in opacity and increases or decreases in ambient $PM_{2.5}$ levels cannot be quantified readily for the sources subject to this SIP revision, and is particularly uncertain for short-term analyses." 73 FR 60959/2. The October 15, 2008, final action was effective on November 14, 2008 (by its terms, the Alabama rule change became effective, and thus applicable to sources, on May 14, 2009).

Following the October 2008 final action, EPA received two petitions for reconsideration submitted on behalf of the Alabama Environmental Council (AEC) and other parties (Petitioners), one on December 12, 2008, and one on February 25, 2009. EPA considered these petitions under section 553(e) of the Administrative Procedures Act (APA) and the CAA. The first petition for reconsideration raised procedural and substantive concerns with EPA's October 15, 2008, final action.[3] EPA denied the December 12, 2008, petition via letter on January 15, 2009. The second petition incorporated by reference the issues raised in the first petition and also identified additional substantive and procedural concerns not included in the first petition.[4] EPA granted the Petitioners' second request for reconsideration of the October 15, 2008, final action via letter on April 3, 2009. In that letter, EPA explained that it anticipated initiating a new rulemaking process to provide additional opportunities for public comment.

On December 12, 2008, Petitioners filed a lawsuit in the Eleventh Circuit Court of Appeals challenging EPA's October 15, 2008, final action. EPA and the appellants subsequently jointly stayed the litigation pending the conclusion of EPA's reconsideration process. EPA's October 2, 2009, proposed rule was EPA's initiation of a new rulemaking process to reconsider its prior action on the Submittals. In that proposal, EPA articulated two alternative options and sought public comment on both. One option was to affirm the October 15, 2008, final action (thus approving the Submittals) and the other was to amend the October 15, 2008, final action (thus disapproving the Submittals). The bases for each alternative were described in detail in the October 2, 2009, proposed rulemaking. 74 FR at 50932–50934. The responses to the comments EPA received on the October 2, 2009, proposed action are summarized in section III of this rulemaking.

II. What action is EPA taking and what is EPA's rationale for disapproving the submittals?

EPA is now taking final action to amend its October 15, 2008, final action and to disapprove Alabama's 2003 and 2008 SIP Submittals regarding its visible emissions rule. As EPA explained in its October 2, 2009, proposed rulemaking, the primary issue for resolution is whether approval of the Submittals is consistent with the requirements of the CAA, specifically, the requirements of section 110(l). If the approval were appropriate under section 110(l), EPA would need to consider whether it would also meet the requirements of section 193, given that the visible emissions rules in question were in effect prior to November 15, 1990, and apply to some sources that are located in areas designated nonattainment for one or more NAAQS. In light of the fact that this SIP revision would apply statewide, including nonattainment areas, EPA has concluded that it cannot approve the SIP revision under section 110(l) if it would worsen air quality by allowing increased emissions of criteria pollutants or precursors to such criteria pollutants. In particular, if the revision would result in increases in emissions of pollutants for which an area is designated nonattainment, specifically $PM_{2.5}$, EPA considers that allowing increased emissions of such pollutants would interfere with the area's ability to attain the NAAQS.[5] *See, e.g.,* 70 FR 53

nominal 2.5 micrometers are referred to as $PM_{2.5}$. As a general matter, the term "PM" refers to particulate matter of unspecified size range and includes both PM_{10} and $PM_{2.5}$.

[3] The Petitioners raised eight main issues: (1) EPA was arbitrary and capricious in failing to reopen the public comment period when ADEM made changes to the rule after the close of the public comment period; (2) EPA was arbitrary and capricious in deviating from rulemaking policy regarding documentation of post-comment period meetings between EPA and ADEM and failing to meet with Petitioners in addition to ADEM; (3) EPA was arbitrary and capricious in proposing to approve a SIP revision before the rule had even been developed at the State level; (4) EPA failed to comply with rulemaking procedures by failing to complete the docket prior to finalizing the rulemaking package; (5) the rule should not have been approved because it does not represent reasonably available control technology requirements for SIPs because Alabama has nonattainment areas for $PM_{2.5}$; (6) EPA's approval of the rule is not consistent with either Section 110(l) or 193 of the CAA due to likely increases in short-term particulate matter emissions; (7) EPA's final action is not consistent with EPA policies on excess emissions and director's discretion; and (8) the final rule does not comply with 40 CFR Part 51 because it is not an "appropriate" visible emission limitation.

[4] The Petitioners specifically highlighted two new issues: (1) The DC Circuit's decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008) (SSM MACT decision) made the Agency's action on the SIP revision untenable; and (2) new documents added to the docket show that throughout the consideration of this matter, EPA acted in an arbitrary and duplicitous manner in failing to re-notice the rulemaking for public comment given the differences between what EPA required of Alabama in the April 12, 2007, proposal and what Alabama actually submitted for approval in its August 22, 2008, submittal.

[5] With respect to attainment areas, section 110(l) requires that an approvable SIP revision not interfere with maintenance of the NAAQS or any other requirement of the CAA. In some circumstances, allowing increases in criteria pollutants may not interfere with maintenance of the NAAQS. EPA has not analyzed whether this SIP revision would be approvable with respect to attainment areas only because the Submittals included rules that applied throughout Alabama, which includes both attainment and nonattainment

Continued

(January 3, 2005); 70 FR 28429 (May 18, 2005) (previous rulemaking actions addressing section 110(l)).

In this particular circumstance, the analysis of whether the Submittals satisfy the CAA is made more difficult by the uncertainty in the precise relationship between the opacity of a stack emission stream and the mass of PM in the same emission stream at the affected sources. After consideration of all the issues raised by the Petitioners in their February 2009 petition for reconsideration, as well as comments received on the October 2, 2009, proposed rulemaking from many industry groups, individual companies, state agencies, and other non-governmental organizations, EPA has concluded that disapproving the 2003 and 2008 Submittals results in the interpretation of the CAA that is most consistent with the plain text and legislative history of the CAA, as well as the air quality goals set forth in the CAA. What follows is EPA's explanation of its analysis, which involves a discussion of the following: (1) The role of visible emissions in NAAQS attainment and maintenance; (2) the history of Alabama's visible emissions rule; (3) consideration of CAA section 110(l); (4) comparison of the original rule to the revised SIP-approved rule; (5) the role of uncertainty in EPA's analysis; and (6) the types of information that would be particularly useful in developing a visible emissions SIP revision.

1. Role of Visible Emissions in NAAQS Attainment and Maintenance

Opacity may be defined as the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. 40 CFR 60.2. Opacity is important because it provides information regarding pollutants visible to the eye leaving an emissions source. In general, the more that opaque particles pass through an emissions point, the more light will be blocked, thus increasing the opacity percentage. However, variables such as the size, number, and composition of the particles in the emissions can result in variations in the percentage of opacity.

Historically, visible emissions have been an important tool for implementation of PM NAAQS and, in particular, for the implementation and enforcement of PM limits on sources to help attain the NAAQS. Visible emissions have been a useful tool to indicate overall operation and maintenance (O & M) of a facility and its emissions control devices even before modern instruments that measure PM on a direct, continuous basis existed. The observation of greater than normal visible emissions, particularly on a recurring basis, has served as an indication that incomplete combustion or other changes to the process and/or the control device had or were occurring; such changes frequently led to increased PM emissions. Although opacity is not a criteria pollutant, opacity standards continue to be used as an indicator of the effectiveness of emission controls for PM emissions, or to assist with implementation and enforcement of PM emission standards for purposes of attaining PM NAAQS. Opacity measurements can serve as an indicator of a well-maintained, well-operated source and that such sources should be able to achieve visible emissions that comply with opacity limits. For example, data submitted by one commenter show routine source operation with opacity of about five percent.[6] Conversely, visible emissions at much higher percentages (such as those allowed by Alabama's revised rules), particularly on a recurring basis, may indicate that a source is in violation of applicable SIP or permit mass limits as well.

Many commenters agreed that the precise relationship between opacity and PM emissions was uncertain. Despite this uncertainty, there is a general relationship between opacity and particulate matter mass emissions. As a result, increases in opacity can be indicative of changes in emissions control device performance or source operation, which in turn can lead to increases in mass emissions.

Furthermore, based on the information contained in the record for this action and a general lack of opacity and corresponding PM emissions data received to date, it is apparent that the mass of emissions based on short-term increases in opacity cannot be quantified readily for each of the 19 sources affected by the SIP revisions in the Alabama Submittals.[7] There are several contributors to the uncertainties associated with relating mass emissions to increases in opacity, including: (1) Differences between combustion technology characteristics and fuel components; (2) differences in control technology types, temperatures at which they operate, and load characteristics; (3) the recognition that both opacity and mass emissions are subject to significant variability over short periods of time and fluctuations such that one may act independently of the other; and (4) differences between the mass of particles that exists at the point of opacity measurement by the COMS (e.g., in the stack) and the direct $PM_{2.5}$ that forms immediately upon exiting the stack (that are related to fuel components more than to control technology).

2. History of Alabama's Visible Emissions Rule

EPA first approved Alabama's visible emissions rules into the Alabama SIP in 1972. 37 FR 10842, 10847 (May 31, 1972). The State submitted the visible emissions rules as part of its SIP for attainment and maintenance of the total suspended particulates (TSP) NAAQS (the predecessor to the PM NAAQS). The State has revised these rules three times in support of those goals.

Historically, Alabama has had areas with attainment problems for the various PM NAAQS. Originally, EPA designated some areas in Alabama as nonattainment for the TSP NAAQS. In 1987, EPA replaced the TSP NAAQS with the PM_{10} NAAQS, and all areas of Alabama were designated as attainment for those NAAQS. 56 FR 11101 and 58 FR 67734. All areas of Alabama remain designated attainment for the PM_{10} NAAQS. In 1997, EPA promulgated new annual and 24-hour particulate matter NAAQS, using $PM_{2.5}$ as the indicator. Effective April 5, 2005, EPA designated portions of Alabama, in the Birmingham and Chattanooga areas, as nonattainment for the 1997 $PM_{2.5}$ NAAQS. 70 FR 944. In 2006, EPA promulgated new $PM_{2.5}$ NAAQS, significantly tightening the 24-hour standards. Effective December 14, 2009, the Birmingham area was designated nonattainment for the 24-hour $PM_{2.5}$

areas, and the State did not make a showing that emissions from such sources would not interfere with maintenance of the NAAQS in attainment areas and with attainment of the NAAQS in nearby nonattainment areas. Similarly, EPA is not basing this decision on section 193 because the Submittals are not approvable under section 110(l); however, section 193 would have to be addressed before EPA could consider approval of the revisions.

[6] Alabama Power Company in Attachment T from the docket shows that over a three-year period its units did not exceed 5 percent opacity for 55.4 percent of the operating time, 10 percent opacity for 89 percent of the operating time, and 15 percent opacity for 97.6 percent of the operating time. In addition, the U.S. District Court for the Northern District of Alabama found in 2009 that at TVA's Plant Colbert, Units 1–4 typical baseline opacity measured about 5–8 percent during normal unit operation, and Unit 5 was projected to operate below 5 percent opacity even with a partially malfunctioning control device and below 10 percent "under extreme conditions that are unlikely to ever occur." *Sierra Club* v. *TVA,* 592 F. Supp. 2d 1357, 1367 (N.D. AL 2009).

[7] EPA specifically requested that commenters provide any available concurrent data showing the PM mass emissions and opacity for sources affected by the SIP revision at issue, but no commenter supplied this information. 74 FR 50934.

NAAQS, as revised in 2006. The Birmingham area remains designated as nonattainment for both the 2006 24-hour and 1997 annual $PM_{2.5}$ NAAQS. Chattanooga remains designated as nonattainment for the 1997 annual $PM_{2.5}$ NAAQS. Alabama's visible emissions rules continue to be a part of the Alabama SIP for attainment and maintenance of the PM NAAQS.

The SIP revision at issue affects the applicable visible emissions limits at approximately 19 stationary source facilities.[8] These 19 facilities include older coal-fired utilities, cement manufacturing facilities, and pulp and paper facilities, among others. Five of these facilities are located in or near nonattainment areas for the current $PM_{2.5}$ NAAQS. Specifically, Cheney Lime and Cement Company (Allgood), Ernest C. Gaston Electric Generating Plant (Alabama Power Company (APC)), and William Crawford Gorgas Electric Generating Plant (APC) are located within the Birmingham nonattainment area for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS; Bowater Incorporated (Westover) is located near that area. In addition, Widows Creek Fossil Plant (Tennessee Valley Authority (TVA)) is located in the Chattanooga nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS. Other facilities affected by these visible emissions rules may also impact these or other nonattainment areas.

The geographic location of affected sources covered by the visible emission rules in the EPA-approved SIP is relevant. This is because (as is discussed more fully below) EPA interprets section 110(l) to prohibit approval of SIP revisions that would increase emissions of pollutants for which an area is designated nonattainment, in the absence of offsetting emission reductions or an attainment demonstration addressing the rule changes at issue.

Opacity remains an important tool that states and EPA rely upon in establishing and enforcing PM-related standards for SIPs and other standards promulgated under the CAA (such as New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants). For example, opacity measurements can serve as an indicator of compliance with PM emissions between PM stack tests. The Submittals would provide sources with the flexibility to allow for visible emissions of up to 100 percent opacity (previous maximum opacity was 40 percent) for up to 2.4 consecutive hours per day[9] (previous consecutive maximum time for "exempt" periods per day was 6 minutes). This change, like all SIP revisions, must be consistent with section 110(l).

3. Consideration of CAA Section 110(l)[10]

In considering whether to approve the SIP revision at issue in this action, EPA must evaluate the changes embodied in the Submittals from the State in light of the requirements of section 110(l). Section 110(l) of the CAA provides, in relevant part, that:

> * * * The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

Congress added section 110(l) during the 1990 amendments to the CAA as support for the cornerstone of the SIP program in the CAA—the attainment and maintenance of the NAAQS. 101 Stat. 2404 (101 Pub. L. 549) (November 15, 1990). The provision was added as part of general revisions to section 110 to address EPA actions on SIP revisions, in part responding to court cases such as a Ninth Circuit Court of Appeals case, *Abramowitz* v. *EPA,* 832 F.2d 1071 (9th Cir. 1987), which discussed *Train* v. *NRDC,* 421 US 60 (1975) (both cases addressed EPA consideration of SIP revisions in light of some evaluation of whether the revision at issue would affect the NAAQS, *i.e.,* the impacts upon attainment or maintenance of the NAAQS). S. Rep. No. 101–228 (Report of the Committee on Environment and Public Works, United States Senate) (1990 CAA Legis. Hist. 8338, 8360–8363).

By its plain language, section 110(l) applies to every SIP revision submitted by a state. In evaluating whether a given SIP revision would interfere with attainment or maintenance, as required by section 110(l), EPA generally considers whether the SIP revision will allow for an increase in actual emissions into the air over what is allowed under the existing EPA-approved SIP. EPA has not required that a state produce a new complete attainment demonstration in order to make every revision to its SIP, provided that the status quo air quality is preserved. For the Submittals at issue in this action, EPA's view has been that if the SIP revision does not interfere with attainment or maintenance of the NAAQS, then it is unlikely to interfere with other applicable requirements. For example, if EPA concludes that emissions of PM allowed under the SIP are not increasing as a result of the SIP revision, then no additional control requirements would be required under section 193.

EPA has historically interpreted section 110(l) as requiring the Administrator to have some basis on which to conclude that a SIP revision would not interfere with attainment and maintenance of the NAAQS, or any other applicable requirement, before EPA could approve the SIP revision. EPA has regularly requested such information from the state to support a revision, particularly where there was some uncertainty regarding the impacts of the SIP revision. For example, in 2005, the State of North Carolina submitted a SIP revision that raised issues similar to the Alabama proposal. After considerable discussion between EPA and North Carolina about what revisions would be consistent with the requirements of section 110(l), the State submitted a SIP revision that addressed key issues. The rules in the revision retained the same number of total minutes and maximum levels of opacity allowed during excursion periods as under the prior EPA-approved SIP (*i.e.,* the four hourly six minute exceedance periods allowed under the existing North Carolina SIP could occur at any time, including consecutively, during a 24-hour period, but the allowable maximum opacity levels during these periods was not increased). In particular, EPA did not adopt an "average daily opacity" approach for North Carolina, which would have allowed extended periods of high opacity (in excess of 40 percent). *See* 70 FR 61556 (October 25, 2005). Similarly, EPA has proposed to disapprove a visible emissions SIP revision for Ohio in which that state sought to relax limitations on the number of occasions of excess opacity per hour, potentially allowing entire days with elevated opacity. The revision was submitted without a section 110(l) showing that the relaxation in opacity requirements would not reflect increased emissions

[8] At this time, it is EPA's understanding that the rules at issue apply to 19 facilities. Due to the applicability portions of the rule, the rule could apply to fewer facilities over time, but will not likely apply to any more.

[9] The Submittals allow up to 2.4 hours per day of operation at opacity levels in excess of 20 percent, provided that the total of such periods did not exceed 2 percent of operating time in a quarter, excluding periods of startup, shutdown, load change and rate change (or other short intermittent periods upon terms approved by ADEM's Director and included in a State-issued permit).

[10] EPA's evaluation of this SIP revision focused on section 110(l). If EPA were to find the revision approvable under section 110(l) it would have to consider other issues raised by the commenters, including whether it is approvable under section 193. Further, section 110(l) applies with respect to all NAAQS in effect, even where EPA has not yet made designations.

that would interfere with attainment and maintenance of the NAAQS or other requirements of the CAA. 70 FR 36901 (June 27, 2005).

EPA recognizes that 110(l) analyses are case-specific and that the scope and nature of the analysis will vary, depending on the factual details of the SIP revision at issue. *See, e.g., Hall* v. *EPA,* 273 F.3d 1146 (9th Cir. 2001) and *Kentucky Resources Council, Inc.,* v. *EPA,* 467 F.3d 986 (6th Cir. 2006); *see also,* 61 FR 16,050, 16,051 (April 11, 1996) (actions on which the *Kentucky Resources Council* case were based).[11] However, in the absence of a full attainment or maintenance demonstration, EPA has consistently required a sufficient basis in the record for concluding that the SIP revision would not interfere with attainment and maintenance of the NAAQS, or any other applicable CAA requirement.[12]

4. Comparison of the Original Rule to the Revised Rule

The substantive starting point for evaluating any SIP revision is to consider the differences between the current EPA-approved SIP rule and the revised rules being proposed by the state in the revision. Many of these differences were highlighted by the Petitioners and other parties during the public comment process on both the April 2007 proposal and the October 2, 2009, reconsideration proposal.

In this case, we began our analysis by comparing the rule in effect in the Alabama SIP at the time of EPA's April 2007 proposed action (hereafter "the previous rule") with the 2003 and 2008 Submittals (hereafter "the current rule"). Under both rules, the maximum number of exempt six-minute periods [13] allowed per day is the same—24; the maximum "allowable average quarterly opacity" [14] is approximately the same—22 percent under the previous rule, and 21.6 percent under the current rule; and the maximum "allowable average daily opacity" is the same under both rules—22 percent.[15] However, there are two significant differences [16] between the previous rule and the current rule. The first is that the current rule allows for maximum visible emissions of 100 percent opacity during the exempt periods, while the previous rule allowed for maximum visible emissions of only 40 percent opacity during such periods. AAC 335–3–4–.01(4) (current rule). The second is that the current rule allows exceedances of the 20 percent SIP standard for intervals of up to 2.4 consecutive hours (*i.e.,* up to 24 consecutive six-minute periods per calendar day), while the previous rule allowed exceedances of the 20 percent SIP standard for intervals of only 0.1 consecutive hours (*i.e.,* one six-minute period per hour).[17] Thus, the two key differences are that the current rule allows for opacity to increase up to 100 percent and allows up to 2.4 consecutive hours of opacity at that level (*i.e.,* the "bundling" of high opacity periods) per day. A critical question, therefore, is whether the significant increase of the maximum allowable opacity from 40 percent to 100 percent for such extended periods could result in more PM emissions were sources to take advantage of the changed limits.

In EPA's original approval notice, we adopted a limited analytical framework for addressing this question. We did not conclude that the proposed change in the SIP would not result in increased PM emissions. Rather, we established a new metric of "average daily opacity" (and "average quarterly opacity") and concluded that section 110(l) did not prohibit approval of a SIP revision that allowed significantly increased opacity levels for longer consecutive periods of time because the revision would not increase the allowable average opacity levels (on either a quarterly or daily basis). This analysis was focused on opacity and operational conditions regarding opacity as opposed to a focus on the relationship between opacity and PM mass emissions, in part because EPA did not have any useful source-specific data regarding the relationship between opacity and PM mass emissions at the affected facilities.

EPA also concluded that the relationship between changes in opacity and increases or decreases in ambient $PM_{2.5}$ levels could not be quantified readily for the sources subject to the SIP revision, and was particularly uncertain for short-term analyses and that the level of uncertainty about whether increased opacity levels allowed under the revision would allow increased mass emissions was sufficiently high that, in the absence of additional information to confirm a change in emissions one way or the other, section 110(l) did not prohibit approval of the SIP revision.

After reconsideration, however, EPA's position is that both of the findings that provided the foundation for its initial approval of the SIP revision were not strong enough to support approval under the CAA. EPA concludes that, as it was described in the Submittals, the concept of "average daily opacity" is not a useful tool for evaluating whether the Submittals are likely to maintain current air quality, particularly given the lack of other limitations on opacity exceedances in the Submittals. One of the primary purposes of opacity limits is to ensure that PM control devices are operating within normal parameters. Thus, larger and longer exceedances of an opacity limit (*e.g.,* 100 percent opacity or other high opacity levels over a longer period of time such as 2.4 consecutive hours), which may indicate problems with a control device or other significant changes in emissions, are more significant than shorter and smaller exceedances. Under the approach of the revised rule, a control device could temporarily shutdown or malfunction, potentially resulting in 100 percent opacity, for an hour or two and the source could still be in compliance with the 22 percent average daily limit. By contrast, an opacity limit that requires consistent compliance at 20 percent, and allows only one excursion of six minutes per hour to 40 percent opacity will limit larger and longer excursions.

In addition, an opacity limit that requires consistent compliance at 20 percent and allows only one excursion of six minutes per hour to 40 percent opacity helps ensure that sources and their control devices are properly maintained, operated, and controlled. In EPA's experience, a source that is properly maintained, operated and

[11] EPA's action today is consistent with both these 9th and 6th Circuit cases addressing 110(l).

[12] As is discussed below, EPA's previous approval of the Submittals was a departure from this approach.

[13] Unless otherwise noted, this notice refers to exempt periods other than those provided by the previous rule for startup, shutdown, load change and rate change (or other short intermittent periods upon terms approved by ADEM's Director and included in a State-issued permit), which were part of the existing SIP-approved rule and remained unchanged under the October 15, 2008 final action rule.

[14] "Allowable average quarterly opacity" is not a traditional measurement used by states or EPA for monitoring opacity or for opacity standard-setting purposes. Rather, EPA first used this approach, which allows sources to "average out" periods of very high opacity with periods of lower opacity, in the notice proposing to approve the Submittals, if the rules were changed to limit allowable average quarterly opacity. *See* 72 FR 18432 (providing instructions for calculating "allowable average quarterly opacity levels.") Subsequently, in the notice approving the Submittals, EPA also used the concept of "allowable average daily opacity." 73 FR 60958.

[15] See previous rule AAC 335–3–4–.01(1)(b) and current rule AAC 335–3–4–.01(4) and 335–3–4–.01(5).

[16] One of the technical support documents (TSDs) provided for this action explains in detail the differences between the current and prior visible emissions rules. EPA considered all the differences in reaching its decision today. EPA is simply identifying two significant differences that are particularly relevant to the analysis of the submittal.

[17] See previous rule AAC. 335–3–4–.01(1)(b) and current rule AAC 335–3–4–.01(4).

controlled should be capable of meeting the opacity requirements of the Alabama SIP without this revision. EPA is concerned that the allowance of higher levels and longer consecutive durations of opacity exceedances, even with an "average daily opacity" cap, would undermine an important purpose of the opacity limit, to ensure proper O & M of sources and their control devices.

After reviewing the issues raised in the petition for reconsideration and additional information received during the reconsideration public comment period, EPA concludes that the approach utilized to evaluate the Submittals in the October 15, 2008, rulemaking resulted in a fundamentally incomplete analysis. Requiring a source to maintain an average daily opacity of 22 percent does not provide assurance that the source will generally achieve the same level of PM control (and emissions) as a source which meets a limit of 20 percent opacity, except for one six-minute period per hour at 40 percent. Accordingly, the approach of the prior notice, which focused solely on maintaining an overall average daily (and quarterly) opacity does not provide an adequate framework for assessing the impact of the Submittals on emissions and air quality, which is the touchstone of the analysis required under section 110(l).

EPA did receive modeling from a variety of sources (which is discussed in the Response to Comments portion of today's action, beginning with Comment 19) which attempt to show the impact on air quality from the changes to the opacity requirements in the Submittals. In addition to EPA's discussion in the Response to Comments section, EPA's Technical Support Document addressing the modeling identifies the information gaps that prevented EPA from conducting the type of source-specific analysis that would be necessary for completion of an adequate 110(l) evaluation. For example, elements that are missing from the submitted modeling include: data from all the sources and source categories affected by the Alabama Submittals; a demonstration of the relationship between PM emissions and opacity at a particular facility and source-category; consideration of emissions from other sources in the modeled area; condensable PM data; explanation for background PM levels used in the evaluation; and an explanation of the use of PM_{10} as a surrogate for $PM_{2.5}$; among other concerns. As EPA noted in its evaluation of modeling submitted during the first comment period:

> Although source-specific correlations between opacity and mass emissions can be established for some sources, none have been for the sources subject to this SIP revision and therefore assumptions must be made about how a change in the opacity rule might affect the level of PM mass emissions being modeled. These assumptions made about the relationship drive model results and, thus, are important in evaluating the result of the modeling exercise.

73 FR 60961. EPA has carefully reviewed all of the modeling submitted and has concluded that, without source-specific data on the mass-opacity relationship, there is not an adequate basis to model the impact of the revisions to the opacity rules on PM mass emissions. Therefore, the models are insufficient and too inaccurate to provide a basis for concluding that the Submittals satisfy the requirements of section 110(l). As discussed below, EPA would need additional data and information before it could conclude that this approach would not result in an increase of nonattainment pollutants that would interfere with attainment and maintenance of the NAAQS.

5. The Role of Uncertainty in EPA's Analysis

As was noted earlier, a key issue in evaluating the Submittals is the element of uncertainty in the relationship between opacity and PM mass emissions. Many SIP submittals involve some level of uncertainty. EPA has never, and does not now, take the position that a small possibility that an attainment SIP might turn out not to result in attainment of the NAAQS, or to prevent a violation of the NAAQS, or that a SIP revision might worsen air quality, necessitates denial of a SIP revision. EPA recognizes that attainment planning generally requires a high degree of technical judgment, and often involves some degree of uncertainty. In EPA's prior approval, we concluded that the level of uncertainty concerning the impact of the SIP revisions on emissions of PM from sources was so great that EPA could not make a technical judgment as to whether or not approval of the Submittals would likely interfere with attainment and maintenance of the NAAQS or any other applicable requirements. In the face of such uncertainty, EPA concluded that section 110(l) did not prohibit the approval of the revisions at issue. After reconsideration, EPA has concluded that its traditional, and more precautionary, approach to interpreting section 110(l) is appropriate.

There is a general relationship between opacity and PM emissions such that an increase in opacity means the concentration of smaller particles, larger particles, or both, increases. *See, e.g.,* Malm, William C., "Introduction to Visibility," Cooperative Institute for Research in the Atmosphere, May 1999 at Chap. 2, p. 8. However, because increases in the quantity of smaller particles may be accompanied by decreases in the quantity of larger particles, and vice versa, changes in opacity do not necessarily reflect corresponding changes in the mass of PM emissions. While source-specific relationships between opacity and PM emissions may be obtained through testing, they can be influenced by a variety of circumstances such as fuel compositions and types of equipment malfunction that may occur. Therefore, while changes in opacity generally indicate changes in PM emissions, there is uncertainty about quantifying the specific level of PM emissions associated with varying levels of opacity.

EPA has previously explained the elements of that uncertainty in its proposed reconsideration action. 74 FR at 50933. One key element is the recognition that both opacity and mass emissions are subject to significant variability of short periods of time and fluctuations such that one may act independently of the other. *Id.* Thus, EPA concludes (and many commenters also acknowledged) that there is a relationship between opacity and PM such that periods of high opacity can result in increased PM emissions, which in turn can cause or contribute to a PM NAAQS violation. We can say with certainty that periods of high opacity would cause interference with the PM NAAQS in some circumstances. What EPA does not know is precisely when such changes in opacity would cause the interference, particularly for a variety of source types. This is the unknown element discussed in detail in EPA's proposal and this final action.

Section 110(l) was intended to allow SIP revisions in the absence of full attainment demonstrations, but EPA's view is that Congress would not have wanted EPA to approve SIP revisions where EPA lacked not only an attainment demonstration but also any basis for concluding that the SIP revision would not interfere with attainment or maintenance of the NAAQS, and other applicable requirements. Accordingly, consistent with our past practice in considering SIP revisions, EPA concludes that there must be either a contemporaneous attainment demonstration or some other basis for concluding that a SIP revision will not interfere with attainment, and that uncertainty alone is not a sufficient

basis for approving a SIP revision. Moreover, EPA has also concluded, following reconsideration, that there is a sufficient likelihood that the SIP revision at issue in this action could allow increased mass emissions over what would have been allowed under the previously approved SIP rule and that, in the absence of additional information or limitations, the revision is not approvable under section 110(l). As noted by commenters during the reconsideration process, although a precise correlation between mass emissions and opacity for an individual source can be difficult to ascertain, the changes contemplated in the Submittals are such that changes in emissions, including increases, are possible under the opacity levels allowed by the SIP revision. Given the location of affected sources within nonattainment areas, EPA has concluded that additional emissions from such sources would interfere with attainment and maintenance of the NAAQS in these areas.

EPA recognizes that there are circumstances in which a source will record opacity levels in excess of a 20 percent standard without necessarily increasing its mass emissions, but there are also many circumstances where increased opacity levels are associated with increased mass levels. The Submittals would provide sources with the flexibility to allow for visible emissions of up to 100 percent opacity for up to 2.4 consecutive hours per day. The degree of operational flexibility associated with the Submittals is such that EPA concludes that the opacity limits in the Submittals are likely overall to allow increased PM emissions. Even though every instance of operation at greater than 20 percent opacity may not result in increased emissions, and though EPA cannot precisely quantify the effect of approving the Submittals on the information in the record, it is reasonably foreseeable that approving the Alabama Submittals would allow increased mass emissions, for at least some sources and under at least some conditions, over the PM emission levels that would have been allowed under the previously approved SIP rule. Given this situation, section 110(l) requires disapproval of the Submittals absent additional limitations which would significantly diminish the likelihood that mass emissions increases will occur. The result of the disapproval is simply that Alabama's previous EPA-approved visible emissions rule will become the federally-enforceable rule in the SIP (although EPA urges that Alabama take any regulatory action necessary to avoid having a State-effective rule that is different from the SIP-approved rule).

6. Information Regarding Development of Visible Emissions SIP Revisions

In EPA's October 2, 2009, reconsideration proposal following reconsideration, EPA included a section entitled, "III. What Additional Information Would EPA Like To Receive?" 74 FR 50934. EPA specifically requested information on the nature of the relationship between opacity and PM mass emissions over both the short and long term and when the opacity and PM mass emissions may have a predictable relationship to one another. Id. EPA also requested source-specific data from Alabama facilities affected by the Submittals. EPA also included a bulleted list of more specific types of information that could assist in conducting an analysis on the impacts of a SIP revision on the air quality of the affected area (i.e., a 110(l) analysis). Id. Providing guidance on development of a general visible emissions SIP revision is difficult because opacity and visible emissions are most easily evaluated in a source-specific context. However, states may consider the following information useful.

As a general matter, states may find it instructive to look at visible emissions SIP revisions that EPA has approved. An example is the North Carolina approval previously referenced in this rulemaking. 70 FR 61556. As was noted earlier in this rulemaking, there are two key differences between the North Carolina action and the Alabama Submittals now being disapproved. First, the North Carolina action did not allow additional minutes of opacity exceptions. Second, the North Carolina action did not change the percentage of opacity allowed during the exception periods.

More generally, EPA expects that providing assurance that a source will comply with a rule that allows no more than one 6-minute exceedance per hour and opacity readings no greater than 40 percent clearly requires more effective control equipment and/or operating procedures than it takes to assure a source will comply with a rule that allows longer consecutive periods of exempt opacity excursions and at higher opacity levels. Opacity and PM emissions are related closely enough that control equipment effective enough to meet the more stringent opacity standard (in terms of the number of consecutive excursions allowed and the level of opacity excursions allowed) will also provide a greater level of PM emissions control. Due to the importance of first understanding the relationship between opacity and PM emissions at the affected sources, source-specific SIP revisions have historically been used by most states in developing different visible emissions standards for a source, particularly when those standards are less stringent than existing standards. Source-specific SIP revisions allow for the ability to analyze the PM/opacity relationship and establish an appropriate opacity limit that will not impact the NAAQS. The technical analysis for such rule changes would likely involve collection of parallel mass and opacity data for the source in question. If that information indicates that there will be increases in PM mass emissions or opacity, then further analysis would be required to ensure that the increased emissions associated with the increased opacity (or rule change at issue) will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA (the 110(l) factors), for that particular source and locale. Further, a more definitive modeling assessment of the effect of any proposed rule would include the representative range of emission rates and/or conditions producing 100 percent opacity for each type of source affected by the rule.

When source-specific information is available, the uncertainty about the relationship between opacity and mass, and the implication of the changes in opacity on PM emissions, is reduced and there may be a basis upon which to make an informed judgment about the impacts of the change with respect to section 110(l). Further, source-specific actions are much more discrete since they typically apply at a particular unit of a particular facility, thus eliminating the need to evaluate the statewide impact of the change. EPA has undertaken source-specific opacity revisions. *See, e.g.,* 66 FR 33027 (June 20, 2001) (approving a source-specific revision affecting 14 units in Alaska). Similarly, a focus on a particular source category may also allow for more specific understanding regarding the relationship between opacity and PM emissions at the affected facilities and the rule's overall impact to air quality. 73 FR 36485 (June 27, 2008) (proposing disapproval of source-category specific revision; notice explains how a source-category revision may be developed).

EPA is not suggesting that every revision to an opacity standard requires source-specific analyses. If a submission provides a sufficient basis for EPA to conclude that changes to a visible emissions requirement will not result in

increased PM emissions in a nonattainment area over what would have been allowed under the previously approved SIP rule (or otherwise interfere with any applicable requirement of the CAA), then EPA anticipates that it would be approvable under section 110(l). Ultimately, the key issue that must be addressed in any 110(l) analysis of an opacity SIP revision is an evaluation regarding the impact of that revision on PM emissions and the NAAQS. As was noted earlier, because Alabama's Submittals were voluntary revisions to the SIP and not mandated, Alabama has no obligation to develop another visible emissions revision.

III. Response to Comments

The following are EPA's responses to the significant adverse comments on EPA's October 2, 2009, proposal. EPA is obligated to respond to adverse comments received and thus, has reviewed the comments that were adverse to a disapproval of the State's SIP revisions. EPA is now responding to those comments. Many of the comments overlapped or were redundant, so in order to assist with readability of the responses, we have organized the comments and responses into subject-matter groupings identified below.

1. Basis for Reconsidering the 2008 Final Action
2. Relationship Between Opacity and PM Emissions
3. Modeling
4. Relative Stringency of Previous Rule (Pre-2008 Final Action) to Current Rule (Post-2008 Final Action)
5. Attainment and Maintenance of the PM NAAQS (PM_{10} and $PM_{2.5}$) and Data Submitted in Response to October 2009 Reconsideration Proposal
6. Impact of Uncertainty in These SIP Revisions
7. Applicability of CAA Sections 110(l) and 193 to This Action
8. CAA Section 110(l) "Demonstration" of Non-Interference With the NAAQS and Other Requirements
9. Use of COMS and Need for Exemptions
10. Relationship of SIP Revisions to 40 CFR Section 51.212
11. Relationship of SIP Revisions to the Compliance Assurance Monitoring (CAM) Rule
12. Relationship of SIP Revisions to *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), and the Vacatur of Certain Provisions in 40 CFR Part 63
13. Relationship of SIP Revisions to Reasonably Available Control Technology (RACT)
14. Other Exemptions in the Alabama SIP Related to Visible Emissions

1. Basis for Reconsidering the 2008 Final Action

Comment 1. Commenters argued that because EPA's October 2, 2009, reconsideration proposal notice did not select an option, or at least disclose to the public which option EPA preferred, EPA's interpretation of the relevant CAA provisions and their application to the situation here will be entitled to no deference upon judicial review. Also, the commenters asserted that their ability to comment on the proposal is hamstrung by EPA's failure to articulate which option EPA would choose.

Response 1. EPA does not agree with commenters' characterization of the October 2, 2009, proposed rulemaking. That proposal described two alternative actions in detail—including the technical, legal, and policy bases for each of the respective actions. EPA provided sufficient information for each alternative for commenters to participate meaningfully and for either alternative proposal to be finalized, depending upon what additional information was developed as a result of the reconsideration. EPA has previously used the alternative proposal option when dealing with a particularly complex rulemaking (*see, e.g.,* proposal regarding California-Imperial Valley Planning Area, 66 FR 42187 (August 10, 2001)). In this case, EPA's interest in ensuring public comment on the two primary options was best achieved through the alternative proposals. There is no indication of any commenter being unable to provide meaningful comments. Numerous commenters provided substantive comments on both of the two proposals. The substance of the commenters' own comments reflect that they were on notice of the factual and legal issues relevant to the reconsideration.

Comment 2. Commenters asserted that there is no new record evidence provided by EPA, Petitioners, or other interested parties in order to support the second petition for reconsideration of EPA's approval of the SIP revision in the October 2008 final action.

Response 2. EPA's authority to reconsider a SIP rulemaking derives from both the Administrative Procedures Act (APA) section 553(e) as well as authority in the CAA. The APA provides the opportunity for any person to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e). The APA does not explicitly limit this right based on new evidence or any other limitations alleged by commenter. Even if there were such a limitation, EPA disagrees that the second petition for reconsideration did not raise issues that warranted reexamination of the factual and legal basis for the October 2008 action.

Comment 3. Commenters argued that the CAA does not authorize EPA to continue to entertain petitions for reconsideration "indefinitely" after a specific CAA process has been followed and reconsideration has been denied. According to the commenters, the CAA allows EPA to "call" an approved State SIP for legal deficiencies, but does not allow EPA to continue to reconsider its actions on a state-submitted SIP revision after the revision is approved. Commenters also argued that EPA lacks authority to reverse its approval of the SIP revisions because EPA may only change its standard for review of SIP revisions under section 110(l) prospectively—*i.e.,* EPA may only apply an allegedly new reading of section 110(l) to new state requests for SIP revision. The commenters further argued that any request for reconsideration of a final SIP approval must follow the procedures identified in CAA section 110(k)(5) for seeking a change to a previously approved SIP revision (noting that section 307 does not apply and section 553(e) of the APA cannot be used to bypass 110(k)).

Response 3. EPA disagrees with the commenters' views of EPA's authority to reconsider rulemakings under these circumstances. An administrative agency has the authority to reconsider its decisions, unless Congress specifically limits the agency's discretion to do so. *See, e.g., Gun South, Inc.* v. *Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and rules do not provide expressly for such reconsideration). The DC Circuit Court recently affirmed this authority in *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008), where it explained that an agency normally can change its position and reverse a prior decision but that in the case before it, Congress limited EPA's ability to remove sources from the list of hazardous air pollutant source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9). *See also, e.g.*, Trujillo v. *General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider"). EPA recently applied this approach in connection with California conformity

SIPs. EPA had approved the SIPs based on a mobile source model that was current at the time of EPA's approval. EPA proceeded to update the mobile source model, but under the previous SIP approvals, conformity decisions would continue to be made on the basis of those previous SIP approvals, and would not take into account the updates to the mobile source model. To remedy this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that they were limited to the period before States submitted, and EPA found adequate, the mobile source budgets in new SIPs based upon the update of the mobile source model. *See* 74 FR 55292, 55342 (October 27, 2009) (discussing EPA's inherent authority to reconsider SIP actions). *See also* 73 FR 21528 (August 22, 2008) (EPA final action on reconsideration of previous Georgia SIP action).

The commenters questioned EPA's authority to reconsider a SIP action and appear to suggest that EPA's authority is limited to only a SIP "call" under section 110(k)(5) of the CAA. The SIP call process, however, is a distinct and separate authority that Congress has given to EPA for use when EPA determines that a current SIP is substantially inadequate to attain or maintain compliance with the CAA requirements. *See, e.g., Sierra Club* v. *Georgia Power Company,* 443 F.3d 1346, 1348 (11th Cir. 2006) (describing the separate revision provisions under the CAA and the SIP call process generally). The SIP call process was not intended to be the sole means of revising the SIP and does not displace EPA's authority to reconsider its approval.[18] While the two processes may be complementary, the authority to reconsider an action and the authority to issue a SIP call are not mutually exclusive, and one or the other may be appropriate in different circumstances.

As the commenters correctly noted, EPA's approval of a SIP revision is not subject to the rulemaking requirements of the CAA section 307(d) because it does not fall within the enumerated categories in section 307(d)(1) of the CAA. Section 307(b)(1), to which a SIP revision rulemaking is subject, contemplates the "filing of a petition for reconsideration by the Administrator of any otherwise final rule or action." 42 U.S.C. 7607(b)(1). Courts have also found that EPA must follow the rulemaking requirements of the APA when evaluating a SIP submission (*see, e.g., Hall*, 273 F.3d at 1161), including section 553(e). Finally, the very nature of a SIP is that it is not a static document; it is regularly revised to account for new EPA standards and new emissions reduction technologies. 42 U.S.C. 7410(a)(2)(H).

Furthermore, EPA notes that the SIP revision at issue did not take effect by its own terms until after the date on which EPA granted the second petition for reconsideration. No sources affected by the revisions to the Alabama SIP should have been required to alter their facilities or their operations in reliance on the prior EPA approval. EPA's view is that a source that is properly maintained, operated and controlled should have no difficulty complying with either the pre-existing or the revised version of visible emissions rules in the SIP, or even complying simultaneously with both versions of the SIP, which suggests that the reconsideration process should not have been disruptive for any source. In the present case, EPA concluded that reconsideration of its approval of the Submittals was necessary to ensure that the final decision was consistent with the plain text and legislative history, and air quality goals of the CAA, given the facts at issue in this situation. While the result of EPA's action today is that Alabama's Submittals are disapproved, the effective date for such disapprovals will be the effective date of this final action. Thus, there is nothing retroactive about today's final action.

Comment 4. Commenters argued that if EPA reverses its approval of the Submittals now, that would be arbitrary, contrary to EPA's statutory authority and its responsibility to implement the CAA, and in violation of EPA's "delegation commitment" to Alabama under the CAA.

Response 4. As a point of clarification, Alabama is authorized to implement certain portions of the CAA through its SIP. Commenters do not explain the "delegation commitment" reference. Such terminology is inapposite as the majority of CAA programs are "authorized," not "delegated," particularly with regard to those embodied in a SIP. Some CAA programs, such as section 112, are routinely "delegated" by EPA to states; however, section 112 programs are not SIP programs. EPA's responsibility to implement the CAA extends to ensuring that its decisions are based in the CAA and its implementing regulations. In the instant action, EPA is reversing a previous approval decision because after reconsideration, EPA has concluded that a disapproval is required based on known technical information (as opposed to uncertainty) and an interpretation of section 110(l) that is most consistent with the plain text and legislative history of the CAA, as well as the air quality goals set forth in the CAA. As was explained above, EPA's reconsideration process is well grounded in statutory authority.

Comment 5. Commenters asserted that EPA's reconsideration proposal notice does not provide any information about the legal authority that the Agency believes justifies its action. The commenters further argued that it is incumbent upon the Agency to disclose the legal basis upon which it proposes to act and to provide the public with the opportunity to comment on that asserted basis, and that without such an explanation from EPA, the October 2, 2009, proposal notice is deficient and does not provide an adequate basis upon which the Agency can lawfully take action.

Response 5. EPA does not agree with commenters' assessment. The October 2, 2009, reconsideration proposal includes two alternative options for final action—both based upon application of section 110(l) of the CAA. Section 110(l) applies to all SIP revisions and limits EPA's legal authority to approve revisions to existing EPA-approved SIP provisions. The reconsideration proposal notice explained the alternative proposed actions as well as the interpretation of section 110(l) that would support each of the alternatives. The substance of the comments reflects that the commenters were in fact on notice of the factual and legal issues that EPA raised for reconsideration.

Comment 6. Commenters asserted that certain documents received in response to a Freedom of Information Act (FOIA) request do not support the reopening of the public comment period.

Response 6. As was explained earlier, there is no prohibition on EPA's authority to review a final action and allow for a new public comment period on that action. EPA has provided the basis of the reconsideration of the October 15, 2008, final rule—the CAA and the APA. Whether documents obtained through a FOIA support EPA's reconsideration, in the opinion of the commenter, is not relevant.

Comment 7. Commenters asserted that EPA appears to be considering a "policy change" in how it interprets and applies section 110(l) in the reconsideration process. Commenters argued that if EPA wants the State to amend its approved SIP to reflect revised EPA policy on section 110(l), EPA must act under section 110(k)(5) of the CAA and not through a "unilateral" notice and

[18] In addition to its SIP call provisions, the CAA also includes provisions for the correction of errors in the SIP. *See* CAA section 110(k)(6). EPA notes that the process it has used for reconsidering and disapproving this SIP revision is entirely consistent with the process required under section 110(k)(6).

comment process. Commenters asserted that they are aware of no other situation where EPA has proposed to act in this manner to "withdraw" a final approval of a SIP revision.[19]

Response 7. EPA's interpretation of 110(l) that is outlined in this final action is consistent with EPA's historic interpretation of 110(l), the plain text of the CAA, and the legislative history of the CAA (as well as court opinions that have considered 110(l)). EPA's decision is based on its re-evaluation of the likelihood that approval of the Submittals will result in increases of allowable PM emissions. In amending its previous action, EPA is placing greater weight on the technical aspects of the SIP Submittals that are known to have the potential for adverse impacts on the NAAQS as a result of allowing greater levels and durations of opacity exceedances. This change does not represent a policy shift, but rather, an analytical reconsideration of what decision is most supported by the CAA, given the facts at issue in this rulemaking. Moreover, EPA's reconsideration process in this action was far from "unilateral." By reopening the rulemaking for additional public comment, and setting forth the legal, technical, and policy bases for that alternative outcomes in the reconsideration process, EPA sought to ensure that the public had an opportunity to comment and review the possible options.

Ironically, if anything, the SIP call process apparently preferred by commenters is more "unilateral" in that such a process is initiated after EPA has concerns that an existing SIP is substantially inadequate and often requires a state to take action to revise its SIP following EPA's final action on the SIP call. Here, EPA's disapproval will result in a rule coming back into effect that was in effect for years. Alabama will not be required to submit a revised SIP revision. Further, as explained above, EPA has used the alternative proposal approach in the past. While the approach is not appropriate in all regulatory actions, it serves an important purpose of seeking public comment in the unusual circumstance in which two potentially supportable decisions exist and additional information or input from the public may be helpful to EPA in making a final decision.

[19] EPA notes APC's request that should EPA take final acting disapproving Alabama's SIP revisions, that EPA stay its disapproval action pending litigation (APC Comments, pp. 10, footnote 2). EPA is not acting on this request through this final action.

Comment 8. Commenters stated that EPA's prior analysis of the SIP revision remains sound and that there is no basis for reversing the conclusions of that analysis. According to the commenters, the rigors of the prior SIP revision process insured that the concerns raised by the Petitioners have already been heard and considered by both ADEM and EPA multiple times. The commenters argued that the petition for reconsideration raised no issues that were not or could not have been raised during the prior rulemaking process. Therefore, the commenters argued that reversing the prior approval of Alabama's Submittals at this point and in this manner would not only be an abuse of EPA's authority under the CAA, it would be the height of arbitrary and capricious Agency action.

Response 8. EPA does not agree with the commenters' assessment. For the reasons described in this final notice, EPA has determined that reconsidering its prior approval and seeking additional notice and comment on the factual and legal issues raised by the Petitioners was an appropriate action. In reversing its prior approval, EPA has concluded that disapproval is necessary pursuant to the plain text of the CAA, its legislative history, and the air quality goals described therein. EPA appreciates that there has been substantial discussion about the merits of the Submittals, including various opportunities for public comment. Ultimately, however, when weighing alternatives, EPA's final decision must be the one that is most consistent with the CAA, even if that decision is reached through a reconsideration process. EPA has already addressed its authority to review the October 15, 2008, final action in response to comments above.

Comment 9. Commenters asserted that in granting the second petition for reconsideration and re-opening the rulemaking for further public comment, EPA ignores the lack of a legal basis for reconsideration, its earlier rejection of AEC's arguments for reconsideration on the merits, and its thorough review and technical analysis of the effect of these SIP revisions during the earlier rulemaking itself. According to the commenters, reconsidering a SIP approval sets a poor precedent and undermines regulatory certainty and the integrity of EPA's rulemaking processes.

Response 9. EPA does not agree with commenters' assessment. To the contrary, the reconsideration process has ensured that EPA has left no issue unconsidered in its analysis of the Submittals. EPA's final action on the Submittals, while amended from its previous action, is strongly grounded in the CAA, the APA, and sound science. This action furthers the purposes of the CAA, is based on the substantive requirements of the CAA, and follows the rulemaking requirements of the CAA and the APA. Thus, the action supports regulatory certainty and the integrity of SIP process. *See, e.g.* 73 FR 21528 (August 22, 2008) (EPA reconsideration of Georgia SIP action). Indeed, the fact that the CAA and the APA provide bases for reconsidering regulatory decisions demonstrates that Congress expected EPA to take necessary action to revise its actions when a party raises factual or legal issues that the Agency finds justify reconsidering such actions.

Comment 10. Commenters questioned why EPA granted the petition for reconsideration of the approval of Alabama's Submittal because the Petitioners have provided no new information.

Response 10. As was discussed above, the APA does not restrict EPA's authority to reconsider a rule to a specific record or timeframe. EPA was petitioned for reconsideration of a rule and EPA granted that reconsideration because it concluded that the petition raised factual and legal issues that justified further evaluation. The second petition for reconsideration raised numerous reasons why EPA's October 15, 2008, final action should be reconsidered, including several reasons not identified in the first petition for reconsideration. Thus, commenters' characterization of the second petition for reconsideration as providing no new information is also not correct.

2. Relationship Between Opacity and PM Emissions

Comment 11. Commenters asserted that data submitted to EPA show that there is no reliable or direct correlation between opacity and PM emissions. In addition to several sources of uncertainty in the relationship between changes in opacity and increases or decreases in $PM_{2.5}$ levels cited by EPA in the April 12, 2007, proposal notice, the commenters argued that other variables affecting the relationship of opacity and PM mass emissions include stack diameter, stack gas temperature, particle density (a function of coal type), and flue gas water vapor content. The commenters argued that many, if not most, of these variables are beyond the control of source operators. Therefore, the commenters stated that while opacity can serve as an indicator of whether the boiler and related pollution control equipment at a specific source are well-controlled and well-operated, changes to opacity of emissions,

including changes to the SIP limits applicable to opacity in a SIP, cannot be presumed to have any direct effect on ambient concentrations of PM.

Response 11. EPA generally agrees with commenters that there is inherent uncertainty in the precise relationship between opacity and ambient concentrations of PM, although we note that some variables are less likely to vary during a single source's operation (as opposed to among different sources). EPA also agrees (as a general matter) with commenters' statements that opacity is useful as an indicator of a source's operations and control technology. Moreover, opacity can be a reliable indicator of PM emissions when appropriate source-specific testing is carried out and correlations are established for the particular source, operating characteristics, and fuel supply.

EPA disagrees, therefore, that increases in opacity of emissions per se could not reflect any increases in mass emissions under any circumstances, in particular in the case of the significant increases in the percentage opacity and the duration of excursion time at issue in these SIP revisions. This comment highlights the importance of ensuring that the final decision made by EPA to approve a SIP revision is based on a reasoned application of that knowledge within the confines of the CAA.

Comment 12. Commenters argued that available data continue to demonstrate there is no reliable, generally applicable relationship between opacity and the PM NAAQS. The commenters asserted that previous technical studies submitted by APC in the rulemaking confirm this lack of correlation. The commenters referred to prior comments for the assertion that: "Because opacity is dependent on so many factors, there is no general relationship between opacity and particulate loading."

Response 12. EPA agrees that opacity data from different individual sources are very specific to the source and to the manner in which it is being operated for the period over which data is collected. In other words, source operation affects data produced by the source. Thus, EPA and others must consider not only the data on opacity and PM, but also the details regarding the facility and its operating characteristics as part of developing an opacity/PM correlation. As a result, such data from one facility may be of limited value in extrapolating reliable conclusions about emissions from another facility. However, EPA expects that sufficiently high increases in opacity up to 100 percent for extended periods can represent some impact on PM emissions from the sources affected by the rules at issue in the Alabama SIP revisions. As noted by comments received through the reconsideration process, although the precise correlation between the mass and opacity of emissions may vary, significant increases in opacity to its highest measurable level at the same source are likely to result in additional PM emissions from that source. Given that several sources are located in and near nonattainment areas, such additional emissions are inconsistent with the prohibition of section 110(l) on SIP revisions that will interfere with attainment and maintenance of the NAAQS.

Comment 13. One commenter asserted that EPA's prior conclusion that greater opacity does not necessarily mean greater PM emissions is entirely reasonable.

Response 13. EPA appreciates commenters' position on this issue—the uncertainty inherent in the relationship between opacity and PM is discussed at length in this final action. While EPA agrees that greater opacity does not necessarily (in all circumstances) mean greater PM emissions, EPA does expect that some periods of greater opacity (particularly of high opacity for longer periods of time) are likely in at least some circumstances to be accompanied by greater PM emissions.

Comment 14. A commenter agreed that it is difficult to accurately characterize differences in direct $PM_{2.5}$ emissions attributable to short-term increases in opacity and further commented that: (1) The type of event causing the short-term increase in opacity will most probably have an effect on any direct $PM_{2.5}$ emissions differences associated with the event, and (2) based on the cumulative size distribution table in AP–42 (Compilation of Air Pollutant Emission Factors), any increase in PM emissions associated with short-term increases in opacity would most likely occur in particle sizes larger than direct $PM_{2.5.}$

Response 14. Commenter appears to refer to Table 1–1.6, "Cumulative Particle Size Distribution and Size-Specific Emission Factors for Dry Bottom Boilers Burning Pulverized Bituminous and Subbituminous," which is found in Chapter 1 of EPA's AP–42, *Compilation of Air Pollutant Emission Factors* (*http://www.epa.gov/ttn/chief/ap42/*). This table suggests that for units having pollutant emissions controlled by electrostatic precipitators (ESPs), $PM_{2.5}$ accounts for only 29 percent of total PM emissions. EPA agrees the type of event causing an increase in opacity of emissions may have an effect on the size distribution of PM emissions. However, EPA disagrees that increases in PM emissions associated with increases in opacity would most likely occur in particle sizes larger than 2.5 micrometers in aerodynamic equivalent diameter, since the circumstance that causes an opacity increase could occur while a PM control device is operating properly, as described by the value contained in the AP–42 table, or while a PM control device is not operating properly, a condition not described in the AP–42 table. The uncertainty regarding the impact of opacity increases on PM emissions is further complicated because particles approximately 1.0 micrometer in diameter have greater potential for increasing opacity than larger particles. *See, e.g.,* Malm, William C., "Introduction to Visibility," Cooperative Institute for Research in the Atmosphere, May 1999 at Chap. 2, p. 8. Thus, for the increases in opacity contemplated in the SIP revisions at issue in this rulemaking, EPA is concerned that this increased opacity would probably include additional particles of the very types that would be problematic for purposes of attaining and maintaining the $PM_{2.5}$ NAAQS.

Comment 15. Commenters argued that with regard to EPA's request for additional information addressing the relationship between opacity and PM emissions generally, only the relationship between opacity and direct $PM_{2.5}$ would be relevant to the situation at hand, and that this information would be virtually impossible to obtain due to the inclusion of larger particles which are an inevitable part of any effluent gas stream.

Response 15. EPA agrees that information concerning the relationship between opacity and $PM_{2.5}$ emissions from a facility would be most relevant for purposes of evaluating impacts on the $PM_{2.5}$ NAAQS, but EPA notes that no commenter provided such data, despite EPA's specific request for such specific data. 74 FR 50934 (October 2, 2009). EPA disagrees that this information would be virtually impossible to obtain. By way of example, some sources are obtaining and reporting these data as part of the current electrical utility maximum achievable control technology (MACT) rule information collection request. Also, under section 110(l) of the CAA, EPA may not approve revisions to SIP if the revisions would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the CAA. Because there are also NAAQS for $PM_{10,}$ states and EPA must also consider potential

impacts of increases of larger particles if increased opacity were to include the emissions of larger particles from a source as the commenter asserted. For 110(l) purposes, analysis of a SIP revision must include all of the current NAAQS, to the extent that the changes in the SIP revision could affect such NAAQS. With respect to this action, EPA has only focused on the potential impacts of the SIP revision on the $PM_{2.5}$ NAAQS because those are the standards that EPA anticipates are most implicated by the increases in opacity at issue.

Comment 16. Commenters argued that although an increase in opacity can be a good indication that PM emissions at the stack also are increasing, the magnitude of mass emissions relative to any one opacity value and the increase in mass emissions relative to increase in opacity generally are not quantifiable. Accordingly commenters asserted that an increase in opacity would provide no information regarding emission levels of $PM_{2.5,}$ as opposed to PM_{10} or total PM, and argued that any correlation between opacity and PM would have to be source specific, and even then, uncertainties remain. The commenters also criticized EPA's information on opacity and PM, noting that the charts included in the docket do not contain sufficient information to evaluate the relationship between opacity and PM.

Response 16. EPA agrees that an increase in opacity can be a good indication that PM emissions at the stack also are increasing. It is for this reason that we are disapproving the SIP revision embodied in the Submittals, even though the magnitude of mass emissions relative to any one opacity value and the increase in mass emissions relative to increase in opacity generally are not quantifiable. EPA also agrees with the commenters that a correlation between mass and opacity can be derived at a specific source, and EPA has in the past approved SIP revisions that relied on such correlations with sufficient technical analysis.

EPA disagrees, however, that information about opacity increases provides no information regarding $PM_{2.5}$ emissions specifically. Rather, information about opacity increases without concurrent $PM_{2.5}$ emissions data or an established correlation between opacity and $PM_{2.5}$ emissions cannot be expected to yield definitive information concerning increases in $PM_{2.5}$ emissions. The memorandum in the docket, EPA–R04–OAR–2005–AL–0002–0064, provides the information known to EPA about the charts referenced by the commenter, EPA–R04–OAR–2005–AL–0002–0045 and EPA–R04–OAR–2005–AL–0002–0047. Further, the charts provided in the docket demonstrate the inherent uncertainty in the relationship between opacity and filterable PM mass emissions by showing a range of mass emission rates associated with a single opacity value and a range of opacity values associated with a single mass emissions rate. However, uncertainty about the precise correlation between mass and opacity as a general matter, does not mean that opacity increases never represent concurrent increases in the mass of PM emissions from a source. To the contrary, given the large increases in maximum allowable opacity and for the periods of time at issue in the SIP revision contemplated in the Submittals, EPA expects that it is likely that there could be increases in mass emissions.

Comment 17. Commenter disputed the relationship between opacity and PM mass emissions based upon EPA statements in an unrelated rulemaking. The commenter asserted that despite providing the option for use of PM continuous emissions monitoring system (CEMS) as a compliance method for PM mass limits in revised NSPS Subparts D and Da, EPA also recently suggested it had concerns regarding the accuracy of PM CEMS measurements above 0.030 pounds per million British Thermal unit (lb/mmBtu). As a result, the commenter argued that EPA declined to exempt units operating above that level from the NSPS opacity standard even when such sources install PM CEMS. 74 FR 5070 (January 28, 2009). Commenter requested, to the extent EPA relies on data from PM CEMS above 0.030 lb/mmBtu in this proceeding, that the Agency explain how it resolved those concerns.

Response 17. EPA disagrees with the commenter's conclusions regarding PM CEMS measurement accuracy above 0.030 lbs/mmBtu. As mentioned in the cited **Federal Register** notice, the contribution of filterable PM to opacity at these emission levels (less than 0.030 lb/mmBtu) is generally negligible, and sources with mass limits at this level or less will operate with little or no visible emissions (*i.e.,* less than 5 percent opacity). As a result, EPA expects that an opacity standard is no longer necessary for such sources because the PM mass emission rate standard is substantially tighter, and the use of PM CEMS with continuous monitoring of PM emissions is more effective than opacity monitoring in these circumstances.

This comment is also not germane to today's action because the SIP revisions at issue did not include the requirement that the affected sources install PM CEMS as a precondition to the revision of the applicable opacity standard. As noted above, opacity standards serve an important role in assuring compliance with PM limits, for example by alerting regulators to problems with source operation or control measures that would not otherwise be noted except during a stack test for PM emissions, which occur only periodically. In some circumstances, opacity is the emission standard that is the subject of an enforcement case.

Comment 18. A commenter articulated the position that its facilities are operating in compliance with PM limits in the title V permits and as a result, the opacity rule is not likely to impact PM compliance. The commenter further opined that ADEM should address any PM nonattainment issues separately from this rulemaking.

Response 18. EPA disagrees with the assessment that opacity is unlikely to have any effect on PM emissions for all the reasons explained in this final action regarding that relationship. Further, Alabama's visible emissions rule is a part of Alabama's plan to attain and maintain the PM NAAQS. Even though it has been in the SIP for some time, the rule was originally included for that purpose. Thus there is nothing separate about this action and Alabama's PM nonattainment issues—the rule at issue here is part of Alabama's overall plan to address the PM NAAQS. Further, if a source is in compliance with the opacity and PM limits, then this disapproval action should have little effect on that source.

3. Modeling

Comment 19. Commenters argued that modeling is not required to demonstrate that changes to Alabama's opacity rule will not implicate the NAAQS. Nonetheless, commenters argued that ADEM performed a modeling analysis demonstrating that even earlier versions of the SIP revision (predating the Submittals that EPA approved in October 2008) would not adversely affect air quality attainment or RFP under very conservative assumptions about the relationship between opacity and PM emissions. In addition, commenters argued that updated modeling from a consultant, ENSR (now known as AECOM), updated ADEM's 2003 modeling in 2007 using AERMOD (an atmospheric dispersion modeling system and EPA's preferred model since 2005) and confirmed ADEM's earlier modeling results. Commenters argued that APC and TVA have performed subsequent modeling that also

supported the conclusion that the increased opacity permitted by the SIP revisions in the Submittals would not interfere with attainment and maintenance of the NAAQS or other requirement of the CAA. Commenters asserted that these modeling results show no problem with the NAAQS even under unrealistic, worst-case conditions. APC also discussed modeling done at APC Plants Barry and Greene and TVA Plant Colbert which APC believes supports affirming EPA's 2008 final action approving the Alabama SIP revisions. Commenters further noted that ADEM performed a modeling analysis demonstrating that the SIP revisions would not affect air quality attainment under very conservative assumptions about a relationship between opacity and PM emissions. According to the commenters, modeling performed by TVA confirms that particulate emissions from the Colbert facility would not interfere with maintenance of the PM_{10} or $PM_{2.5}$ NAAQS, even for the unrealistic scenario in which the ESPs are shut down for 10 percent of the time every day of the year.

Response 19. EPA disagrees with the commenter's assertions. As discussed in 73 FR 60961 (October 15, 2008), all modeling results are predicated on a known or assumed correlation between opacity and PM mass emissions. Because this correlation can differ for each source and operating condition, modeling that does not use source-specific correlations does not and cannot demonstrate with certainty the impact of changes in opacity on PM NAAQS. With respect to the modeling described by the commenters, the models do not demonstrate that the Submittals would not interfere with attainment or maintenance of the NAAQS because the models do not appear to have included condensable PM or background analyses, to have assessed the impact of nearby PM emissions sources, or to have assessed the impact of secondary PM formation. Generally, however, the utility of modeling would still be limited because the precise relationship between opacity levels and PM mass emissions is not known. The docket for this action includes a technical support document (TSD) summarizing the modeling that EPA received and some of the key assumptions and other issues that impacted the utility of the modeling.

Comment 20. Commenters argued that EPA has routinely approved SIP demonstrations based on the use of air models, rightly concluding in such matters that the use of the air models leads to a reasonable demonstration of compliance with the NAAQS.

Response 20. As a general matter, EPA agrees that modeling can be a useful tool in appropriate circumstances. In this case, the modeling provided did not reduce uncertainty regarding the relationship between opacity and PM emissions sufficiently to support approval of the Submittals. Further, the modeling did not conclusively demonstrate that there would be no impact on the NAAQS. Thus, EPA could not conclude that the modeling submitted supported approval of the Submittals under section 110(l). EPA's modeling TSD provides more information on the modeling submitted to EPA as part of this action.

Comment 21. Commenters stated that monitoring data show a decline in ambient $PM_{2.5}$ and PM_{10} levels at monitors that could potentially be impacted by TVA's Colbert and Widows Creek Plants.

Response 21. EPA acknowledges that ambient PM levels have been improving in many parts of the country as a result of rigorous state and EPA efforts to control emissions from many sources of various types. EPA wants to maintain these improvements and to support further improvements for protection of public health as many areas are still designated nonattainment for the NAAQS. Indeed, this is among the reasons why reviewing SIP revisions pursuant to section 110(l) is such an important exercise.

4. Relative Stringency of Previous Rule (Pre-2008 Final Action) to Current Rule (Post 2008 Final Action)

Comment 22. Commenters argued that Petitioners' claims regarding "bundling" or other potential ways of "using" Alabama's visible emissions revisions to somehow reduce control efforts while still meeting permit requirements are misplaced. According to the commenters, it is extremely difficult to achieve continuous or near-continuous compliance with the opacity rules, so there is absolutely no incentive to try to "game" the system by trying to achieve less than maximum opacity control at any one time. Further, commenters argued that facility procedures aimed at minimizing opacity levels at all times in order to avoid non-exempted exceedances insofar as practicable remain intact after the rule revisions went into effect January 1, 2009.

Response 22. The commenters' argument appears to be that even though "bundling" could occur, it will not, because sources are diligently striving to minimize their opacity levels. While EPA certainly expects that sources are seeking to minimize their opacity levels, EPA's analysis of the revision considered what the two versions of the Alabama rules allowed—and not necessarily how sources were operating under each rule scenario. As with the modeling submitted by many commenters, the primary problem associated with their conclusions about the amount of PM emissions during longer periods of elevated opacity is the reliance on an assumed relationship between opacity and PM emissions that has not been established for the specific source. As mentioned previously, this relationship is unknown for each source and operating condition, absent sufficient evaluation. EPA disagrees that the "bundling" of periods of high opacity could never reflect higher PM mass emissions.

EPA understands the difficulties associated with operating older facilities, but disagrees that continuous compliance with opacity rules can be achieved only through extreme difficulty. The Alabama SIP opacity limits in effect following this disapproval should generally be capable of being met by a source that is properly maintained, operated and controlled. There are control technologies and operational paradigms that allow older facilities to comply with Alabama's pre-October 15, 2008, opacity rules (this was recognized by the court in the TVA Colbert case, *Sierra Club* v. *TVA,* 592 F. Supp. 2d 1357 (N.D. Ala. 2009)).

Comment 23. Commenter explained that to attempt to bundle six-minute opacity exceedances would necessitate a purposeful "turn-down" of the unit's ESP and, thus, result in non-compliance with two provisions of the commenter's Lowman Plant's major source operating permit (title V permit): (1) That "all air pollution control devices * * * be * * * operated at all times in a manner so as to minimize the emissions of air contaminants," and (2) once the emissions exceed a six-minute average opacity of 20 percent, corrective actions must be taken within two hours.

Response 23. EPA's analysis of the SIP revisions at issue is governed by, among other provisions, section 110(l) of the CAA. In that context, as was explained previously, EPA must compare the existing SIP and the proposed SIP revision. While affected sources may have permit limits that are more stringent than the applicable SIP regulations, EPA's analysis must focus on what the SIP itself would allow. Permits may be revised from time to time, depending on applicable requirements. As a result, the type of analysis completed by the commenter based on the applicable permits might

be changed over time. Further, while EPA would, of course, be concerned by a purposeful "turn-down" of any control device, EPA expects that there are other circumstances under which extended periods of consecutive exemptions would allow high opacity levels (and mass emissions) that would not occur in a well-operated, well-controlled, and well-maintained plant. EPA appreciates PowerSouth Energy Cooperative's (PSEC's) analysis, which demonstrates that this disapproval action should have little effect on the vast majority of sources.

Comment 24. Commenters provided data in three attachments provided by PSEC showing emissions during the period of January 1, 2009, thru September 30, 2009, clearly indicate that no "bundling" occurred. For example, Attachment 1 shows that of the total of 90 six-minute periods of excess opacity (*i.e.,* six-minute averages of opacity greater than 20 percent), including startup/shutdown and load change periods, there were 40 occurrences of isolated six-minute periods of excess opacity; 14 occurrences of two consecutive six-minute periods of excess opacity; four occurrences of three consecutive six-minute periods of excess opacity; one occurrence of four consecutive six-minute periods of excess opacity; and one occurrence of six consecutive six-minute periods of excess opacity.

Response 24. EPA appreciates the submission of operating data. One of the difficulties with the technical analysis regarding opacity is that details regarding facility operation can impact both opacity and PM in different ways. Further, EPA must consider the effect of the Submittals on how a facility may be allowed to operate, not just how the facility actually has been operating. With these considerations in mind, the operating data were informative, but not determinative, because even if a facility currently operates as the commenters describe, the facility would be allowed to operate otherwise under Alabama's proposed SIP revisions.

Comment 25. Commenters suggested that this 22 percent limit ensures that the average daily opacity under the revised SIP is no greater than under the previous SIP. The commenters asserted that this fully responds to AEC's hypothesis of the "bundling of high opacity periods" and concerns about the elimination of the "40 percent cap" under the revised SIP. Further the commenters explained the use of a daily opacity limit to establish short-term equivalency is appropriate because a calendar day is the shortest period over which compliance with the PM NAAQS is measured. The commenters stated that AEC provides no supporting data on the bundling and operating data provided, which commenters believe demonstrates that bundling has not occurred.

Response 25. The Commenters' statements are incomplete. While the 22 percent limit does serve the purpose of ensuring subject sources are constrained by the same maximum allowable average daily opacity as under the previously approved SIP (as explained in EPA's 2008 final notice), these SIP revisions would allow opacity levels of up to 100 percent during exempt periods and for multiple consecutive exempt periods, neither of which was previously authorized under the SIP. The prior version of the visible emissions rule capped maximum opacity at 40 percent and limited the time at such level to only six minutes per hour. Further, whether "bundling" in fact has occurred in the past is not the focus of EPA's analysis for purposes of section 110(l).[20] As part of this reconsideration, EPA has had to re-evaluate the concept of the "22 percent daily cap" supported by the commenter. EPA has concluded that even with an "average daily opacity" cap, these SIP revisions undermine the purpose and effectiveness of the opacity standard by allowing extended periods of high opacity. Such high opacity can be indicative of problems with control device operation or other circumstances potentially leading to increased mass emissions. Given that some sources affected by the opacity limits at issue in the SIP revisions are located within designated nonattainment areas, EPA concludes that this likelihood of increased emissions renders the Submittals unapprovable under section 110(l).

Comment 26. Commenters argued that the equivalency between the previous and revised SIPs, with respect to the short-term and long-term emission rates, will ensure that there will be no interference with NAAQS notwithstanding the bundling of high opacity periods. Further, the commenters mentioned that in approving the North Carolina SIP revision for visible emissions, EPA concluded that such bundling through the "elimination of the current restriction of no more than one six minute exception period per hour" does not "pose a problem for purposes of Section 110(l)." Commenters cite to 70 FR at 61558 for support.

Response 26. As EPA explained earlier in this final action, the North Carolina opacity revisions are not analogous to Alabama's opacity revisions for the main reason that Alabama's revisions allow for periods of opacity up to 100 percent, whereas the North Carolina revision retained the same maximum opacity of 40 percent. The allowance for this high opacity level, along with the lengthy time allowed for elevated opacity (up to 2.4 consecutive hours), was not present in the North Carolina case.

Comment 27. Commenters argued that plant operating data confirm that the bundling of high opacity periods does not occur in practice. Further, the 22 percent cap resolves any concerns regarding the bundling were it to occur.

Response 27. EPA appreciates commenters' information on actual operations; however, as explained previously EPA's analysis under section 110(l) focuses on what the revised SIP rules would allow. Further, as discussed above, the 22 percent cap does not resolve EPA's concerns about extended periods of very high opacity.

Comment 28. Commenters argued that the rule really has nothing to do with air quality, and that if it did, EPA would have to justify and explain why it is proposing to condemn an opacity rule that is numerically more stringent and that has fewer exemptions than many other states' opacity rules.

Response 28. EPA does not agree with commenters' statements. Alabama's visible emissions rule is part of Alabama's EPA-approved SIP, and part of its plan to attain and maintain the PM NAAQS. As a result, any revision of the EPA-approved opacity rules is subject to evaluation under section 110(l) of the CAA. Furthermore, the extended consecutive periods of opacity exemptions allowed renders this standard uniquely less stringent than any other EPA-approved opacity rule.

Comment 29. Commenters argued that the daily opacity limit is neither necessary for approval nor unlawful. According to the commenters, because EPA's proposed approval was not based on a finding that the rule would not allow any more PM during a 24-hour period than the old rule, it is not necessary for the daily limit to meet such a criterion.

Response 29. EPA disagrees that the potential for more PM emissions as a result of elevated opacity is not germane to this action. EPA's prior approval of the SIP revisions was based on uncertainty about whether the revisions

[20] The SIP revisions at issue have been under reconsideration since before the changes to Alabama's visible emissions rule now being disapproved went into effect; thus, the data submitted in public comments may not be a representative random sampling of the long-term effects of the rule.

to the opacity standard would allow more PM emissions during a 24-hour period. EPA would not have previously proposed approval if the record clearly demonstrated that the rule would have resulted in increased PM in nonattainment areas. After reviewing public comment and the State's revised submissions, EPA based its prior approval in part on the average daily opacity limit included in the revision. At that time, EPA accepted certain assumptions, including that the 22 percent daily opacity limit would serve to lessen the potential for elevated emissions of PM associated with the increases in opacity. Following EPA's reconsideration and review of information submitted to EPA, EPA no longer accepts that the average daily opacity limit is an appropriate or effective tool for evaluating the impact of the Submittals on PM emissions. Given EPA's position that there is a sufficient likelihood of increased PM emissions associated with the elevated opacity allowed under the SIP revisions, the Submittals are not approvable under 110(l).

5. Attainment and Maintenance of the PM NAAQS (PM_{10} and $PM_{2.5}$) and Data Submitted in Response to October 2009 Reconsideration Proposal

Comment 30. Commenter argued that while the Clean Air Fine Particle Implementation Rule requires that direct $PM_{2.5}$ emissions be addressed in $PM_{2.5}$ attainment demonstration SIPs, the primary thrust of the regulation is the control of precursor compounds and not direct $PM_{2.5}$ emissions. According to the commenters, if the Alabama attainment plans are similar to those of Tennessee in that sulfates are identified as the main contributor to fine particulate matter and reliance is being placed on reductions of sulfur dioxide (SO_2) to demonstrate compliance, with no measure specified for stationary direct $PM_{2.5}$, then the Petitioners' assertion that approval of the Alabama SIP revisions would adversely affect $PM_{2.5}$ attainment or RFP has no merit and should be rejected. The commenters explained that if this is the case then the Petitioner's assertion that approval of the Alabama SIP revisions would not be consistent with sections 110(l) and 193 of the CAA should also be rejected as having no merit unless it can be demonstrated that a fixed source of direct $PM_{2.5}$ is a significant contributor to a nonattainment area. Additionally, according to the commenters, this should be an adequate affirmative demonstration that the requirements of sections 110(l) and 193 of the Act are not an issue. Further, the commenters asserted that even for areas achieving conformance with the $PM_{2.5}$ ambient standard, for which no SIP would be required, the effect of the reductions of $PM_{2.5}$ precursors would be so dominant as to negate any changes to direct $PM_{2.5}$ emissions.

Response 30. As was explained earlier, given that ADEM did not submit a full attainment demonstration specifically addressing this rule and did not propose any offsetting reductions to compensate for emission increases in nonattainment areas, EPA's analysis is necessarily focused on the comparison between the previous EPA-approved version of the visible emissions rules and the revisions that the State seeks, in order to ensure that the revision would not allow an increase in emissions of pollutants that would interfere with attainment or maintenance of the NAAQS, or with other requirements of the CAA. A primary consideration, therefore, is whether the revisions could result in increases in emissions of a type for which the area where the source is located is designated nonattainment. In this context, EPA must evaluate the relative stringencies of the two versions of the opacity rules, as was explained earlier.

EPA notes that the commenter's arguments here are premised upon what might or might not be appropriate in the context of a nonattainment SIP for certain pollutants in an area. EPA does not agree that the implementation regulations for the 1997 $PM_{2.5}$ NAAQS are designed or intended to ignore direct $PM_{2.5}$ emissions from sources, and evaluation of controls for such emissions is a required element of such a SIP. While it may be correct that a nonattainment SIP in a particular area might be designed to focus upon emissions of SO_2 and nitrogen oxides, or other $PM_{2.5}$ precursors, as an attainment strategy, it does not follow that emissions of $PM_{2.5}$ from the sources subject to Alabama opacity rule do not impact attainment and maintenance of these NAAQS. Considerations mentioned by the commenters might be relevant in the evaluation of the attainment demonstration accompanying a nonattainment SIP for the 1997 $PM_{2.5}$ NAAQS, but they are not relevant in the context of a section 110(l) analysis.

Comment 31. Commenters argued that Alabama's revised SIP for visible emissions is a small piece in the overall PM attainment puzzle. According to the commenter, any incremental primary $PM_{2.5}$ emissions increase as a result of revising the SIP, assuming for purposes of argument that such an increase occurs, would be an inconsequential contributor to the $PM_{2.5}$ attainment status against the background of the significantly greater secondary $PM_{2.5}$ (sulfate and nitrate) contributions. The commenter asserted that viewed in this broader context, EPA could reasonably conclude, based on the equivalency demonstration, that the revised SIP is consistent with the earlier SIP.

Response 31. The comment fails to appreciate EPA's limitations in reviewing SIP revisions, as described in section 110(l). In addition, EPA did not receive an "equivalency demonstration" from ADEM that addressed all the elements in section 110(l). Further, an increase of PM emissions by any increment would make it more difficult for areas in Alabama to attain and maintain the NAAQS. EPA has considered the SIP as a whole, and concludes that the potential increase renders the revisions not approvable.

Comment 32. Commenters explained that following new data collected under the current SIP confirms that EPA's prior analysis was sound:

A. New data collected under the current SIP shows there is no "bundling;"

B. New data collected under the current SIP shows that daily opacity has improved; and

C. New data collected under the current SIP shows why the rule makes sense.

Response 32. EPA appreciates the submission of these data. EPA disagrees, however, with the conclusions that the commenters draw from the data. The commenters' focus on what is actually happening with respect to "bundling" and opacity levels fails to consider what could happen under the SIP revision. EPA's analysis pursuant to section 110(l) must focus on the differences between the two versions of the visible emissions rules in terms of what they would allow and not on the choices individual facilities may have made to date in terms of opacity and PM emissions. Thus, EPA does not agree that the data presented by commenters support approval of the Submittals. The commenters did not, unfortunately, submit data to establish what the PM mass emissions were during periods of elevated opacity at these sources.

Comment 33. Commenter saw no basis for the supposition that Alabama's opacity rule revisions will affect PM NAAQS compliance. The commenters asserted that as indicated in the attachments, PSEC's Lowman Unit 1's opacity compliance continues to be very good. Additionally, the commenters explained that annual particulate emission testing in 2008 and 2009 indicate PM emissions well below the

standard and show no difference before and after the opacity rule revisions.

Response 33. EPA acknowledges that some facilities affected by the SIP revisions may be operating at opacity levels below those required by the Alabama SIP. Indeed, a source that is well-controlled, well-maintained, and well-operated could achieve opacity levels well below 20 percent. However, EPA's obligation under section 110(l) is to consider how a facility could operate under the new rule—not how it typically operates or has historically operated. Moreover, EPA notes that annual PM testing offers valuable but limited information about mass emissions because the testing occurs only once per year for a limited period of time. The question not addressed by the comments is what the PM mass emissions would be, were a source to be operating at the 100 percent opacity for 2.4 hours contemplated by the SIP revision at issue.

Comment 34. Commenters asserted that there are no new data that would support EPA's withdrawal of its approval of the rule.

Response 34. As was discussed previously, EPA's authority to reconsider a SIP revision is not limited only to circumstances where there are new data. EPA has already explained in today's action why its prior approval was not consistent with the purposes of section 110(l), and that reconsideration and disapproval is appropriate. Notably, the reconsideration was initiated before the revised rule went into effect and that sources should be capable of complying with either rule or both rules simultaneously.

In addition, EPA disagrees that no new information supports this disapproval. A number of commenters have submitted data and information that, while not directly addressing the questions that EPA posed, nevertheless help to illustrate the problems with the SIP revisions. For example, information submitted by AEC suggests that at least some sources, under some conditions, could have increased PM emissions during the longer periods of higher opacity that would be permissible under the revised visible emissions rules in the Submittals. *See* Comment Letter from George E. Hays and attachments (on behalf of Alabama Environmental Council, among others), Docket No. EPA–R04–OAR–2005–AL–0002–0089.1. Moreover, many of the commenters during the reconsideration process submitted comments in which their analysis suggested that there is a relationship between PM mass emissions and opacity, even if the precise correlation cannot be established without much more rigorous testing and evaluations on a source specific basis. *See* Modeling TSD. As was noted earlier, even some of the commenters opposing EPA's disapproval action identified the uncertainty in the relationship between opacity and PM mass emissions, and the possibility of the SIP revisions resulting in emission increases. *See, e.g.,* Comment Letter from Lauren E. Freeman (on behalf of the Utility Air Regulatory Group) at 4, Docket No. EPA–R04–OAR–2005–AL–0002–0086.1.

Comment 35. Commenter noted that with regard to EPA's request for information on condensable PM, COMS do not measure condensable PM, which is in a gaseous form at stack conditions.

Response 35. EPA acknowledges the response, which underscores one component of the uncertainty inherent in the relationship between opacity and PM emissions.

6. Impact of Uncertainty in These SIP Revisions

Comment 36. Commenters asserted that while EPA has consistently (and correctly) noted the uncertain relationship between opacity and PM for short-term analysis, any question regarding how this uncertainty might impact PM, in this case, has now been eliminated entirely with the addition of the 22 percent daily average requirement. Commenters further stated that ADEM's August 2008 submittal remedied any "uncertainty" question with respect to 24-hour PM by including an additional restriction on daily average opacity, so that the average daily opacity allowed under the revision is now no greater than under the previous SIP.

Response 36. EPA has shown through calculations, that the maximum allowable average daily opacity under both the previous rule and the revised rule is 22 percent. However, as discussed above, the revised visible emissions rule at issue in the SIP revisions would allow sources to operate in a manner they could not under the previous rule—including increases in opacity concentrations up to 100 percent for an extended period of time. As a result, under the revised rule, sources may now be permitted to cause much more opacity to levels that would have been a violation under the previous EPA-approved SIP rules. Such emissions include very high concentrations of excess opacity for extended periods. EPA has thus concluded that the "average daily opacity" cap provides no assurance against increased mass emissions. Indeed, as discussed above, EPA has concluded that there is a sufficient likelihood of increased mass emissions under the revisions so as to make it unapprovable under section 110(l).

Comment 37. Commenters stated that there is always some uncertainty when attainment or interference with a NAAQS is considered in a SIP process because it involves an element of prediction and reliance on modeling. Further, commenters explain their positions that section 110(l) does not require absolute certainty and EPA should not substitute "could" for "would" in the 110(l) context.

Response 37. EPA agrees the Act does not require attainment demonstrations or other technical analysis of impacts on attainment or maintenance of the NAAQS to an "absolute certainty." However, to make a determination that the NAAQS will not be adversely impacted, EPA must at least be able to reach the conclusion that this is most likely the case. In this action, EPA is relying on what is known about the relationship between opacity and PM emissions to conclude that the State's revised visible emissions rules in the Submittals is less stringent than the previous EPA-approved rule, and that the likely increases in emissions of PM at affected sources would be inconsistent with section 110(l). Under the revised rule, a source could exceed its 20 percent opacity limit for well over an hour (up to 100 percent opacity). In contrast, the previous SIP-approved rule allowed only one occurrence per hour of a 6-minute average opacity above 20 percent (and only up to 40 percent). Control equipment that is effective enough to avoid a second occurrence of 6-minute average opacity above 20 percent will make even the first occurrence an infrequent event. Likewise, control equipment and operating procedures that are effective enough to enable a unit to meet the requirements of the previous SIP will also allow a lesser quantity of PM emissions than control equipment and operating procedures that are sufficient to comply with the current SIP revision but do not necessarily enable a unit to comply with the previous SIP rule.

In addition, contrary to the commenters' belief, this is not dependent upon replacing the word "would" with the word "could." EPA's conclusion is that available evidence indicates that some of the affected sources would have increases in PM emissions, and that these emissions would occur in locations where such increased emissions would interfere with attainment and maintenance of the NAAQS. Commenters evidently misconstrue "uncertainty" about the

precise amount of such likely emissions increases as evidence that no such increases could occur.

Comment 38. Commenters raised concerns regarding PM CEMS technology, and the representativeness of PM emissions data obtained during Performance Specification (PS) 11 testing. *See* 40 CFR part 60, Appx. B. Briefly, the commenters asserted that PS 11 correlation testing, which requires disabling of PM control devices under artificial conditions in order to obtain sufficient variability in PM emissions to satisfy the PS 11 statistical criteria, rarely provide data representative of actual operations or control device malfunctions. Commenters also noted that it would not make sense to require sources to spend money to install PM CEMS or to perform periodic performance tests in order to develop a source-specific correlation between opacity and PM.

Response 38. EPA disagrees with the commenter's views regarding PM CEMS technology and PS 11 testing, especially in the context of evaluating the SIP revisions at issue here. The procedures of PS 11 are conducted to develop a source-specific PM emissions correlation for an individual source operating over a range of PM emissions conditions through comparison of results from PM emissions testing and PM CEMS. Note that PS–11 does not require PM control devices to be disabled. Those PM measurement and testing correlation procedures differ from an opacity and PM emissions correlation, which is the fundamental issue requiring resolution for addressing the visible emissions rules revision in Alabama's Submittals. EPA also disagrees that use of PM CEMS or periodic performance testing could be "nonsensical" in determining a source-specific correlation between opacity and PM emissions. Indeed, as EPA has previously explained, source-specific approaches such as concurrent opacity and PM emissions measurements may be one way to determine "* * * any useful and definitive relationships between stack particulate mass emissions values and their corresponding opacity levels * * *" 73 FR 60962 (October 15, 2008).

EPA agrees that data obtained over a range of operating and control device conditions would be necessary to develop a site-specific correlation between opacity and PM emissions and that a single, site-specific correlation should not be extrapolated to other sources. Retaining Alabama's original visible emissions rule (the pre-October 15, 2008, final rule) relieves ADEM (and affected sources) from performing an assessment of increased source opacity on PM emissions.

Comment 39. Commenters suggested that the source-specific nature of the opacity/PM relationship does not mean that the uncertain impact of a particular change in an opacity rule can be resolved by requiring source-specific testing.

Response 39. EPA agrees that a well-designed data collection program should be able to reduce to acceptable levels, if not eliminate, most of the uncertainty associated with the relationship between PM emissions and opacity resulting from changing opacity limits. However, as the commenters themselves argue, the variability in the relationship between PM emissions and opacity limits is such that, absent the use of PM CEMS, source specific evaluation would be one way to determine the impacts of the change at a given source. EPA through this disapproval is not determining that the only means to revise an opacity standard is through source by source evaluation, nor is EPA requiring that with today's action.

Comment 40. Commenters argued that to the extent that EPA seeks information on PM compliance methods in order to assess the costs of requiring Alabama to impose more source-specific PM testing in order to evaluate the impact of its revised opacity rule, commenters disagree that such an evaluation is required under CAA 110(l).

Response 40. EPA agrees that an assessment of the cost of a potential requirement for source-specific testing is not necessary pursuant to section 110(l). In order to fully provide the public with an opportunity to comment on the proposed action, EPA sought specific information, including costs, to assist the public in identifying what information might be useful to EPA. EPA has already explained how it considered the SIP revisions and the basis for its final action.

7. Applicability of CAA Sections 110(l) and 193 to This Action

Comment 41. Commenters stated that because EPA correctly found the revisions would not interfere with the attainment or maintenance of the NAAQS or any other requirement of the CAA, section 110(l) concerns are not implicated. The commenters stated that as long as a SIP revision does not "interfere with" air quality (*i.e.,* make it worse), EPA must approve it. According to the commenter, Alabama's rule is consistent with the development of an overall plan for attainment, in that all of the sources subject to the Rule are also subject to various other programs and requirements that EPA has approved to ensure the NAAQS are protected.

Response 41. Commenters' focus on "air quality" is a good point—and was EPA's primary concern as well. EPA's action in this case focuses on the known differences between the previous EPA-approved SIP rules and the SIP revisions in the Submittals, and what is known regarding the technical aspects of the relationship between opacity and PM mass emissions. Specifically, that the revised rule allows extended periods of much higher opacity that were not previously authorized. EPA has concluded that available evidence indicates that the revised rule could result in more emissions, and thus interfere with attainment and maintenance of the NAAQS, to use the commenters' term, "make it worse." Further, for older facilities (such as the ones subject to the visible emissions rule at issue), particularly those that are less controlled, opacity can be an important indicator of operation and control device performance, which, in turn, can affect air quality. In this context, and lacking reliable scientific correlations between opacity emissions and PM NAAQS violations, EPA has concluded that the rule changes described in the Submittals are not approvable under section 110(l).

With respect to the commenters' argument that other regulatory programs exist to help insure attainment and maintenance of the NAAQS, EPA agrees. However, for the sources affected by the visible emissions rules at issue, the opacity standards provide an important tool to assure compliance with these other measures. The mere existence of a regulatory framework to provide for the attainment of the NAAQS does not negate the need for effective tools to assure that the framework succeeds.

Comment 42. Commenters stated that unless ADEM relied upon the opacity standard to comply with the PM NAAQS, section 110(l) considerations do not come into play. The commenters further stated that in this case, Alabama did not rely on the opacity standard to demonstrate attainment of the PM NAAQS.

Response 42. Alabama's visible emissions rule is part of Alabama's plan to attain and maintain the NAAQS, and it is in the EPA-approved SIP (and has been for a long time). Any revision to the SIP is subject, by the plain text of the CAA, to the requirements of section 110(l).

Comment 43. Commenters stated that EPA's October 2008 approval applied and satisfied the correct CAA section 110(l) standard. According to the

commenters, EPA is not required to re-examine the adequacy of the level of reductions provided in a plan that has already achieved attainment, or speculate how a requested SIP revision might fit into the mix of controls that may be chosen by the state to support a future attainment demonstration with respect to a new standard. The commenters argued that EPA's review under CAA section 110(l) only needs to address whether the revision would affect the status quo. EPA could have (and in commenters' view, should have) limited its review to whether the revision interfered with the requirement to assess good O & M of PM control equipment between PM stack tests. Further the commenters asserted that because Alabama did not rely on a short-term opacity/PM relationship to support its previously approved PM attainment demonstration, EPA was not required to analyze changes in the opacity standard for equivalency under section 110(l).

Response 43. EPA does not agree with commenters' characterization of EPA's obligation under section 110(l). As a point of clarification, Alabama has several nonattainment areas, including $PM_{2.5}$ nonattainment areas. The State's visible emissions rule applies to a group of stationary sources Statewide—it does not apply only in designated attainment areas. Thus, EPA does not agree with commenters' argument that because Alabama is currently attaining some NAAQS, EPA's consideration under section 110(l) should be different. Further, as was noted earlier, in the absence of an attainment demonstration regarding the rules at issue, EPA can approve a SIP revision for a nonattainment area only if EPA finds that it will not worsen air quality by increasing emissions of a nonattainment pollutant, and it is otherwise consistent with attainment and maintenance of the NAAQS. Even accepting the commenters' argument that the opacity standard is intended to be a gauge of good O & M of a source, the SIP revisions contemplated in the Submittals raise concerns because the revisions allow facilities to emit up to 100 percent opacity for extended periods of time—which is hard to square with the need to assure good source operation. Indeed, other commenters have asserted that opacity at such levels is the equivalent to turning off any relevant control device for an extended period of time. Even under what EPA understands commenters' argument to be, the SIP revisions present serious concerns about good O & M and would not be approvable.

Comment 44. Commenters explained their view that 110(l) does not impose on states a requirement to "demonstrate" that each proposed revision will not interfere with attainment or require EPA to reject each revision that presents "some remote possibility for interference." Commenters cited to *Kentucky Resources Council (KRC), Inc.* v. *EPA,* 467 F.3d 986, 994–95 (6th Cir. 2006) for support.

Response 44. Section 110(l) prohibits any SIP revision that would have the effect of interfering with attainment or maintenance of the NAAQS, RFP, or any other requirements of the CAA. Typically, states elect to provide the requisite information necessary to establish that their intended SIP revisions would not have any of these effects. EPA often works with states to evaluate the effects of a given SIP revision. In the final analysis, however, EPA is not authorized to approve any SIP revision that has such effects.

When, as here, available information indicates that the SIP revision at issue could result in the increase in PM emissions at some sources located in or near designated PM nonattainment areas, EPA has concluded that the SIP revision is not approvable and that residual uncertainty about the precise amount of additional PM emissions that would be associated with the dramatic increases in opacity does not render the revision approvable.

Commenters' citation to *KRC,* 467 F.3d 986, is misplaced because the case supports EPA's disapproval action. In that case, the Sixth Circuit considered an EPA action approving revisions to the Kentucky SIP regarding Kentucky's inspection and maintenance (I/M) program that removed the requirement from the active portion of Kentucky's SIP. The Court explained that Congress did not intend for EPA to "reject each and every SIP revision that presents some remote possibility for interference. Thus, where the EPA does not find that a SIP revision would interfere with attainment, approval of the revision does not do violence to the statute." *KRC* at 994. The Court upheld EPA's view that:

> As long as actual emissions in the air are not increased, EPA believes that equivalent (or greater) emissions reductions will be acceptable to demonstrate non-interference. EPA does not believe that areas must wait to produce a complete attainment demonstration to make any revisions to the SIP, provided the status quo air quality is preserved.

KRC at 995 (quoting a prior SIP action, 70 FR 28,429, 28,430 (May 18, 2005)). During the course of the SIP revision at issue in that case, EPA informed Kentucky of the need to demonstrate equivalent offsetting reductions due to the existing nonattainment areas in Kentucky. Kentucky responded by adopting additional control requirements into its SIP programs which were sufficient to offset the increased emissions anticipated as a result of removing the I/M program from the active SIP. This type of equivalency analysis was not provided by Alabama and we cannot conclude in this case that the status quo air quality will be maintained. Rather, in the case of Alabama, EPA judges that there is more than a remote possibility for increased emissions under the SIP revision and that our current action is consistent with the *KRC* case.

Comment 45. Commenters make a distinction between attainment and nonattainment areas for purposes of a 110(l) analysis. Commenters appear to suggest that because Alabama had no outstanding nonattainment plans due in the time frame of the October 15, 2008, final rule, that the 110(l) analysis should address whether the revision would affect the status quo.

Response 45. EPA agrees that the 110(l) analysis for a nonattainment area should, in the absence of an attainment demonstration, assure at least that the status quo is maintained. Thus, EPA will generally not approve a SIP revision that allows additional emissions of pollutants for which an area is designated nonattainment in the absence of offsetting reductions. Because EPA now concludes that Alabama's SIP revisions are likely to result in an increase in PM emissions, for which parts of Alabama are designated nonattainment, it cannot be approved consistent with section 110(l).[21] While EPA has previously required a more robust 110(l) analysis for nonattainment areas, there is still an analysis required for attainment areas. Section 110(l) applies to all SIP revisions, regardless of whether the revision is impacting attainment areas or nonattainment areas. Alabama's visible emissions rule at issue is part of Alabama's plan to attain and maintain the NAAQS. The analysis under 110(l) does not depend on what SIP revisions are currently due, although 110(l)

[21] As was discussed above, EPA also concludes that even if the uncertainty about the impact of the SIP revision on PM emissions were so great that EPA could make no technical judgment at all about the net effect of this SIP revision on PM emissions, the revision would still not be approvable under section 110(l).

requires EPA to consider other applicable requirements in the SIP.

Comment 46. Commenters explained that because they believe that there is no relationship between opacity and PM, the inquiry as to 110(l) could end there. Commenters also argued against substituting the words "could interfere" for "would interfere" in 110(l).

Response 46. EPA does not agree that there is no relationship between opacity and PM emissions. Rather, EPA concludes that there is a general relationship between opacity and PM emissions, but for a specific source and its operating characteristics, there is uncertainty about whether increases in opacity are accompanied by increases in PM emissions without examination of each source at issue. In addition, EPA does not substitute the words "could interfere" for "would interfere" in interpreting and applying 110(l). For any given source at any given time, it is accurate to say that increased opacity could be accompanied by increased PM emissions. However, in evaluating what would be allowed under the Submittals across all sources and circumstances, EPA concludes it is likely that the increased opacity allowed by the Submittals would result in increased PM emissions. EPA judges the significant increase in the flexibility in the opacity exemptions allowed to sources under the revised rule is great enough that, absent a convincing demonstration otherwise, the Agency may only conclude the revised rule hinders (*i.e.,* "would interfere" with) efforts to attain and maintain compliance with the PM NAAQS.

Comment 47. Commenters explained that changes to Alabama's Visible Emission Rule do not affect compliance with PM limits. According to the commenter, Alabama has not relied on opacity limits to demonstrate attainment with the PM NAAQS. Thus, the commenter argued that section 110(l) does not apply here at all.

Response 47. Section 110(l) applies, by its plain text, to all SIP revisions including Alabama's 2003 and 2008 Submittals. Contrary to the commenter's belief, the State has historically included the visible emissions rules in its SIP for purposes of attainment and maintenance of the PM NAAQS. The fact that the State may not have sought specific SIP credit attributable to the opacity limits (not to be confused with SIP credit for the PM limits that such opacity limits are designed to assure compliance with) does not mean that the opacity limits are not part of the SIP.

Comment 48. Commenters explained that 110(l) does not require absolute certainty regarding interference with attainment and maintenance of the NAAQS. According to the commenters, EPA has never taken that position and it would be a departure from Agency practice to take such a position. Commenters cited to *KRC* v. *EPA,* 467 F.3d 986 (6th Cir. 2006) and *Galveston-Houston Ass'n for Smog Prevention (GHASP)* v. *EPA,* 289 Fed. Appx. 745 (5th Cir. 2008). Commenters concluded that EPA cannot rely on mere uncertainty as a basis for disapproving a SIP revision.

Response 48. EPA agrees that section 110(l) does not require absolute certainty. EPA's decision today relies on certainties concerning the impacts of the revisions to Alabama's visible emissions rules in the Submittals. These certainties include that the Alabama rule would allow for increase of maximum opacity from 40 percent to 100 percent and would allow such increases for up to 2.4 hours at a time, instead of for only six minutes per hour. EPA is disapproving the revision because while there are uncertainties—such as precisely when PM mass emissions would increase or by what precise amount—EPA expects that it is likely in at least some circumstances to result in increases in PM mass emissions. EPA generally, absent an attainment demonstration or offsetting emission reductions, will not approve a SIP revision that results in increases in emissions of a pollutant for which an area is designated nonattainment pursuant to the requirements of section 110(l). EPA has already discussed the *KRC* case in a previous response. The *GHASP* case supports EPA's position in this action because that was another case where the court upheld EPA's interpretation that section 110(l) requires that a SIP revision must at least maintain status quo air quality to be approvable.

8. CAA Section 110(l) "*Demonstration*" *of Non-Interference With the NAAQS and Other Requirements*

Comment 49. Commenters argued that it is not clear what EPA means when it says that "Alabama has not provided EPA with an affirmative demonstration that the [Rule] will not interfere with the attainment and maintenance of the NAAQS" (74 Fed. Reg. at 50933), since, in the commenters' view, that is exactly what the 2008 revision adding the 22 percent daily average cap ensures. Commenters further stated that to require Alabama to provide more than the modeling of its 2003 submittal would be contrary to what the CAA requires and would be essentially asking for the impossible given the acknowledged uncertainty between opacity and PM, particularly for short-term analysis.

Response 49. EPA does not agree with the commenters' interpretation of 110(l) or characterization of what was provided to EPA. As was explained above, EPA has concluded that the interpretation of 110(l) that is most consistent with the plain text, legislative history, and air quality goals of the CAA is that in order to approve the SIP revision, there must be some reasonable basis for concluding that the SIP revision will not interfere with attainment or maintenance of the NAAQS, consistent with the requirements of 110(l). As commenters acknowledged, the evaluation for this particular SIP revision is challenging due to the inherent uncertainty in the relationship between opacity and PM mass emissions at a given source. For this reason, it is even more important that the demonstration be sufficient to ensure that EPA is complying with section 110(l).

A fundamental purpose of 110(l) is to allow SIP revisions in the absence of a full attainment demonstration provided that such revisions are consistent with continued attainment and maintenance of the NAAQS. To the extent that emission increases of a particular SIP revision cannot be modeled with some level of certainty regarding impact on the NAAQS, section 110(l) may bar that SIP revision, absent equivalent offsetting emissions reductions and in the absence of an attainment or maintenance demonstration. In EPA's judgment, the analysis submitted in connection with the SIP revisions at issue here fails to provide a reasonable basis on which to conclude that the changes would not interfere with attainment and maintenance of the NAAQS. EPA concludes that the CAA prohibits this SIP revision because air emissions could be allowed to increase and thus, worsen air quality in nonattainment areas.

Comment 50. Commenters argued that there is no basis for reversing EPA's prior analysis because the current SIP ensures opacity will be equal to or lower than that allowed under the previous SIP. Commenters further stated that EPA demonstrated mathematically that both the suggested changes in its 2007 proposal to approve the Rule and in Alabama's 2008 revisions as submitted are at least as stringent as Alabama's existing SIP and even more stringent than the 2003 revisions.

Response 50. As discussed above, EPA has concluded after reconsideration that it is not appropriate to measure the stringency of the SIP revisions in the Submittals using an

"average daily limit." Alabama's revised rule allows for extended periods of operation at high levels of opacity that were not previously authorized. Absent a showing that a source's PM emissions would not be elevated if it was permitted to have opacity at up to 100 percent for up to 2.4 hours a day, EPA has concluded that the SIP revisions would be inconsistent with section 110(l).

Comment 51. Commenters argued that Alabama has made an affirmative demonstration that the visible emissions standards in the previous SIP and the revised SIP are equivalent. Alabama's previous visible emissions rule allowed opacity of up to 40 percent for one six-minute period per hour. The revised rule allows the same maximum time of higher opacity in a single day (up to 144 minutes per day), but eliminates the 40 percent cap. To assure equivalency with the previous rule, the revised SIP limits the daily average opacity to less than 22 percent. The basis for derivation of the 22 percent limit was clearly set out in EPA's final rule. 73 FR at 60958–59 (October 15, 2008).

Response 51. As explained above, as a result of this reconsideration EPA disagrees that the two versions of the visible emissions rules could be equivalent, as explained in detail in the Rule Comparison TSD included in the docket. Ultimately, if the impacts of the two versions were actually equivalent, there would be no reason for Alabama to seek the SIP revisions. The practical reality is that the revised rule allows for opacity increases not previously authorized (both in concentration and quantity of time). Furthermore, the rule at issue specifically affects facilities which for one reason or another are not subject to any other opacity limit—and thus this opacity limit is particularly important both for air quality and as an indicator of facility O & M. While EPA understands the commenters' concerns, EPA does not agree that the two versions of the visible emissions rules are equivalent.

Comment 52. One commenter stated that EPA's approval was entirely consistent with section 110(l). According to the commenter, EPA made an "appropriate inquiry" under section 110(l) to protect the NAAQS because it made an equivalency determination and did not rely solely on uncertainty as a basis for the approval. This commenter believes that any uncertainty is erased by the 22 percent cap.

Response 52. EPA's October 15, 2008, final action relied heavily on the uncertainty inherent in the relationship between opacity and PM mass emissions. The October 15, 2008, action was different from other 110(l) analyses previously completed by EPA for that reason. EPA agrees that this rule presents particularly complex technical issues but has ultimately decided that heavy reliance on uncertainty as a basis for approval is not the decision most consistent with the CAA. Section 110(l) is intended to preclude SIP revisions that could have adverse consequences for public health, and accordingly EPA thinks that it should continue to interpret the provision using a precautionary principle to ensure such public health protection in the face of uncertainty about the impacts of a SIP revision.

Comment 53. Commenters drew comparisons between Ohio's recent opacity proposal and North Carolina's previous opacity proposal and concluded that Alabama's opacity limits are far below those of other states (specifically, North Carolina and Georgia).

Response 53. EPA does not agree with commenters' assessment of opacity requirements in other states. Alabama's revised rule was unique in that it allows opacity of up to 100 percent (not allowed under the recent North Carolina revisions)—and it allows such opacity for up to 2.4 consecutive hours. Opacity revisions, by nature, require detailed case-by-case analyses. Due to the specific circumstances of a state (*i.e.,* attainment status, affected facilities, topography, etc…), it is difficult to directly compare opacity rules from state to state (or SIP to SIP). While previous opacity decisions are informative, no other state presents a circumstance totally analogous to Alabama's circumstances. In addition, EPA has proposed to disapprove comparable revisions to the visible emissions rules in the Ohio SIP for reasons comparable to those described in this final action.

9. Use of COMS and Need for Exemptions

Comment 54. One commenter argued that without a regulatory mechanism to address excess emissions reported from COMS, such as that used by Alabama, sources are vulnerable to enforcement actions for short term opacity excursions that have negligible environmental effects.

Response 54. The environmental effect of individual "short-term" opacity excursions depends upon the duration and level of such exceedances, as well as the relationship between opacity and PM emissions at the source where they occur. This is one reason why EPA has concluded that use of an "average daily opacity" cap, in which longer excursions at higher levels are allowed to be "averaged out" with periods of normal operation at lower opacity levels, does little to help reduce PM emissions. Therefore, an "average daily opacity cap" is not a sufficient basis to approve the proposed SIP revisions. Frequent recurrence of such events may reflect the need to improve source operation or emission controls in order to comply with the opacity limit, but that would be masked by the averaging effect of an average daily opacity standard.

In the case of the visible emissions rule changes at issue in these SIP revisions, some sources may have to take action to improve their opacity performance in order to comply with the previous SIP rule. Finally, today's action does not impede the State's ability to exercise its own enforcement discretion in the event that it decides a given opacity violation does not warrant such action.

Comment 55. Commenters explained that when utilizing COMS that yield opacity data for nearly 100 percent of source operating time, given the extremely short data averages utilized for opacity data (six-minute data averages), time periods of excess occur from even the best operated sources.

Response 55. EPA acknowledges that some sources may have difficulty in complying with 20 percent opacity limits 100 percent of the time, especially when events out of the source's control occur, but EPA expects that all sources can comply with the pre-existing version of the visible emissions rule that will be in place as a result of today's disapproval action. EPA expects that any unusual difficulties for specific sources would ease as sources subject to Alabama's visible emissions rule take steps to improve their opacity performance.

Comment 56. One commenter explained that 40 CFR 60.284(e) is the recognition by EPA that some type of exemption time period is necessary when opacity regulations are enforced by a continuous in-stack monitoring system and that this regulation is probably the basis of the Alabama SIP revisions. The commenter further explained its view that the "the preamble to both the NSPS (40 CFR 60.7(c)) and the MACT [maximum achievable control technology] (40 CFR 63.10(e)(3))" both state that sources required to submit reports of excess emissions from continuous in-stack monitoring systems are only required to submit summary reports of the excess emissions data and not detailed reports, provided that the total duration of excess is less than one percent of the

total operating time of the monitored source for the operating time period and that the monitor downtime is less than five percent of the total operating time of the monitored source for the reporting time period. The commenter considered these two regulations as a "de facto" recognition by EPA of [the need for] exemption time periods similar to that proposed in the Alabama SIP revisions.

Response 56. EPA disagrees with the premise of the comment, as it misses the mark concerning what is relevant in the context of a SIP revision for purposes of section 110(l). The NSPS and SIPs serve different purposes under the CAA. The NSPS are industry-specific nationally uniform air emission standards that limit the amount of emissions allowed from new sources or from modified existing sources. They are technology-based standards, meaning that they contain industry-specific limitations based on the best available technology. Under section 111 of the CAA, a standard of performance must reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction that the Administrator determines has been adequately demonstrated. Such determinations take into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impact and energy requirements. The fact that such standards contain various reporting requirements about excess emissions does not address the issues relevant to an analysis to support a SIP revision.

SIPs are EPA-approved state plans for the establishment, regulation, and enforcement of air pollution standards—the NAAQS. Under section 110 of the Act, each state must adopt a plan to provide for implementation, maintenance, and enforcement of the primary and secondary NAAQS within the state. Because SIPs serve a different purpose than the NSPS, EPA evaluates them differently. For example, the NSPS provide exemptions from compliance during brief periods such as startup, shutdown, and malfunctions (SSM). Such automatic exemptions are not appropriate for SIP rules because SIPs are ambient-based standards and any emissions above the allowable may cause or contribute to violations of the NAAQS. Generally, because SIPs must provide for attainment and maintenance of the NAAQS and the achievement of prevention of significant deterioration increments, EPA's policy is that all periods of excess emissions must be considered violations. SIPs can contain regulations with affirmative defenses for violations that occur due to events not reasonably within the control of the source, but they should not contain automatic exemptions. EPA's policy with respect to appropriate SIP provisions is contained in the 1999 memorandum entitled "*State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.*"

Comment 57. Commenters explained that despite its best efforts, continuous compliance with the 20 percent opacity limit is an unachievable goal, and imposing penalties for failing to achieve an unattainable goal does not promote continuous, long term environmental improvement.

Response 57. EPA's final action does not impose penalties or implicate any specific enforcement actions. Rather, it simply finds that Alabama's revisions to its visible emissions rule are not approvable under section 110(l) of the CAA. EPA encourages the commenter to discuss specific compliance concerns with ADEM. Sources should generally be capable of complying with the Alabama opacity rule, but we remain open to considering further SIP revisions that provide greater assurance that PM emissions will not increase as a result.

10. Relationship of SIP Revisions to 40 CFR 51.212

Comment 58. Commenters argued that the visible emissions rule in the revised SIP is appropriate under 40 CFR 51.212(b). Some commenters also discussed that the "indirect" use of COMS for compliance determinations adopted by Alabama and many other states is based on the approach adopted by EPA under the NSPS, which also specify Method 9 as the compliance method but require reporting of COMS data as an indicator of good control device O & M. The commenters asserted that because ADEM's rule continues to use COMS data as an indicator of good O & M, but now simply provides an option for its use "directly * * * for compliance determinations," respecting the independently enforceable opacity limit as allowed under Appendix P, the rule continues to meet EPA's criteria. Other commenters highlighted the position that 51.212 provides states with discretion and the Alabama rule enhances enforcement through use of COMS.

Response 58. In the present action, EPA is not evaluating the approvability of the SIP revision to Alabama's visible emission rule revisions in light of the requirements of 40 CFR 51.212. While EPA agrees that this provision requires states to have SIPs with appropriate methods to assure compliance with emissions limits, EPA is not here addressing whether the revisions at issue would or would not meet those requirements. EPA's analysis for the present action focused on the section 110(l) limitations on EPA's authority to approve a SIP revision. Even if Alabama's revised visible emissions rule were consistent with section 51.212, this would not alleviate the concerns that EPA has with respect to section 110(l).

Comment 59. Commenters stated that ADEM's two percent criterion is consistent with policies developed by EPA in the 1980s to support the use of continuous monitors. Commenters noted that there is no national standard on visible emissions and ADEM's use of a flexible approach is consistent with part 51.

Response 59. In the present rulemaking, EPA is not articulating a position on ADEM's enforcement discretion or policies regarding enforcement discretion, although EPA is aware of the fairly recent Eleventh Circuit Court's opinion addressing ADEM's enforcement discretion in a visible emissions context. As was explained earlier, EPA acknowledges the various comments that support ADEM's Submittals by citing to other federal requirements. However, EPA's analysis was focused on its authority under section 110, and the review of ADEM's Submittals that is most supported by the CAA.

11. Relationship of SIP Revisions to Compliance Assurance Monitoring (CAM) Rule

Comment 60. Commenters explained that although Alabama's visible emissions rule may have some role in evaluating long-term PM control device operation, it is no longer the primary means by which major sources assure compliance with SIP limits on PM. Commenters believe that this role is now filled by EPA's CAM rule at 40 CFR part 64.

Response 60. EPA's present action is not dependent upon whether the State's visible emissions rule is the "primary" means for evaluating compliance with PM limits, although that has been and continues to be a legitimate reason for such opacity limits in SIPs. EPA's present action is based primarily on its obligation under section 110(l) not to approve SIP revisions that would interfere with attainment or maintenance of the NAAQS or other applicable requirements of the CAA. EPA agrees that the CAM rule provides additional support for evaluation of

control device operation; however, CAM applicability and methodologies vary from facility-to-facility. The CAM rule is designed to provide reasonable assurance of ongoing compliance with applicable emissions limits, such as the PM emission limits of the SIP. But CAM requirements are in addition to the requirements of Alabama's visible emissions rule; as a result, the commenters' statements do not resolve whether the revisions to the visible emissions rule satisfy section 110(l).

12. Relationship of SIP Revisions to Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008), and the Vacatur of Certain Provisions in 40 CFR Part 63

Comment 61. Commenters explained that the D.C. Circuit Court's vacatur of 40 CFR part 63 provisions pertaining to SSM and its impact on the opacity SIP revision are irrelevant. Further, commenters noted that SSM provisions are not at issue in the instant SIP revision.

Response 61. EPA does not agree with the blanket statement that SSM provisions are not at issue in the instant SIP revision. As part of EPA's 110(l) evaluation, EPA may consider the SIP as a whole—including other provisions, such as SSM provisions, that may further affect the consequences of a given SIP revision. In this case, EPA's analysis focused primarily on the provisions of the visible emissions rule that the State actually sought to change in the Submittals. However, EPA may consider the entirety of a rule, and the SIP, in completing a 110(l) analysis.

13. Relationship of SIP Revisions to Reasonably Available Control Technology (RACT)

Comment 62. Commenters explained that the Submittals on opacity are not required to comply with RACT and that there is no requirement for EPA to review "unrelated SIP revisions requests" for future RACT compliance. Moreover, commenters stated that when Alabama does submit a SIP revision to address RACT, EPA is not compelled to require that revision to establish any particular opacity standard. Another commenter stated that Alabama's revised SIP imposes the proper opacity RACT standard. Several commenters noted that the Petitioners will have separate opportunity to challenge RACT determinations is RACT-specific rulemaking.

Response 62. RACT refers to equipment and practices that reduce pollutant emissions that are reasonably available and both technologically and economically feasible. RACT usually applies to existing sources in nonattainment areas. Since EPA has concluded that this revision is not approvable under section 110(l) for the reasons already stated, it is not necessary to determine whether Alabama has relied on opacity limits to meet its RACT obligations.

Notably, section 172 of the Act, *Nonattainment plan provisions in general,* requires nonattainment plans "shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards." Section 172 requirements, including RACT, are applicable requirements of the CAA which section 110(l) evaluations may consider.

Section 110(l) requires that EPA consider whether the revision at issue would interfere with the NAAQS, and any other applicable requirement concerning attainment and RFP. Thus, EPA is authorized to consider whether the revision would interfere with an area's ability to comply with RACT or other requirements in the SIP. In this case, however, EPA's review was primarily focused on interference with the NAAQS. While some applicable requirements may be subject to separate SIP revisions, as was noted by several commenters, that does not mean that EPA is prohibited from considering whether revision of a rule at issue may implicate another applicable requirement. RACT issues are likely to also be addressed separately in other SIP revisions.

14. Other Exemptions in Alabama SIP Related to Visible Emissions

Comment 63. Commenters noted that EPA's final action was not inconsistent with EPA policies on excess emissions and director's discretion.

Response 63. As was previously noted by EPA in the 2007 proposal and the October 2008, action, the director's discretion provisions under Alabama rule 335–3–4–.01(1)(c) and (d) are unchanged by the SIP revisions. As a result, periods of excess emissions allowed in a permit pursuant to those provisions remain unchanged under Alabama's rules. EPA did, however, consider Alabama's provisions for excess emissions in evaluating the rule as a whole and comparing it with the previous EPA-approved SIP rule. These types of details become relevant, particularly when parties compare Alabama's visible emissions rules with those in other states. In this action, EPA is not taking any action on Alabama's existing SIP-approved rules that implicate director's discretion and excess emissions.

IV. Final Action

EPA is taking final action to amend an October 15, 2008, final rulemaking on two SIP revisions regarding the State of Alabama's rules for visible emissions from certain stationary sources. EPA has now determined upon reconsideration that Alabama's SIP revisions, dated September 11, 2003, and August 22, 2008, are not approvable pursuant to CAA section 110(l). Accordingly, EPA is now disapproving the revisions submitted by the State of Alabama on September 11, 2003, and August 22, 2008. As a result of this action, Alabama's visible emissions rule that was in the SIP prior to the October 15, 2008, final action will be the "current" SIP-approved rule. Alabama is urged to undertake rulemaking in order to conform its SIP-approved rule with its State-effective rule.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined to be a "significant regulatory action" subject to review by the Office of Management and Budget (OMB) under Executive Order 12866 (58 FR 51735, October 4, 1993). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because these SIP disapprovals under section 110 will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit

enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This rule will not have a significant impact on a substantial number of small entities because EPA understands that only one small entity will be affected by this rule. Furthermore, even if additional small entities were affected by this rule, this rule would not have a significant economic impact on any small entity because it simply restores a long-standing requirement of the Alabama SIP concerning visible emissions.

Therefore, after considering the economic impacts of today's rulemaking on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 "for State, local, or tribal governments or the private sector." EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or local law should not be approved as part of the Federally approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 will not in-and-of itself create any new rules but simply disapproves certain State requirements for inclusion into the SIP.

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded this rule is not likely to have a significant adverse effect on the supply, distribution or use of energy because this rule applies only to 19 facilities in Alabama and simply restores a long-standing rule concerning visible emissions.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 *note*) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs EPA to provide Congress, through the OMB, explanations when the Agency decides not to use available and applicable VCS.

EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove State choices, based on the criteria of the CAA. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP

under section 110. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

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 May 6, 2011.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 6, 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 rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: March 29, 2011.

Gwendolyn Keyes Fleming,

Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart B—Alabama

■ 2. Section 52.50(c) is amended by revising the entry for "Section 335–3–4–.01" to read as follows:

§ 52.50 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED ALABAMA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Section 335–3–4–.01	Visible Emissions	10/15/1996	4/6/2011 [Insert citation of publication].	
*	*	*	*	*

* * * * *

[FR Doc. 2011–8032 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0259; FRL–9285–4]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Volatile Organic Compound Emission Control Measures for Lithographic and Letterpress Printing in Cleveland

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving into the Ohio State Implementation Plan (SIP) revisions to its previously approved offset lithographic and letterpress printing volatile organic compound (VOC) rule. These rule revisions specify compliance dates for subject facilities using an add-on control device and recordkeeping requirements when a recipe log is maintained for each batch of fountain solution or cleaning solution. These rule revisions satisfy the requirements of reasonably available control technology (RACT) and the Clean Air Act (CAA). EPA proposed these rules for approval on December 30, 2010, and received no comments.

DATES: This final rule is effective on May 6, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Nos. EPA–R05–OAR–2010–0259. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886–6052 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Steven Rosenthal, Environmental Engineer, Air Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What public comments were received on the proposed approval and what is EPA's response?
II. What action is EPA taking today and what is the purpose of this action?
III. Statutory and Executive Order Reviews

I. What public comments were received on the proposed approval and what is EPA's response?

No comments were received.

II. What action is EPA taking today and what is the purpose of this action?

EPA is approving Ohio's revised offset lithographic and letterpress printing rule (OAC 3745–21–22), submitted to EPA on March 9, 2010, into the Ohio SIP. This VOC rule applies to offset lithographic and letterpress printing operations in Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit Counties. The primary purpose of this action is to allow an alternative for demonstrating compliance with add-on control requirements, and to specify recordkeeping requirements, when a recipe log is maintained for each batch of fountain solution or cleaning solution.

In EPA's December 30, 2010, proposal (75 FR 82363), we present a detailed legal and technical analysis of the State's submission. The reader is referred to that notice for additional background on the submission and the bases for EPA's approval.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 6, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: March 10, 2011.

Susan Hedman,

Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart KK—Ohio

■ 2. Section 52.1870 is amended by adding paragraph (c)(152) to read as follows:

§ 52.1870 Identification of plan.

* * * * *

(c) * * *

(152) On March 9, 2010, the Ohio Environmental Protection Agency (Ohio EPA) submitted revisions to its previously approved offset lithographic and letterpress printing volatile organic compound (VOC) rule for approval into its state implementation plan (SIP). This submittal revises certain compliance dates and recordkeeping requirements.

(i) *Incorporation by reference.*

(A) Ohio Administrative Code Rule 3745–21–22 "Control of volatile organic compound emissions from offset lithographic printing and letterpress printing facilities.", effective February 10, 2010.

(B) January 29, 2010, "Director's Final Findings and Orders", signed by Chris Korleski, Director, Ohio EPA.

[FR Doc. 2011–8167 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

Oil Pollution Prevention

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 100 to 135, revised as of July 1, 2010, on page 71, in Appendix E to Part 112, the second section 5.1 is removed.

[FR Doc. 2011–8328 Filed 4–5–11; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0325; FRL–8868–6]

Hexythiazox; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of hexythiazox in or on corn, sweet, kernel plus cob with husk removed; corn, sweet, forage; bean, dried; and bean, succulent. Gowan Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 6, 2011. Objections and requests for hearings must be received on or before June 6, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0325. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9369; e-mail address: *odiott.olga@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's eCFR site at *http://www.gpoaccess.gov/ecfr.* To access the harmonized test guidelines referenced in this document electronically, please go *http://www.epa.gov/ocspp* and select "Test Methods and Guidelines."

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0325 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 6, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0325, by one of the following methods:

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

II. Summary of Petitioned For Tolerance

In the **Federal Register** of August 19, 2009 (74 FR 41898) (FRL–8426–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F7549) by Gowan Company, 370 South Main Street, Yuma, AZ, 85364. The petition requested that 40 CFR 180.448 be amended by establishing tolerances for residues of the insecticide hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parts per million of the parent compound), in or on corn, sweet, kernel plus cob with husk removed at 0.1 parts per million (ppm); corn, sweet, forage at 3 ppm; bean, dried at 0.4 ppm; and bean, succulent at 0.4 ppm. That notice referenced a summary of the petition prepared by Gowan Company, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance levels for corn, sweet, forage; and bean, succulent to 4 ppm and 0.3 ppm, respectively. The

reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for hexythiazox including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with hexythiazox follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Hexythiazox has low acute toxicity by the oral, dermal and inhalation routes of exposure. It produces mild eye irritation, is not a dermal irritant, and is negative for dermal sensitization. Hexythiazox is not a developmental or reproductive toxicant. The toxicology database for hexythiazox provides no indication of increased susceptibility in rats or rabbits from *in utero* and postnatal exposure to hexythiazox. The database does not show any evidence of treatment-related effects on the nervous system or the immune system. Hexythiazox is classified as "likely to be carcinogenic to humans". EPA has determined that a non-quantitative risk assessment approach (i.e., nonlinear, reference dose (RfD) approach) was appropriate and protective of all chronic effects including potential carcinogenicity of hexythiazox.

Specific information on the studies received and the nature of the adverse effects caused by hexythiazox as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Hexythiazox. Human Health Risk Assessment to Support New Uses on Sweet Corn, Dry Beans and Succulent Beans," page 24 in docket ID number EPA–HQ–OPP–2009–0325.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for hexythiazox used for human risk assessment can be found in the final rule published in the **Federal Register** of March 17, 2010 (Vol. 75 FR 12691) (FRL–8813–7), and at *http://www.regulations.gov* in document "Hexythiazox. Human Health Risk Assessment to Support New Uses on Sweet Corn, Dry Beans and Succulent Beans," page 11 in docket ID number EPA–HQ–OPP–2009–0325.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to hexythiazox, EPA considered exposure under the petitioned-for tolerances as well as all existing hexythiazox tolerances in 40 CFR 180.448. EPA assessed dietary exposures from hexythiazox in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No such effects were identified in the toxicological studies for hexythiazox; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used tolerance level residues, assumed 100 percent crop treated (PCT), and incorporated DEEM default processing factors.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data in the **Federal Register** of March 17, 2010 (Vol. 75 FR 12691) (FRL–8813–7), EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to hexythiazox. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *chronic exposure.*

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for hexythiazox. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level

water exposure models in the dietary exposure analysis and risk assessment for hexythiazox in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of hexythiazox. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), the estimated drinking water concentration (EDWC) of hexythiazox for chronic exposures for non-cancer and cancer assessments is estimated to be 4.5 ppb for surface water. Since surface water residue values greatly exceed groundwater EDWCs, surface water residues were used in the dietary risk assessment.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Hexythiazox is not currently registered for any specific use patterns that would result in residential exposure. However, the following uses that could result in residential exposures are pending registration in the near future and are included in this risk assessment: Turf, ornamental landscape plantings, ornamental plants, trees and vines in nurseries, residential fruit trees, nut trees, caneberries, and orchids.

Both adults and children may be exposed to hexythiazox residues from contact with treated lawns or treated plants. The exposure and risk assessment included risks to adult handlers from inhalation exposures. The exposure assessment for children included risks from incidental oral exposure resulting from transfer of residues from the hands or objects to the mouth, and from incidental ingestion of soil. Details of the residential exposure and risk assessment are contained in the final rule published in the **Federal Register** of July 14, 2010 (75 FR 40741), and at *http://www.regulations.gov* in document "Hexythiazox. Human Health Risk Assessment to Support New Uses on Sweet Corn, Dry Beans, and Succulent Beans," page 16 in docket ID number EPA–HQ–OPP–2009–0325.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found hexythiazox to share a common mechanism of toxicity with any other substances, and hexythiazox does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that hexythiazox does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicology data base indicates no increased susceptibility of rats or rabbits to *in utero* and/or postnatal exposure to hexythiazox.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for hexythiazox is incomplete under the new 40 CFR part 158 data requirements for conventional pesticides, which requires certain generic testing, including acute and subchronic neurotoxicity studies and an immunotoxicity study. However, the toxicology database does not show any evidence of treatment-related effects on the nervous system or the immune system. The overall weight of evidence suggests that this chemical does not directly target either system. Although acute and subchronic neurotoxicity studies and an immunotoxicity study are required as a part of new data requirements in the 40 CFR part 158 for conventional pesticide registrations, the Agency does not believe that conducting these studies will result in a lower POD than any currently used for risk assessment, and therefore, a database uncertainty factor (UF_{DB}) is not needed to account for the lack of these studies.

ii. There is no indication that hexythiazox is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that hexythiazox results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. The dietary risk assessment is highly conservative and not expected to underestimate risk. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to hexythiazox in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by hexythiazox.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short, intermediate, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from

a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, hexythiazox is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to hexythiazox from food and water will utilize 51% of the cPAD for children 1–2 years of age, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of hexythiazox is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

There are potential short-term exposures from the pending residential uses for hexythiazox. The Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to hexythiazox.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 15,000 for adults and 1,900 for children. Because EPA's level of concern for hexythiazox is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

There are potential intermediate-term exposures from the pending residential uses for hexythiazox. The Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to hexythiazox.

Using the exposure assumptions described in this unit for intermediate-term exposures, EPA has concluded that the combined intermediate-term food, water, and residential exposures result in aggregate MOEs of 15,000 for adults and 2,200 for children. Because EPA's level of concern for Hexythiazox is a MOE of 100 or below, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* As discussed in Unit III.C.1.iii, EPA concluded that regulation based on the chronic reference dose will be protective for both chronic and carcinogenic risks. As noted in this unit there are no chronic risks of concern.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to hexythiazox residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (high performance liquid chromatography method with UV detection (HPLC/UV)) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

A Codex MRL for common beans (pods and/or immature seeds) is currently established at 0.5 ppm. It is not possible to harmonize the U.S. tolerance with the Codex MRL since the Codex MRL is for parent compound only and the U.S. expression includes metabolites of concern. There are no Canadian or Mexican MRLs for beans and there is no Codex, Canadian or Mexican MRL for sweet corn commodities.

C. Revisions to Petitioned for Tolerances

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance levels for corn, sweet, forage; and bean, succulent to 4 ppm and 0.3 ppm, respectively. The tolerance spreadsheet in the Agency's Guidance for Setting Pesticide Tolerances Based on Field Trial Data was used to determine appropriate tolerance levels for sweet corn forage, dried beans and succulent beans. The tolerance spreadsheet was not used for sweet corn kernel plus cob with husk removed (K+CWHR) because >65% of the residues were <LOQ. The data indicate that the proposed tolerance for sweet corn forage is too low, the recommended tolerance is 4.0. Additionally, the tolerance spreadsheet indicates that the proposed level of 0.4 ppm is too high for succulent beans. The tolerance should be set at 0.3 ppm.

V. Conclusion

Therefore, tolerances are established for residues of hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parts per million of the parent compound), in or on corn, sweet, kernel plus cob with husk removed at 0.1 ppm; corn, sweet, forage at 4 ppm; bean, dried, seed at 0.4 ppm; and bean, succulent at 0.3 ppm.

VI. Statutory and Executive Order Reviews

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

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory

Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

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

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

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: March 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.448 is amended by alphabetically adding the following commodities to the table in paragraph (c), to read as follows:

§ 180.448 Hexythiazox; tolerances for residues.

* * * * *

(c) * * *

Commodity	Parts per million
Bean, dried, seed (EPA Regions 7–12 only)	0.4
bean, succulent (EPA Regions 7–12 only)	0.3
* * * * * * *	
Corn, sweet, kernel plus cob with husks removed (EPA Regions 7–12 only)	0.1
Corn, sweet, forage (EPA Regions 7–12 only)	4.0
* * * * * * *	

* * * * *

[FR Doc. 2011–8182 Filed 4–5–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0636; FRL–8864–3]

Indaziflam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of indaziflam in or on multiple commodities which are identified and discussed later in this document. Bayer CropScience LP requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 6, 2011. Objections and requests for hearings must be received on or before June 6, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0636. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Bethany Benbow, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–8072; *e-mail address: benbow.bethany@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).

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

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

B. How can I get electronic access to other related information?

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

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0636 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 6, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0636, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of January 6, 2010 (75 FR 864) (FRL–8801–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of two pesticide petitions (PP 9F7589 and PP 9E7588) by Bayer CropScience LP, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR part 180 be amended by adding a section for the herbicide indaziflam and establishing tolerances therein for residues of indaziflam, *N*-[(1R,2S)-2,3-dihydro-2,6-dimethyl-1*H*-inden-1-yl]-6-(1-fluoroethyl)-1,3,5-triazine-2,4-diamine, in or on fruit, citrus, group 10; fruit, pome, group 11; fruit, stone, group 12; nut, tree, group 14; pistachio; grape; and olive; each at 0.01 parts per million (ppm) and almond, hulls at 0.20 ppm (PP 9F7589). Additionally, Bayer CropScience LP requested an import tolerance for sugarcane, sugar, refined at 0.01 ppm (PP 9E7588). That notice referenced a summary of the petitions prepared by Bayer CropScience LP, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA has modified the petitioner's request by lowering the proposed tolerance level for almond, hulls from 0.20 ppm to 0.15 ppm. EPA is also revising the proposed commodity term, "Sugarcane, sugar, refined" to read "Sugarcane, refined sugar." Additionally, EPA is revising the citrus and pome fruit crop group names and the requested tolerance expression. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for indaziflam including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with indaziflam follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The toxicology database for indaziflam is complete and adequate for selecting toxicity endpoints for risk assessment. The scientific quality of the data is relatively high, and the toxicity is well-characterized for all types of effects, including potential developmental, reproductive, immunologic and neurologic toxicity.

Indaziflam has low acute toxicity via the oral, dermal, and inhalation routes of exposure. It is not irritating to the eye or skin and is not a dermal sensitizer.

The nervous system is a target for indaziflam in rats and dogs. In the dog degenerative neuropathology of the brain, spinal cord and sciatic nerve was reported in the dog following both subchronic and chronic oral exposure. Neuropathology in the dog was the most sensitive effect and was selected as the risk assessment endpoint for all

repeated exposure scenarios. In the rat, histopathology of the brain and pituitary *pars nervosa* was observed following chronic exposure. Clinical signs of neurotoxicity were observed in both species in several studies, including rat adult and developmental neurotoxicity studies. Decreased motor activity observed in the rat acute neurotoxicity study was selected as the appropriate endpoint for assessing acute oral exposures.

In addition to the neurological system, chronic exposure was associated with degenerative renal effects in the rat and mouse, hypertrophy (considered adaptive), increased macrovacuolation and multinucleated hepatocytes in the rat liver, increased follicular cell hypertrophy and colloid alteration in the rat thyroid, degeneration in rat reproductive tissues including atrophied seminal vesicles (males), and in female mice, blood-filled ovarian cysts/follicles (females) and gastric lesions. Thyroid and gastric effects were also observed following subchronic exposure of the rat. Decreased body weight gains were generally observed in the available subchronic and chronic studies. No systemic toxicity was observed in a 28-day dermal toxicity study in the rat.

Developmental effects in offspring were absent or limited to doses that also caused systemic toxicity in the adult. In the rat developmental toxicity study, decreased fetal weight was observed in the presence of maternal effects that included decreased body weight and clinical signs of toxicity. No developmental effects were observed in rabbits up to maternally toxic dose levels. Decreased pup weight and delays in sexual maturation (preputial separation in males and vaginal patency in females) were observed in the rat 2-generation reproductive toxicity study, along with clinical signs of toxicity, at a dose causing parental toxicity that included clinical signs and decreased weight gain. In the developmental neurotoxicity study, transiently decreased motor activity (PND 21 only) in male offspring was observed and was considered a potential neurotoxic effect. It was observed at a dose that also caused clinical signs of neurotoxicity along with decreased body weight in maternal animals.

There was no evidence of carcinogenicity observed in the 2-year dietary rat or mouse carcinogenicity bioassays and no evidence of genotoxicity in mutagenicity studies (reverse gene mutation in bacteria, forward gene mutation in mammalian cells) or *in vitro* and *in vivo* chromosomal aberration assays. Based on the lack of evidence of carcinogenicity or genotoxicity, the Agency classified indaziflam as "not likely to be carcinogenic to humans."

Specific information on the studies received and the nature of the adverse effects caused by indaziflam, as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Indaziflam: Human health risk assessment for use in citrus, stone, and pome fruits; grapes; tree nuts; pistachios; olives; and sugar cane (imported refined sugar)," p. 41 in docket ID number EPA–HQ–OPP–2009–0636.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which NOAEL are observed and the LOAEL which adverse effects of concern are identified. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.* A summary of the toxicological endpoints for indaziflam used for human risk assessment is shown in the table below of this unit.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR INDAZIFLAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including females 13–49 years of age and infants and children).	NOAEL = 50 mg/kg/day .... UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.5 mg/kg/day aPAD = 0.5 mg/kg/day	Acute oral neurotoxicity in the rat. LOAEL = 100 mg/kg/day based on decreased motor and locomotor activity in females.
Chronic dietary (All populations).	NOAEL = 2 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.02 mg/kg/day. cPAD = 0.02 mg/kg/day	Chronic oral (dietary) toxicity in the dog. LOAEL = 6/7 mg/kg/day M/F, based on nerve fiber degenerative lesions in the brain, spinal cord and sciatic nerve.
Incidental oral short-term (1 to 30 days) and intermediate-term (1 to 6 months).	NOAEL= 7.5 mg/kg/day .... UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic oral (gavage) in the dog. LOAEL = 15 mg/kg/day based on axonal degenerative microscopic findings in the brain, spinal cord and sciatic nerve.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR INDAZIFLAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Dermal short-term ..... (1 to 30 days) and intermediate-term (1 to 6 months).	Dermal (or oral) study NOAEL = 7.5 mg/kg/day (dermal absorption rate = 7.3%). UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic oral (gavage) in the dog. LOAEL = 15 mg/kg/day based on axonal degenerative microscopic findings in the brain, spinal cord and sciatic nerve.
Inhalation short-term (1 to 30 days) and intermediate-term (1 to 6 months).[1]	Inhalation (or oral) study NOAEL= 7.5 mg/kg/day (inhalation absorption rate = 100%). UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic oral (gavage) in the dog. LOAEL = 15 mg/kg/day based on axonal degenerative microscopic findings in the brain, spinal cord and sciatic nerve.
Cancer (Oral, dermal, inhalation).	Classification: "Not Likely to be Carcinogenic to Humans" based on the absence of significant tumor increases in the two-year dietary rat and mouse bioassays.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

[1] EPA selected a point of departure from an oral study to assess short-term residential handler inhalation risks for indaziflam. While it is possible that extrapolation of an inhalation endpoint from an oral study may sometimes underestimate inhalation risk, in this case the Agency believes the risk assessment is protective of adult handlers. MOEs calculated for residential handlers ranged from 3,000 to 510,000, thus providing an ample margin of safety to account for any uncertainties in route-to-route extrapolation. Further, the contribution of residential inhalation exposure to aggregate risk is small.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to indaziflam, EPA considered exposure under the petitioned-for tolerances. There are no tolerances currently established for indaziflam. EPA assessed dietary exposures from indaziflam in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for indaziflam. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed that residues are present in all commodities at the tolerance level and that 100% of commodities are treated with indaziflam. DEEM–FCID, Version 2.03 default concentration factors were used to estimate residues of indaziflam in processed commodities with the exception of the empirically derived raisin processing factor of 2.8x.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed that residues are present in all commodities at the tolerance level and that 100% of commodities are treated with indaziflam. DEEM–FCID, Version 2.03 default concentration factors were used to estimate residues of indaziflam in processed commodities with the exception of the empirically derived raisin processing factor of 2.8x.

iii. *Cancer.* Based on the results of carcinogenicity studies in rats and mice, EPA classified indaziflam as "Not Likely to be Carcinogenic to Humans" therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue or PCT information in the dietary assessment for indaziflam. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The residues of concern in drinking water include indaziflam and its degradates: Triazine indanone, indaziflam-carboxylic acid, indaziflam-olefin, indaziflam-hydroxyethyl, fluoroethyl-diaminotriazine (FDAT), and dihydroaminotriazine (a degradate of FDAT). The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for indaziflam and its degradates in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of indaziflam and its degradates. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of indaziflam and its degradates for acute exposures are estimated to be 84 parts per billion (ppb) for surface water and 3.7 ppb for ground water. The chronic exposures for non-cancer assessments are estimated to be 26 ppb for surface water and 3.7 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 84 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 26 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Indaziflam

is currently registered for the following uses that could result in residential exposures: Residential turfgrass and recreational areas. EPA assessed residential exposure using the following assumptions: There is a potential for short-term exposure of homeowners applying products containing indaziflam on home lawns. There is also a potential for short- and intermediate-term post-application exposure of adults and children entering lawn and recreation areas, including golf courses, which have been treated with indaziflam. Indaziflam post-application inhalation exposures are expected to be negligible due to its low vapor pressure, low application rates, and the types of application equipment used (i.e., hand-held equipment that is not likely to generate a vapor). Therefore, a quantitative post-application inhalation exposure assessment was not considered necessary. EPA assessed the following residential exposure scenarios:

i. Short-term dermal and inhalation exposures of residential handlers using various types of application equipment and formulation types on the proposed residential use sites;

ii. Short-term post-application dermal exposures of adults and children entering treated turf areas; and

iii. Short-term postapplication incidental oral exposures of children from contact with treated turfgrass.

Since the doses and endpoints selected to assess short- and intermediate-term exposures are the same, a separate quantitative intermediate-term assessment was not completed; the short-term risk assessments are protective of intermediate-term risks.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found indaziflam to share a common mechanism of toxicity with any other substances. Indaziflam and its metabolite fluoroethyldiaminotriazine (FDAT) contain a triazine moiety within their chemical structures. Several triazine herbicides were determined by EPA to have a common mechanism of toxicity based on their ability to disrupt the hypothalamic-pituitary-gonadal axis (U.S. EPA, 2002). The triazine common mechanism group (TCMG) includes atrazine, simazine, propazine, and the metabolites desethyl-s-atrazine (DEA), deisopropyl-s-atrazine (DIA), and diaminochlorotriazine (DACT). Indaziflam and its metabolite FDAT were considered for incorporation into the TCMG by EPA based on structure; indaziflam, FDAT, and the TCMG members contain a common triazine moiety. However, EPA determined that it would not be appropriate to include indaziflam and FDAT in the TCMG for the following reasons:

i. The structure of indaziflam and FDAT are unique in that they contain a fluoroethyl group at the 2-position of the triazine ring, whereas the TCMG members contain a chlorine substituent at the 2-position of the triazine ring and;

ii. Indaziflam and FDAT do not elicit the same toxicological responses shared by the TCMG members. The TCMG members cause an increase in mammary gland tumors in rats and multiple developmental effects such as attenuation of the luteinizing hormone surge, altered pregnancy outcome, and delayed preputial separation. Although delayed sexual maturation was observed in the rat reproductive toxicity study, the effects occurred only at the highest dose. None of the other effects associated with the TCMG members were observed in the carcinogenicity, developmental, or reproductive guideline studies for indaziflam. In a non-guideline study, FDAT delayed vaginal patency in a dose-dependent manner. However, none of the other characteristic developmental effects of the TCMG members were observed, and this effect only occurred at higher doses compared to DACT. Therefore, unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA found that neither indaziflam nor its metabolite FDAT have a common mechanism of toxicity with any other substances, and indaziflam does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that indaziflam does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, *see* EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10x) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10x, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The pre- and post-natal toxicity database for indaziflam includes guideline rat and rabbit developmental toxicity studies, a 2-generation reproduction toxicity study in rats and a developmental neurotoxicity study in rats. As discussed in Unit III.A., there was no evidence of increased pre- or post-natal susceptibility of fetuses or offspring in any of these studies.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for indaziflam is considered complete and includes acceptable developmental toxicity studies in rats and rabbits, a 2-generation reproductive toxicity study in rats, a developmental neurotoxicity in rats, acute and subchronic neurotoxicity screening studies in rats, and an immunotoxicity study.

ii. There is no evidence that indaziflam results in increased pre- or post-natal susceptibility of rats or rabbits in the prenatal developmental studies of rats in the 2-generation reproduction study, or of rats in the developmental neurotoxicity study.

iii. There are no significant residual uncertainties in the exposure databases. The final report on the stability of indaziflam in frozen storage and processing data for citrus oil were only recently submitted by the petitioner and are currently undergoing full review at the Agency; however, based on a preliminary screening of the data, EPA does not expect these studies to have a measurable impact on exposure estimates for indaziflam.

a. *Storage stability.* Preliminary information from the study indicates that indaziflam is stable in frozen

storage over a 25–26 month period, well beyond the 17-month period that samples from the residue field trials were stored frozen prior to analysis.

b. *Citrus oil processing data.* Although all citrus commodities from submitted field trials and a processing study have total residues below the method limit of quantitation (LOQ) at a 5× exaggerated application rate, data were required for the processed commodity citrus oil due to the extremely high theoretical concentration factor (1000x). Citrus oil was not analyzed during the originally submitted processing study. Data from the recently submitted study indicate that indaziflam residues concentrate in citrus oil at approximately 11.7x compared to those in citrus raw agricultural commodities (RACs). Based on this preliminary concentration factor, the total residues in citrus oil are still estimated to be less than the LOQ. Therefore, EPA believes that the tolerance of 0.01 ppm (the LOQ) for citrus fruit is adequate to cover residues in citrus oil, as no finite residues would be expected in citrus oil even at exaggerated rates.

The dietary food exposure assessments were performed assuming tolerance-level residues and 100 PCT for all commodities. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to indaziflam in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children including incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by indaziflam.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to indaziflam will occupy 3% of the aPAD for infants, less than 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to indaziflam from food and water will utilize 10% of the cPAD for infants, less than 1 year old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of indaziflam is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Indaziflam is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to indaziflam.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 2,400 for adults and 1,300 for children. For adults, EPA aggregated short-term residential handler inhalation and dermal exposure with chronic dietary exposure from food and water. For children, EPA aggregated short-term dermal and incidental oral residential exposures plus chronic dietary exposure from food and water. Because EPA's level of concern for indaziflam is for MOEs below 100, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Since the doses and endpoints selected to assess short- and intermediate-term exposures to indaziflam are the same, a separate quantitative intermediate-term assessment was not completed; the short-term risk assessments are protective of both short- and intermediate-term risks.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, indaziflam is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to indaziflam residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS) Method DH–003–P07–02) is available to enforce the tolerance expression. The method is able to determine, separately, residues of indaziflam and FDAT. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; *telephone number:* (410) 305–2905; *e-mail address: residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established an MRL for indaziflam.

C. Revisions to Petitioned-For Tolerances

EPA is lowering the almond, hulls tolerance proposed at 0.20 ppm to 0.15 ppm based on analysis of the field trial data using the Agency's NAFTA-harmonized tolerance/MRL calculator in accordance with the *Guidance for Setting Pesticide Tolerances Based on Field Trial Data.* EPA is also revising the proposed commodity term, "Sugarcane, sugar, refined" to read "Sugarcane, refined sugar" to agree with the Agency's Food and Feed Vocabulary. Additionally, EPA is revising the requested tolerance expression to clarify the chemical moieties that are covered by the tolerances and specify how compliance with the tolerances is to be measured. The revised tolerance expression makes clear that the

tolerances cover residues of the herbicide indaziflam, including its metabolites and degradates, but that compliance with the tolerance levels is to be determined by measuring only indaziflam, *N*-[(1R,2S)-2,3-dihydro-2,6-dimethyl-1*H*-inden-1-yl]-6-(1-fluoroethyl)-1,3,5-triazine-2,4-diamine, in or on the commodities.

EPA was petitioned for tolerances on citrus fruit group 10 and pome fruit group 11. In the **Federal Register** of December 8, 2010 (75 FR 76284) (FRL–8853–8), EPA issued a final rule that revised the crop grouping regulations. As part of this action, EPA expanded and revised the existing citrus fruit group 10 and pome fruit group 11. Changes to crop group 10 included adding the specialty commodities Australian desert lime, Australian finger lime, Australian round lime, Brown River finger lime, Japanese summer grapefruit, Mediterranean mandarin, Mount White lime, New Guinea wild lime, Russell River lime, sweet lime, Tachibana orange, Tahiti lime, tangelo, tangor, trifoliate orange, and uniq fruit; creating subgroups; revising the representative commodities; and naming the new crop group citrus fruit group 10–10. Changes to crop group 11 included adding the specialty commodities azarole, medlar, Asian pear, Chinese quince, Japanese quince, and tejocote; creating subgroups; revising the representative commodities; and naming the new crop group pome fruit group 11–10. EPA indicated in the December 8, 2010 final rule as well as the earlier January 6, 2010 proposed rule (75 FR 807) (FRL–8801–2) that, for existing petitions for which a Notice of Filing had been published, the Agency would attempt to conform these petitions to the rule. Therefore, consistent with this rule, EPA has assessed exposure to the herbicide, indaziflam, assuming use under the revised crop groups. Because revising the requested crop groups to the updated crop groups did not result in a risk of concern, EPA is proposing to establish tolerances for indaziflam residues on citrus fruit group 10–10 and pome fruit group 11–10.

V. Conclusion

Therefore, tolerances are established for residues of the herbicide indaziflam, including its metabolites and degradates, in or on fruit, citrus, group 10–10 at 0.01 ppm; fruit, pome, group 11–10 at 0.01 ppm; fruit, stone, group 12 at 0.01 ppm; nut, tree, group 14 at 0.01 ppm; pistachio at 0.01 ppm; almond, hulls at 0.15 ppm; grape at 0.01 ppm; olive at 0.01 ppm; and sugarcane, refined sugar at 0.01 ppm. Compliance with the tolerance levels is to be determined by measuring only indaziflam, *N*-[(1R,2S)-2,3-dihydro-2,6-dimethyl-1*H*-inden-1-yl]-6-(1-fluoroethyl)-1,3,5-triazine-2,4-diamine, in or on the commodities.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: March 23, 2011.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.653 is added to read as follows:

§ 180.653 Indaziflam; tolerances for residues:

(a) *General.* Tolerances are established for residues of the herbicide indaziflam, *N*-[(1R,2S)-2,3-dihydro-2,6-dimethyl-1*H*-inden-1-yl]-6-(1-fluoroethyl)-1,3,5-triazine-2,4-diamine, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the table below is to be determined by

measuring only indaziflam, in or on the commodity.

Commodity	Parts per million
Almond, hulls	0.15
Fruit, citrus, group 10–10	0.01
Fruit, pome, group 11–10	0.01
Fruit, stone, group 12	0.01
Grape	0.01
Nut, tree, group 14	0.01
Olive	0.01
Pistachio	0.01
Sugarcane, refined sugar [1]	0.01

[1] Tolerance without a corresponding U.S. registration.

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 2011–7774 Filed 4–5–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0307; FRL–8864–1]

Mancozeb; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of mancozeb in or on almonds, cabbage, lettuce, peppers, and broccoli. Dow AgroSciences LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 6, 2011. Objections and requests for hearings must be received on or before June 6, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see* also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0307. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–9367; *e-mail address: ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. How can I get electronic access to other related information?

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

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2005–0307 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 6, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2005–0307, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of November 30, 2005 (70 FR 71836) (FRL–7747–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 3E6536 for mandarin oranges/mandarins; PP 4F4324 for almond nuts and almond hulls; PP 4F4333 for broccoli, cabbage, lettuce, and peppers) by Dow AgroSceinces LLC, 9330 Zionsville Road, Indianapolis, IN 46268. The petitions requested that 40 CFR 180.176 be amended by establishing tolerances for residues of the fungicide mancozeb, zinc manganese ethylenebis dithiocarbamate, in or on mandarin

oranges/mandarins at 5.0 parts per million (ppm) (PP 3E6536), almond nuts at 0.1 ppm and almond hulls at 10.0 ppm (PP 4F4324); and broccoli at 13.0 ppm, cabbage at 10.0 ppm, lettuce at 10.0 ppm, and peppers at 7.0 ppm (PP 4F4333). That notice referenced a summary of the petition prepared by Dow AgroSciences LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* One comment was received on the notice of filing. EPA's response to this comment is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA is setting the tolerances at levels different than originally requested in the petitions, with the exception of almond. The reason for these changes is explained in Unit IV.D. The request for mandarin oranges has been withdrawn.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *"

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for mancozeb including exposure resulting from the tolerances established by this action.

Mancozeb is a member of the ethylene bisdithiocarbamate (EBDC) group of fungicides that also includes the related active ingredients maneb and metiram. Mancozeb, maneb and metiram, are all metabolized to ethylenethiourea (ETU) in the body and all degrade to ETU in the environment. Therefore, EPA has considered the aggregate or combined risks from food, water and non-occupational exposure resulting from mancozeb alone and ETU from all sources (*i.e.,* the other EBDC fungicides) for this action.

In response to the petitions submitted to establish tolerances for residues of mancozeb on almond, cabbage, leaf lettuce, peppers, and broccoli, EPA completed two risk assessments in 2007:

- A mancozeb risk assessment which considered all existing and proposed uses for mancozeb, and
- An ETU risk assessment that considered exposure to ETU from all sources (mancozeb, metiram, and maneb) for all existing and proposed uses.

Although the 2007 mancozeb review showed risks that were acceptable, the 2007 ETU review demonstrated unacceptable cancer risks, therefore preventing the Agency from acting on the petitions for almond, cabbage, leaf lettuce, peppers, and broccoli. The Agency worked to refine the cancer risk assessment for ETU. A refined cancer risk assessment for ETU from all sources has been completed and the Agency is now prepared to act on the proposed tolerances for almond, cabbage, leaf lettuce, peppers, and broccoli. Because the 2010 ETU review dealt strictly with refining the cancer risk, the Agency will be relying on three risk assessments to support this tolerance document. These assessments are as follows:

- A 2007 risk assessment for mancozeb for acute, short-term, intermediate-term, chronic, and cancer risk (refer to risk assessment in the Docket EPA–HQ–OPP–2005–0307 titled "Mancozeb: Human Health Risk Assessment to Support Proposed New Uses on Broccoli, Cabbage, Lettuce, Peppers and Almonds"),
- A 2007 risk assessment for ETU for acute, short-term, intermediate-term and chronic risk (refer to risk assessment in the Docket EPA–HQ–OPP–2005–0307 titled "Ethylenethiourea (ETU) from EBDCs: Health Effects Division (HED) Human Health Risk Assessment of the Common Metabolite/Degradate ETU"),
- A 2010 addendum to the 2007 ETU assessment for cancer risk (refer to risk assessment in the Docket EPA–HQ–OPP–2005–0307 titled "Addendum to the Aggregate Human Health Risk Assessment of the Common Metabolite/ Degradate Ethylene Thiourea (ETU) to Support New Tolerances on Imported Grapes and Bananas for Metiram and for New Tolerances for Mancozeb on Almonds, Broccoli, Cabbage, Lettuce, and Peppers.").

In the **Federal Register** of April 16, 2010, (75 FR 19967) (FRL–8822–2) the voluntary cancellation of the last product containing maneb registered for use in the United States was announced by the Agency. Therefore, it is important to note that since all products for maneb have been cancelled and there are limited existing stocks for maneb still in the channels of trade, the risk assessments for ETU likely overestimates the exposures to this common metabolite. EPA's assessment of exposures and risks associated with mancozeb and ETU follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In addition to evaluating mancozeb, EPA also evaluated the risks of ETU, a contaminant, metabolite and degradation product of mancozeb and the other EBDC group of fungicides, which includes the related active ingredients metiram and maneb.

1. *Mancozeb.* Mancozeb is not acutely toxic via the oral, dermal or inhalation routes of exposure. Further, mancozeb is not a skin irritant nor is it a skin sensitizer, although it does cause mild eye irritation. The findings in multiple studies demonstrate that the thyroid is a target organ for mancozeb. Thyroid toxicity was manifested as alternations in thyroid hormones, increased thyroid weight, and microscopic thyroid lesions (mainly thyroid follicular cell hyperplasia). These effects are due to the ETU metabolite. In a subchronic study in the rat, neuropathology was seen (injury to peripheral nerves) microscopically with associated clinical signs (abnormal gait and limited use of rear legs) and loss of muscle mass. An acute neurotoxicity study with mancozeb has been completed and reviewed since the 2007 risk assessment; neuropathology was not observed, and minimal effects upon motor activity were observed at high doses. The Agency conducted a preliminary dietary assessment using a point-of-departure from this study and found no risk concerns. Other toxicity included increases in bilateral retinopathy in the chronic rat study. Elevated cholesterol and a mild, regenerative, anemia occurred in subchronic and chronic dog studies.

Mancozeb is rapidly absorbed and eliminated in the urine. In oral rat metabolism studies with radiolabelled

mancozeb and other EBDCs, an average 7.5% *in vivo* metabolic conversion of EBDC to ETU occurred, on a weight-to-weight basis. Metabolism data indicate mancozeb does not bio-accumulate. Mancozeb has been tested in a series of *in vitro* and *in vivo* genotoxicity assays, which have shown that it exhibits weak genotoxic potential.

Thyroid follicular cell adenomas and carcinomas were increased in high-dose males and females in the combined rat toxicity/carcinogenicity study with mancozeb. Doses in a mouse study were too low to assess carcinogenicity, and there were no treatment-related changes in tumor rates. Historically, mancozeb's potential for carcinogenicity has been based on its metabolite ETU, which is classified as a probable human carcinogen. However, since ETU is known to be the chemical causing the thyroid tumors observed, the cancer assessment has been done only for ETU rather than the parent compound.

Developmental defects in the rat developmental toxicity study included hydrocephaly, skeletal system defects, and other gross defects which occurred at a dose causing maternal mortality and did not indicate increased susceptibility of offspring. Abortions occurred in the rabbit developmental toxicity study at the high dose which also caused maternal mortality, and there was no indication of enhanced susceptibility of offspring in the rabbit. There was no evidence of reproductive toxicity in the 2-generation reproduction study in rats.

2. *ETU.* The thyroid is a target organ for ETU; thyroid toxicity in subchronic and chronic rat, mouse, and dog studies included decreased levels of T_4, increases or decreases in T_3, compensatory increases in levels of TSH, increased thyroid weight, and microscopic thyroid changes, chiefly hyperplasia. Overt liver toxicity was observed in one chronic dog study. ETU is classified as a probable human carcinogen based on liver tumors in female mice.

Developmental defects in the rat developmental study were similar to those seen with mancozeb, and included hydrocephaly and related lesions, skeletal system defects, and other gross defects. These defects showed increased susceptibility to fetuses because they occurred at a dose which only caused decreased maternal food consumption and body weight gain.

Specific information on the studies received and the nature of the adverse effects caused by mancozeb as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled "Mancozeb: Human Health Risk Assessment to Support Proposed New Uses on Broccoli, Cabbage, Lettuce, Peppers and Almonds" on pages 13–15 in docket ID number EPA–HQ–OPP–2005–0307.

Additionally, specific information on the studies received and the nature of the toxic effects caused by ETU as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* in document titled "Ethylenethiourea (ETU) from EBDCs: Health Effects Division (HED) Human Health Risk Assessment of the Common Metabolite/Degradate ETU" on pages 16–17 in docket ID number EPA–HQ–OPP–2005–0307.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, *see http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for mancozeb and ETU used for human risk assessment is discussed in Unit IV.B. of the final rule published in the **Federal Register** of August 18, 2010 (75 FR 50902) (FRL–8841–1).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to mancozeb, EPA considered exposure under the petitioned-for tolerances as well as all existing mancozeb tolerances in 40 CFR 180.176. In evaluating dietary exposure to ETU, EPA considered exposure under the petitioned-for tolerances discussed in this document as well as all existing uses of the EBDC group of fungicides (maneb, metiram, mancozeb) including the uses for which there are maneb tolerances even though all maneb registrations have been canceled. EPA assessed dietary exposures from mancozeb and ETU in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for mancozeb and ETU. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII).

a. *Mancozeb.* The following assumptions were made for the acute exposure assessments: The Agency conducted a highly refined, probabilistic acute dietary assessment incorporating maximum percent crop treated information for new and existing uses, field trial or monitoring data, and processing and cooking factors.

b. *ETU.* The following assumptions were made for the acute exposure assessments: The Agency conducted a highly refined, probabilistic acute dietary assessment incorporating maximum percent crop treated information for new and existing EBDC uses, field trial or monitoring data for existing EBDC uses, and processing and cooking factors. It was assumed that commodities would not be treated with more than one EBDC in a season, as there are label restrictions regarding treatment with multiple EBDCs. Percent crop treated was estimated by summing the percent crop treated for the individual EBDCs. For residue values, EPA used either market basket survey data or field trial data. For a few commodities, mancozeb-derived ETU from mancozeb field trial data were used for both mancozeb and maneb because maneb field trial data were not available and application rates were sufficiently similar to estimate maneb-derived ETU values.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII.

a. *Mancozeb.* The chronic dietary exposure and risk assessment for mancozeb (non-cancer and cancer) incorporated average values based either on field trial data or monitoring data and average percent crop treated data for new and existing uses, as well as processing and cooking factors.

b. *ETU.* Chronic anticipated residues were calculated from field trial data on EBDCs or monitoring data for ETU. Averages of the field trial and market basket survey residues were used. EPA also used PCT data.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight-of-the-evidence from cancer studies and other relevant data. If quantitative cancer risk assessment is appropriate, cancer risk may be quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Mancozeb degrades and/or metabolizes to ETU which causes thyroid tumors; therefore, EPA has historically attributed mancozeb's carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen. The Agency has used the cancer potency factor (Q_1^*) of 0.0601 $(mg/kg/day)^{-1}$ for ETU (based on liver tumors in female mice) for risk assessment. Therefore, cancer risk from exposure to mancozeb has been calculated by estimating exposure to mancozeb-derived ETU and using Q_1^* for ETU. The same approach has been taken for the other EBDCs. EPA's estimated exposure to mancozeb-derived ETU and ETU from other EBDCs included ETU residues found in food as well as ETU formed by metabolic conversion on parent mancozeb in the body (conversion rate of 0.075). EPA relied on the same estimates used for the chronic exposure assessment in assessing cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition* a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition* b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition* c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

In the 2007 acute risk assessment for mancozeb, the Agency estimated the PCT for existing uses as follows:

Apple, 41%; asparagus, 34%; barley, 0.9%, beet, sugar, 2.9%; cantaloupe, 10%; carrot, 13%; casaba, 10%; corn, field, 1%; corn, sweet, 22%; cottonseed, oil, 0.8%; cucumber, 32%; grape, 14%; honeydew melon, 13%; oat, 1%; onion, dry bulb, 77%; peanut, 2.3%; pear, 51%; potato, 50%; pumpkin, 10%; rice, 1%; rye grain, 1%; squash, summer, 86%; squash, winter, 10%; tomato, 80%; watermelon, 30%; wheat, grain, 2.3%.

In the 2007 chronic risk assessment for mancozeb, the Agency estimated the PCT for existing uses as follows:

Apple, 26%; asparagus, 16%; barley, 0.2%, beet, sugar, 1.3%; carrot, 9%; casaba, 8%; corn, field, 1%; corn, sweet, 12%; cottonseed, oil, 0.2%; cucumber, 18%; grape, 9%; honeydew melon, 8%; oat, 1%; onion, dry bulb, 38%; peanut, 0.9%; pear, 32%; potato, 36%; pumpkin, 8%; rice, 1%; rye grain, 1%; squash, summer, 41%; squash, winter, 8%; tomato, 49%; watermelon, 28%; wheat, grain, 0.9%.

In the 2007 acute risk assessment for ETU the Agency estimated the PCT for existing uses as follows:

Apple, 65%; asparagus, 30%; barley, 2%; bean, dried, 2.5%; beets, sugar, 15%; Brussels sprouts, 32%; cantaloupe, 12.5%; carrot, 2.5%; casaba, 12.5%; cauliflower, 15%; celery, 12%; chickpea, 2.5%; Chinese waxgourd, 15%; chive, 20%; collards, 10%; corn, field, 2.5%; corn, sweet, 17.5%; cottonseed, oil, 3.5%; cranberry, 31%; cucumber, 40%; eggplant, 65%; fennel, Florence, 12%; fig, 1%; garlic, 25%; grape, 81.5%; grape, wine, 81.5%; guar, seed, 1%; honeydew melon, 12.5%; kale, 5%; leek, 25%; mustard greens, 5%; oat, 2%; onion, dry bulb, 85%; peanut, 3.5%; pear, 55%; potato, 85%; pumpkin, 15%; rice, 2.5%; rye grain, 2%; squash, summer, 35%; squash, winter, 0%; tomato, fresh, 80%; tomato, processed, 25%; turnip tops, 86%; walnut, 37.5%; watermelon, 55%; wheat, grain, 3.5%.

In the 2007 chronic risk assessment for ETU the Agency estimated the PCT for existing uses as follows:

Apple, 42%; asparagus, 21%; barley, 2%; bean, dried, 1%; beets, sugar, 6%; Brussels sprouts, 21%; cantaloupe, 6%; carrot, 8%; casaba, 6%; cauliflower, 5%; celery, 12%; chickpea, 1%; Chinese waxgourd, 5%; chive, 10%; collards, 10%; corn, field, 1%; corn, sweet, 11%; cottonseed, oil, 2%; cranberry, 31%; cucumber, 20%; eggplant, 45%; fennel, Florence, 12%; fig, 1%; garlic, 25%; grape, 60%; grape, wine, 60%; guar, seed, 1%; honeydew melon, 6%; kale, 6%; kohlrabi, 1%; leek, 10%; mustard greens, 5%; oat, 2%; onion, dry bulb, 60%; peanut, 2%; pear, 40%; potato, 63%; pumpkin, 6%; rice, 1%; rye grain, 2%; squash, summer, 25%; squash, winter, 25%; tomato, fresh, 54%; tomato, processed, 54%; walnut, 31%; watermelon, 10%; wheat, grain, 2%.

For the 2010 ETU cancer risk assessment the Agency estimated the PCT for existing uses as follows:

Apple, 51%; asparagus, 15%; barley, 1%; bean, dried, 1%; beets, sugar, 3.5%; Brussels sprouts, 15%; cantaloupe, 7.5%, carrot, 5%; cauliflower, 10%; chickpea, 1%; collards, 31%; corn, field, 1%; corn, sweet, 6%; cottonseed, oil, 11%; cranberry, 45%; cucumber, 30%; eggplant, 30%; fig, 5%; flaxseed, 11%; garlic, 25%; grape, 6%; grape, wine, 26%; guar, seed, 1%; kale, 73%; leek, 15%; mustard greens, 22%; oat, 11%; onion, dry bulb, 75%; peanut, 2%; pear, 35%; potato, 67.5%; pumpkin, 20.5%; rice, 1%; rye grain, 11%; safflower, oil, 11%; squash, summer, 57%; squash, winter, 26%; tomato, fresh, 30%; tomato, processed, 30%; turnip tops, 36%; walnut, 36%; watermelon, 45%; wheat, grain, 11%.

In most cases, EPA uses available data from USDA/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most

recent 6 to 7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

In the 2007 acute risk assessment for mancozeb, the Agency estimated the PCT for new uses as follows:

Almond, 35%; broccoli, 9%; cabbage, 47%; cabbage, Chinese, 47%; head lettuce 66%; leaf lettuce 61%; pepper, bell, 48%; pepper, non-bell, 48%.

In the 2007 chronic risk assessment for mancozeb, the Agency estimated the PCT for new uses as follows:

Almond, 35%; broccoli, 7%; cabbage, 42%; cabbage, Chinese, 42%; head lettuce 58%; leaf lettuce 59%; pepper, bell, 43%; pepper, non-bell, 43%.

For the 2007 ETU acute assessment, the Agency estimated the PCT for new uses as follows:

Almond, 50%; broccoli, 22%; cabbage, 82%; cabbage, Chinese, 82%; pepper, bell, 88%; pepper, non-bell, 88%.

For the 2007 ETU chronic assessment, the Agency estimated the PCT for new uses as follows:

Almond, 45%; broccoli, 17%; cabbage, 57%; cabbage, Chinese, 57%; pepper, bell, 73%; pepper, non-bell, 73%.

For the 2010 ETU cancer assessment, the Agency estimated the PCT for new uses as follows:

Almond, 28%; broccoli, 15%; cabbage, 62%; cabbage, Chinese, 62%; pepper, bell, 74%; pepper, non-bell, 74%.

EPA estimates the percent crop treated for new uses (PCTn) of a pesticide represent the upper bound of use expected during the pesticide's initial 5 years of registration. The PCTn recommended for use in the chronic dietary assessment is calculated as the average PCT of the pesticide or pesticides that are the market leader or leaders, (*i.e.,* the pesticides with the greatest PCT) on that site over the three most recent years of available survey data. The PCTn recommended for use in the acute dietary assessment is the maximum observed PCT over the same period. Comparisons are only made among pesticides of the same pesticide types (e.g., the market leader for fungicides on the use site is selected for comparison with a new fungicide). The market leader included in the estimation may not be the same for each year since different pesticides may dominate at different times.

Typically, EPA uses USDA/NASS as the source data because it is publicly available and directly reports values for PCT. When a specific use site is not reported by USDA/NASS, EPA uses proprietary data and calculates the PCT given reported data on acres treated and acres grown. If no data are available, EPA may extrapolate PCTn from other crops, if the production area and pest spectrum are substantially similar.

EPA refines PCTn estimates based on approaches other than the market leader approach if the previous PCTn estimates based on the market leader indicate that the chemical exposure potentially poses a risk of concern. EPA considers the pest or pest spectrum targeted by the chemical for the new uses and identifies other pesticides already registered on that crop that target the same pest or pest spectrum. The PCTn is calculated based on the data from the three most recently available pesticide usage surveys. If multiple chemicals are identified that target the same pest spectrum, then the one with the highest PCT is selected from each year/crop combination. Consideration is also given to the potential for the development of resistance for each chemical using data available from the Resistance Action Committees.

EPA has considered all available relevant information and concludes that it is unlikely that the PCTn values will be exceeded during the next 5 years.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which mancozeb may be applied in a particular area.

2. *Dietary exposure from drinking water*—i. *Mancozeb.* The Agency has determined that mancozeb is very short-lived in soil and water, and would not reach water used for human consumption whether from surface water or ground water.

ii. *ETU.* ETU is highly water soluble, and may reach both surface and ground water under some conditions. The ETU surface water Estimated Drinking Water Concentrations (EDWCs) were generated using a combined monitoring/modeling approach. Results of a surface water monitoring study conducted by the ETU Task Force were used to refine the outputs of the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM–EXAMS) models; the site/scenario modeled was application of an EBDC fungicide on peppers in Florida, and was chosen to produce the highest EDWC acute values. The ground water EDWC was detected in a Florida community water system intake in a targeted ground water monitoring study conducted by the EBDC task force from 1999 to 2003. Both these surface and ground water values represent upper-bound conservative estimates of the total ETU residual concentrations that might be found in surface water and ground water due to the use of the EBDC fungicides.

Based on the PRZM/EXAMS and monitoring studies, the EDWCs of ETU acute and chronic exposures are estimated to be 25.2 parts per billion (ppb), and 0.1 ppb, respectively for surface water. The EDWC for chronic exposure is estimated to be ppb for ground water 0.21.

Estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 25.2 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water. For cancer dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-

occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

i. *Mancozeb.* Mancozeb is currently registered for use on the following residential sites: Home gardens, golf courses, and sod farms (potential exposure to mancozeb is from residues remaining on transplanted turf). The Agency has determined that it is appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to mancozeb. Since residues of mancozeb are not expected in drinking water, only mancozeb food residues are considered.

The two scenarios that were evaluated for mancozeb are the "short/intermediate-term home garden aggregate (adult)" which considers residential handler exposures (inhalation) to adult applicators combined with average food exposures and the "short/intermediate-term treated turf aggregate (toddler)" which considers residential incidental oral exposures to toddlers combined with average food exposures. The only postapplication scenario for adults in contact with treated turf (golf courses) is via the dermal route of exposure. Since no dermal endpoints were selected for mancozeb, a quantitative risk assessment for this scenario is not required.

ii. *ETU.* ETU non-dietary exposure is expected as a result of the registered uses of mancozeb and the other EBDCs on home gardens, golf courses and sod farms. For ETU, aggregate exposure sources include food, drinking water, home gardening activities and golfing. The Agency has determined that it is appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to mancozeb.

The three scenarios that were evaluated for ETU are as follows: The first is the "short/intermediate-term home garden aggregate" which combines handler exposures (inhalation and dermal) and postapplication garden exposures (dermal) plus average daily food and drinking water exposure for adults and postapplication garden exposures (dermal) plus average daily food and drinking water exposure for youth. The second is the "short-term treated turf aggregate (toddlers)" which combines treated turf post application exposures (incidental oral and dermal) plus average daily food and drinking water exposure for toddlers. And the last is the "short/intermediate-term treated turf aggregate" which considers short-term residential exposures (dermal) plus average daily food and drinking water exposure for adults such as golfing on treated turf. This assessment is protective of adult and youth golfers. Although exposure to children golfing could be almost twice that of the adult golfer because of increased surface area/body weight (SA/BW) ratios, younger golfers are not expected to use the golf course for the same length of time as adolescents and adults. The shorter duration on the golf course for younger golfers offsets the higher SA/BW; therefore, risks from short-term post-application exposures to young golfers are likely to be similar to risks for adult golfers.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

As previously mentioned, the risk estimates summarized in this document are those that result only from the use of mancozeb, and ETU derived from mancozeb and the other EBDC chemicals, which are all dithiocarbamates. For the purposes of this action, EPA has concluded that mancozeb does not share a common mechanism of toxicity with other substances. The Agency reached this conclusion after a thorough internal review and external peer review of the data on a potential common mechanism of toxicity.

EPA concluded that the available evidence does not support grouping the dithiocarbamates based on a common toxic effect (neuropathology) occurring by a common mechanism of toxicity (related to metabolism to carbon disulfide). After a thorough internal and external peer review of the existing data bearing on a common mechanism of toxicity, EPA concluded that the available evidence shows that neuropathology can not be linked with carbon disulfide formation. For more information, please see the December 19, 2001 memo, "The Determination of Whether Dithiocarbamate Pesticides Share a Common Mechanism of Toxicity" on the internet at *http://www.epa.gov/oppsrrd1/cumulative/dithiocarb.pdf.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*—i. *Mancozeb.* In the rat developmental study, developmental effects were observed in the presence of severe maternal effects, including maternal mortality and clinical signs. In the rabbit developmental study, developmental effects (spontaneous abortions) were observed at the same dose (80 mg/kg/day) at which maternal effects included mortality and clinical signs. In the rat reproduction study, no effects were observed in offspring, while thyroid effects and body weight gain decrements occurred in adults.

ii. *ETU.* There was evidence of increased susceptibility of fetuses to ETU in the rat developmental studies because hydrocephaly occurred at doses below that causing maternal toxicity. Acceptable reproductive and rabbit developmental toxicity studies were not available for ETU. As a result, the Agency evaluated the level of concern for the effects observed when considered in the context of all available toxicity data. In addition, the Agency evaluated the database to determine if there were residual uncertainties after establishing toxicity endpoints and traditional uncertainty factors to be used in the ETU risk assessment.

3. *Conclusion*—i. *Mancozeb.* In the 2007 assessment, EPA retained the presumptive 10X FQPA safety factor for the protection of children due to the absence of a required developmental neurotoxicity study. That study has recently been received. Neurotoxicity was not observed in the study, and the young animals did not show susceptibility, as compared to the adults, for the slight toxicity that was observed (reduced body weight gain). Additionally, since the completion of the 2007 assessment, EPA has imposed a new data requirement for immunotoxicity data and such data has

not been submitted for mancozeb. The absence of an immunotoxicity study does not raise significant uncertainty. In the absence of that study, the available toxicity data for mancozeb have been thoroughly examined for any information which suggests a potential for immunotoxicity. The analysis did not reveal such information and the Agency does not believe that conducting the immunotoxicity study will result in a point of departure (POD) less than the currently selected PODs for risk assessment.

Because EPA is relying on the 2007 assessment in evaluating acute and chronic risks, EPA is retaining the children's safety factor determination in that assessment (retain the additional 10X factor). EPA expects that once that determination is revisited, the children's safety factor will be lowered or removed entirely due to the submission of the DNT study and the fact that immunotoxicity is not a concern with mancozeb. These changed circumstances certainly do not support an additional safety factor higher than 10X. Further, as discussed below, EPA believes that the 2007 risk assessment does not underestimate exposure to mancozeb. Accordingly, EPA concludes that the 2007 determination on the children's safety factor protects the safety of infants and children.

ii. *ETU.* The toxicity database for ETU is not complete. EPA lacks the following studies: A DNT study; a developmental study in rabbits; a 2-generation reproduction study; and a comparative thyroid study in adults and offspring. Given these multiple data gaps for studies that directly assess the risk to the young, EPA does not have reliable data to remove or modify the presumptive 10X FQPA safety factor.

No further safety factor to protect is needed for the following reasons. First, the Agency determined that the degree of concern for the susceptibility seen in ETU developmental studies was low. The reasons for this conclusion are:

- The teratogenic effects of ETU have been well-characterized in numerous studies in the published literature, as well as in a guideline study submitted by the registrant. In addition, since metabolism studies have shown that approximately 7.5% of mancozeb converts to ETU in mammalian systems, the extensive toxicity database with mancozeb on developmental effects provide extensive information about pre- and post-natal toxicity of ETU;
- There is a clear NOAEL for these effects and the dose-response relationship, although steep, is well characterized in the numerous developmental studies in rats.
- The developmental endpoint with the lowest NOAEL was selected for deriving the acute RfD.
- The target organ (thyroid) was selected for deriving the chronic RfD as well as endpoints for non-dietary exposures (incidental oral, dermal, and inhalation). Since the ETU doses selected for overall risk assessments will address the concern for developmental and thyroid toxicity, there are no residual uncertainties with regard to prenatal and/or postnatal toxicity.

Second, the information on ETU gleaned from the extensive mancozeb database on effects other than development effects also reduces, to a degree, the uncertainty arising from the significant datagaps for ETU.

Third, EPA has concluded that the exposure assessment, although refined, is unlikely to under-estimate potential exposures especially considering exposure to maneb was included even though all maneb products have been canceled. In making this judgment, EPA has taken into account that it is relying on three separate reviews in this Notice:

- A 2007 risk assessment for mancozeb for acute, short-term, intermediate-term, chronic, and cancer risk,
- A 2007 risk assessment for ETU for acute, short-term, intermediate-term and chronic risk, and
- A 2010 addendum to the 2007 ETU assessment for cancer risk—and that the percent crop treated estimates differ slightly between reviews.

In comparing the percent crop treated information from 2007 and 2010, there are some increases in usage for some crops, and there are decreases in usage for other crops. These differences appear to largely offset each other. Further, most of the increases are attributable to estimated increases in maneb usage but, as noted, maneb was canceled in 2010 and it is unlikely that existing stocks are sufficient to sustain prior usage levels much less any increased usage. An EPA sensitivity analysis of the main contributors to ETU exposure showed no significant increase in exposure from the changed percent crop treated estimated. The percent crop treated values used in these risk assessments are detailed in the memo titled "Mancozeb. Discussion on Percent Crop Treated Values Used in Aggregate and Chronic Assessments" in docket number EPA–HQ–OPP–2005–0307.

In any event, there are two other aspects of the exposure assessment that are likely to significantly overstate exposure to mancozeb and ETU. First, exposure estimates for some crops, including bananas, a high-consumption food, include the assumption that everything consumed in the United States has been treated. Second, the residue data used in the assessment for the proposed commodities and many other crops are based on crop field trials. Monitoring studies conducted for several crops have shown that residues on foods close to the point of consumption are much lower than the residues found in crop field trials.

For all of these reasons, EPA concludes that it has not underestimated exposure to mancozeb and ETU.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk (Mancozeb).* The mancozeb acute aggregate assessment considers acute exposure to mancozeb only and not ETU. Further, this assessment is based on residues of mancozeb in food only since residues of mancozeb are not expected in drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to mancozeb will occupy 6.9% of the aPAD for females 13–49 years of age, the only population group of concern.

2. *Acute risk (ETU).* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to ETU will occupy 87% of the aPAD for females 13–49 years of age, the only population group of concern.

3. *Chronic risk (Mancozeb).* There are no long-term residential exposure scenarios for mancozeb and there is not likely to be residues of mancozeb in drinking water. Therefore, the long-term or chronic (non-cancer) aggregate risk for mancozeb includes contribution from food alone. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to mancozeb from food will utilize 3.3% of the cPAD for children 1–2 years of age, the population group receiving the greatest exposure.

4. *Chronic Risk (ETU).* The aggregate chronic risks were calculated using food

and water exposure only because golfing and toddler transplanted turf exposure scenarios were considered to occur only on a short term basis. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to ETU from food and water will utilize 58% of the cPAD for children (1 to 2 years old), the population group receiving the greatest exposure.

5. *Short-and intermediate-term risk (Mancozeb).* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Mancozeb is currently registered for uses that could result in short- and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to mancozeb. The two scenarios that were evaluated for mancozeb are the following:

i. *Short/intermediate-term home garden aggregate (adult).* The aggregate short/intermediate-term home garden MOEs for adults are 110,000. Because for mancozeb EPA is concerned only with MOEs that are below 1,000, this MOE does not raise a risk concern.

ii. *Short-term treated turf aggregate (toddler).* The mancozeb short-term aggregate risk (MOE) for toddlers exposed to treated turf is 1,100. Because for mancozeb EPA is concerned only with MOEs that are below 1,000, this MOE does not raise a risk concern.

6. *Short- and intermediate-term risk (ETU).* Short- and intermediate-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Mancozeb is currently registered for uses that could result in short- and intermediate-term residential exposure to ETU. The 2007 assessment also included products containing maneb which were expected to result in short- and intermediate-term exposure. As previously discussed, these products have since been cancelled. The Agency determined that it was appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to ETU. The three scenarios that were evaluated for ETU are the following.

i. *ETU short/intermediate-term home garden aggregate.* The ETU short/intermediate-term home garden aggregate MOEs for adults is 13,000 and 17,000 for youth, respectively. Because for ETU EPA is concerned only with MOEs that are below 1,000, this MOE does not raise a risk concern.

ii. *ETU short-term treated turf aggregate (toddlers).* The ETU short-term treated turf aggregate MOE for toddlers is 1,100. Because for ETU EPA is concerned only with MOEs that are below 1,000, this MOE does not raise a risk concern.

iii. *ETU short/intermediate-term treated turf aggregate.* The ETU short-term treated turf aggregate MOE for golfers is 6,100. Because for ETU EPA is concerned only with MOEs that are below 1,000, this MOE does not raise a risk concern.

7. *Aggregate cancer risk for U.S. population (mancozeb and ETU).* As noted earlier in this document, mancozeb degrades and/or metabolizes to ETU which causes the same types of thyroid tumors as those seen when animals are dosed with mancozeb; therefore, EPA has historically attributed mancozeb's carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen (B2).

The cancer risks were aggregated using the food and drinking water doses for the general population and the food, water and recreational doses for golfers, home gardeners and athletes. The average daily dose was used for food and water exposures and the lifetime average daily dose was used for the recreational exposures. The aggregate doses were multiplied times the potency factor for ETU, 0.0601 $(mg/kg/day)^{-1}$ to determine the cancer risks. The risk is estimated to be 3×10^{-6}.

EPA generally considers cancer risks (expressed as the probability of an increased cancer case) in the range of 1 in 1 million (or 1×10^{-6}) or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the logarithmic scale; for example, risks falling between 3×10^{-7} and 3×10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described above, cancer risk should generally not be assumed to exceed the benchmark level of concern of the range of 10^{-6} until the calculated risk exceeds approximately 3×10^{-6}. This is particularly the case where some conservatism is maintained in the exposure assessment. Although the ETU exposure risk assessment is refined, it retains significant conservatism in that, for leafy greens, field trial data and not market basket data on similar crops is used in estimating exposure. The leafy greens have tended to be among the top contributors to the aggregate risk (along with water and leaf lettuce). For other commodities, market basket data has shown reductions in residues one to two orders of magnitude lower than field trial data. Moreover, the only remaining EBDC registration for leafy greens (maneb) was canceled in 2010 but the exposure assessment does not take this into account. Additional conservatism is included in the exposure assessment by the assumption of 100 percent crop treated for many commodities. Accordingly, EPA has concluded the aggregate cancer risk for all existing mancozeb and other EBDC uses and the uses associated with the tolerances established in this action fall within the range of 1×10^{-6} and are thus negligible.

8. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to mancozeb residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate methods are available for the enforcement of tolerances for the plant commodities which are the subject of this request. The Pesticide Analytical Method (PAM) Vol. II lists Methods I, II, III, IV, and A for the determination of dithiocarbamate residues in/on plant commodities. The Keppel colorimetric method (Method III) is the preferred method for tolerance enforcement. The Keppel method determines EBDCs as a group by degradation to CS_2. The analytical methodology for ETU is based on the original method published by Olney and Yip (JAOAC 54:165–169).

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; *telephone number:* (410) 305–2905; *e-mail address: residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food

standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

There are no established or proposed Codex MRLs for residues of mancozeb; however, Codex limits for mancozeb and similar fungicides are grouped under dithiocarbamates measured as carbon disulfide. There are Codex MRLs for almonds; almond hulls; cabbages, head; lettuce, head; cos lettuce; peppers, sweet. Tolerances for the EBDC pesticides are expressed in terms of carbon disulfide (CS_2), which is the same as the Codex tolerance expression. The level of 0.1 ppm for almonds is also the same as the Codex MRL for almonds. However, for the reasons indicated below, the tolerance levels being established for the other subject crops cannot be harmonized with the associated Codex MRLs.

- Based on the calculations in the Agency's tolerance spreadsheet, in accordance with the Agency's "Guidance for Setting Pesticide Tolerances Based on Field Trial Data," the appropriate tolerance level for cabbage is 9.0 ppm. The tolerance level cannot be harmonized with Codex; the highest residue level in the crop field trials (6.0 ppm in CS_2 equivalents) is greater than the Codex MRL for cabbage (5 ppm).

- The available data indicate that the appropriate tolerance level for head lettuce is 3.5 ppm. The tolerance level cannot be harmonized with Codex; the highest residue level in the crop field trials (2.2 ppm in CS_2 equivalents) is considerably less than the Codex MRL of 10 ppm for head lettuce.

- The available data indicate that the appropriate tolerance level for leaf lettuce is 18 ppm. The tolerance level cannot be harmonized with Codex; the highest residue level in the crop field trials (14 ppm in CS_2 equivalents) is greater than the Codex MRL for Cos lettuce (10 ppm).

- The appropriate tolerance level for pepper is 12 ppm. The tolerance level cannot be harmonized with Codex as the Codex MRL has been established for sweet pepper only.

- The appropriate tolerance level for almond hulls is 4 ppm. This value cannot be harmonized with Codex as it is significantly below the Codex MRL of 20 ppm.

C. Response to Comments

The company Cerexagri, Inc. submitted a comment on the initial notice of filing in 2006. Cerexagri proposed that EPA reject the petitions for reasons primarily dealing with information included in the risk assessment provided by Dow AgroSciences in the petitions. The Agency conducts its own risk assessments and does not rely on those provided by registrants. For example, Cerexagri did not agree with Dow AgroSciences proposal to assume that "mancozeb uses will simply replace a share of the existing maneb market". Nor did Cerexagri agree with Dow AgroSciences use of market basket data to extrapolate expected residues on the proposed commodities. The EPA did not base PCT estimates for new commodities based on the assumption that one EBDC will replace another but instead used its standard market leader approach to determine appropriate PCT numbers. Further, the EPA relied on the results of the crop field trial data to estimate exposure to the proposed commodities and many other crops. Results of the Market Basket Survey were only used for commodities/chemicals associated with the survey. Therefore, the objections voiced by Cerexagri are not relevant to the conclusions reached by the Agency regarding these petitions.

Finally, Cerexagri requested that the EPA first engage in a public process that would seek the participation of the grower community, research community and other interested parties before determining which new uses of EBDC fungicides should be approved because approval of the uses requested in this petition may preclude the approval of other uses. EPA, however, has followed all procedural requirements in the FFDCA section. Moreover, in the time since this petition was submitted, no further uses of EBDCs have been requested.

D. Revisions to Petitioned-For Tolerances

All of the tolerance levels being established in this document, with the exception of almond, are different than the levels requested in the original tolerance petitions. EPA revised the tolerance levels based on analysis of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's "Guidance for Setting Pesticide Tolerances Based on Field Trial Data."

V. Conclusion

Therefore, tolerances are established for residues of mancozeb, zinc manganese ethylenebis dithiocarbamate in or on almond at 0.1 ppm; almond, hulls at 4 ppm; broccoli at 7 ppm; cabbage at 9 ppm; lettuce, head at 3.5 ppm; lettuce, leaf at 18 ppm; and pepper at 12 ppm.

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined

that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: March 21, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.176 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.176 Mancozeb; tolerances for residues.

(a) * * *

Commodity	Parts per million
Almond	0.1
Almond, hulls	4
* * * * *	
Broccoli	7
Cabbage	9
* * * * *	
Lettuce, head	3.5
Lettuce, leaf	18
* * * * *	
Pepper	12
* * * * *	

* * * * *

[FR Doc. 2011–7461 Filed 4–5–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0493; FRL–8863–1]

Ethiprole; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes permanent tolerances (without U.S. registrations) for residues of the insecticide ethiprole [5-amino-1-[2,6-dichloro-4-(trifluoromethyl)phenyl]-4-[(ethyl)-sulfinyl]-1*H*-pyrazole-3-carbonitrile], including its metabolites and degradate, in or on rice and tea. Bayer CropScience LP requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 6, 2011. Objections and requests for hearings must be received on or before June 6, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see also* Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0493. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Carmen Rodia, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 306–0327; e-mail address: *rodia.carmen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. How can I get electronic access to other related information?

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

C. How can I file an objection or hearing request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those

objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0493 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 6, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0493, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 19, 2009 (74 FR 41898) (FRL–8426–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7550) by Bayer CropScience LP, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709–2014. The petition requested that 40 CFR part 180 be amended by establishing permanent tolerances for residues of the insecticide ethiprole [5-amino-1-[2,6-dichloro-4-(trifluoromethyl)phenyl]-4-[(ethyl)-sulfinyl]-1*H*-pyrazole-3-carbonitrile], expressed as parent equivalent, in or on cattle, fat at 0.1 parts per million (ppm); cattle, liver at 0.1 ppm; cattle, meat at 0.01 ppm; cattle, meat byproducts, except liver at 0.02 ppm; eggs at 0.05 ppm; goat, fat at 0.1 ppm; goat, liver at 0.1 ppm; goat, meat at 0.01 ppm; goat, meat byproducts, except liver at 0.02 ppm; hog, fat at 0.1 ppm; hog, liver at 0.1 ppm; hog, meat at 0.01 ppm; hog, meat byproducts, except liver at 0.02 ppm; horse, fat at 0.1 ppm; horse, liver at 0.1 ppm; horse, meat at 0.01 ppm; horse, meat byproducts, except liver at 0.02 ppm; milk at 0.01 ppm; poultry, fat at 0.1 ppm; poultry, meat at 0.01 ppm; poultry, meat byproducts at 0.05 ppm; rice, grain at 3.0 ppm; sheep, fat at 0.1 ppm; sheep, liver at 0.1 ppm; sheep, meat at 0.01 ppm; sheep, meat byproducts, except liver at 0.02 ppm; and tea, dried at 50 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience LP, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified a number of the petitioned-for tolerances for ethiprole. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for ethiprole, including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with ethiprole follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Ethiprole has a low acute toxicity via the acute oral, dermal, and inhalation routes of exposure, and is not a skin sensitizer nor a skin or eye irritant. In the mammalian toxicology database, the critical effects of ethiprole are hepatoxicity and thyroid toxicity. The rat was the most sensitive species overall after administration of ethiprole. Evidence of hepatoxicity is seen in the 28-day mouse and rat; 90-day rat and dog; chronic/carcinogenicity rat and mouse; 2–generation rat; developmental rat; and subchronic neurotoxicity rat studies, and was manifested as increased liver weight and hepatocellular hypertrophy. Other indicators of hepatotoxicity include:

1. Increased prothrombin time as observed in the 28- and 90-day rat studies; and

2. Changes in clinical chemistry such as increased alanine transaminase activity, increased alkaline phosphates activity, increased cholesterol, increased triglycerides, and increased total protein concentration.

Liver toxicity was also observed within the mice chronic/carcinogenicity study. A statistically significant increased incidence (12%) of hepatocellular adenoma (HCA) was observed in females at the highest dose tested (HDT), when compared to controls (6/50 vs. 0/50). These benign tumors were only observed in high dose females where a reduced survival rate was also observed. Since no treatment-related HCA were reported at the lower dose levels, the dose-dependent effect could not be established. In addition, no hepatocellular carcinoma was noted in either sex. Given the lack of genotoxicity potential, the absence of carcinoma following a prolonged exposure to ethiprole, and the absence of any dose relationship, this increased incidence of HCA in high dose female mice was, therefore, considered to be due to a threshold mechanism with a probable phenobarbital-like action hepatocellular hypertrophy associated

with transient liver cell proliferation followed by a steady state.

Thyroid toxicity was also observed in numerous studies throughout the ethiprole database. These studies include the 28- and 90-day rat; chronic/carcinogenicity rat; 2-generation rat; and subchronic neurotoxicity rat studies. The results/observations of the 3 mechanistic studies conducted in rats suggest that ethiprole exerts effect by inducing hepatic microsomal enzymes (*e.g.,* T4-glucuronyl transferase). This mechanism can lower the circulating levels of thyroid hormones (T4 and T3), resulting in a release from negative feedback inhibition and a compensatory increased secretion of thyroid stimulating hormone (TSH) by the pituitary gland. This negative feedback loop results in increased TSH levels to compensate for the reduced T4 blood levels, since glucuronyl transferase in the liver is conjugating and removing T4 via the bile. The chronic hypersecretion of TSH predisposes the sensitive rodent thyroid gland to develop an increased incidence of focal hyperplasic and neoplasic (adenomas) lesions by a secondary (epigenetic) mechanism. The thyroid toxicity observed in adult rodents was manifested as increased thyroid weight, thyroid follicular hyperthrophy along with higher TSH plasma levels, and reduced T4 (thyroxine) plasma levels. A study that evaluates homeostasis and the developing nervous system in the young is not available.

Based on a battery of mutagenicity studies, ethiprole is not considered to be genotoxic. In accordance with the *EPA's Final Guidelines for Carcinogen Risk Assessment* (March 2005), ethiprole is classified as "Suggestive Evidence of Carcinogenic Potential." This classification is based on benign liver tumors in female mice, and benign thyroid tumors in male rats. While the evidence from animal data is suggestive of carcinogenicity, a cancer risk to humans from dietary exposure to ethiprole is of low concern and the cRfD is deemed protective of any potential cancer risk based on the following weight-of-evidence considerations:

1. The liver tumors in mice were benign with no progression to malignancy;

2. The thyroid tumors in rats were also benign (with no progression to malignancy), and the increase in the tumor incidences at the high dose did not reach statistical significance when compared to controls;

3. In both species (mice and rats), tumors were observed only at the HDT (*i.e.,* there was a lack of evidence of a dose-response relationship);

4. There is no concern for mutagenicity/genotoxicity;

5. The no-observed-adverse-effect-level (NOAEL) of 0.85 milligrams/kilograms/day (mg/kg/day) used for deriving the cRfD is approximately 86-fold lower than the dose (73 mg/kg/day) that induced benign tumors in mice; and

6. The retention of the 10x FQPA SF yields a chronic Population Adjusted Dose (cPAD) that provides even more protection for non-cancer dietary risk (*i.e.,* the cPAD of 0.003 mg/kg/day is approximately 2,400-fold lower than the dose at which tumors were seen).

Thus, for all these reasons, the Agency has determined that the cPAD will adequately account for all chronic effects, including carcinogenicity, likely to result from exposure to ethiprole.

More detailed information on the studies received and the nature of the adverse effects caused by ethiprole as well as the NOAEL and the LOAEL from the toxicological studies can be found in the document entitled, "Ethiprole: Human Health Risk Assessment for Proposed Uses on Imported Rice and Tea," dated December 1, 2010, by going to *http://www.regulations.gov.* The referenced document is available in the docket established by this action, which is described under **ADDRESSES**. Locate and click on the hyperlink for docket ID number EPA–HQ–OPP–2009–0493. Double-click on the document to view the referenced information on pages 13–20 of 60.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern (LOC) to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the lowest-observed-adverse-effect-level (LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, *see http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

The acute and chronic dietary endpoints were not harmonized with Canada's Pesticide Management Regulatory Agency (PMRA) due to policy differences. For both endpoints, PMRA chose the prenatal developmental toxicity study in rabbits as their POD. PMRA considered this endpoint to be protective of all populations, including pregnant women and their fetuses. EPA did not choose the prenatal developmental toxicity study in rabbits for the acute dietary endpoint as the observed increased incidence of abortions in the dams occurred from days 21 to 28 days of gestation, and was not considered to be a single dose (acute) effect since it did not occur within 1 to 2 days of dosing. In addition, EPA did not rely on the prenatal developmental toxicity in rabbits for the chronic dietary assessment since it is not a long-term study. Instead, EPA relied on the combined chronic/carcinogenicity oral (dietary) toxicity rat study in which thyroid and liver toxicity were observed at 3.21 mg/kg/day with a NOAEL of 0.85 mg/kg/day. This chronic rat study is protective of the effects observed in the rabbit developmental study selected by Canada's PMRA. A summary of the toxicological endpoints for ethiprole used for human health risk assessment is shown in the table of this unit.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ETHIPROLE FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/FQPA safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute Dietary (All Populations, including Infants, Children, and Females, 13–49 years of age).	NOAEL = 35 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = UF_{DB} = 10x	Acute RfD = 0.35 mg/kg/day .... aPAD = 0.035 mg/kg/day	Acute Neurotoxicity (dietary) in Rats. LOAEL = 250 mg/kg/day, based on increased tremors (females), decreased grooming (both sexes), decreased arousal alert (females), increased number of animals for which no assessment of gait was possible (females), increased eye closure (females), increased standing/sitting hunched (females), deceased activity and rearing counts (females), increased hindlimb and forelimb grip strength (males), decreased forelimb grip strength (day 8) (females), decreased splay (females, day 1), and increased splay (males, day 8).
Chronic Dietary (All Populations).	NOAEL= 0.85 mg/kg/day ..... UF_A = 3x UF_H = 10x FQPA SF = UF_{DB} = 10x	Chronic RfD = 0.03 mg/kg/day cPAD = 0.003 mg/kg/day	Combined Chronic/Carcinogenicity Oral (dietary) Toxicity in Rats. LOAEL = 3.21/4.40 mg/kg/day M/F, based on observed effects in the thyroid and/or liver (histopathologic changes, increased organ weights, and/or altered thyroid hormone or bilirubin levels).
Cancer (Oral, Dermal, Inhalation).	Suggestive Evidence of Carcinogenicity. Quantification of cancer risk using a cancer potency factor is not needed. The cRfD is protective of potential cancer risk.		

Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_{DB} = to account for the absence of key data (i.e., lack of a critical study). FQPA SF = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic).

More detailed information on the toxicological endpoints for ethiprole can be found in the document entitled, "Ethiprole: Human Health Risk Assessment for Proposed Uses on Imported Rice and Tea," dated December 1, 2010, by going to *http://www.regulations.gov.* The referenced document is available in the docket established by this action, which is described under **ADDRESSES**. Locate and click on the hyperlink for docket ID number EPA–HQ–OPP–2009–0493. Double-click on the document to view the referenced information on page 21 of 60.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to ethiprole, EPA considered exposure under the petitioned-for tolerances. Acute and chronic dietary (food only) exposure and risk assessments were conducted using the Dietary Exposure Evaluation Model (DEEM–FCID™), Version 2.03. The dietary assessments assumed that 100% of crops with the requested uses of ethiprole were treated and that all treated crops contained residues at tolerance-level residues for acute and chronic dietary exposure. In addition, empirical processing factors were assumed for the requested crop uses. EPA assessed dietary exposures from ethiprole in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. An unrefined, acute dietary exposure assessment using tolerance-level residues, empirical processing factors and assuming 100 percent crop treated (PCT) for the proposed commodities was conducted for the general U.S. population and various population subgroups.

ii. *Chronic exposure.* An unrefined chronic dietary risk analysis was conducted with the DEEM–FCID™ model, assuming tolerance-level residues, empirical processing factors, and 100 PCT.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. If quantitative cancer risk assessment is appropriate, cancer risk may be quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier non-cancer key event. If carcinogenic mode of action data is not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has determined that the cPAD will adequately account for all chronic effects, including carcinogenicity, likely to result from exposure to ethiprole. No separate exposure assessment pertaining to cancer risk was performed for ethiprole; rather, EPA relied on the chronic exposure assessment described in this Unit for assessing the risk of all chronic effects, including cancer.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue information in the dietary assessment for ethiprole. Tolerance-level residues and 100 PCT were assumed for all proposed food commodities.

More detailed information on the acute and chronic dietary (food only)

exposure and risk assessment for ethiprole can be found in the document entitled, "Ethiprole: Acute and Chronic Dietary (Food Only) Exposure and Risk Assessment for Proposed Imported Tolerances on Rice and Tea," dated December 1, 2010, by going to *http://www.regulations.gov.* The referenced document is available in the docket established by this action, which is described under **ADDRESSES**. Locate and click on the hyperlink for docket ID number EPA–HQ–OPP–2009–0493. Double-click on the document to view the referenced information on pages 6–8 of 12.

2. *Dietary exposure from drinking water.* Ethiprole and its degradates were not considered for drinking water assessment because ethiprole is not registered for use in the U.S.; therefore, exposure to drinking water is precluded.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Ethiprole is not registered for any specific use patterns that would result in residential exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to ethiprole and any other substances, and ethiprole does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action; therefore, EPA has not assumed that ethiprole has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity, and to evaluate the cumulative effects of such chemicals, *see* the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's Web site at *http://www.epa.gov/pesticides/cumulative/.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional ten-fold (10x) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity, and the completeness of the database on toxicity and exposure unless EPA determines, based on reliable data, that a different margin of safety will be safer for infants and children. This additional margin of safety is commonly referred to as the FQPA SF. In applying this provision, EPA either retains the default value of 10x, or uses a different additional safety factor when reliable data are available to EPA to support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* Although no teratogenic effects were observed in the existing toxicology database, there is uncertainty regarding the potential impact of ethiprole on thyroid hormone homeostasis in the developing organism. Given the observations that thyroid hormones were affected in several studies throughout the ethiprole database and the critical role thyroid hormones play in the development of the nervous system, the Agency is requiring a developmental thyroid toxicity study to assess for more subtle effects that may not be identified in the available core guideline studies.

3. *Conclusion.* Based on the hazard and exposure data, the Agency is retaining the 10x FQPA SF due to the lack of a developmental thyroid toxicity study in rats. As described previously, hormonal changes (decreased T4 plasma levels, increased TSH plasma levels and alteration in thyroid weights) were observed in several studies following oral administration of ethiprole. Therefore, there is concern that perturbation of thyroid homeostasis may lead to hypothyroidism, and possibly result in adverse effects on the developing nervous system. Since the developmental and reproductive studies do not assess the thyroid in the developing animals, EPA has required that a developmental thyroid assay be conducted to evaluate the impact of ethiprole on thyroid hormones, structure and/or thyroid hormone homeostasis during development. EPA's determination on the FQPA SF is based on the following:

i. The toxicological database for ethiprole is complete with the exception of a developmental thyroid toxicity study in juvenile rats, which is needed to address potential prenatal and perinatal thyroid toxicity. Thyroid toxicity was noted throughout the toxicological database; however, the thyroid toxicity was assessed in adult animals only.

ii. In mammals, no neurotoxic effects were observed during the subchronic neurotoxicity study in which adverse effects of increased thyroid and liver weights were observed at 7.2/33 mg/kg/day (LOAEL) in males and females, respectively. The acute neurotoxicity study yielded a LOAEL of 250 mg/kg/day for decreased locomotor activity (both sexes, day 1) and FOB findings in both sexes on the day of treatment (4 hours after dosing). The FOB findings include increased tremors (females), decreased grooming (both sexes), decreased arousal alert (females), increased number of animals for which no assessment of gait was possible (females), increased eye closure (females), increased standing/sitting hunched (females), decreased activity and rearing counts (females), increased hindlimb and forelimb grip strength (males), decreased forelimb grip strength (day 8) (females), decreased splay (females, day 1), and increased splay (males, day 8). The similarity in the NOAELs from the acute neurotoxicity and subchronic neurotoxicity studies are consistent with the metabolism data that suggests that ethiprole is not accumulated in the system.

A developmental neurotoxicity (DNT) study is not required for ethiprole. In view of the fact that thyroid toxicity appears to be the most sensitive endpoint, and thyroid hormones play a critical role in the development of the nervous system, the Agency is requiring the developmental thyroid toxicity study in lieu of the DNT.

iii. There is no evidence that ethiprole results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies, or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties in the exposure database for ethiprole. Since the dietary exposure estimates were based on several conservative assumptions, the Agency does not believe that the exposure estimates are underestimated.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the

lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists. For this action, there is potential exposure to ethiprole from food only.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions described in this unit for dietary and non-dietary acute exposures, EPA has concluded that acute exposure to ethiprole from food only will utilize 4% of the aPAD for the general U.S. population and 14% of the aPAD for all infants (<1 year old), the population group receiving the greatest exposure. There are no residential uses for ethiprole. Based on the explanation in Unit III.C.3., regarding residential use patterns, acute residential exposure to residues of ethiprole is not expected.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to ethiprole from food only will utilize 22% of the cPAD for the general U.S. population and 42% of the cPAD for all infants (<1 year old), the population group receiving the greatest exposure. There are no residential uses for ethiprole. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of ethiprole is not expected.

3. *Aggregate cancer risk for U.S. population.* Based on the data summarized and referenced in Unit III.A., EPA has concluded that the cRfD/cPAD for ethiprole is protective of the cancer effects. As noted in this Unit, the chronic exposure for the general U.S. population utilizes 22% of the cPAD.

4. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general U.S. population, or to infants and children, from aggregate exposure to ethiprole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

The submitted data are adequate to satisfy residue analytical methods data requirements for tolerance enforcement purposes. The proposed High Performance Liquid Chromatography/Multistage Mass Spectrometer (HPLC/MS–MS) enforcement method, Method 01128, is acceptable for determination of residues of ethiprole and its sulfone metabolite RPA097973 for data collection in plant commodities. The proposed Gas Chromatograph-Electron Capture Device (GC–ECD) method (Report No. B003572) is suitable for determining residues of parent ethiprole and its sulfone metabolite RPA097973 in milk, eggs and tissues. The FDA multiresidue method testing study for ethiprole and its sulfone metabolite RPA097973 is adequate and indicates that PAM multiresidue methods are not suitable for enforcing maximum residue limits (MRLs) due to the thermolability of ethiprole.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international MRLs established by the Codex Alimentarius Commission (Codex), as required by section 408(b)(4) of FFDCA. The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, section 408(b)(4) of FFDCA requires that EPA explain the reasons for departing from the Codex level.

There are currently no MRLs established by Codex for ethiprole. The tolerances established in this rule are identical to those being established in Canada.

C. Revisions to Petitioned-for Tolerances

There are currently no U.S. tolerances or MRLs in Canada for ethiprole and no uses for ethiprole are currently being proposed in the U.S. or Canada. As part of PP 9E7550, Bayer CropScience LP proposed harmonized tolerances/MRLs for ethiprole residues to allow for the importation of ethiprole-treated rice (3.0 ppm) and tea (50 ppm) into the U.S. and Canada. In addition, Bayer CropScience LP proposed tolerances for the combined residues of the insecticide ethiprole in or on various livestock commodities.

Adequate residue data are available from the rice field trials conducted in China, India and Thailand reflecting the critical use pattern for ethiprole on imported rice. The Agency's *Guidance for Setting Pesticide Tolerances Based on Field Trial Data* was utilized for determining appropriate tolerance level for ethiprole residues in or on rice, grain. EPA has determined that these residue data indicate that the tolerance in or on rice, grain should be set at 1.7 ppm.

Adequate residue data are available from the tea field trials conducted in China reflecting the critical use pattern for ethiprole on imported tea. These residue data show that the highest average residues on plucked fresh tea leaves will be 11 ppm. Taking into account data from the tea processing study that shows that combined ethiprole residues concentrate by up to 2.53x in dried tea (green and black), EPA determined that a tolerance of 30 ppm for dried tea would be appropriate.

EPA and PMRA are recommending the same tolerance values for rice and tea. In addition, EPA and PMRA are not establishing tolerances on livestock commodities since ethiprole is not registered in the U.S., and feedstuffs derived from rice are unlikely to be imported into the U.S. and Canada and fed to livestock. Further, based upon review of the available residue data supporting PP 9E7550, EPA has determined that the residue of concern in plant commodities (rice and tea) for both tolerance expression and risk assessment is only ethiprole.

V. Conclusion

Therefore, permanent tolerances (without U.S. registrations) are being established for residues of the insecticide ethiprole, including its metabolites and degradate, in or on the imported plant commodities listed in this Unit. Compliance with the tolerance levels specified in this Unit is to be determined by measuring only ethiprole [5-amino-1-[2,6-dichloro-4-(trifluoromethyl)phenyl]-4-[(ethyl)-sulfinyl]-1*H*-pyrazole-3-carbonitrile], in or on the following imported plant commodities: Rice, grain at 1.7 ppm; and tea, dried at 30 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is

not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

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

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

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

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: March 25, 2011.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.652 is added to read as follows:

§ 180.652 Ethiprole; tolerances for residues.

(a) *General.* Tolerances (without U.S. registrations) are established for residues of the insecticide ethiprole, including its metabolites and degradate, in or on the following commodities listed in the table. Compliance with the tolerance levels specified in the table is to be determined by measuring only ethiprole [5-amino-1-[2,6-dichloro-4-(trifluoromethyl)phenyl]-4-[(ethyl)-sulfinyl]-1*H*-pyrazole-3-carbonitrile], in or on the following commodities:

Commodity	Parts per million
Rice, grain [1]	1.7
Tea, dried [1]	30

[1] There are no U.S. registrations for rice and tea.

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 2011–8024 Filed 4–5–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[EPA–HQ–RCRA–2010–0851; FRL–9290–6]

Land Disposal Restrictions: Nevada and California; Site Specific Treatment Variances for Hazardous Selenium Bearing Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final actions to both issue a site-specific treatment variance to U.S. Ecology Nevada (USEN) in Beatty, Nevada and to withdraw an existing site-specific treatment variance issued to Chemical Waste Management, Inc. (CWM) in Kettleman Hills, California. These actions pertain to the treatment of a hazardous waste generated by the Owens-Brockway Glass Container Company in Vernon, California that is unable to meet the concentration-based treatment standard for selenium established under the Land Disposal Restrictions program. The site-specific treatment variance issued to USEN provides an alternative treatment standard of 59 mg/L for selenium as measured by the Toxicity Characteristic Leaching Procedure. EPA has determined that the treatment performed by USEN provides the best demonstrated treatment available for this waste by reducing the potential amount of selenium released to the environment, while minimizing the total volume of hazardous waste land disposed.

DATES: This direct final rule will be effective June 6, 2011 without further notice, unless EPA receives adverse written comment by May 6, 2011. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2010–0851, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov* and *miller.jesse@epa.gov.* Attention Docket ID No. EPA–HQ–RCRA–2010–0851.
- *Fax:* 202–566–9744. Attention Docket ID No. EPA–HQ–RCRA–2010–0851.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200

Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–RCRA–2010–0851. Please include a total of 2 copies.

• *Hand Delivery:* Please deliver 2 copies to EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2010–0851. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 HQ–Docket Center, Docket ID No. EPA–HQ–RCRA–2010–0851, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Docket Facility 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 RCRA Docket is (202) 566–0270. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For more information on this rulemaking, contact Jesse Miller, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery (MC 5304 P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone (703) 308–1180; fax (703) 308–0522; or *miller.jesse@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why is EPA using a direct final rule?

EPA is publishing this rule as a direct final rule because we view this action as a noncontroversial action and anticipate no adverse comment. Based on the information and data submitted by the petitioner for this site-specific treatment variance and the oversight being provided by the regulatory authorities in the states of Nevada and California, we do not believe that there will be adverse comments on this action. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as a proposed rule should EPA receive adverse comments. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, *see* the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

If we do not receive adverse comment, the rule will take effect on June 6, 2011. Section 3010(b) of RCRA states that rules implementing subtitle C of RCRA normally take effect six months after promulgation, but that EPA may provide for a shorter effective date for rules with which the regulated community does not need six months to come into compliance. This is such a rule, as the Owens-Brockway Glass Container Company should be able to transport the waste to USEN for treatment and disposal in a much shorter period of time.

B. Does this action apply to me?

This action applies only to U.S. Ecology Nevada located in Beatty, Nevada and to Chemical Waste Management, Inc. located in Kettleman Hills, California.

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I. Background

A. Basis for Land Disposal Restrictions Treatment Variances

Under sections 3004(d) through (g) of the Resource Conservation and Recovery Act (RCRA), the land disposal of hazardous wastes is prohibited unless such wastes are able to meet the treatment standards established by EPA. Under section 3004(m) of RCRA, EPA is required to set "levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." EPA

interprets this language to authorize treatment standards based on the performance of the best demonstrated available technology (BDAT). This interpretation was upheld by the DC Circuit in *Hazardous Waste Treatment Council* v. *EPA,* 886 F. 2d 355 (D.C. Cir. 1989).

The Agency recognizes however, that there may be wastes that cannot be treated to the levels specified in the regulations (*see* 40 CFR 268.40) because an individual waste matrix or concentration can be substantially more difficult to treat than those wastes evaluated in establishing the treatment standard (51 FR 40576, November 7, 1986). For such wastes, EPA has a process by which a generator or treater may seek a treatment variance (*see* 40 CFR 268.44). If granted, the terms of the variance establish an alternative treatment standard for the particular waste at issue.

B. Basis of the Current Selenium Treatment Standard

Treatment of selenium poses special difficulties. In particular, it can be technically challenging to treat wastes containing selenium and other metals e.g., cadmium, lead and/or chromium because of their different chemical properties and solubility curves (62 FR 26041, May 12, 1997).

The current treatment standard for a waste exhibiting the toxicity characteristic for selenium (RCRA Hazardous Waste D010) is based upon the performance of stabilization on low concentration selenium wastes. When the Agency developed the treatment standard for selenium, EPA believed that wastes containing high concentrations of selenium were rarely generated and land disposed (59 FR 47980, September 19, 1994). The Agency also stated that it believed that, for most wastes containing high concentrations of selenium, recovery of the selenium would be feasible using recovery technologies currently employed by copper smelters and copper refining operations (Id.). The Agency further stated in 1994, that it did not have any performance data for selenium recovery, but available information indicated that some recovery of elemental selenium out of certain types of scrap material and other wastes was practiced in the United States.[1]

In 1994, the Agency used performance data from the stabilization of a mineral processing waste that was characteristically hazardous (RCRA Hazardous Waste D010) to set the national treatment standard for selenium. At that time, we determined that this was the most difficult to treat selenium waste. This untreated waste contained up to 700 ppm total selenium and 3.74 mg/L selenium as measured by the Toxicity Characteristic Leaching Procedure (TCLP). The resulting post-treatment levels of selenium in the TCLP leachate were between 0.154 mg/L and 1.80 mg/L, which (after considering the range of treatment process variability) led to EPA establishing a national treatment standard of 5.7 mg/L for D010 selenium nonwastewaters.[2] This D010 mineral processing waste also contained other toxic metals (i.e., arsenic, cadmium, and lead) above the characteristic levels. The treatment technology used to establish the selenium levels also resulted in meeting the Land Disposal Restrictions (LDR) treatment standards for these non-selenium metals. The waste to reagent ratios varied from 1:1.3 to 1:2.7 (62 FR 26041).

Thus, in the Phase IV final rule, the Agency determined that a treatment standard of 5.7 mg/L, as measured by the TCLP, continued to be appropriate for D010 nonwastewaters (63 FR 28556, May 26, 1998). The Agency also changed the universal treatment standard (UTS) for selenium nonwastewaters from 0.16 mg/L to 5.7 mg/L TCLP.

C. Site-Specific Treatment Variance for Selenium-Bearing Waste

On May 26, 1999 (64 FR 28387), EPA granted Chemical Waste Management, Inc. (CWM) in Kettleman Hills, California a site-specific treatment variance from the LDR treatment standards for hazardous selenium-bearing waste generated by the Owens-Brockway Glass Container Company (Owens-Brockway) at their Vernon, California manufacturing facility. Under 40 CFR 268.44(o), CWM was allowed to treat the waste to an alternative treatment standard for selenium of 51 mg/L TCLP with a waste to reagent ratio of 1 to 2.7. Total selenium concentrations in the electrostatic precipitator (ESP) dust generated at the Owens-Brockway facility range from 2,400 mg/kg to 5,700 mg/kg. The untreated waste has a leachable selenium concentration ranging from 228 mg/L to 440 mg/L TCLP. In addition, the untreated waste has a leachable arsenic concentration ranging from 3.3 mg/L to 8.6 mg/L TCLP, a leachable cadmium concentration ranging from 3.9 mg/L to 11.0 mg/L TCLP, and a leachable lead concentration ranging from <0.10 mg/L to 16.3 mg/L TCLP. (For a more detailed discussion of EPA's basis for granting the site-specific treatment variance to CWM, *see* 64 FR 28387, May 26, 1999.)

II. Basis for This Determination

Under 40 CFR 268.44, facilities can apply for a site-specific treatment variance in cases where a waste that is generated under conditions specific to only one site cannot be treated to the specified LDR treatment standards. In such cases, the generator(s) or the treatment facility may apply to the Administrator, or to EPA's designated representative, (in this case the Assistant Administrator for Solid Waste and Emergency Response) for a site-specific variance from a treatment standard. The applicant for a site-specific variance must demonstrate that, because the physical or chemical properties of the waste differ significantly from the waste analyzed in developing the treatment standard, the waste cannot be treated to the specified levels or by the specified methods. There are other grounds for obtaining variances, but this is the only provision relevant to this action.

III. Development of This Variance

A. U.S. Ecology Nevada Petition

On September 16, 2008, U.S. Ecology Nevada (USEN) submitted a petition requesting a site-specific treatment variance from the LDR treatment standards for hazardous selenium-bearing waste generated by Owens-Brockway at their Vernon, California manufacturing facility. USEN requested an alternative treatment standard of 59 mg/L as measured by the TCLP for the selenium contained in the waste. This alternative treatment standard was achieved with a waste to reagent ratio of 1 to 0.45, using 20% ferrous sulfate,

[1] Because selenium is a non-renewable resource, and because the wastes in question contain high selenium concentrations, EPA's preference would be to recover the selenium in an environmentally sound manner. However, based on information contained in the *Mineral Commodity Summaries 2010* published by the U.S. Department of the Interior, U.S. Geological Survey, the amount of domestic production of secondary selenium is estimated to be very small because most of the materials eligible for possible secondary smelting (e.g., scrap xerographic and electronic materials) were exported for recovery of the contained selenium.

[2] The calculation of the LDR treatment standard was based on a specific method, sometimes called "C 99" which has been used in other LDR rulemakings. This methodology seeks to account for process variability (including variability that may be attributed to sampling and analytical processes). *See* 63 FR 28556, May 26, 1998 and the document, *Final—Best Demonstrated Available Technology (BDAT) Background Document for Quality Assurance/Quality Control Procedures and Methodology,* USEPA. October 23, 1991.

15% quick lime and 10% sodium sulfide flakes.[3]

B. What type and how much waste will be subject to this variance?

Owens-Brockway operates a glass manufacturing facility that ESP dust. The ESP dust is generated by the glass furnace air emissions control system and is hazardous due to its high concentrations of leachable arsenic, cadmium, lead, and selenium. The corresponding EPA hazardous waste codes are D004, D006, D008, and D010, respectively. The waste generated by Owens-Brockway does not meet the LDR treatment standards and requires treatment prior to land disposal. As discussed previously, the physical properties and the chemical composition of the ESP dust generated by Owens-Brockway are considerably different from the waste used to establish the current LDR treatment standard for selenium. The Agency set the national treatment standard for nonwastewaters using performance data from the stabilization of a characteristically hazardous mineral processing waste, which the Agency determined at the time to be the most difficult to treat selenium waste.[4]

According to the petition submitted by USEN, the quantity of ESP dust shipped off-site for management as a hazardous waste ranges from 50 to 100 tons per year.[5] The ESP dust, as generated, contains fine particle matter resulting from the combustion of natural gas and particulate matter generated by the dry scrubber used to control SO_X emissions. The material is normally returned to the process as a substitute raw material; however, there are circumstances when it cannot be used again due to the high levels of hazardous contaminants, its physical state or excess quantity. In these situations, the ESP dust is managed as a RCRA hazardous waste.

C. Description of the Waste Treatment Process

USEN will stabilize the Owens-Brockway ESP dust using a combination of reagents and techniques. These reagents include ferrous sulfate (FeSO4), quick lime (CaO), and sodium sulfide (Na2S). USEN typically uses a combination of hydroxide and sulfide precipitation to treat high concentration wastes. Most often, an alkaline reagent (quick lime) is used to raise the solution pH to lower the solubility of the metal constituents and start the precipitation process.

As noted previously, (*see* 64 FR 28387, May 26, 1999), EPA concluded that it is difficult, if not impossible, to optimize the treatment for selenium when other metals are being treated, because the selenium solubility curve differs from that of most other metals. Thus, successfully stabilizing other metals generally means that treatment for selenium cannot be optimized. As further pointed out in the petition submitted by USEN, selenium's minimum solubility is in the range of 6.5 to 7.5, while other characteristic metals have a minimum solubility in the pH range of 8 to 12. In simple terms, if you maximize the stabilization treatment recipe to treat arsenic, cadmium, and lead, the selenium becomes soluble and will not meet the treatment standard (i.e., fail the TCLP). If you maximize the recipe to treat selenium, the other metals will not meet the treatment standard.

USEN has been unsuccessful in developing a treatment recipe that can achieve all the LDR treatment standards applicable to this waste (e.g., arsenic, chromium, lead, and selenium). USEN tested and submitted performance data on 135 treatment recipes on five different ESP dust samples using a combination of reagents and concentrations of reagents. USEN was unable to achieve the LDR treatment standard of 5.7 mg/L selenium using any of the 135 treatment recipes. The average post treatment selenium TCLP value achieved was 47 mg/L TCLP, which is approximately a 90% reduction in soluble selenium. The treatment to an average of 47 mg/L TCLP was the result of a recipe with a waste to reagent ratio of 1:0.45. With a variability factor applied to the average TCLP selenium value, the final treatment standard would be 59 mg/L TCLP.[6]

With the data and information provided to the Agency as part of their site-specific treatment variance petition, EPA was able to perform an analysis which shows that the USEN treatment process would generate a lower volume of waste material, post treatment, coupled with a lower potential for selenium being released to the environment. Mass balance calculations performed by the Agency indicated that the treatment conducted by USEN has the potential to release between 3.88 to 7.76 kilograms (8.54 to 17.1 pounds) of selenium per year to the environment. This range is a result of Owens-Brockway generating between 50 and 100 tons of waste annually. (As we discuss in the next section, CWM, even with a lower alternative treatment standard, has the potential to release greater amounts of selenium per year to the environment. This is due to the higher waste to reagent ratio used to stabilize the waste material.[7]) As such, the Agency has determined that USEN has optimized its stabilization recipe by reducing the amount of selenium potentially released to the environment and minimizing the amount of reagent that must be used to achieve this result.

IV. EPA's Reasons for Granting This Site-Specific Treatment Variance to USEN and Withdrawing the Site-Specific Variance From CWM at 40 CFR 268.44

EPA has reviewed USEN's petition for a site-specific treatment variance from the LDR treatment standards for hazardous selenium-bearing waste generated by Owens-Brockway and is granting a variance from the selenium treatment standard from 5.7 mg/L TCLP to an alternative treatment standard of 59 mg/L TCLP, with the condition that USEN does not exceed a waste to reagent ratio of 1:0.45. Concurrently, EPA is withdrawing the site-specific variance granted to CWM that established an alternative treatment standard of 51 mg/L TCLP for this same waste (69 FR 6567, February 11, 2004).

[3] The selenium concentrations used to calculate the alternative treatment standard were (in mg/L TCLP) 49.34, 51.39, 49.39, 43.91, and 54.34. The most effective treatment recipe was determined using a 50 gram sample of waste where reagents were listed as a percent of waste sample weight. For example, 20% ferrous sulfate, 15% quick lime, and 10% sodium sulfide flakes would measure out as 10 grams of ferrous sulfate, 7.5 grams of quick lime, and 5 grams of sodium sulfide flakes for a total of 22.5 grams of total reagent. The waste to reagent ratio was then calculated by dividing 22.5 by 50 to get a waste to reagent ratios of 1:0.45.

[4] The untreated waste had a total selenium concentration of up to 700 ppm selenium, with a leachable selenium concentration of 3.74 mg/L TCLP. The post treatment levels of selenium were between 0.154 mg/L and 1.80 mg/L TCLP, which led the Agency to establish the treatment standard of 5.7 mg/L TCLP for nonwastewaters. *See* 63 FR 28556, May 26, 1998.

[5] According to information obtained from USEPA's RCRA Biennial Report, in 2005, approximately 108 tons of hazardous waste identified as D010 was shipped from Owens-Brockway's Vernon facility to the CWM facility in Kettleman Hills, California, while in 2007, almost 61 tons of D010 waste was shipped to CWM in Kettleman Hills, California.

[6] The calculation of the LDR treatment standard was based on a specific method, sometimes called "C 99" which has been used in other LDR rulemakings. This methodology seeks to account for process variability (including variability that may be attributed to sampling and analytical processes). *See* 63 FR 28556, May 26, 1998 and the document, *Final—Best Demonstrated Available Technology (BDAT) Background Document for Quality Assurance/Quality Control Procedures and Methodology,* USEPA. October 23, 1991.

[7] With the majority of the treatment recipes tested, USEN was able to meet the LDRs for all the other RCRA metals, including any underlying hazardous constituents.

EPA has determined that USEN, despite having a higher selenium treatment standard based on selenium concentration, does, in fact, have the potential to release less selenium in a land disposal environment by utilizing a much more environmentally favorable waste to reagent ratio. As such, the Agency believes that the treatment performed by USEN is the best treatment available for this waste. CWM uses a waste to reagent ratio of 1:2.7, while USEN uses a waste to reagent ration of 1:0.45. Consequently, the Agency has determined that a treatment standard of 59 mg/L TCLP for this selenium-bearing waste is more protective of human health and the environment, due to the fact that it generates a lower volume of waste material, with a much lower leaching potential. In particular, the treatment process employed by CWM has the potential to release between 8.56 to 17.11 kilograms (18.8 to 37.69 pounds) of selenium per year to the environment, whereas USEN has the potential to release 3.88 to 7.76 kilograms (8.54 to 17.1 pounds) of selenium per year to the environment. Furthermore, utilizing the waste to reagent ratio of 1:2.7 would dispose of between 185 and 370 tons of waste to land disposal per year, whereas utilizing the waste to reagent ratio of 1:0.45 would dispose of only 72.5 to 145 tons of waste to land disposal per year.

Based on the foregoing, the Agency is granting USEN's petition for a site-specific treatment variance for the ESP dust generated at the Owens-Brockway glass manufacturing plant in Vernon, California. We are also withdrawing the portion of CWM's site-specific treatment variance that pertains to its management of the Owens-Brockway waste, i.e., 51 mg/L TCLP for selenium-bearing D010 waste.

Technology-based treatment standards, whether adopted by generally applicable rule or through a variance to the generally applicable rule, serve as the measure of when threats posed by land disposal of the hazardous waste are "minimized," as required by RCRA section 3004(m). *See* 55 FR 6640 (February 26, 1990). Thus, EPA has typically limited the standards adopted by a variance to a single standard. *See* 70 FR 44505 (August 3, 2005). We are continuing this practice here by rescinding the current variance granted to CWM (69 FR 6567, February 11, 2004). The Agency has determined that the existing treatment standard is less stringent than the standard we would now be granting, both with respect to potential concentrations of selenium released to the environment and also the waste to reagent ratios. Under these circumstances, EPA believes that threats posed by land disposal are minimized by use of the treatment process utilized by USEN.

Please note that the waste already disposed of pursuant to the standard established in the original treatment variance granted to CWM would be lawfully disposed, and would not have to be retreated if the standard in the variance were altered or lapsed. This variance results in amending 40 CFR 268.44(o) to allow hazardous selenium-bearing waste generated by Owens-Brockway in Vernon, California, with the RCRA hazardous waste identification code of D010, to be treated to an alternate treatment standard of 59 mg/L TCLP by USEN with the condition that the waste to reagent ratio not exceed 1:0.45.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action does two things: (1) Grants a site-specific treatment variance to USEN for the treatment of hazardous selenium-bearing waste under RCRA's LDR program; and (2) withdraws an existing site-specific treatment variance to CWM. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR 268.42 and .44 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0085. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

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.

This site-specific treatment variance does not create any new requirements. Rather, it establishes an alternative treatment standard for a specific waste that applies to only one facility, USEN located in Beatty, Nevada and withdraws an existing site-specific treatment variance for the same waste at CWM located in Kettleman Hills, California. Therefore, we hereby certify that this rule will not add any new regulatory requirements to small entities. This rule, therefore, does not require a regulatory flexibility analysis.

D. Unfunded Mandates Reform Act of 1995

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. This action imposes no enforceable duty on any State, local or tribal governments or the private sector. This action would not impose any new duties on the State's hazardous waste program. EPA has determined, therefore, that this rule would not contain regulatory requirements that might significantly or uniquely affect small governments in that the authority for this action exists with the Federal government. Therefore, this action is not subject to the requirements of sections 202 or 205 of the 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.

E. Executive Order 13132: Federalism

This action does not have federalism implications. This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does two things: (1) Grants a site-specific treatment variance applicable to one facility, and (2) withdraws a site-specific treatment variance for that same waste at another facility. Thus, Executive Order 13132 would not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action would not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action is a site-specific treatment variance that applies to only one facility, while withdrawing a site-specific treatment variance for that same waste at another facility. Neither facilities are tribal facilities or located on tribal lands. Thus, Executive Order 13175 would not apply to this action.

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

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

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

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it would not be a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of protection provided to human health and the environment because of a reduced level of selenium being landfilled than currently occurs. The treatment variance applies to a specific hazardous selenium-bearing waste that will be treated in an existing, permitted RCRA facility, ensuring protection to human health and the environment. Therefore, the rule will not result in any disproportionately negative impacts on minority or low-income communities relative to affluent or non-minority communities.

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, when finalized 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 June 6, 2011. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 268

Environmental Protection, Hazardous Waste, Variances.

Dated: March 31, 2011.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

■ 1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

■ 2. In § 268.44, the table in paragraph (o) is amended by revising the entry for "Owens Brockway Glass Container Company, Vernon, CA" and revising footnote 7 to read as follows:

§ 268.44 Variance from a treatment standard.

* * * * *

(o) * * *

TABLE—WASTES EXCLUDED FROM THE TREATMENT STANDARDS UNDER § 268.40

Facility name [1] and address	Waste code	See also	Regulated hazardous constituent	Wastewaters		Nonwastewaters	
				Concentration (mg/l)	Notes	Concentration (mg/kg)	Notes
*	*	*	*	*	*	*	
Owens Brockway Glass Company, Vernon, CA [6,7].	Container	D010	Standards under § 268.40.	Selenium	NA	NA	59 mg/L TCLP.	NA
*	*	*	*	*	*	*	

[1] A facility may certify compliance with these treatment standards according to provisions in 40 CFR 268.7.

* * * * *

[6] Alternative D010 selenium standard only applies to electrostatic precipitator dust generated during glass manufacturing operations.

[7] D010 waste generated by this facility must be treated and disposed by U.S. Ecology Nevada at their RCRA permitted facility in Beatty, Nevada. The treatment variance is conditioned on the waste to reagent ratio not exceeding 1 to 0.45.

* * * * *

Note: NA means Not Applicable.

[FR Doc. 2011–8179 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R06–RCRA–2010–0307; FRL–9291–1]

Oklahoma: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Oklahoma has applied to the EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for Final authorization, and is authorizing the State's changes through this immediate final action. The EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize Oklahoma's changes to its hazardous waste program will take effect. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes.

DATES: This final authorization will become effective on June 6, 2011 unless the EPA receives adverse written comment by May 6, 2011. If the EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the Federal Register and inform the public that this authorization will not take effect.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *E-mail: patterson.alima@epa.gov.*
3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.
4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The Federal regulations.gov Web site is an "anonymous access" system, which means the 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 the EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the 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.

You can view and copy Oklahoma's application and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following locations: Oklahoma Department of Environmental Quality, 707 North Robinson, Oklahoma City, Oklahoma 73101–1677, (405) 702–7180 and EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, (214) 665–8533, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, and E-mail address *patterson.alima@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to state programs necessary?

States which have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask the EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of

changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273, and 279.

B. What decisions have we made in this rule?

We conclude that Oklahoma's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Oklahoma Final authorization to operate its hazardous waste program with the changes described in the authorization application. Oklahoma has responsibility for permitting treatment, storage, and disposal facilities within its borders. Also section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA"), Public Law 109–59, 119 Statute 1144 (August 10, 2005) provides the State of Oklahoma opportunity to request approval from EPA to administer RCRA subtitle C in Indian Country and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that the EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in Oklahoma including issuing permits, until the State is granted authorization to do so.

C. What is the effect of today's authorization decision?

The effect of this decision is that a facility in Oklahoma subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Oklahoma has enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses, or reports;
- enforce RCRA requirements and suspend or revoke permits; and
- take enforcement actions after notice to and consultation with the State.

This action does not impose additional requirements on the regulated community because the regulations for which Oklahoma is being authorized by today's action is already effective under State law, and are not changed by today's action.

D. Why wasn't there a proposed rule before today's rule?

The EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize the State program changes.

E. What happens if the EPA receives comments that oppose this action?

If the EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time. If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program, we will withdraw only that part of this rule, but the authorization of the program changes that the comments do not oppose will become effective on the date specified in this document. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. For what has Oklahoma previously been authorized?

Oklahoma initially received final Authorization on January 10, 1985 (49 FR 50362–50363) published December 27, 1984 to implement its base hazardous waste management program. We authorized the following revisions: Oklahoma received authorization for revisions to its program with publication dates: April 17, 1990 (55 FR 14280–14282), effective June 18, 1990; September 26, 1990 (55 FR 39274) effective November 27, 1990; April 2, 1991 (56 FR 13411–13413) effective June 3, 1991; September 20, 1991 (56 FR 47675–47677) effective November 19, 1991; September 29, 1993 (58 FR 50854–50856) effective November 29, 1993; October 12, 1993 (58 FR 52679–52682) effective December 13, 1993; October 7, 1994 (59 FR 51116–51122) effective December 21, 1994; January 11, 1995 (60 FR 2699–2702) effective April 27, 1995; October 9, 1996 (61 FR 52884–52886) effective December 23, 1996; Technical Correction March 14, 1997 (62 FR 12100–12101) effective March 14, 1997; September 22, 1998 (63 FR 50528–50531) effective November 23, 1998; March 29, 2000 (65 FR 16528–16532) effective May 30, 2000; May 10, 2000 (65 FR 29981–29985) effective June 10, 2000; January 2, 2001 (66 FR 28–33) effective March 5, 2001; April 9, 2003 (68 FR 17308–17311) effective June 9, 2003 and February 4, 2009 (74 FR 5994–6001). The authorized Oklahoma RCRA program was incorporated by reference into the CFR published on December 9, 1998 (63 FR 67800–67834) effective February 8, 1999, August 26, 1999 (64 FR 46567–46571) effective October 25, 1999, August 27, 2003 (68 FR 51488–51492) effective October 27, 2003 and August 27, 2010 (75 FR 36546) June 28, 2010. On March 26, 2010, and January 18, 2011, Oklahoma submitted a final complete program revision application seeking authorization of its program revision in accordance with 40 CFR 271.21.

The Oklahoma Hazardous Waste Management Act ("OHWMA") provides the ODEQ with the authority to administer the State Program, including the statutory and regulatory provisions necessary to administer the provisions of RCRA Cluster XVIII, and designates the ODEQ as the State agency to cooperate and share information with EPA for purpose of hazardous waste regulation. The Oklahoma Environmental Quality Code ("Code"), at 27A O.S. Sections establishes an EQB to be the rulemaking body for the DEQ, specifically charged with the responsibility of promulgating rules to implement the duties and responsibilities of the DEQ. The EQB consists of 13 members appointed by the Governor with the advice and consent of the State senate. The Code, 27A O.S. Section 2–2–201, also establishes a Hazardous Waste Management Advisory Council ("Council") with the authority to recommend rules to the Board on behalf of the ODEQ.

The Environmental Quality Act, at 27A O.S. Section 1–3–101(E), grants the Oklahoma Corporation Commission ("OCC") authority to regulate certain aspects of the oil and gas production and transportation industry in Oklahoma, including certain wastes generated by pipelines, bulk fuel sales terminals and certain tank farms, as well as underground storage tanks. To clarify areas of environmental jurisdiction, the

ODEQ and OCC developed an ODEQ/OCC Jurisdictional Guidance Document to identify respective areas of jurisdiction. The current ODEQ/OCC jurisdictional Guidance Document was amended and signed on January 27, 1999. The revisions to the State Program necessary to administer Cluster XVIII and Checklist 220 in RCRA Cluster XIX will not affect the jurisdictional authorities of the ODEQ or OCC.

The Board adopted RCRA Cluster XVIII amendments on November 18, 2008 and became effective on July 1, 2009 and also adopted RCRA Cluster XIX which is part of Checklist 220 on March 24, 2010 with an effective date July 11, 2010. The rules were also codified at OAC 252:205 et seq, Subchapter.

Pursuant to OAC 252:205–3–2, the State's incorporation of Federal regulations does not incorporate prospectively future changes to the incorporated sections of the 40 CFR, and no other Oklahoma law or regulation reduces the scope of coverage or otherwise affects the authority provided by these incorporated-by-reference provisions. Further, Oklahoma interprets these incorporated provisions to provide identical authority to the Federal provisions. Thus, OAC Title 252, Chapter 205 provides equivalent and no less stringent authority than the Federal Subtitle C program in effect July 1, 2009 and July 11, 2010. The State of Oklahoma incorporate by reference the provisions of 40 Code of Federal Regulations (CFR) parts 124 of 40 CFR that are required by 40 CFR 271.14 (with the addition of 40 CFR 124.19(a) through (c), 124.19(e), 124.31, 124.32, 124.33 and Subpart G); 40 CFR parts 260–268 [with the exception of 260.21, 261.(b)(18), 262 subparts E and H, 264.1(f), 264.1(g)(12), 264.149, 264.150, 264.301(1), 264.1030(d), 264.1050(g), 264.1080(e), 264.1080(f), 264.1080(g), 265.1(c)(4), 265.1(g)12), 265.149, 265.150, 265.1030(c), 265.1050(f) 265.1080(e), 265.1080(f), 265.1080(g), 268.5, 268.6, 268.13, 268.42(b), and 268.44(a) through (g)]; 40 CFR part 270 [with the exception of 270.1(c)(2)(ix and 270.14(b)(18)]; 40 CFR part 273; and 40 CFR part 279.

The OHWMA provides the DEQ with the authority to administer the State Program, including the statutory and regulatory provisions necessary to administer the provisions of RCRA Cluster XVIII and Checklist 220 in RCRA Cluster XIX, designates the DEQ as the State agency to cooperate and share information with the EPA for the purpose of hazardous waste regulation.

Pursuant to 27A O.S. Section 2–7–104, the Executive Director has created the Land Protection Division ("LPD") to be responsible for implementing the State Program. The LPD is staffed with personnel that have the technical background and expertise to effectively implement the provisions of the State program subtitle C Hazardous Waste Management program.

G. What changes are we approving with today's action?

On March 26, 2010, and January 11, 2011, the State of Oklahoma submitted final complete program applications, seeking authorization of their changes in accordance with 40 CFR 271.21. We now make an immediate final decision, subject to receipt of written comments that oppose this action that the State of Oklahoma's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. The State of Oklahoma revisions consist of regulations which specifically govern Federal Hazardous Waste revisions promulgated from July 1, 2007 through December 31, 2008 (RCRA Cluster XVIII and Checklist 220 in RCRA Cluster XIX). Oklahoma requirements are included in a chart with this document.

Description of Federal requirement (include checklist #, if relevant)	Federal Register date and page (and/or RCRA statutory authority	Analogous state authority
1. Exclusion of Oil-Bearing Secondary Materials Processed in a Gasification System to Produce Synthesis. (Checklist 216).	73 FR 57–72 January 2, 2008.	Oklahoma Statutes Title 27A Section 2–7–101 et seq.; as amended through July 1, 2009. Oklahoma Administrative Code Rules 252:205–3–2, effective July 1. 2009. Oklahoma Hazardous Waste Management Act, as amended effective July 1, 2009.
2. NESHAP: Final Standards for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II) Amendments. (Checklist 217).	73 FR 18970–18984 April 8, 2008.	Oklahoma Statutes Title 27A Section 2–7–101 et seq.; as amended through July 1, 2009. Oklahoma Administrative Code Rules 252:205–3–2, effective July 1. 2009. Oklahoma Hazardous Waste Management Act, as amended effective July 1, 2009.
3. F019 Exemption for Wastewater Treatment Sludges from Auto Manufacturing Zinc Phosphating. (Checklist 218).	73 FR 31756–31769 June 4, 2008.	Oklahoma Statutes Title 27A Section 2–7–101 et seq.; as amended through July 1, 2009. Oklahoma Administrative Code Rules 252:2053–2, effective July 1. 2009. Oklahoma Hazardous Waste Management Act, as amended effective July 1, 2009.
4. Academic Laboratories Generator Standards. (Checklist 220).	73 FR 72912–72960 December 1, 2008.	Oklahoma Statutes Title 27A Section 2–7–101 et seq.; as amended through July 1, 2009. Oklahoma Administrative Code Rules 252:205–3–2, effective July 1, 2009. Oklahoma Hazardous Waste Management Act as amended effective July 11, 2010.

H. Where are the revised state rules different from the Federal rules?

The only clarification in this FR notice is at OAC 252:205–3–2(c)(3) states "in 261.31(a) the listing for F019, at the end: "Zinc phosphate sludges meeting exemption conditions remain subject to regulations as hazardous waste characteristic" This statement is consistent with EPA's interpretation of its rule and was added by way of clarification.

I. Who handles permits after the authorization takes effect?

Oklahoma will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to

administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization. We will not issue any more new permits or new portions of permits for the provisions listed in the Table in this document after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Oklahoma is not yet authorized.

J. How does today's action affect Indian country (8 U.S.C. 1151) in Oklahoma?

The State of Oklahoma Hazardous Program is not being authorized to operate in Indian Country.

K. What is codification and is the EPA codifying Oklahoma's hazardous waste program as authorized in this rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the CFR. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart LL for this authorization of Oklahoma's program changes until a later date. In this authorization application the EPA is not codifying the rules documented in this **Federal Register** notice.

L. Administrative Requirements

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. The reference to Executive Order 13563 (76 FR 3821, January 21, 2011) is also exempt from review under Executive orders 12866 (56 FR 51735, October 4, 1993). This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action 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 action authorizes preexisting requirements under State law and does not impose any additional enforceable duty beyond that required by State 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). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action 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 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, "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.

Under RCRA 3006(b), the EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a State authorization application to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the Executive Order. 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. The EPA will submit a report containing this document 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 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 action will be effective June 6, 2011.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: March 19, 2011.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2011–8169 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 413

[CMS–1435–IFC]

RIN 0938–AQ94

Medicare Programs: Changes to the End-Stage Renal Disease Prospective Payment System Transition Budget-Neutrality Adjustment

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment will revise the end-stage renal disease (ESRD) transition budget-neutrality adjustment finalized in the CY 2011 ESRD Prospective Payment System (PPS) final rule for renal dialysis services provided on April 1, 2011 through December 31, 2011. We are revising the transition budget-neutrality adjustment to reflect the actual election decision to receive payment under the ESRD PPS for renal dialysis services furnished on or after January 1, 2011

made by ESRD facilities, rather than projected elections using the same methodology as described in the ESRD PPS proposed and final rules. This results in a zero percent adjustment for renal dialysis services furnished April 1, 2011 through December 31, 2011.

DATES: *Effective date:* April 1, 2011.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 6, 2011.

ADDRESSES: In commenting, please refer to file code CMS–1435–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed)

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1435–IFC, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1435–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses: a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, *see* the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Terri Deutsch, (410) 786–9462.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

A. Establishment of the ESRD PPS Transition Budget-Neutrality Adjustment

On August 12, 2010, we published a final rule (75 FR 49030 through 49214) in the **Federal Register**, entitled "Medicare Program; End-Stage Renal Disease Prospective Payment System", hereinafter, referred to as the CY 2011 ESRD PPS final rule. In the CY 2011 ESRD PPS final rule, we implemented a case-mix adjusted bundled prospective payment system (PPS) for Medicare outpatient end-stage renal disease (ESRD) dialysis services furnished beginning January 1, 2011, in accordance with the statutory provisions set forth in section 153(b) of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA).

Section 1881(b)(14) of the Social Security Act (the Act) requires a case-mix adjusted bundled ESRD PPS for renal dialysis services furnished by ESRD facilities beginning January 1, 2011, which replaces the basic case-mix adjusted composite payment system. Section 1881(b)(14)(E)(i) of the Act requires the Secretary to provide a "four-year phase-in" of the payments under the ESRD PPS for renal dialysis services furnished on or after January 1, 2011. For the purposes of this interim final rule with comment, the term "transition" will be used to describe the timeframe during which payments are based on the blend of the payment rates under the basic case-mix adjusted composite payment system and the ESRD PPS. Section 1881 (b)(14)(E)(ii) of the Act permits an ESRD facility to make a one-time election prior to January 1, 2011, in a form and manner specified by the Secretary of the Department of Health and Human Services (the Secretary), to be excluded from the transition and be paid entirely based on the payment amount under the ESRD PPS.

As specified in regulations at 42 CFR 413.239(b)(1), ESRD facilities were required to notify their fiscal intermediary or Medicare administrative contractor (FI/MAC) of their election choice to either be included or excluded from the 4-year transition period in a manner established by the FI/MAC no later than November 1, 2010. In addition, § 413.239(b)(1) provides that once a decision is made, the election to be excluded from the 4-year transition cannot be rescinded. As required under § 413.239(b)(3), ESRD facilities that became certified for Medicare participation and began to furnish dialysis services on November 1, 2010 through December 31, 2010, must have notified their FI/MAC of their election decision at the time of enrollment. For ESRD facilities that failed to make an election by November 1, 2010, § 413.239(b)(2) requires that payment be based on the blended payment during the transition. Further, under § 413.239(c), ESRD facilities that are certified for Medicare participation and begin furnishing renal or home dialysis services on or after January 1, 2011, are paid under the ESRD PPS.

Section 1881(b)(14)(E)(iii) of the Act requires that we make an adjustment to payments for renal dialysis services provided by ESRD facilities during the transition so that the estimated total amount of payments under the ESRD PPS, including payments under the transition, equal the estimated total amount of payments that would otherwise occur under the ESRD PPS without a transition. We refer to this provision as the transition budget-neutrality adjustment. As described in the CY 2011 ESRD PPS final rule (75 FR

49082), the transition budget-neutrality adjustment is comprised of two parts. The first part created a payment adjustment under the basic case-mix adjusted composite payment system portion of the blended rate during the transition. The second part created a factor that would make the estimated total amount of payments under the ESRD PPS, including payments under the transition, equal the estimated total amount of payments that would otherwise occur without such a transition. In this interim final rule with comment, we are addressing the second part of the transition budget-neutrality adjustment finalized in the CY 2011 ESRD PPS final rule.

B. Transition Budget-Neutrality Adjustment

In the CY 2011 ESRD PPS final rule (75 FR 49082), we explained that section 1881(b)(14)(E)(iii) of the Act requires that we make an adjustment to payments for renal dialysis services furnished by the ESRD facilities during the transition so that the estimated total amount of payments under the ESRD PPS, including payments under the transition, equals the estimated total amount of payments that would otherwise occur under the ESRD PPS without such a transition. In calculating the transition budget-neutrality adjustment, we first determined the estimated increases in payments under the transition and then determined an offset factor, based on certain assumptions of which facilities would choose to opt out of the transition (74 FR 49946). We explained that using estimates of simulated payments under the basic case-mix adjusted composite payment and under the ESRD PPS by facility, we estimated that 43 percent of the 4,951 ESRD facilities would choose to be excluded from the transition and that 57 percent of those ESRD facilities would choose to be paid the blended rate during the transition. As a result, we estimated that during the first year of the transition, total payments would exceed the estimated payments under the ESRD PPS in the absence of the transition (75 FR 49083).

In order to maintain the 98 percent budget-neutrality requirement in section 1881 (b)(14)(A)(ii) of the Act during the initial year of the transition period, we finalized the reduction of all payments to ESRD facilities in CY 2011 by a factor that is equal to 1 minus the ratio of estimated payments under the ESRD PPS if there were no transition, to the total estimated payments under the transition, or 3.1 percent. This approach resulted in a 3.1 percent reduction in all payments to ESRD facilities (that is, the 3.1 percent adjustment would be applied to both the blended payments made under the transition and payments made 100 percent under the ESRD PPS). We stated that we believed that because the application of the 3.1 percent reduction to all payments would evenly distribute the effect of the transition adjustment, it would not have affected the decision of ESRD facilities when choosing whether or not to opt out of the transition.

In the CY 2011 ESRD PPS final rule (75 FR 49082 through 49083), we acknowledged that the transition budget-neutrality adjustment may not reflect the actual choices made by the ESRD facilities regarding whether or not to opt out of the ESRD PPS transition. We also indicated that we were not able to wait until November 1, 2010, when ESRD facilities were to notify their respective FI/MACs, to establish the transition budget-neutrality adjustment. We explained that we based the final budget-neutrality adjustment on our best projections of how ESRD facilities would fare under the ESRD PPS compared to the basic case-mix adjusted composite payment system. We stated that we believed that ESRD facilities would choose to be excluded from the blended payment if payment under the ESRD PPS provided financial benefits. We also indicated that the transition budget-neutrality adjustment would be updated each year of the transition to reflect the appropriate blend of the PPS and composite rate payments. Finally, we noted that given that the transition budget-neutrality adjustment applies in each transition year, we would consider whether we would prospectively correct for an over or understatement of the number of facilities that chose to opt out of the transition when we updated the adjustment for CY 2012.

The simulation (resulting in the 3.1 percent reduction) was based on determining which payment approach (that is, blended payments or 100 percent ESRD PPS payments) would financially benefit an ESRD facility. However, based upon analysis of the elections submitted by ESRD facilities, we found that the decision to receive payment under the blend or under the ESRD PPS did not appear to be based solely on which payment approach would be more financially advantageous. Rather than 43 percent of ESRD facilities electing to receive 100 percent payment under the ESRD PPS as was determined by simulating 2007 payments, 87 percent of ESRD facilities elected to opt out of the transition and elected to receive full payment under the ESRD PPS. We received elections from 5,645 ESRD facilities. Of the 5,645 elections received, 5,068 (or 90 percent) opted to receive payment under the ESRD PPS. We matched the 5,645 elections received in 2010 from ESRD facilities to the 4,951 facilities in 2007 that were used in the simulation. Of the 4,951 facilities, we received terminations for three facilities and therefore, we removed those three facilities from our computation. In addition, we did not receive an election for 210 facilities. As § 413.239(b)(2) requires that payment be made under the blend during the transition for facilities that fail to make an election by November 1, 2010, we considered the 210 facilities to have elected the transition. Therefore, after matching the 5,645 elections to the 4,951 facilities in 2007 (including 3 terminations and 210 assumptions), we determined that 4,324 of the 4,951 ESRD facilities in 2007 (or 87 percent) elected to receive payment under the ESRD PPS for CY 2011.

II. Provisions of the Interim Final Rule With Comment

In this interim final rule with comment, we are revising the ESRD transition budget-neutrality adjustment finalized in the CY 2011 ESRD PPS final rule (75 FR 49030 through 49214). We believe that this updated adjustment better reflects the actual elections made by ESRD facilities with regard to the transition because there is a significant difference between the projected and the actual number of ESRD facilities that elected to receive full payment under the ESRD PPS.

Subsequent to the publication of the CY 2011 ESRD PPS final rule, we received numerous comments from stakeholders including ESRD facilities and major ESRD associations requesting that we not defer reconciling any discrepancies between the estimated simulated election decisions with the actual decisions made by ESRD facilities. These stakeholders cited many negative outcomes that would result from a 3.1 percent transition budget-neutrality adjustment reduction, including limiting or reducing renal dialysis services which would result in individuals with ESRD experiencing difficulties in accessing vital and life-sustaining dialysis services. Additionally, these stakeholders cited that as a result of the 3.1 percent transition budget-neutrality adjustment reduction, they would have difficulty recruiting and retaining staff, staff to patient ratios would decrease, and renal dialysis services could be limited.

We find these requests compelling specifically because the number of ESRD facilities electing to receive full payment under the ESRD PPS is

substantially greater than the number of facilities that we estimated would elect to receive full payment under the ESRD PPS and therefore, the assumption used in the simulation to calculate the transition budget-neutrality adjustment was understated. We believe that rather than provide for a prospective adjustment in CY 2012, it is important to revise the transition budget-neutrality adjustment at this time for services furnished on April 1, 2011 through December 31, 2011.

As discussed in detail below, in this interim final rule with comment, we are revising the transition budget-neutrality adjustment by using the actual number of ESRD facilities that elected to receive 100 percent payment under the ESRD PPS. We believe that revising the transition budget-neutrality adjustment and eliminating the 3.1 percent reduction to payments in CY 2011, as discussed below, will mitigate difficulties cited above in patient access to renal dialysis services that could result from ESRD facilities limiting renal dialysis services due to the reduction in payments.

We are revising the transition budget-neutrality adjustment by re-calculating the transition budget-neutrality adjustment based on the actual elections received by the FI/MACs using the same methodology as described in the CY 2011 ESRD PPS proposed and final rules. This results in a zero percent adjustment. The zero percent adjustment is equal to 1 minus the ratio of the estimated payments under the ESRD PPS were there no transition (that is, 98 percent of total estimated payments that would have been made under the basic case-mix adjusted composite payment) to the total estimated payments under the transition.

Therefore, in this interim final rule with comment, the revised transition budget-neutrality adjustment of zero percent will apply prospectively to renal dialysis services furnished April 1, 2011 through December 31, 2011. As discussed earlier, we are not changing the application of the transition budget-neutrality adjustment factor. We are applying the zero percent transition budget-neutrality adjustment to both the blended payments under the transition and payments under the ESRD PPS.

We note that in the analysis of the 2010 ESRD facility elections and in our computation of the revised transition budget-neutrality adjustment using actual facility elections that we are finalizing in this interim final rule with comment, we did not change the methodology that was described in the CY 2011 ESRD PPS proposed rule (75 FR 49944 through 49947) published on September 29, 2009, and finalized in the CY 2011 ESRD PPS final rule (75 FR 49030 through 49214) for determining the revision to the transition budget-neutrality adjustment that will apply to renal dialysis services furnished on April 1, 2011 through December 31, 2011; rather, we are merely changing the number of ESRD facilities that elected to opt out of the transition that was used in the transition budget-neutrality calculation to reflect the actual rather than projected elections. All other provisions finalized in the CY 2011 ESRD PPS final rule remain unchanged.

III. Waiver of Notice of Proposed Rulemaking and the 30-Day Delay in the Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** in accordance with 5 U.S.C. section 553(b) of the Administrative Procedure Act (APA) and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

In addition, we ordinarily provide a 30-day delay in the effective date of the provisions of an interim final rule with comment. Section 553(d) of the APA (5 U.S.C. section 553(d)) ordinarily requires a 30-day delay in the effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the finding and its reasons in the rule issued. In addition, similar notice-and-comment procedures and a 30-day delay in effective date are required, but can be waived under section 1871 of the Act.

We find good cause that it is unnecessary to undertake notice-and-comment rulemaking to revise the ESRD transition budget-neutrality adjustment by updating estimated figures with actual figures, because we are not changing our underlying methodology for computing or applying the transition budget-neutrality adjustment. The numbers we are updating pertain to elections made by ESRD facilities with regard to participation in the transition. Because we are not attempting to further project how ESRD facilities would behave and are instead using the actual number of the facilities that opted out of the transition, we find notice and the opportunity for public comment unnecessary.

In addition, we also find good cause to waive these procedures with regard to revising the transition budget-neutrality adjustment because it would be contrary to the public interest to maintain the adjustment finalized in the CY 2011 ESRD PPS final rule for the remainder of CY 2011. In particular, we believe that delaying the revision of the transition budget-neutrality adjustment until the CY 2012 rulemaking in order to allow ESRD facilities an opportunity to comment on the revised adjustment that converts a 3.1 percent payment reduction to zero percent payment adjustment, could further decrease renal dialysis services to a vulnerable population that relies on these services to maintain their lives. For example, stakeholders have informed us that as a result of the 3.1 percent transition budget-neutrality adjustment reduction based on CMS' estimation of the ESRD facilities that would elect to receive full payment under the ESRD PPS, they will have difficulty recruiting and retaining staff, staff to patient ratios could decrease, and services could decrease due to decreases in staff and supplies. Therefore, we believe that delaying this revision could result in difficulties in access of care. We believe that revising the transition budget-neutrality adjustment in the way we discussed above and applying it without delay will mitigate these concerns and difficulties, and therefore, we find good cause to waive notice and comment rulemaking.

Also, for the reasons above, we believe that it is unnecessary and it is contrary to the public interest to delay the application of the revised transition budget-neutrality adjustment factor in order to provide for the required 30-day delay in the effective date of this interim final rule with comment. Delaying the effective date for an additional 30 days would further delay revising the adjustment (and therefore, the underestimation of how ESRD facilities would elect to receive payment under the ESRD PPS) and would continue to place a financial burden on ESRD facilities.

Therefore, for the reasons stated above, we believe there is good cause to waive not only notice-and-comment procedures but also the 30-day delay in the effective date for this interim final rule with comment.

IV. Collection of Information Requirements

This interim final rule with comment does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Statement

We have examined the impact of this interim final rule with comment period as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This is not a significant rule and we have determined that this interim final rule with comment does not have a significant economic impact. Therefore, we have not prepared an RIA.

With regards to the ESRD transition budget-neutrality adjustment, we believe that with a zero percent adjustment we are budget-neutral for payments made for renal dialysis services furnished on April 1, 2011 through December 31, 2011. The zero percent transition budget-neutrality adjustment applied to payments made to ESRD facilities for renal dialysis services furnished on April 1, 2011 through December 31, 2011 will increase payments to providers as compared to payments they would receive with a 3.1 percent transition budget-neutrality adjustment reduction. This will benefit all providers.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. All ESRD facilities will receive a zero percent budget-neutrality adjustment to their payment for renal dialysis services furnished April 1, 2011 through December 31, 2011, instead of a 3.1 percent reduction, including small dialysis facilities. We are not preparing an analysis for the RFA because the Secretary has determined that this interim final rule with comment will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Social Security Act (the Act) requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined this rule does not have a substantial impact on small rural hospitals. Most dialysis facilities are free standing and we have determined that that this interim final rule with comment will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This rule will have no consequential effect on State, local, or Tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services are revising the 3.1 percent transition budget-neutrality adjustment reduction to a zero percent transition budget-neutrality adjustment for renal dialysis services furnished on April 1, 2011 through December 31, 2011.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 18, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: March 29, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–8181 Filed 4–1–11; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–8175]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain

management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.;* unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region I				
New Hampshire:				
Hudson, Town of, Hillsborough County	330092	November 17, 1977, Emerg; January 3, 1979, Reg; April 18, 2011, Susp.	April 18, 2011 ...	April 18, 2011.
Nashua, City of, Hillsborough County ...	330097	February 6, 1975, Emerg; June 15, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Rhode Island:				
Cranston, City of, Providence County ...	445396	September 11, 1970, Emerg; August 27, 1971, Reg; April 18, 2011, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
East Providence, City of, Providence County.	445398	June 5, 1970, Emerg; May 18, 1973, Reg; April 18, 2011, Susp.	.....do	Do.
Johnston, Town of, Providence County	440018	August 1, 1975, Emerg; September 1, 1978, Reg; April 18, 2011, Susp.	.....do	Do.
North Providence, Town of, Providence County.	440020	October 6, 1972, Emerg; December 15, 1977, Reg; April 18, 2011, Susp.	.....do	Do.
Providence, City of, Providence County	445406	September 11, 1970, Emerg; December 11, 1970, Reg; April 18, 2011, Susp.	.....do	Do.
Region IV				
Alabama:				
Randolph County, Unincorporated Areas.	010182	N/A, Emerg; November 5, 2003, Reg; April 18, 2011, Susp.	.....do	Do.
Roanoke, City of, Randolph County	010348	N/A, Emerg; May 3, 1995, Reg; April 18, 2011, Susp.	.....do	Do.
Wadley, Town of, Randolph County	010183	July 15, 1975, Emerg; August 19, 1985, Reg; April 18, 2011, Susp.	.....do	Do.
Wedowee, Town of, Randolph County	010401	N/A, Emerg; October 29, 1998, Reg; April 18, 2011, Susp.	.....do	Do.
Kentucky:				
McLean County, Unincorporated Areas	210153	February 6, 1979, Emerg; February 15, 1991, Reg; April 18, 2011, Susp.	.....do	Do.
Morehead, City of, Rowan County	210204	June 4, 1975, Emerg; July 5, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
Rowan County, Unincorporated Areas ..	210203	May 19, 1975, Emerg; January 19, 1983, Reg; April 18, 2011, Susp.	.....do	Do.
Region V				
Ohio:				
Clyde, City of, Sandusky County	390489	August 14, 1974, Emerg; April 2, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Corning, Village of, Perry County	390440	July 18, 1975, Emerg; September 1, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Crooksville, Village of, Perry County	390441	April 16, 1976, Emerg; March 4, 1988, Reg; April 18, 2011, Susp.	.....do	Do.
Fremont, City of, Sandusky County	390490	June 9, 1975, Emerg; April 18, 2011, Reg; April 18, 2011, Susp.	.....do	Do.
Glenford, Village of, Perry County	390442	August 11, 1978, Emerg; August 2, 1995, Reg; April 18, 2011, Susp.	.....do	Do.
Green Springs, Village of, Sandusky and Seneca Counties.	390492	April 2, 1976, Emerg; August 15, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Hemlock, Village of, Perry County	390708	February 27, 1976, Emerg; August 19, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Lindsey, Village of, Sandusky County ...	390494	June 20, 1975, Emerg; September 1, 1978, Reg; April 18, 2011, Susp.	.....do	Do.
New Boston, Village of, Scioto County	390497	April 17, 1975, Emerg; January 26, 1983, Reg; April 18, 2011, Susp.	.....do	Do.
New Lexington, Village of, Perry County	390443	September 15, 1975, Emerg; September 2, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
New Straitsville, Village of, Perry County.	390709	August 27, 1976, Emerg; April 17, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Perry County, Unincorporated Areas	390778	May 19, 1977, Emerg; September 27, 1991, Reg; April 18, 2011, Susp.	.....do	Do.
Rarden, Village of, Scioto County	390499	February 14, 1977, Emerg; April 17, 1989, Reg; April 18, 2011, Susp.	.....do	Do.
Sandusky County, Unincorporated Areas.	390486	November 13, 1974, Emerg; January 17, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Scioto County, Unincorporated Areas ...	390496	November 20, 1975, Emerg; June 19, 1989, Reg; April 18, 2011, Susp.	.....do	Do.
Woodville, Village of, Sandusky County	390495	November 21, 1975, Emerg; June 18, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Region VI				
Arkansas:				
Crossett, City of, Ashley County	050471	May 29, 1975, Emerg; June 11, 1976, Reg; April 18, 2011, Susp.	.....do	Do.
Hamburg, City of, Ashley County	050005	October 18, 1974, Emerg; April 1, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
Montrose, Town of, Ashley County	050006	October 10, 1974, Emerg; March 15, 1982, Reg; April 18, 2011, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Portland, City of, Ashley County	050008	August 12, 1974, Emerg; March 1, 1988, Reg; April 18, 2011, Susp.	.....do	Do.
Wilmot, City of, Ashley County	050009	January 14, 1975, Emerg; March 15, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
Oklahoma:				
Anadarko, City of, Caddo County	400018	July 3, 1975, Emerg; September 17, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Apache, City of, Caddo County	400019	August 6, 1975, Emerg; May 15, 1985, Reg; April 18, 2011, Susp.	.....do	Do.
Caddo County, Unincorporated Areas	400479	N/A, Emerg; June 12, 1995, Reg; April 18, 2011, Susp.	.....do	Do.
Carnegie, Town of, Caddo County	400021	September 3, 1975, Emerg; July 20, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
Hydro, Town of, Caddo County	400024	January 9, 1987, Emerg; November 1, 1989, Reg; April 18, 2011, Susp.	.....do	Do.
Texas:				
Argyle, Town of, Denton County	480775	November 13, 1980, Emerg; April 16, 1990, Reg; April 18, 2011, Susp.	.....do	Do.
Carrollton, City of, Collin, Dallas, and Denton Counties.	480167	May 27, 1975, Emerg; July 16, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Celina, City of, Collin and Denton Counties.	480133	May 27, 1975, Emerg; November 1, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Coppell, City of, Dallas and Denton Counties.	480170	June 11, 1975, Emerg; August 1, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Copper Canyon, Town of, Denton County.	481508	July 8, 1985, Emerg; September 18, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Corinth, City of, Denton County	481143	March 5, 1975, Emerg; May 15, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Dallas, City of, Collin, Dallas, Denton, Kaufman, and Rockwell Counties.	480171	June 30, 1970, Emerg; March 16, 1983, Reg; April 18, 2011, Susp.	.....do	Do.
Denton County, Unincorporated Areas	480774	July 22, 1975, Emerg; May 4, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Denton, City of, Denton County	480194	February 18, 1972, Emerg; August 1, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Double Oak, Town of, Denton County	481516	May 28, 1982, Emerg; March 4, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Flower Mound, Town of, Denton and Tarrant Counties.	480777	July 31, 1975, Emerg; September 18, 1986, Reg; April 18, 2011, Susp.	.....do	Do.
Fort Worth, City of, Denton and Tarrant Counties.	480596	September 17, 1971, Emerg; June 4, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Frisco, City of, Collin and Denton Counties.	480134	October 7, 1975, Emerg; June 18, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Grapevine, City of, Dallas, Denton, and Tarrant Counties.	480598	October 3, 1974, Emerg; November 17, 1982, Reg; April 18, 2011, Susp.	.....do	Do.
Hackberry, City of, Denton County	481607	December 17, 1987, Emerg; April 2, 1997, Reg; April 18, 2011, Susp.	.....do	Do.
Highland Village, City of, Denton County.	481105	June 16, 1978, Emerg; July 16, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Krum, City of, Denton County	480779	N/A, Emerg; September 23, 1996, Reg; April 18, 2011, Susp.	.....do	Do.
Lakewood Village, Town of, Denton County.	481663	N/A, Emerg; June 11, 2009, Reg; April 18, 2011, Susp.	.....do	Do.
Lewisville, City of, Denton County	480195	January 20, 1975, Emerg; October 18, 1988, Reg; April 18, 2011, Susp.	.....do	Do.
Northlake, Town of, Denton County	480782	April 16, 1990, Emerg; September 30, 1994, Reg; April 18, 2011, Susp.	.....do	Do.
Plano, City of, Collin and Denton Counties.	480140	July 19, 1974, Emerg; January 2, 1980, Reg; April 18, 2011, Susp.	.....do	Do.
Ponder, Town of, Denton County	480784	N/A, Emerg; July 17, 2002, Reg; April 18, 2011, Susp.	.....do	Do.
Sanger, City of, Denton Counties	480786	December 19, 1977, Emerg; April 24, 1979, Reg; April 18, 2011, Susp.	.....do	Do.
Trophy Club, Town of, Denton and Tarrant Counties.	481606	June 12, 1987, Emerg; June 12, 1987, Reg; April 18, 2011, Susp.	.....do	Do.
Westlake, Town of, Denton and Tarrant Counties.	480614	May 24, 1993, Emerg; June 2, 1993, Reg; April 18, 2011, Susp.	.....do	Do.
Region VII				
Missouri:				
Amazonia, City of, Andrew County	290005	July 30, 1999, Emerg; May 1, 2005, Reg; April 18, 2011, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Bolckow, City of, Andrew County	290006	May 17, 1988, Emerg; May 17, 1989, Reg; April 18, 2011, Susp.	.....do	Do.
Country Club, Village of, Andrew County.	290604	September 13, 1976, Emerg; August 24, 1984, Reg; April 18, 2011, Susp.	.....do	Do.
Savannah, City of, Andrew County	290664	December 21, 1978, Emerg; December 21, 1978, Reg; April 18, 2011, Susp.	.....do	Do.

*-do- = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: March 21, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation.

[FR Doc. 2011–8112 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2011–0002]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified BFEs will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below of the modified BFEs for each community listed. These modified BFEs have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this final rule includes the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection.

The modified BFEs are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

These modified BFEs are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Alabama:					
Cullman (FEMA Docket No.: B–1146).	City of Cullman (10–04–0559P).	June 1, 2010; June 8, 2010; *The Cullman Times*.	The Honorable Max A. Towson, Mayor, City of Cullman, 204 2nd Avenue Northeast, Cullman, AL 35055.	October 6, 2010	010209
Houston (FEMA Docket No.: B–1150).	City of Dothan (10–04–5284P).	July 9, 2010; July 16, 2010; *The Dothan Eagle*.	The Honorable Mike Schmitz, Mayor, City of Dothan, P.O. Box 2128, Dothan, AL 36303.	November 15, 2010	010104
Arizona:					
Maricopa (FEMA Docket No.: B–1160).	City of Tempe (10–09–2035P).	September 16, 2010; September 23, 2010; *Arizona Business Gazette*.	The Honorable Hugh Hallman, Mayor, City of Tempe, 31 East 5th Street, Tempe, AZ 85281.	January 21, 2011	040054
Mojave (FEMA Docket No.: B–1160).	Fort Mojave Indian Reservation (10–09–1826P).	September 10, 2010; September 17, 2010; *The Kingman Daily Miner*.	Mr. Timothy Williams, Chairman, Fort Mojave, Indian Reservation, 500 Merriman Avenue, Needles, CA 92363.	August 31, 2010	040133
Navajo (FEMA Docket No.: B–1150).	City of Show Low (09–09–2789P).	July 9, 2010; July 16, 2010; *White Mountain Independent*.	The Honorable Rick Fernau, Mayor, City of Show Low, 550 North 9th Place, Show Low, AZ 85901.	June 28, 2010	040069
Pinal (FEMA Docket No.: B–1160).	Town of Florence (10–09–1057P).	September 24, 2010; October 1, 2010; *Casa Grande Dispatch*.	The Honorable Vikki Kilvinger, Mayor, Town of Florence, 775 North Main Street, Florence, AZ 85132.	January 31, 2011	040084
Yavapai (FEMA Docket No.: B–1160).	Unincorporated areas of Yavapai County (10–09–0965P).	August 27, 2010; September 3, 2010; *The Daily Courier*.	Ms. Carol Springer, Chair, Yavapai County Board of Supervisors, 1015 Fair Street, Prescott, AZ 86305.	January 3, 2011	040093
Yavapai (FEMA Docket No.: B–1150).	Unincorporated areas of Yavapai County (10–09–2672P).	July 9, 2010; July 16, 2010; *The Daily Courier*.	Ms. Carol Springer, Chair, Yavapai County Board of Supervisors, 1015 Fair Street, Prescott, AZ 86305.	November 15, 2010	040093
California:					
Merced (FEMA Docket No.: B–1150).	City of Merced (10–09–0548P).	July 9, 2010; July 16, 2010; *Merced Sun-Star*.	The Honorable Bill Spriggs, Mayor, City of Merced, 678 West 18th Street, Merced, CA 95340.	November 15, 2010	060191
Riverside (FEMA Docket No.: B–1160).	City of Riverside (10–09–0680P).	September 3, 2010; September 10, 2010; *The Press-Enterprise*.	The Honorable Ronald O. Loveridge, Mayor, City of Riverside, 3900 Main Street, Riverside, CA 92522.	August 27, 2010	060260
Sacramento (FEMA Docket No.: B–1150).	City of Sacramento (10–09–0525P).	July 9, 2010; July 16, 2010; *The Sacramento Bee*.	The Honorable Kevin Johnson, Mayor, City of Sacramento, 915 I Street, 5th Floor, Sacramento, CA 95814.	November 15, 2010	060266
San Bernardino (FEMA Docket No.: B–1150).	City of Colton (09–09–2788P).	July 9, 2010; July 16, 2010; *San Bernardino Bulletin*.	The Honorable David Zamora, Mayor, City of Colton, 650 North La Cadena Drive, Colton, CA 92324.	November 15, 2010	060273
San Bernardino (FEMA Docket No.: B–1150).	City of San Bernardino (09–09–2788P).	July 9, 2010; July 16, 2010; *San Bernardino Bulletin*.	The Honorable Patrick J. Morris, Mayor, City of San Bernardino, 300 North D Street, 6th Floor, San Bernardino, CA 92418.	November 15, 2010	060281
Santa Barbara (FEMA Docket No.: B–1150).	Unincorporated areas of Santa Barbara County (10–09–1185P).	July 9, 2010; July 16, 2010; *Santa Barbara News-Press*.	Ms. Joni Gray, Chair, Santa Barbara County Board of Supervisors, 385 North Arrowhead Avenue, 5th Floor, San Bernardino, CA 92415.	June 29, 2010	060331
Santa Clara (FEMA Docket No.: B–1165).	City of Milpitas(10–09–1254P).	October 12, 2010; October 19, 2010; *San Jose Mercury News*.	The Honorable Jose Esteves, Mayor, City of Milpitas, 455 East Calaveras Boulevard, Milpitas, CA 95035.	September 30, 2010	060344
Santa Clara (FEMA Docket No.: B–1150).	Unincorporated areas of Santa Clara County (09–09–2556P).	June 30, 2010; July 7, 2010; *Santa Clara Weekly*.	Mr. Ken Yeager, Chairman, Santa Clara County Board of Supervisors, 70 West Hedding Street, 10th Floor, San Jose, CA 95110.	June 23, 2010	060337
Shasta (FEMA Docket No.: B–1165).	City of Anderson (10–09–1399P).	October 13, 2010; October 20, 2010; *Anderson Valley Post*.	The Honorable Norma Comnick, Mayor, City of Anderson, 1887 Howard Street, Anderson, CA 96007.	September 30, 2010	060359
Shasta (FEMA Docket No.: B–1165).	Unincorporated areas of Shasta County (10–09–1399P).	October 13, 2010; October 20, 2010; *Anderson Valley Post*.	Mr. Les Baugh, Chairman, Shasta County Board of Supervisors, 1450 Court Street, Suite 308B, Redding, CA 96001.	September 30, 2010	060358
Ventura (FEMA Docket No.: B–1150).	City of Simi Valley (10–09–2783P).	July 9, 2010; July 16, 2010; *The Ventura County Star*.	The Honorable Bob Huber, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	November 15, 2010	060421
Colorado:					
Arapahoe (FEMA Docket No.: B–1165).	City of Aurora (10–08–0276P).	September 9, 2010; September 16, 2010; *Aurora Sentinel*.	The Honorable Ed Tauer, Mayor, City of Aurora, 15151 East Alameda Parkway, 5th Floor, Aurora, CO 80012.	January 14, 2011	080002
Douglas (FEMA Docket No.: B–1165).	Town of Parker (10–08–0768P).	October 7, 2010; October 14, 2010; *Douglas County News-Press*.	The Honorable David Casiano, Mayor, Town of Parker, 20120 East Mainstreet, Parker, CO 80138.	October 29, 2010	080310

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Douglas (FEMA Docket No.: B–1165).	Unincorporated areas of Douglas County (10–08–0768P).	October 7, 2010; October 14, 2010; *Douglas County News-Press*.	Ms. Jill E. Reppela, Chair, Douglas County Board of Commissioners, 100 3rd Street, Castle Rock, CO 80104.	October 29, 2010	080049
Gunnison (FEMA Docket No.: B–1146).	City of Gunnison (09–08–0466P).	June 10, 2010; June 17, 2010; *The Gunnison Country Times*.	The Honorable Stu Ferguson, Mayor, City of Gunnison, 201 West Virginia Avenue, Gunnison, CO 81230.	October 15, 2010	080080
Gunnison (FEMA Docket No.: B–1146).	Unincorporated areas of Gunnison County (09–08–0466P).	June 10, 2010; June 17, 2010; *The Gunnison Country Times*.	Mr. Hap Channell, Chairman, Gunnison County Board of Commissioners, 200 East Virginia Avenue, Suite 104, Gunnison, CO 81230.	October 15, 2010	080078
Jefferson (FEMA Docket No.: B–1160).	City of Westminster (10–08–0546P).	September 16, 2010; September 23, 2010; *Westminster Window*.	The Honorable Nancy McNally, Mayor, City of Westminster, 4800 West 92nd Avenue, Westminster, CO 80031.	January 21, 2011	080008
Jefferson (FEMA Docket No.: B–1160).	Unincorporated areas of Jefferson County (10–08–0546P).	September 16, 2010; September 23, 2010; *Westminster Window*.	Ms. Faye Griffin, Chair, Jefferson County Board of Commissioners, 100 Jefferson County Parkway, Golden, CO 80419.	January 21, 2011	080087
Pueblo (FEMA Docket No.: B–1160).	City of Pueblo (10–08–0862P).	September 3, 2010; September 10, 2010; *The Pueblo Chieftain*.	Mr. Ray Aguilera, President, Pueblo City Council, 200 South Main, Pueblo, CO 81003.	January 10, 2011	085077
Weld (FEMA Docket No.: B–1146).	Town of Milliken (09–08–0927P).	June 18, 2010; June 25, 2010; *The Tribune*.	The Honorable L. Jane Lichtfuss, Mayor, Town of Milliken, 1101 Broad Street, Milliken, CO 80543.	October 25, 2010	080187
Weld (FEMA Docket No.: B–1146).	Unincorporated areas of Weld County (09–08–0927P).	June 18, 2010; June 25, 2010; *The Tribune*.	Ms. Barbara Kirkmeyer, Chair, Weld County Board of Commissioners, 915 10th Street, P.O. Box 758, Greeley, CO 80632.	October 25, 2010	080266
Florida:					
Bay (FEMA Docket No.: B–1146).	City of Panama City Beach (10–04–2741P).	June 25, 2010; July 2, 2010; *The News Herald*.	The Honorable Gayle Oberst, Mayor, City of Panama City Beach, 110 South Arnold Road, Panama City Beach, FL 32413.	November 2, 2010	120013
Charlotte (FEMA Docket No.: B–1165).	Unincorporated areas of Charlotte County (10–04–4920P).	October 22, 2010; October 29, 2010; *Charlotte Sun*.	Mr. Bob Starr, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	October 15, 2010	120061
Lake (FEMA Docket No.: B–1160).	City of Clermont (10–04–4299P).	September 3, 2010; September 10, 2010; *Daily Commercial*.	The Honorable Harold Turville, Jr., Mayor, City of Clermont, 685 West Montrose Street, Clermont, FL 34711.	January 10, 2011	120133
Lake (FEMA Docket No.: B–1160).	Unincorporated areas of Lake County (10–04–4299P).	September 3, 2010; September 10, 2010; *Daily Commercial*.	Ms. Jennifer Hill, Chair, Lake County Board of Commissioners, 315 West Main Street, P.O. Box 7800, Tavares, FL 32778.	January 10, 2011	120421
Lee (FEMA Docket No.: B–1156).	City of Cape Coral (10–04–0289P).	August 27, 2010; September 3, 2010; *The Fort Myers News-Press*.	The Honorable John Sullivan, Mayor, City of Cape Coral, P.O. Box 150027, Cape Coral, FL 33915.	January 3, 2011	125095
Lee (FEMA Docket No.: B–1156).	Unincorporated areas of Lee County (10–04–0289P).	August 27, 2010; September 3, 2010; *The Fort Myers News-Press*.	Mr. Frank Mann, Chairman, Lee County Board of Commissioners, P.O. Box 398, Ft. Myers, FL 33902.	January 3, 2011	125124
Miami-Dade (FEMA Docket No.: B–1165).	City of Miami (10–04–5593P).	October 12, 2010; October 19, 2010; *Miami Daily Business Review*.	The Honorable Tomás P. Regalado, Mayor, City of Miami, 3500 Pan American Drive, Miami, FL 33133.	September 30, 2010	120650
Miami-Dade (FEMA Docket No.: B–1150).	City of Sunny Isles Beach (10–04–4666P).	July 9, 2010; July 16, 2010; *Miami Daily Business Review*.	The Honorable Norman S. Edlecup, Mayor, City of Sunny Isles Beach, 18070 Collins Avenue, Sunny Isles Beach, FL 33160.	June 30, 2010	120688
Monroe (FEMA Docket No.: B–1160).	Unincorporated areas of Monroe County (10–04–5258P).	September 17, 2010; September 24, 2010; *Key West Citizen*.	The Honorable Heather Carruthers, Mayor, Monroe County, 1100 Simonton Street, Key West, FL 33040.	September 10, 2010	125129
Orange (FEMA Docket No.: B–1165).	City of Orlando (10–04–0788P).	August 12, 2010; August 19, 2010; *Orlando Weekly*.	The Honorable Buddy Dyer, Mayor, City of Orlando, P.O. Box 4990, Orlando, FL 32802.	December 17, 2010	120186
Orange (FEMA Docket No.: B–1150).	City of Orlando (10–04–0789P).	May 20, 2010; May 27, 2010; *Orlando Weekly*.	The Honorable Buddy Dyer, Mayor, City of Orlando, P.O. Box 4990, Orlando, FL 32802.	September 24, 2010	120186
Polk (FEMA Docket No.: B–1150).	City of Winter Haven (10–04–1058P).	June 4, 2010; June 11, 2010; *News Chief*.	The Honorable Jeff Potter, Mayor, City of Winter Haven, 451 3rd Street Northwest, Winter Haven, FL 33881.	October 12, 2010	120271
Sumter (FEMA Docket No.: B–1150).	Unincorporated areas of Sumter County (10–04–1900P).	July 22, 2010; July 29, 2010; *Sumter County Times*.	Mr. Don Burgess, Chairman, Sumter County Board of Commissioners, 7375 Powell Road, Wildwood, FL 34785.	November 26, 2010	120296
Georgia: Lamar (FEMA Docket No.: B–1172).	City of Barnesville (10–04–1925P).	August 24, 2010; August 31, 2010; *The Herald-Gazette*.	The Honorable Peter Banks, Mayor, City of Barnesville, 109 Forsyth Street, Barnesville, GA 30204.	December 29, 2010	130207

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Hawaii: Maui (FEMA Docket No.: B–1160).	Unincorporated areas of Maui County (10–09–1230P).	September 10, 2010; September 17, 2010; *The Maui News*.	The Honorable Alan M. Arakawa, Mayor, Maui County, 200 South High Street, 9th Floor, Wailuku, HI 96793.	January 18, 2011	150003
Kansas: Johnson (FEMA Docket No.: B–1160).	City of Leawood (10–07–2021P).	September 15, 2010; September 22, 2010; *The Johnson County Sun*.	The Honorable Peggy J. Dunn, Mayor, City of Leawood, 4800 Town Center Drive, Leawood, KS 66211.	January 20, 2011	200167
Kentucky:					
Hopkins (FEMA Docket No.: B–1165).	City of Madisonville (10–04–3232P).	September 10, 2010; September 17, 2010; *The Messenger*.	The Honorable David Jackson, Mayor, City of Madisonville, 67 North Main Street, Madisonville, KY 42431.	January 17, 2011	210115
Hopkins (FEMA Docket No.: B–1165).	Unincorporated areas of Hopkins County (10–04–3232P).	September 10, 2010; September 17, 2010; *The Messenger*.	The Honorable Donald E. Carroll, Judge, Hopkins County, 56 North Main Street, Madisonville, KY 42431.	January 17, 2011	210112
Montana:					
Cascade (FEMA Docket No.: B–1156).	Unincorporated areas of Cascade County (10–08–0429P).	August 10, 2010; August 17, 2010; *Great Falls Tribune*.	Mr. Bill Salina, Chairman, Cascade County Board of Commissioners, 325 2nd Avenue North, Room 111, Great Falls, MT 59401.	December 15, 2010	300008
Yellowstone (FEMA Docket No.: B–1172).	Unincorporated areas of Yellowstone County (09–08–0713P).	June 10, 2010; June 17, 2010; *The Billings Gazette*.	Mr. John Ostlund, Chairman, Yellowstone County Board of Commissioners, P.O Box 35000, Billings, MT 59107.	May 28, 2010	300142
Nevada: Clark (FEMA Docket No.: B–1150).	City of Las Vegas (10–09–1223P).	July 1, 2010; July 8, 2010; *Las Vegas Review-Journal*.	The Honorable Oscar B. Goodman, Mayor, City of Las Vegas, 400 Stewart Avenue, 10th Floor, Las Vegas, NV 89101.	June 22, 2010	325276
North Carolina:					
Pitt (FEMA Docket No.: B–1156).	City of Greenville (10–04–3020P).	August 23, 2010; August 30, 2010; *The Daily Reflector*.	The Honorable Patricia C. Dunn, Mayor, City of Greenville, P.O. Box 7207, Greenville, NC 27835.	December 28, 2010	370191
Pitt (FEMA Docket No.: B–1156).	City of Greenville (10–04–3296P).	August 19, 2010; August 26, 2010; *The Daily Reflector*.	The Honorable Patricia C. Dunn, Mayor, City of Greenville, P.O. Box 7207, Greenville, NC 27835.	August 12, 2010	370191
Richmond (FEMA Docket No.: B–1157).	Unincorporated areas of Richmond County (10–04–5289P).	August 6, 2010; August 13, 2010; *Richmond County Daily Journal*.	Mr. Kenneth R. Robinette, Chairman, Richmond County Board of Commissioners, P.O. Box 504, Rockingham, NC 28380.	July 30, 2010	370348
Wake (FEMA Docket No.: B–1160).	Unincorporated areas of Wake County (09–04–2504P).	September 7, 2010; September 14, 2010; *The News & Observer*.	Mr. David Cooke, Wake County Manager, P.O. Box 550, Raleigh, NC 27602.	January 12, 2011	370368
Wake (FEMA Docket No.: B–1156).	Unincorporated areas of Wake County (09–04–7036P).	July 29, 2010; August 5, 2010; *The News & Observer*.	Mr. David Cooke, Wake County Manager, P.O. Box 550, Raleigh, NC 27602.	December 3, 2010	370368
South Carolina:					
Richland (FEMA Docket No.: B–1146).	Unincorporated areas of Richland County (09–04–2521P).	May 28, 2010; June 4, 2010; *The Columbia Star*.	Mr. Paul Livingston, Chairman, Richland County Council, 2020 Hampton Street, 2nd Floor, Columbia, SC 29202.	October 4, 2010	450170
South Dakota: Lincoln (FEMA Docket No.: B–1156)	Unincorporated areas of Lincoln County (10–08–0327P).	August 19, 2010; August 26, 2010; *Lennox Independent*.	Mr. Jim Schmidt, Chairman, Lincoln County Board of Commissioners, 104 North Main Street, Canton, SD 57013.	December 24, 2010	460277
Tennessee:					
Knox (FEMA Docket No.: B–1150).	Unincorporated areas of Knox County (10–04–1555P).	July 9, 2010; July 16, 2010; *Knoxville News-Sentinel*.	The Honorable Tim Burchett, Mayor, Knox County, 400 Main Street, Suite 615, Knoxville, TN 37902.	June 30, 2010	475433
Shelby (FEMA Docket No.: B–1150).	Town of Collierville (10–04–1188P).	June 24, 2010; July 1, 2010; *The Collierville Herald*.	The Honorable Stan Joyner, Jr., Mayor, Town of Collierville, 500 Poplar View Parkway, Collierville, TN 38017.	June 17, 2010	470263
Utah:					
Washington (FEMA Docket No.: B–1150).	City of Washington (10–08–0519P).	July 9, 2010; July 16, 2010; *The Spectrum*.	The Honorable Kenneth Neilson, Mayor, City of Washington, 111 North 100 East Washington, Washington, UT 84780.	November 15, 2010	490182
Weber (FEMA Docket No.: B–1160).	City of Ogden (10–08–0035P).	September 3, 2010; September 10, 2010; *Standard Examiner*.	The Honorable Matthew R. Godfrey, Mayor, City of Ogden, 2549 Washington Boulevard, Suite 910, Ogden, UT 84401.	January 10, 2011	490189
Wisconsin: Dane (FEMA Docket No.: B–1150).	City of Madison (10–05–3876P).	July 9, 2010; July 16, 2010; *Wisconsin State Journal*.	The Honorable Dave Cieslewicz, Mayor, City of Madison, 210 Martin Luther King, Jr. Boulevard, City-County Building, Room 403, Madison, WI 53703.	July 30, 2010	550083

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 7, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–8117 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 09–52; FCC 11–28]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopted a number of procedures, procedural changes, and clarifications of existing rules and procedures, designed to promote ownership and programming diversity, especially by Native American tribes, and to promote the initiation and retention of radio service in and to smaller communities and rural areas.

DATES: Effective May 6, 2011, except for the amendment to § 73.7000, which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Peter Doyle or Thomas Nessinger, Federal Communications Commission, Media Bureau, Audio Division, 445 12th Street, SW., Room 2–B450, Washington, DC 20445.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418–2700 or *Peter.Doyle@fcc.gov;* Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418–2700 or *Thomas.Nessinger@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Second Report and Order and First Order on Reconsideration (Second R&O), FCC 11–28, adopted and released March 3, 2011. The full text of the Second R&O is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Paperwork Reduction Act of 1995 Analysis

This Second R&O adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA) (Pub. L. 104–13, 109 Stat 163 (1995) (codified in 44 U.S.C. 3501–3520)). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

Synopsis of Order

1. In the Second R&O, the Commission addressed one of the issues set forth in the Further Notice of Proposed Rule Making (FNPRM) that accompanied the First Report and Order in this proceeding (75 FR 9797, March 4, 2010, FCC 10–24, rel. Feb. 23, 2010) (First R&O), and additionally addressed those issues set forth in the Notice of Proposed Rule Making in this proceeding, 24 FCC Rcd 5239 (2009) (Rural NPRM) that were not addressed in the First R&O. It set forth a waiver standard for Native American Tribes and Alaska Native Villages (Tribes) seeking to avail themselves of the Tribal Priority adopted in the First R&O, but that do not have Tribal Lands as defined by the Commission. The Tribal Priority as adopted requires that a Tribe or Tribal-owned entity proposing a new radio station qualifying for the Tribal Priority must show that 50 percent or more of the proposed station's signal covers Tribal Lands. Not all Tribes possess reservations or other Tribal Lands, however. Because the record was not fully developed on this issue, rather than set forth an alternate coverage standard, the Commission stated it would be receptive to requests to waive the requirement of Tribal Land coverage, setting forth various factors that would be considered probative in a determination of the functional equivalent of Tribal Lands. The Second R&O also adopted some of the changes proposed in the Rural NPRM in the Commission's procedures for awarding new channel allotments and assignments under section 307(b) of the Communications Act, 47 U.S.C. 307(b); adopted a rule prohibiting FM translator applicants from proposing to change channels from the non-reserved to reserved bands and vice-versa; and codified existing standards for determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window.

2. In the FNPRM, the Commission noted the concern of some commenters that the Tribal Priority, as originally adopted in the First R&O, would benefit only those Tribes possessing Tribal Lands, as the Commission defined that term in the First R&O. The requirement that at least 50 percent of the proposed station's principal community contour cover Tribal Lands was designed to ensure that a facility qualifying for the Tribal Priority is primarily used for its intended purpose, namely, to assist Tribes in their mission of promulgating Tribal language and culture, promoting Tribal self-governance, and serving the specific needs of Tribal communities. Commenters noted, however, that while there are 563 Tribes in the United States, there are only 312 reservations, with some Tribes occupying more than one reservation. Thus, not all Tribes could avail themselves of the Tribal Priority as adopted.

3. The record on this issue was not as well-developed as the Commission anticipated. Commenters noted that the situations of different Tribes are extremely varied and are likely to require different showings, necessitating flexible standards. The Commission thus decided against adopting a specific standard for defining a functional equivalent of Tribal Lands. Rather than modify the Tribal Priority at this time,

the Commission encouraged Tribes lacking Tribal Lands to seek waiver in appropriate cases of the tribal coverage requirements of the Tribal Priority. Because, as noted in the First R&O, approximately two-thirds of all Tribal citizens do not live on Tribal Lands, the Commission recognized the potential need for the availability of a Tribal Priority in such circumstances, and will accordingly be receptive to waiver requests that demonstrate waiver would serve the goals of the Tribal Priority—to enable the Tribe to provide radio service uniquely devoted to the needs, language, and culture of the Tribal community—because a majority of the proposed service would cover the functional equivalent of Tribal Lands.

4. A waiver of the tribal coverage provisions of the Tribal Priority should be formally requested by an official of a federally recognized Tribe who has proper jurisdiction and is empowered to speak for the Tribe. Beyond that requirement, as is the case with any waiver request, an applicant seeking to establish eligibility for the Tribal Priority may submit any evidence probative of a connection between a defined community or area and the Tribe itself. Such a waiver showing should explain that the communities or areas associated with the Tribe do not fit the definition of Tribal Lands set forth in the First R&O. A waiver showing should also detail how a proposed service to the area would aid the Tribe in serving the needs and interests of its citizens in that community, and thus further the goals of the Tribal Priority. Factors probative of a geographically identifiable Tribal population grouping might include, for example, evidence of an area to which the Tribe delivers services to its citizens, or evidence of an area to which the federal government delivers services to Tribal members, for example, federal service areas used by the Indian Health Service, Department of Energy, or Environmental Protection Agency. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development. Evidence that a Tribal government has a defined seat, such as a headquarters or office, in combination with evidence that Tribal citizens live and/or are served by the Tribal government in the immediate environs of such a governmental seat, would also be probative of a nexus between that community and the Tribe. Further, absent a physical seat of Tribal government, a Tribe might, for example, provide evidence that a majority of members of the Tribal council or board live within a certain radius of the proposed station (similar to 47 CFR 73.7000, under which an applicant for a noncommercial educational radio station may qualify for a "local applicant" credit by establishing that it is physically headquartered, has a campus, or has 75 percent of its governing board living within 25 miles of the reference coordinates of the proposed community of license). An applicant might also provide a showing under the standard enunciated in 25 CFR 83.7(b)(2)(i), that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Additionally, tribes might provide other indicia of community, such as Tribal institutions (e.g., hospitals or clinics, museums, businesses) or activities (e.g., conferences, festivals, fairs).

5. Regardless of the waiver showing provided, an applicant seeking to take advantage of the Tribal Priority must set forth a defined area for the functional "Tribal Lands" to be covered, and the community on those lands that would be considered the community of license. This showing is necessary to duplicate, as closely as possible, the Tribal Land coverage provisions of the Tribal Priority, and also to make determinations such as community coverage. Additionally, the showing should demonstrate the predominantly Tribal character of the coverage area sought, and that such area does not include regions so non-Native in their character or location as to defeat the shared purposes of both the Commission and the Tribes, namely, to enable Tribes to serve their citizens, to perpetuate Tribal culture, and to promote self-government. The Commission found that the use of waivers to establish the equivalent of Tribal Lands will serve the public interest by affording maximum flexibility to Tribes in non-landed situations, particularly given that the circumstances of such Tribes are so varied. In evaluating such waiver requests, the Commission noted that it will delineate the "Tribal Lands" equivalent as narrowly as possible, viewing most favorably those proposals that seek facilities narrowly designed, to the extent feasible under technical and geographic constraints, to provide service to Tribal citizens rather than to non-Tribal members living in adjacent areas or communities.

6. In the Rural NPRM, the Commission observed that new allotments for FM channels and, especially, awards for new AM stations were being made based on either (a) dispositive 47 U.S.C. 307(b) (section 307(b)) preferences under Priority (3) of the Commission's allotment priorities, to proponents for first local transmission service, at communities located in or very near large Urbanized Areas, or (b) dispositive preferences under Priority (4), "other public interest matters," based solely upon the differential in raw population totals to be served under the proposal. This has led to a disproportionate number of new FM allotments and AM construction permits being awarded as additional services to already well-served urbanized areas, in some cases at the expense of smaller communities or rural areas that received fewer services. The Commission noted that the vast majority of mutually exclusive groups of applications for new AM stations were being resolved under section 307(b), rather than through competitive bidding, pursuant to 47 U.S.C. 309(j) (section 309(j)). The Commission expressed the same concerns with regard to moves of stations (i.e., changes of community of license) from smaller communities and rural areas toward urbanized areas, because the same section 307(b) criteria are used to compare the applicant's former and new community and/or service areas.

7. Accordingly, the Commission tentatively concluded that it should modify its policies to more equitably distribute radio service among urban and rural areas, and to promote the resolution of mutual exclusivity through competitive bidding where section 307(b) principles do not dictate a preference among communities. First, the Commission tentatively concluded that it should establish a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover 50 percent or more of an urbanized area, was in fact proposing a service to the entire urbanized area, and that accordingly it would not award such an applicant a preference for providing first local transmission service under Priority (3) of the FM allotment priorities to a small community within that area. Second, in the case of applicants for new AM stations, the Commission tentatively concluded that it should change its application of Priority (4)—other public interest matters—and sought comment on alternative proposals in this regard. The alternatives included ceasing treating Priority (4) as a dispositive section 307(b) criterion, or a more narrowly defined application of Priority

(4), under which no dispositive preference would be awarded if the population in 75 percent of the proposed station's principal community contour already receives five or more aural services, and the proposed community of license already has more than five transmission services, except where the applicant can make a successful showing as set forth in the case of *Greenup, Kentucky and Athens, Ohio,* 2 FCC Rcd 4319 (MMB 1987) (Greenup). An applicant whose proposed contour did not meet the five reception/five transmission service criteria would proceed to a modified Priority (4) analysis. The Commission suggested that, as part of this modified analysis, a Greenup showing, involving calculation of a Service Value Index (SVI), which takes into account both population and the number of reception services, could be useful. The Commission tentatively concluded that, in such a situation, it would award a dispositive section 307(b) preference under Priority (4) if the SVI difference was 50 percent or greater. Otherwise, the application would proceed to competitive bidding. Third, the Commission proposed an "underserved listeners" preference, that would be co-equal with Priorities (2) and (3), under which it would grant a section 307(b) preference to an applicant proposing to provide third, fourth, or fifth aural reception service to a substantial portion of its covered population.

8. With regard to proposed community of license change applications, the Commission tentatively concluded that there should be an absolute bar on proposals that would leave populations with no or only one reception service. The Commission also proposed to apply the same Priority (3) standards to community of license changes as it proposed for new FM allotment and AM applications, when determining whether a proposed community change represents a preferential arrangement of allotments. Finally, the Commission sought comment on a number of other proposals: whether to disallow community changes that would remove third, fourth, or fifth reception service to a significant population; whether to bar removal of a second local transmission service at a community; and whether provision of service to underserved listeners should outweigh a proposal of first local transmission service, in both the community change and new station/allotment contexts.

9. Many commenters opposed these changes, arguing that they were unnecessary. They contended that 80 percent of the U.S. population lived in urbanized areas, and that locating radio stations where most people live was the most efficient use of spectrum and of distributing radio service. Some commenters also objected that the Commission's proposed changes would have a disproportionate effect on minorities and radio stations owned by and programming to minorities, as most of their audiences live in urbanized areas. The Commission observed that section 307(b)'s purpose was to ensure that all Americans, whether living in large urbanized areas or small communities or rural areas, had access to a variety of radio services, to the extent that demand exists to provide such service. The limited goal of the Rural NPRM was to provide greater opportunities for those applicants who propose such service with the expectation that it would be viable, to the extent that they are mutually exclusive with applicants proposing yet more service to urbanized areas whose residents already have an abundance of radio listening choices. The Commission further rejected the contention that its proposals would disproportionately affect minority broadcasters and listeners, noting that while most members of minority groups live in urbanized areas, most Americans generally live in such areas, and in roughly the same proportions. The same considerations apply in rural and smaller communities, that also have minority populations that are equally deserving of radio service. The Commission thus stated that the speculative benefit of additional service in urban areas did not outweigh its concern that the current priorities fail to promote new service, or the retention of existing service, at less well-served communities and that the current allocation priorities do not realistically reflect broadcasters' actual economic incentives. The Commission also took into account a commenter's analysis showing that, in many cases, the community of license of a station represented a small percentage of the total population covered by the station, and often was not the largest community served by the station. It concluded that awards of section 307(b) preferences should take into account the totality of a station's service, not merely the community of license designated by the applicant or proponent.

10. The Commission adopted its proposals, in somewhat modified form, noting that the procedural changes would take place in three related, but distinct, contexts: (1) Applications for new AM stations; (2) proposals for new commercial FM allotments; and (3) applications to change the community of license of an existing radio station (in which the moving station's new facilities are compared to its existing facilities under section 307(b), for a determination of whether the new community constitutes a preferential arrangement of allotments).

11. With regard to applications for new AM radio stations, the Commission noted its Congressional mandate to use competitive bidding as the primary means of awarding new service. As a threshold matter, the Commission will restrict the award of dispositive section 307(b) preferences among mutually exclusive AM applications to those situations where there is a significant difference between the proposals. First, with regard to proposals for first local transmission service under Priority (3), it adopted its tentative conclusion that any new AM station proposal for a community located within an urbanized area, that would place a daytime principal community signal over 50 percent or more of an urbanized area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the urbanized area rather than the proposed community. This is the standard the Commission has heretofore used in determining whether an applicant for a new AM station must provide a showing under *Faye and Richard Tuck,* 3 FCC Rcd 5374, 5376 (1988) (*Tuck*). Recognizing the possibility that the majority of a proposed station's daytime principal community contour could cover part of an urbanized area without necessarily triggering the urbanized area service presumption—for example, when the proposed contour covers only 45 percent of an urbanized area, but urbanized area coverage constitutes well over half of the contour—the Commission stated its willingness to entertain challenges, at the appropriate stage of the application or allotment proceeding, detailing the reasons the proposal should nonetheless be treated as one to serve the urbanized area rather than the named community of license. For AM facilities, the determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be limited to a consideration of rule-compliant minor modifications to the proposal, without changing the proposed antenna configuration or site, and spectrum availability as of the close of the filing window.

12. The urbanized area service presumption may be rebutted by a compelling showing (1) That the proposed community is truly independent of the urbanized area, (2)

of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet. The required compelling showing may be based on the existing three-pronged *Tuck* test (*see Tuck,* 3 FCC Rcd at 5378). However, the *Tuck* factors, especially the eight-part test of independence, will be more rigorously scrutinized than has sometimes been the case in the past. For example, an applicant should submit actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents could work if they so chose.[1] Similarly, the record should include actual evidence that the community's residents perceive themselves as separate and distinct from the urbanized area, rather than merely self-serving statements to that effect from town officials or business leaders. Moreover, certain of the *Tuck* independence factors have become increasingly anachronistic, and accordingly will not be given as much weight. For example, as local telephone companies have started to discontinue routine distribution of telephone directories, factor five is less meaningful than it once was. Similarly, with the closing of even major city newspapers, the lack of a local newspaper should not necessarily be fatal to a finding of independence, though it is still a relevant factor. However, the mere existence of a city- or town-posted site on the World Wide Web is not a substitute for evidence of independent media also covering a community, as a means of demonstrating a community's independence from an urbanized area. In addition to demonstrating independence, a compelling showing sufficient to rebut the urbanized area service presumption must also include evidence of the community's need for an outlet for local expression. For example, an applicant may rely on factors such as the community's rate of growth; the existence of substantial local government necessitating coverage; and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area. An applicant will be afforded wide latitude in attempting to overcome the presumption, but a compelling showing will be required.

13. The Commission did not believe it necessary or desirable to eliminate completely an applicant's ability to make its public interest case for additional service at a community under Priority (4), other public interest matters. It nonetheless found that large service population differentials between competing proposals should not suffice, in and of themselves, for a dispositive section 307(b) preference under Priority (4), especially when the proposed new population is already abundantly served. Such a preference often unfairly disadvantages those who would provide additional media voices to those needing them most. The Commission thus adopted, in modified form, the proposal to emphasize underserved populations, that is, those receiving fewer than five aural services, under Priority (4). Accordingly, a new AM applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, as defined in 47 CFR 73.182(d), where the proposed community of license has two or fewer local transmission services, may receive a dispositive section 307(b) preference under Priority (4). For purposes of this analysis, "community of license" will be considered to be the entire urbanized area if the proposed community of license is subject to the urbanized area service presumption.

14. The Commission further adopted the proposal to allow, but not require, new AM applicants not meeting the above-stated 25 percent/two transmission service standard to submit an SVI showing as set forth in *Greenup* (6 FCC Rcd at 1495) in order to receive a dispositive Priority (4) preference. An applicant opting to present a *Greenup* analysis must demonstrate a 30 percent differential in SVI between its proposal and the next-highest ranking proposal before the Commission will award a dispositive section 307(b) preference under Priority (4). The Commission in *Greenup* found an 18.8 percent SVI differential to be dispositive in an FM allotment case. Because, unlike in an FM allotment proceeding, an applicant for a new AM station need not receive a section 307(b) preference, but may proceed to auction, a higher SVI differential should be required in this context. A 30 percent SVI differential is sufficiently high to demonstrate that a proposed community merits a dispositive section 307(b) preference, but is not so low as to undermine section 309(j)'s general preference for awarding new commercial stations primarily through competitive bidding. An applicant receiving a dispositive section 307(b) preference under Priority (4) will, of course, be subject to the prohibition on reducing service set forth in the First R&O (25 FCC Rcd at 1598–99) and codified in 47 CFR 73.3571(k)(i).

15. Except under the circumstances outlined above, dispositive section 307(b) preferences will not be granted under Priority (4). Thus, as is currently the practice, mutually exclusive application groups in which no applicant receives a section 307(b) preference will proceed to competitive bidding. These new procedures will not be applied to pending applications for new AM stations and major modifications to AM facilities filed in the 2004 AM Auction 84 filing window, but will only apply to those applications filed after the Second R&O's release date. This is because the AM Auction 84 applications have been pending for many years, and in most cases the applicants have invested considerable resources in technical studies, settlements and technical resolutions, and section 307(b) showings, thus applying the new procedures to such applications would place undue hardship on the applicants.

16. With regard to proposals for new allotments to be added to the FM Table of Allotments (47 CFR 73.202), although the section 307(b) considerations of fair, efficient, and equitable distribution of new radio service in the non-reserved FM band are much the same as they are in the AM band, the mechanism for evaluating the respective section 307(b) merits of competing allotment proposals is quite different, insofar as competing proposals for new FM allotments cannot simply be sent to auction if no dispositive section 307(b) difference can be found. Accordingly, the standards for awarding section 307(b) preferences cannot be as strict or as limited as those set forth above with regard to dispositive section 307(b) preferences for new AM applications.

17. As regards Priority (3) (first local transmission service) preferences, the Commission adopted the same urbanized area service presumption set forth above. The determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be made based on an applicant's certification that there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated pursuant to a minor modification application to serve 50 percent or more

[1] *See Lincoln and Sherman, Illinois,* Memorandum Opinion and Order, 23 FCC Rcd 15835, 15842–43 (2008) (Commissioners Copps and Adelstein, jointly dissenting); *Evergreen, Alabama and Shalimar, Florida,* Memorandum Opinion and Order, 23 FCC Rcd 15846, 15852–53 (2008) (Commissioners Copps and Adelstein jointly dissenting).

of an Urbanized Area.[2] If a proposal does not qualify for a first local transmission service preference, the Commission will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), as is the case now. However, the Commission directed the staff to accord greater weight to service to underserved populations than to the differences in raw population totals, concluding that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities. Because it is impossible to anticipate every possible competing allotment proposal, the Commission did not eliminate outright any factor, including reception population, for determining dispositive section 307(b) preferences in the FM allotment context. For now, the Commission limited its direction to a determination that, of all considerations in making new FM allotments, raw reception population totals—of whatever magnitude—should receive less weight than other legitimate service-based considerations. These procedures shall not apply to any non-final FM allotment proceeding, including "hybrid" coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit. Although it is well settled that the Commission may apply modified rules to applications that are pending at the time of rule modification, substantial equitable considerations apply to these categories of proceedings. Affected licensees and permittees may have expended considerable sums or entered into agreements following such actions. Moreover, filings and licensing actions subsequent to a license modification could impose significant burdens on parties forced to take steps to protect formerly licensed facilities. The revised procedures will apply, however, to all pending petitions to amend the FM Table of Allotments, and to all other open FM allotment proceedings and non-final FM allotment orders.

18. Licensees and permittees seeking to change community of license differ from applicants in the above two categories insofar as, for section 307(b) purposes, they do not face comparative analysis with respect to communities proposed by competing applicants. Rather, the section 307(b) comparison is between the applicant's present community and the community to which it seeks to relocate (*see* 47 CFR 73.3571(j)(2) and 73.3573(g)(2)). The applicant must demonstrate that the facility at the new community represents a preferential arrangement of allotments (FM) or assignments (AM) over the current facility. In such cases, the Commission adopted certain changes designed to require more specificity on the part of licensees and permittees regarding the actual effects of the proposed moves, while still affording flexibility to propose truly favorable arrangements of radio allotments and assignments. First, it adopted the urbanized area service presumption outlined above, which may be rebutted in the same manner as set forth herein, and will be subject to the same determinations described above as to whether the proposed facility "could be modified" to cover over 50 percent of an urbanized area. Additionally, applicants not qualifying for Priority (3) preferences under this standard will still be able to make a Priority (4) showing that will require them to provide a more detailed explanation of the claimed public interest benefits of the proposed move.

19. With regard to Priority (4) claims, the Commission sought, again, to limit the presumption that raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under section 307(b). It imposed an absolute bar to any facility modification that would create white or gray area. The Commission also stated it would strongly disfavor any change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour (noting that loss of service to underserved listeners offset by proposed new service to a greater number of underserved listeners would not constitute a "net loss of service" to such listeners, and would be viewed more favorably). Applicants would also be required not only to set forth the size of the populations gaining and losing service under the proposal, but also the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised section 307(b) priorities. For example, an applicant will not only be required to detail that it is providing 500,000 listeners with a 21st reception service, and removing the sixth reception service from 50,000 listeners, but also to provide a rationale to explain how this service change represents a preferential arrangement of allotments or assignments.[3] Additionally, the Commission will strongly disfavor any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. The Commission retains its presumption against removal of sole transmission service. Finally, as is and has always been the case, under Priority (4) applicants may offer any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community, a drop in population justifying the removal of transmission service at the old community, population growth in areas surrounding the proposed new community that can best be met by a centrally located service, or any other changes in circumstance believed relevant to Commission consideration. These procedures shall apply to any applications to change community of license that are pending as of the release date of the Second R&O.

20. The Commission stated its intent that the changes introduced here will, first, cause applicants to give more

[2] Specifically, a proponent would need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, proponents will be required to consider all existing registered towers in the Commission's Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, all applicants and allotment proponents must consider widely-used techniques, such as directional antennas and contour protection, when certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area. While this is not a conclusive test, it is one that the Commission will treat as establishing a rebuttable presumption of an allotment that could not be modified to serve both the majority of an Urbanized Area and the community of license.

[3] Such explanation need not be a granular accounting of the reception service provided each individual or population pocket in the proposed contour. A detailed summary should suffice, for example, to point out that 50,000 people would receive 20 or more services, 10,000 would receive between 15 and 20 services, 7,000 would receive between 10 and 15 services, etc. The showing should, however, state what service the modified facility would represent to the majority of the population gaining new service, e.g., the 16th service to 58 percent of the population, and the corresponding service that the majority of the population losing service would lose, e.g., 60 percent of the current coverage population would lose the ninth reception service. New service or service losses to underserved listeners should be detailed.

consideration to the effects of proposed station moves on listeners, both those they would serve at a new community and those from whom they would remove existing service; and second, that a fuller explanation of the claimed benefits of a station move will introduce greater transparency into the community change procedure, both to aid in decision-making and for the benefit of affected listeners. The Commission expects that these procedures will help to achieve a balance between distribution of radio service to the largest populations, on the one hand, and distribution of new service to those most in need of it on the other.

21. In the Rural NPRM, the Commission noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221–300) to modify their authorizations to "hop" into the reserved band (channels 201–220). *See* 47 CFR 74.1233. By making these modifications, translator stations are able to operate under the less restrictive NCE rules, which permit the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band. The filing of such band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, and potentially precludes the use of those frequencies in future reserved band filing windows for FM translators. The integrity of the window filing process is critical to provide equal opportunity to frequencies for translator applicants across the country. The Commission therefore tentatively concluded that § 74.1233 of the Commission's rules should be modified to require that applications to move into the reserved band from the non-reserved band, or to move into the non-reserved band from the reserved band, may only be filed by FM translator stations that have filed license applications or are licensed, and that have been operating for at least two years. In addition to seeking comment on the proposal, the Commission sought comment on the duration of the proposed holding period.

22. Some commenters opposed the proposal, questioning the extent of the band-hopping problem, or suggesting instead that individual FM translator permits and licenses contain conditions prohibiting band-hopping. Another commenter supported the prohibition but suggested an exception for translator operators who could show that they had been displaced and the only frequencies available were in the other band. The Commission found over 160 translator applicants in the last non-reserved band filing window had "hopped" to the reserved band and were operating there. The Commission concluded that adoption of the prohibition proposed in the Rural NPRM, in conjunction with the two-year holding period, will best preserve the fairness of the window filing process while providing flexibility for translators that have operated long enough to have an established listener base. Even though the Commission did not codify a rule that would permit the filing of non-minor-change displacement proposals, it directed Commission staff to continue to consider such waiver requests on a case-by-case basis.

23. As the Commission observed in the Rural NPRM, the first and most fundamental step in the AM auction process is a staff determination as to which applications filed during the relevant filing window are mutually exclusive with one another. In the context of an AM auction, mutual exclusivity is determined by an evaluation of engineering data provided in conjunction with the FCC Form 175. Applicants must specify a frequency on which they seek to operate in accordance with the Commission's existing interference standards.

24. It is well established that mutual exclusivity arises when grant of one application would preclude grant of a second, and the interference rules and protection requirements are the technical standards used to determine mutual exclusivity. Public notices released prior to an AM auction specifically note that the staff applies 47 CFR 73.37, 73.182, and 73.183(b)(1), among other standards, to make mutual exclusivity determinations. In the AM service, mutual exclusivity may occur during three operational timeframes: daytime, critical hours, and nighttime. There are three classes of nighttime interference contributors: (a) A high-level interferer, defined as a station that contributes to the fifty percent exclusion root-sum-square (RSS) nighttime limit of another station; (b) a mid-level interferer, defined as a station that enters the twenty-five but not fifty percent RSS of another station; and (c) a low-level interferer, defined as a station that does not enter into the twenty-five percent RSS of another station. To combat the extreme levels of interference that have led to a deterioration of the AM service, the Commission established a strict new standard, stating that a new station may be authorized only if it qualifies as a low interferer with respect to any other station on the same or first adjacent channel. The nighttime protection requirements are codified in 47 CFR 73.182. For AM auction window applications, the staff analyzes the daytime, critical hours, and nighttime facilities specified in each application against every other application filed in the window. Two AM applications filed during the same filing window are considered mutually exclusive if either fails to fully protect the other as required by the Commission's technical rules.

25. The Commission tentatively concluded, in the Rural NPRM, to codify its decision in *Nelson Enterprises, Inc.,* 18 FCC Rcd 3414 (2003), in which the Commission concluded that the staff properly applied 47 CFR 73.182(k) interference standards to establish mutual exclusivity between window-filed applications, i.e., determined that the rule limits the interference a new station application may cause to another application filed in the same AM window. Because the rule establishes that the RSS methodology should be applied for the calculation of nighttime interference for non-coverage purposes, the Commission concluded that the staff properly relied on the rule for making mutual exclusivity determinations, and found it proper to apply 47 CFR 73.182 in considering the effect of nighttime interference caused and received by simultaneously filed AM auction filing window proposals, as well as existing stations.

26. In the Rural NPRM, the Commission also tentatively concluded that it should modify § 73.3571 of the rules, by explicitly providing that the interference standards in § 73.182(k) of the Commission's rules apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. That is, two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the twenty-five percent exclusion RSS nighttime limit of the other. Two parties filed comments, arguing that these standards would reduce the number of new AM construction permits awarded in filing windows. The Commission disagreed, noting that several mechanisms in AM new application processing, including technical resolutions and settlements, could lead to multiple grants, that the interference rules and protection requirements are the technical standards used for establishing mutual exclusivity, and that the criteria applied by the staff

were fully consistent with the strict interference limitations established by the Commission. The Commission thus concluded that codifying the applicability of 47 CFR 73.182(k) AM nighttime interference standards to mutually exclusive AM auction applications promotes the integrity of the AM service, and is thus in the public interest.

27. *First Order on Reconsideration.* In the First R&O, the Commission adopted a Tribal Priority, giving federally recognized Tribes and majority Tribal-owned entities a section 307(b) priority for proposing service, 50 percent or more of which would cover "Tribal Lands," as defined in the First R&O, as long as the proposals met certain conditions. Two parties called attention to perceived difficulties with the implementation of the Tribal Priority that might inadvertently limit the ability of qualifying entities to receive the Tribal Priority. One party argued that Alaska Native Regional Corporations, created pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA) should be allowed to claim the Tribal Priority. The Commission found, however, that such corporations are not sovereign or quasi-sovereign entities, as are Tribes, and because the Tribal Priority was based on the government-to-government relationship between the United States Government and Tribes, the Commission could not extend the Tribal Priority to such corporations.

28. Native Public Media and the National Congress of American Indians (NPM/NCAI) jointly observed that some Tribes have Tribal Lands that are either too small to comprise 50 percent or more of a station's principal community contour, or are so irregularly shaped that 50 percent or more of a station's contour could not cover Tribal Lands. They contended that such Tribes could not qualify for the Tribal Priority under the coverage provisions set forth in the First R&O, therefore an alternative coverage provision was needed. The Commission agreed that an alternative was needed, but sought to craft a standard that would include such Tribes while ensuring that the Tribal Priority would be used for its intended purpose, that is, for Tribes to provide radio service to their members, rather than to primarily non-Tribal areas. Accordingly, a Tribe may claim the Tribal Priority if (a) at least 50 percent of the area within the proposed facility's principal community contour is over that Tribe's Tribal Lands, as set forth in the First R&O, or (b) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. The first and second requirements of the alternative test ensure that the proposed station will serve substantial Tribal Lands and populations. The Commission found that service to fewer than 2,000 people should generally be considered insufficient to claim the Tribal Priority.[4] However, a situation could arise where a proposal meets these requirements but the population of the applicant's Tribal Lands represents a relatively small percentage of the total population residing in the coverage area, and in this circumstance a Tribal Priority might potentially deprive the majority, non-tribal population of needed local service. To address this concern, the Tribal Priority cannot be claimed if the combined population on Tribal Lands within the proposed station's service contour constitutes less than 50 percent of the total covered population. This requirement is designed to avoid applying the Tribal Priority to regions and populations that are largely non-Native in character or location, in keeping with the priority's goals. The Commission will entertain waiver requests from applicants proposing Tribal service to service areas in which the population on Tribal Lands is less than 50 percent of the covered population, in appropriate situations.[5] Finally, the limitation that the applicant will not cover more than 50 percent of the Tribal Lands of a non-applicant Tribe will avoid exhausting the remaining spectrum in areas where many Tribes have Tribal Lands in close proximity, before all qualifying Tribes have an opportunity to apply. This limitation will also encourage different Tribes whose lands are in close proximity to each other to form consortia to establish radio service serving the various Tribes' needs, as well as share the expense of starting new radio service.

[4] A tribal proposal that covers 50% of Tribal Lands but does not meet the 2,000 population threshold may be able to make a persuasive waiver showing if it serves Tribal Lands that are isolated and does not propose service to a significant non-Tribal population.

[5] For example, if all the tribes in a densely populated area were to form a consortium to provide service covering all of their Tribal Lands, and the collective population still does not constitute 50 percent of the total covered population, the Commission would be receptive to a showing that the proposed facility is designed to minimize non-Tribal coverage while still providing needed service to Tribal Lands. The Commission would also consider other factors, such as: the abundance of non-Tribal radio service in the area; the absence of Tribal radio service in the area; and the absence of other Tribal-owned or Tribal-oriented media of mass communications in the area, or a showing that other such Tribal-directed media are inadequate to serve the needs of Tribal communities.

Final Regulatory Flexibility Analysis

29. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601–612, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Rural NPRM. The Commission sought written public comment on the proposals in the Rural NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order

30. The Second R&O adopted rule and procedural changes to codify or clarify certain allotment, assignment, auction, and technical procedures. In the Second R&O, the Commission also codified a prohibition against "band hopping" FM translator station applications, and codified standards determining nighttime AM mutual exclusivity among window-filed applications for new AM broadcast stations. In the Second R&O, the Commission also addressed issues raised in the FNPRM released with the First R&O. The Tribal Priority, adopted by the Commission in the First R&O, is available to applicants meeting all of the following eligibility criteria: (1) The applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the Rural NPRM) are covered by the principal community contour of the proposed facility; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the proposed community of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned commercial transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. Although "tribal lands" was given an expansive definition in the First R&O, commenters noted that not all Tribes had reservations or other tribal lands as the

Commission defined that term. Thus, in the FNPRM the Commission sought comment on how the Tribal Priority could be applied to Tribes that lacked tribal lands. Additionally, the Commission sought comment on whether, and how, to establish a bidding credit to assist Tribes seeking to establish commercial radio stations, and competing with non-Tribal applicants for such facilities at auction.

31. After considering the few comments filed in response to the FNPRM, the Commission determined that the record did not support the establishment of a specific coverage standard for Tribes without Tribal Lands. Instead, such Tribes may, through a Tribal official with proper jurisdiction, request waiver of the tribal coverage criterion of the Tribal Priority, by making an appropriate showing of a defined geographic area identified with the Tribe. Among the probative factors in such a showing would be evidence of an area to which the Tribe delivers services to its citizens, or evidence of an area to which the federal government delivers services to Tribal members. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development. Additionally, if a Tribe were able to provide evidence that its Tribal government had a defined seat, such as a headquarters or office, this in combination with evidence that Tribal citizens lived and/or were served by the Tribal government in the immediate environs of such a governmental seat would provide strong evidence of a nexus between that community and the Tribe. Absent a physical location for Tribal government, a Tribe might also, for example, provide evidence that a majority of members of the Tribal council or board lived within a certain radius of a community. The Commission would also accept a showing under the standard enunciated in 25 CFR 83.7(b)(2)(i), that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Other evidence, such as evidence of the existence of Tribal institutions or events in a defined area, would also be considered probative of a geographically identifiable Tribal population grouping. Regardless of the evidence provided, the Tribe must define a reasonable boundary for the "tribal lands" to be covered, and the community on those lands that would be considered the community of license, with an eye toward duplicating as closely as possible the Tribal Land coverage provisions of the Tribal Priority.

32. In the Rural NPRM, the Commission also stated that the procedures and priorities it had been using to allocate radio service had not been completely successful in effecting the fair, efficient, and equitable distribution of radio service mandated by section 307(b) of the Communications Act. Specifically, the Commission noted that current policies had resulted in an inordinate number of new services in large, already well-served urban areas, as well as moves of existing stations from smaller and rural communities into or near to urbanized areas. The Commission further observed that in many cases, the sole determinant in assigning new service was the number of people receiving new service, and that reliance on the differences in populations receiving new service in already abundantly served areas may have an adverse impact on the fair distribution of service in new AM and FM station licensing, and may be inconsistent with statutory and policy goals.

33. In order to address these concerns, the Commission concluded in the Second R&O that it should rectify the policies that it perceived as overwhelmingly favoring proposals in and near urbanized areas at the expense of smaller communities and rural areas. First, the Commission established a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover more than 50 percent of an urbanized area, in fact proposes service to the entire urbanized area, and accordingly will not receive a section 307(b) preference for providing first local transmission service. This urbanized area service presumption may be rebutted by a compelling showing, not only that the proposed community is truly independent of the urbanized area, but also of the community's specific need for an outlet for local expression separate from the urbanized area and the ability of the proposed service to provide that outlet. Additionally, in the case of applicants for new AM stations, the Commission stated that an applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer local transmission services, may receive a dispositive section 307(b) preference under Priority (4). An applicant whose proposed contour does not meet the 25 percent/two transmission service criteria may, but is not required to, provide a Service Value Index showing as set forth in the *Greenup* case. Such a showing, however, must yield a difference in SVI of at least 30 percent over the next-highest ranking proposal in order to receive a dispositive section 307(b) preference under Priority (4) of the assignment priorities. Absent such a showing, no dispositive section 307(b) preference will be awarded, and the competing applications for new AM stations will proceed to competitive bidding.

34. In the case of new FM allotments, before awarding a dispositive section 307(b) preference to an applicant proposing first local service at a community, the Commission will apply the rebuttable urbanized area service presumption as described in the preceding paragraph. If a proposal does not qualify for a first local transmission service preference, the Commission will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), but directs the staff to accord greater weight to service to underserved populations than to the differences in raw population totals. The Commission concluded that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities.

35. As noted above, in the Rural NPRM the Commission expressed concern over the movement of radio stations away from smaller and rural communities and toward urbanized areas. In order to change its community of license, a radio station must show that service at the new community constitutes a preferential arrangement of allotments or assignments compared to service at the current community. Currently, a substantial number of such applicants justify the benefits of such moves by setting forth the greater number of listeners who would receive a new service at the new community of license. The Commission sought to limit the presumption that such raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under section 307(b). The Commission adopted its proposal to prohibit any community of license change that would create white or gray area, that is, leave any area with no reception services or only one reception service. As with proposals for

new AM stations and FM allotments, the Commission will apply the rebuttable urbanized area service presumption as described above to an applicant for a change of community of license that proposed to provide the new community with its first local transmission service. An applicant not qualifying for a first local transmission service preference may then make a showing under Priority (4), other public interest matters. Such a showing, however, will require the applicant to provide a more detailed explanation of the claimed public interest benefits of the proposed move than is currently the case. A Priority (4) showing that reveals a net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour will be strongly disfavored. The Commission will now require applicants not only to set forth the size of the populations gaining and losing service under the proposal, but also to summarize the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised section 307(b) priorities. Additionally, pursuant to the Commission's proposal in the Rural NPRM, it will accord significant weight against any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. Applicants may also offer, as part of a Priority (4) showing, any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community.

36. In the Rural NPRM, the Commission also noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221–300) to modify their authorizations to "hop" into the reserved band (channels 201–220). Such modifications enable translator stations to operate under the less restrictive NCE rules, permitting the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band. The Commission stated that such band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, potentially precludes the use of those frequencies in future reserved band filing windows for FM translators, and diminishes the integrity of the window filing process. The Commission therefore tentatively concluded that 47 CFR 74.1233 should be modified to prohibit this practice. In the Second R&O, the Commission adopted its tentative conclusion, and codified this prohibition.

37. The Commission also tentatively concluded, in the Rural NPRM, that it should modify 47 CFR 73.3571 to codify the Commission's decision in *Nelson Enterprises, Inc.,* 18 FCC Rcd 3414 (2003), by explicitly providing that the AM nighttime interference standards found in 47 CFR 73.182(k) should apply in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. The Commission believed this rule change was needed to promote the strict interference standard that the Commission has determined is necessary to revitalize the AM service. In the Second R&O, the Commission adopted its tentative conclusion, and codified these procedures.

38. The Commission also released, with the Second R&O, a First Order on Reconsideration, dealing with two issues raised by commenters with regard to the Tribal Priority. One of these issues concerned whether to extend the Tribal Priority to corporations established pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. 1601 *et seq.* Such regional corporations are established in the ANCSA statutes and are incorporated under Alaska law. These corporations, however, are not themselves Tribes, and their shares are owned by individual Natives rather than the Tribes themselves. The Commission determined that, because the basis for the Tribal Priority was the government-to-government relationship between the Tribes and the federal government, and because the regional corporations established pursuant to ANCSA are not sovereign or quasi-sovereign entities, the Tribal Priority could not be extended to such corporations.

39. The second issue on reconsideration concerned Tribes with small or irregularly shaped tribal lands. As originally established, the Tribal Priority requires that at least 50 percent of the principal community contour of a proposed station cover tribal lands. A commenter noted that some Tribes had tribal lands that, in total, would not comprise 50 percent of even a small radio station's contour, and moreover that some tribal lands were, for example, strips of land following rivers, that would not fit into the generally circular contours of non-directional radio stations. The Commission adopted a modification of the Tribal Priority: A Tribe may claim the Tribal Priority if (a) at least 50 percent of the proposed facility's principal community contour covers that Tribe's Tribal Lands, as set forth in the First R&O, or (b) the proposed principal community contour (i) covers 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. This is intended to facilitate use of the Tribal Priority by Tribes with small or irregularly shaped lands, while avoiding the problem of certain Tribes claiming the remaining spectrum in certain areas where many Tribes have smaller tribal lands in close proximity before all qualifying Tribes have an opportunity to apply. In such situations, different Tribes, whose lands are in close proximity to each other, might be encouraged to form consortia to establish radio service serving the various Tribes' needs, as well as sharing the expense of starting new radio service. The Commission also determined that Tribes complying with these new criteria might still provide service to very small Tribal populations situated among much larger non-Tribal populations. This is also designed to ensure that the Tribal Priority is used primarily to establish service to Tribal populations and communities, rather than proportionally minimal Tribal populations. The limitations on claiming the Tribal Priority in these situations is subject to waiver requests in appropriate situations (such as proposals covering a number of Tribes, narrowly tailored to minimize non-Tribal coverage, in areas where there is abundant non-Tribal service and no Tribal service).

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

40. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

41. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the

rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

42. The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. The SBA has established a small business size standard for this category, which is: firms having $7 million or less in annual receipts (13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008)). According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on January 13, 2011, 10,820 (97%) of 11,127 commercial radio stations have revenue of $7 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

Description of Projected Reporting, Record Keeping and Other Compliance Requirements

43. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. A question will be modified in FCC Form 340, to reflect the changed tribal coverage provisions for claiming eligibility for the Tribal Priority. These are largely self-identification questions reflecting the applicant's status, although in the case of tribal coverage some geographic analysis may be required, and/or a showing may be needed to establish eligibility for the Tribal Priority in the absence of tribal lands as defined in the First R&O. In certain cases (AM auction filing window applications, FM allotment proceedings, and applications to change community of license), section 307(b) information is already required. In some cases, the procedures set forth in the Second R&O require more stringent analysis of information already requested of such applicants, resulting in little or no increase in burden on those applicants. In other cases, especially with regard to applications to change community of license, applicants may need to perform more analysis than is currently the case, increasing the reporting burden. Also, new showings may be required of certain applicants claiming the Tribal Priority, in order to demonstrate their eligibility for the priority. However, these burdens should be moderate to minimal, and are needed in order to achieve the Commission's statutory mandate of fair, efficient, and equitable distribution of radio service (and, in the case of Tribal Priority claimants, are necessary in order to open up the Tribal Priority to greater numbers of Tribes seeking to establish new radio service). The remaining procedural changes in the Second R&O are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants will continue to be evaluated for mutual exclusivity based on the nighttime interference standards set forth in the *Nelson Enterprises, Inc.* case, and any burden will not be increased merely because those standards are now codified. Likewise, codifying a limitation on FM translator "band hopping" applications may require potential applicants to evaluate whether they are eligible to file, but will not require greater reporting burdens.

Steps Taken To Minimize Significant Impact of Small Entities, and Significant Alternatives Considered

44. 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)).

45. With regard to the proposals in the FNPRM, the Commission did receive and consider two alternative proposals for Tribes without tribal lands wishing to claim the Tribal Priority. The Commission did not adopt either proposal, choosing instead to consider requests for waiver of the tribal coverage criterion of the Tribal Priority. The waiver standard allows requesting parties the flexibility to determine how much or how little information is necessary to overcome the criterion, and thus can be less burdensome than a more rigid standard.

46. In the Rural NPRM, the Commission put forth several alternative proposals for modifications to its section 307(b) evaluation procedures, in an effort to encourage the establishment of new service at smaller and rural communities and prevent stations already serving such communities from moving out. Many of these were ultimately rejected in favor of less burdensome alternatives. For example, the Commission considered not awarding dispositive section 307(b) preferences to AM filing window applicants unless they proposed *bona fide* first transmission service or better, eliminating a Priority (4) "other public interest matters" analysis entirely. After considering comments, the Commission decided that applicants should be afforded the opportunity to demonstrate that they would provide service to underserved populations, and thus that new service at the proposed community fulfilled the objectives underlying section 307(b). The Commission also proposed to require a *Greenup* Service Value Index showing but, due to the expense of such showings, determined that such a showing should be optional but not required. Certain other alternatives, proposed as high priorities or mandatory showings in the *Rural NPRM,* were instead included in Priority (4), other public interest matters or were otherwise downgraded in the *Second R&O.* For example, the Commission did not, as proposed, establish a priority for underserved listeners (those who would receive third, fourth, and fifth service), but rather indicated that it would strongly favor such showings under Priority (4); moreover, the Commission did not adopt the proposal to bar absolutely community of license changes that would remove service to underserved listeners, although it indicated it would strongly disfavor such moves. Similarly, the Commission did not adopt a proposal to bar removal of second local transmission service at a community,

stating instead that such removals would weigh heavily against such moves in communities of over 7,500 population. These modifications of the Rural NPRM proposals were made based upon comments filed by broadcasters, many of whom are small businesses, and are designed to accommodate their concerns while still rectifying the problems identified by the Commission in making its Rural NPRM proposals. The Commission thus determined that the procedural changes, as adopted, represent the least burdensome means of achieving the stated policy goals.

47. With regard to the proposed rule banning translator "band hopping" applications, the Commission did consider commenter's proposals but decided to adopt the rule as proposed. The alternatives proposed and considered did not, in the Commission's view, fully address the basic unfairness inherent in allowing certain translator permittees and licensees to change frequencies in order to take advantage of different operating rules in another frequency band. Because this practice gives an unfair advantage to a small subset of translator operators, the Commission believed the proposed rule was necessary to make the operating rules uniform for all such operators.

48. The proposed rule applying AM nighttime mutual exclusivity standards to mutually exclusive AM filing window applications merely codifies current procedure established in Commission precedent, and presents no change or new burden on applicants requiring consideration of less burdensome alternatives. The Commission did propose, in the Rural NPRM, to codify certain guidelines for submitting contours using alternate prediction methods. However, in part because commenters identified certain technical difficulties and burdens associated with the proposed guidelines, the Commission declined to adopt the proposal.

49. Finally, the Commission granted on reconsideration a proposal for an alternative tribal coverage provision of the Tribal Priority. As discussed above, Tribes with small tribal lands in some cases could not comply with the Tribal Priority condition that 50 percent or more of the proposed principal community contour cover those tribal lands. Only one proposal was submitted to rectify this problem. While the Commission adopted this proposal, it modified it to provide that the Tribal Priority would not be afforded an applicant who covered more than 50 percent of another, non-applicant Tribe's tribal land. The Commission made this modification to avoid a situation in which Tribes with tribal lands in close proximity raced to be the first to claim limited spectrum in an area. Likewise, on its own motion the Commission determined that proposed service to small Tribal Lands of less than 2,000 population would not be considered significant enough to qualify for the Tribal Priority, and that the Tribal population covered by the proposal is at least 50 percent of the total covered population. This is to avoid the situation in which a relatively small Tribe would gain a priority for service to a potentially much larger non-Tribal population. Thus, while other alternatives were not presented, the Commission considered the problem and arrived at its own modifications in order to avoid potential conflicts among qualified Tribal applicants, and in order to avoid unfairness to non-Tribal applicants at the expense of small Tribes, who nonetheless retain the ability to form consortia to establish new radio service and qualify for the Tribal Priority.

Report to Congress

50. The Commission will send a copy of the Second R&O, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801(a)(1)(A)). In addition, the Commission will send a copy of the Second R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second R&O, First Order on Reconsideration, and FRFA (or summaries thereof) will also be published in the **Federal Register** (*See* 5 U.S.C. 604(b)).

Ordering Clauses

51. Accordingly, *it is ordered,* pursuant to the authority contained in sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j), that this Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making *is adopted.*

52. *It is further ordered* that, pursuant to the authority found in sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's rules are hereby amended as set forth herein.

53. *It is further ordered* that the rules adopted herein will become effective May 6, 2011, except for Section 73.7000, which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective date.

List of Subjects

47 CFR Part 73

Radio broadcast services.

47 CFR Part 74

Experimental radio, auxiliary, special broadcast and other program distributional services.

Federal Communications Commission.

Bulah Wheeler,

Deputy Manager.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 74 to read as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Section 73.3571 is amended by revising paragraph (h)(1)(ii) and adding a Note to the end of the section to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) * * *

(1) * * *

(ii)(A) Such AM applicants will be subject to the provisions of §§ 1.2105 of this chapter and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. Applications must include the following engineering data:

(*1*) Community of license;

(*2*) Frequency;

(*3*) Class;

(*4*) Hours of operations (day, night, critical hours);

(*5*) Power (day, night, critical hours);

(*6*) Antenna location (day, night, critical hours); and

(*7*) All other antenna data.

(B) Applications lacking data (including any form of placeholder, such as inapposite use of "0" or "not applicable" or an abbreviation thereof) in any of the categories listed in paragraph (h)(1)(ii)(A) of this section will be immediately dismissed as incomplete without an opportunity for amendment. The staff will review the remaining applications to determine whether they meet the following basic eligibility criteria:

(*1*) Community of license coverage (day and night) as set forth in § 73.24(i), and

(*2*) Protection of co- and adjacent-channel station licenses, construction permits and prior-filed applications (day and night) as set forth in §§ 73.37 and 73.182.

(C) If the staff review shows that an application does not meet one or more of the basic eligibility criteria listed in paragraph (h)(1)(ii)(B) of this section, it will be deemed "technically ineligible for filing" and will be included on a Public Notice listing defective applications and setting a deadline for the submission of curative amendments. An application listed on that Public Notice may be amended only to the extent directly related to an identified deficiency in the application. The amendment may modify the proposed power, class (within the limits set forth in § 73.21 of the rules), antenna location or antenna data, but not the proposed community of license or frequency. Except as set forth in the preceding two sentences, amendments to short-form (FCC Form 175) applications will not be accepted at any time. Applications that remain technically ineligible after the close of this amendment period will be dismissed, and the staff will determine which remaining applications are mutually exclusive. The engineering proposals in eligible applications remaining after the close of the amendment period will be protected from subsequently filed applications. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

* * * * *

Note to § 73.3571: For purposes of paragraph (h)(1)(ii) of this section, § 73.182(k) interference standards apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. Two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter into, i.e., raise, the twenty-five percent exclusion RSS nighttime limit of the other.

■ 3. Section 73.7000 is amended by revising the definition of "Tribal coverage" to read as follows:

§ 73.7000 Definition of terms (as used in subpart K only).

* * * * *

Tribal coverage. (1) Coverage of a Tribal Applicant's or Tribal Applicants' Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour, or

(2) The facility's 60 dBu (1 mV/m) contour—

(i) Covers 50 percent or more of a Tribal Applicant's or Tribal Applicants' Tribal Lands,

(ii) Serves at least 2,000 people living on Tribal Lands, and

(iii) The total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither paragraphs (1) nor (2) of this definition may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. To the extent that Tribal Lands include fee lands not owned by Tribes or members of Tribes, the outer boundaries of such lands shall delineate the coverage area, with no deduction of area for fee lands not owned by Tribes or members of Tribes.

* * * * *

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 4. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 307, 336(f), 336(h) and 554.

■ 5. Section 74.1233 is amended by revising paragraph (a)(1), to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) * * *

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. For FM translator stations, a major change is any change in frequency (output channel) except changes to first, second or third adjacent channels, or intermediate frequency channels, and any change in antenna location where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In addition, any change in frequency relocating an unbuilt station from the non-reserved band to the reserved band, or from the reserved band to the non-reserved band, will be considered major. All other changes will be considered minor. All major changes are subject to the provisions of §§ 73.3580 and 1.1104 of this chapter pertaining to major changes.

* * * * *

[FR Doc. 2011–7964 Filed 4–5–11; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 76, No. 66
Wednesday, April 6, 2011

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

DEPARTMENT OF ENERGY

5 CFR Chapters XXIII and XXIV

10 CFR Chapters II, III, and X

18 CFR Chapter I

41 CFR Chapter 109

48 CFR Chapter 9

Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Request for information; extension of public comment period.

SUMMARY: On February 3, 2011, the Department of Energy (DOE) published a request for information (RFI) issued as part of its implementation of Executive Order 13563, "Improving Regulation and Regulatory Review." This document announces that the period for submitting reply comments is extended to April 15, 2011. The February 3 document incorrectly published in the Notices section of the **Federal Register**.

DATES: DOE will accept comments, data, and information regarding the RFI received no later than April 15, 2011.

ADDRESSES: Interested persons are encouraged to submit comments, identified by "Regulatory Burden RFI," by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: Regulatory.Review@hq.doe.gov. Include "Regulatory Burden RFI" in the subject line of the message.

Mail: U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW., Room 6A245, Washington, DC 20585.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585. E-mail: *Regulatory.Review@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On January 18, 2011, the President issued Executive Order 13563, "Improving Regulation and Regulatory Review," to ensure that Federal regulations seek more affordable, less intrusive means to achieve policy goals, and that agencies give careful consideration to the benefits and costs of those regulations. Additionally, the Executive Order directs agencies to consider how best to promote retrospective analyses of existing rules. Specifically, Agencies must develop a preliminary plan under which the agency will periodically review existing regulations to determine which should be maintained, modified, strengthened, or repealed to increase the effectiveness and decrease the burdens of the agency's regulatory program.

DOE took a number of steps to implement the Executive Order, including issuance of an RFI seeking public comment on how best to review its existing regulations and to identify whether any of its existing regulations should be modified, streamlined, expanded, or repealed. (76 FR 6123, Feb. 3, 2011) DOE sought comment on the RFI until March 21, 2011, and allowed for reply comments to be filed until April 4, 2011. DOE posted comments received during the initial comment period on its Web site: *http://www.gc.energy.gov/1705.htm*, but encountered technical difficulties and was unable to post all of the comments until March 30, 2011. DOE also received a request from a member of the public to extend the reply comment period given these technical difficulties. As a result, in this notice, DOE extends the reply comment period until April 15, 2011. While the intent of the reply comment period is to foster constructive dialogue on DOE's regulatory review process, DOE notes that it is not necessary to have filed comments during the initial comment period to file reply comments, and that the substance of comments filed during the reply comment period need not relate to comments filed during the initial comment period. DOE will consider any comments received by April 15, 2011 and deems any comments received between March 21, 2011 and April 15, 2011 to be timely submitted.

Issued in Washington, DC, on March 31, 2011.

Sean A. Lev,

Acting General Counsel.

[FR Doc. 2011–8228 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0016]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security Federal Emergency Management Agency DHS/FEMA–011 Training and Exercise Program Records System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the "Department of Homeland Security Federal Emergency Management Agency—011 Training and Exercise Program Records System of Records" and this proposed rulemaking. In this proposed and consolidating rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act in order to preserve the objectivity and fairness of testing and examination material.

DATES: Comments must be received on or before May 6, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0016, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name

and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Thomas R. McQuillan (202–646–3323), Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC 20478. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) proposes to establish a new DHS system of records titled, "DHS/FEMA—011 Training and Exercise Program Records System of Records."

In support of its mission, components within FEMA such as the Protection and National Preparedness Bureau, the National Processing Service Centers (NPSCs), the United States Fire Administration (USFA), the and the FEMA Emergency Management Institute (FEMA/EMI) sponsor a wide range of training and exercise programs for FEMA's employees and contractors and its partners in the first responder and emergency management communities.

Through its training and exercise programs, FEMA brings together partners from State, local, Tribal, regional, international, and nongovernmental/volunteer organizations, as well as the private sector, including firefighters, emergency medical services, emergency management agencies, law enforcement, and public officials. These programs provide FEMA's employees, contractors and partners with the opportunity to develop the situational awareness and skills necessary to quickly prevent, respond to, or mitigate all hazards affecting the people of the United States.

This system of records notice is being published because FEMA collects and maintains personally identifiable information (PII) about the individuals who register or apply for its training and exercise programs and the organization employing or sponsoring these individuals, as well as information used to grant access to IT systems that support these programs. FEMA's training and exercise programs also maintain information about the trainings and exercise events, such as rosters and reports, which may be shared among participants. The type and amount of PII FEMA collects from individuals to facilitate their participation may vary among programs.

The purpose of this system is to facilitate registration for, participation in, and the completion and documentation of, training and exercise programs sponsored by FEMA in support of its mission.

FEMA collects, uses, and maintains the records within this system under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act; the Federal Fire Prevention and Control Act of 1974, as amended; 44 U.S.C. 3101–3106; 6 U.S.C. 748; Homeland Security Presidential Directives, and several Executive Orders, as described in this notice. This updated system of records strengthens privacy protections and provides greater transparency regarding FEMA's training and exercise records by encompassing the full range of the agency's training and exercise programs into a single system of records. To further safeguard individuals' privacy, FEMA limits access to the information in this system by verifying the status and "need to know" of individuals registering for and participating in the agency's training and exercise programs.

The proposed routine uses are compatible with the purpose of the original collection as they ensure that the information within this system is shared in association with individuals' registration and participation in FEMA's training and exercise programs, and otherwise ensure that the sharing of information in this system is consistent with that of other DHS systems.

FEMA collects, uses, and maintains information about the individuals who register or apply for its training and exercise programs, including DHS employees and contractors, other Federal employees, volunteers and members of the first responder and emergency management communities, to foster the development of mission critical skills among them through participation in these training and exercise programs. FEMA's training and exercise programs may share information with State, local, Tribal, international, nongovernmental/volunteer organizations, and private sector organizations. FEMA shares this information to facilitate the development of training and exercise programs, coordinate, facilitate, and track participation in training and exercise programs, and for statistical FEMA's sharing of information with education institutions for transcript purposes will only take place upon the request of the student.

In accordance with the Privacy Act of 1974 the Department of Homeland Security is giving notice that it proposes to consolidate the Privacy Act system of records notice titled, Department of Homeland Security/Federal Emergency Management Agency/National Emergency Training Center–017 Student Application and Registration Records system of records [October 5, 2004, 69 FR 192] into the this system of records. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/FEMA–011 Training and Exercise Program Records System of Records. Some information in DHS/FEMA–011 Training and Exercise

Program Records System of Records relates to official DHS testing and examination activities. DHS is claiming an exemption for certain records in this new record system pursuant to 5 U.S.C. 552a(k)(6). These exemptions are needed to protect information relating to DHS testing and examination activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required since its training records will include testing and examination materials. DHS is claiming an exemption for these records in order to preserve the integrity, objectivity and fairness of the testing and examination process.

A notice of system of records for DHS/FEMA–011 Training and Exercise Program Records System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph 54:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

54. The DHS/FEMA–011 Training and Exercise Program Records System of Records consists of electronic and paper records and will be used by FEMA. The DHS/FEMA–011 Training and Exercise Program Records System of Records consists of electronic and paper records and will be used by DHS and its components and offices to maintain records about individual training, including enrollment and participation information, information pertaining to class schedules, programs, and instructors, training trends and needs, testing and examination materials, and assessments of training efficacy. The data will be collected by employee name or other unique identifier. The collection and maintenance of this information will assist DHS in meeting its obligation to train its personnel and contractors in order to ensure that the agency mission can be successfully accomplished. The DHS/FEMA–011 General Training and Exercise Program Records System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, Tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a (k)(6), where it states for;"testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process." Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (e)(12) (Computer Matching) if the agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the **Federal Register** notice of such establishment or revision.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(k) From subsection (h) (Legal Guardians) the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

Dated: March 30, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–8088 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–17–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0515; Directorate Identifier 2009–NM–196–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), Model CL–600–2D15 (Regional Jet Series 705), and Model CL–600–2D24 (Regional Jet Series 900) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier NPRM for the products listed above. This action revises the earlier NPRM by expanding the scope. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Several cases have been reported of cracks in the joint extrusions securing the outer bondment to the acoustic panel of the nacelle transcowl assemblies. Although there is no effect on flight safety (thrust reverser stowed), thrust reverser deployment under rejected take-off or emergency landing load conditions could potentially result in acoustic panel failure and possible runway debris.

* * * * *

The loss of an acoustic panel during rejected take-off or emergency landing load conditions could leave debris on the runway. This debris, if not removed, creates an unsafe condition for other airplanes during take-off or landing, as those airplanes could impact debris on the runway and sustain damage. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by May 23, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Craig Yates, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7355; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0515; Directorate Identifier 2009–NM–196–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on May 18, 2010 (75 FR 27665). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

In paragraph (f)(2) of the original NPRM, we referred to Task 05–51–27–210–801 of Part 2, Volume 1, of the Bombardier CRJ Series Regional Jet Aircraft Maintenance Manual (AMM), CSP B–001, Revision 28, dated January 20, 2009, as a source of information for doing the inspection of the transcowl assembly. Revision 28 of the AMM does not include the inspection. We have revised paragraph (h) of the supplemental NPRM (referenced as paragraph (f)(2) in the original NPRM) to specify the inspection procedure.

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2009–33, dated July 28, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Several cases have been reported of cracks in the joint extrusions securing the outer bondment to the acoustic panel of the nacelle transcowl assemblies. Although there is no effect on flight safety (thrust reverser stowed), thrust reverser deployment under rejected take-off or emergency landing load conditions could potentially result in acoustic panel failure and possible runway debris.
>
> This directive mandates inspection, repair (if necessary) and reinforcement of the transcowl assemblies.

The loss of an acoustic panel during rejected take-off or emergency landing load conditions could leave debris on the runway. This debris, if not removed, creates an unsafe condition for other airplanes during take-off or landing, as those airplanes could impact debris on the runway and sustain damage. The inspection is a detailed visual inspection of the outboard edge of the transcowl joint extrusion for evidence of cracking. The repair consists of doing an eddy current or liquid penetrant inspection for cracking, and depending on the results, either removing the affected joint extrusion area and replacing with packers, or contacting Bombardier for repair instructions and doing the repair. The reinforcement of the transcowl assemblies includes installing new support channels. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; and Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Comments

We have considered the following comments received on the earlier NPRM.

Requests To Refer to Latest Task Revision of AMM

Comair, Inc. (Comair) and Mesa Airlines (Mesa) both requested that we include the latest revision of the AMM task or a statement to account for the current AMM release for the task proposed in the original NPRM. Comair explained that the latest AMM task revisions are at Revisions 29 and 30, and Mesa explained that the AMM task is up to Revision 31, dated March 20, 2010.

We partially agree with the request to refer to the latest revision of the AMM task. We agree that later revisions of the AMM task are more appropriate to the actions proposed in the original NPRM. However, instead of referring to the latest revisions of the AMM task in the supplemental NPRM, we have revised paragraph (h) of the supplemental NPRM to spell out the required actions, thus eliminating the need to request an alternative method of compliance (AMOC) every time the AMM is updated. A reference to Revision 34, dated November 20, 2010, to the AMM task as an additional source of guidance is provided in Note 1 of the supplemental NPRM.

Request To Require Only Part 3 of the AMM Task

Comair requested that we revise the original NPRM to refer only to Part 3 of AMM Task 05–51–27–210–810. Comair reasoned that Part 1 and Part 2 do not pertain to the subject of the unsafe condition addressed by the original NPRM and should not be mandated through the AD process.

We assume Comair is referring to AMM Task 05–51–27–201–801. While we disagree with the request to refer to "Procedure—Part 3," in the required actions in the supplemental NPRM, we have included this reference in Note 1 of the Supplemental NPRM. As discussed above, the supplemental NPRM specifies the required actions instead of referring to a specific AMM task revision, thus eliminating the need for section identification as new revisions to the AMM are released. We have not revised the supplemental NPRM in this regard.

Request To Define High-Energy Stop (HES) or Rejected Take-Off (RTO)

Comair requested that we define the terms HES and RTO in the original NPRM because inspections should not be mandated if the RTO/HES occurs outside certain parameters. Comair explained that an RTO might occur at any speed and not require any braking or deployment of the thrust reverser. Comair stated that Revision 30 of AMM Task 05–51–27–210–807, defines when the joint extrusion of the transcowl assemblies need to be inspected as follows:

- If an RTO occurs and thrust reversers are deployed above 68% N1.
- If during an HES, the thrust reversers are deployed above 68% N1.

We infer that Comair is referring to AMM Task 05–51–27–210–801, which calls out the conditions to proceed, as Comair suggests, in Part 3 of the AMM task, "Examination of the Joint Extrusion of the Transcowl Assemblies." We agree with the request to define RTO and HES for the reasons Comair stated. We have revised paragraph (h) of the supplemental NPRM (paragraph (f)(2) of the original NPRM) accordingly.

Request for Inclusion of Post-Serviceable Part Numbers

Mesa requested that we revise the original NPRM to include post-serviceable part numbers KCN624–2003–4, –6, or –8.

We agree to include post-serviceable part numbers KCN624–2003–4, –6, or –8 in the supplemental NPRM. Part numbers KCN624–2003–4, –6, and –8 are listed in paragraph 1.N., "Relationship Chart," of Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010, which is an additional source of service information for the actions specified in Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010. We have revised paragraph (g)(1)(i) of the supplemental NPRM accordingly.

Request for Inclusion of Credit Service Information

Mesa requested that we revise paragraphs (f)(1)(ii), (f)(3), (f)(4), and (f)(5) of the original NPRM to include Bombardier Service Bulletin 670SH–78–029, dated July 3, 2008; Revision A, dated June 30, 2009; and Revision B, dated November 25, 2009; as a source of service information.

We agree to revise the supplemental NPRM to give credit to those operators who have done the actions in accordance with Bombardier Service Bulletin 670SH–78–029, dated July 3, 2008; Revision A, dated June 30, 2009; and Revision B, dated November 25, 2009. We have revised paragraph (i) of the supplemental NPRM (paragraph (f)(4) of the original NPRM), accordingly. Paragraphs (g)(2), (i), and (k) of the supplemental NPRM (paragraphs (f)(1)(ii), (f)(3), and (f)(5) of the original NPRM) refer to the latest revisions of the service information. While Mesa and Bombardier referred to Bombardier Service Bulletin 670SH–78–029, Revision A, dated July 29, 2009, June 30, 2009, is the appropriate date for Revision A of Bombardier Service Bulletin 670SH–78–029.

FAA's Determination and Requirements of This Proposed AD

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

Certain changes described above expand the scope of the earlier NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this proposed AD.

Differences Between This AD and the MCAI or Service Information

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

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

Explanation of Additional Paragraph in the Supplemental NPRM

We have added a new paragraph (f) to this supplemental NPRM to clarify the responsibility for performing the

proposed actions within the specified compliance times. We have re-identified subsequent paragraphs accordingly.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 361 products of U.S. registry. We also estimate that it would take about 8 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $245,480, or $680 per product.

In addition, we estimate that any necessary follow-on actions would take between 4 and 8 work-hours and require parts costing $0, for a cost between $340 and $680 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2010–0515; Directorate Identifier 2009–NM–196–AD.

Comments Due Date

(a) We must receive comments by May 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Bombardier, Inc. Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10003 through 10265 inclusive.

(2) Bombardier, Inc. Model CL–600–2D15 (Regional Jet Series 705) and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15192 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 78: Engine exhaust.

Reason

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

Several cases have been reported of cracks in the joint extrusions securing the outer bondment to the acoustic panel of the nacelle transcowl assemblies. Although there is no effect on flight safety (thrust reverser stowed), thrust reverser deployment under rejected take-off or emergency landing load conditions could potentially result in acoustic panel failure and possible runway debris.

* * * * *

The loss of an acoustic panel during rejected take-off or emergency landing load conditions could leave debris on the runway. This debris, if not removed, creates an unsafe condition for other airplanes during take-off or landing, as those airplanes could impact debris on the runway and sustain damage.

Compliance

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

Inspection, Repair, and Reinforcement

(g) Within 5,000 flight hours or 24 months after the effective date of this AD, whichever occurs first, inspect for the part number and serial number of each transcowl assembly, and, as applicable, the repair status of each transcowl assembly.

(1) If all transcowl assemblies installed on any airplane meet one of the conditions listed in paragraph (g)(1)(i), (g)(1)(ii), or (g)(1)(iii) of this AD, no further action is required by this AD, except paragraphs (h) and (k) of this AD must be complied with.

(i) Having part number (P/N) KCN624–2003–3, –4, –5, –6, –7, or –8, as listed in Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010.

(ii) Having P/Ns CN624–2001–XXX or KCN624–2001–X (XXX and X mean various dash numbers), with serial number (S/N) SB0965 or higher.

(iii) Having P/Ns CN624–2001–XXX or KCN624–2001–X (XXX and X mean various dash numbers), and repaired in accordance with one of the Bombardier repair engineering orders (REOs) listed in paragraph 1.D. of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; or paragraph 1.A. of Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010.

(2) If one or more of the transcowl assemblies have P/N CN624–2001–XXX or KCN624–2001–X (XXX and X mean various dash numbers), with S/N SB0964 or lower, and have not been repaired in accordance with one of the Bombardier REOs listed in paragraph 1.D. of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; or paragraph 1.A. of Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010; do the actions specified in paragraph (i) of this AD.

(h) As of the effective date of this AD, if any high-energy stop occurs and the thrust reversers are deployed above 68% N1; or if a rejected take-off (RTO) occurs and the thrust reversers are deployed above 68% N1; perform a detailed inspection for cracks of each transcowl assembly (left, right, upper, and lower) before further flight, by doing the actions specified in paragraphs (h)(1), (h)(2), and (h)(3) of this AD. Doing the requirements of paragraph (i) of this AD terminates the requirements of paragraph (h) of this AD.

(1) Open the cowling on the left and right engines.

(2) Do a detailed inspection for cracks of the joint extrusion of the upper and lower transcowl assembly on the left and right engines at the location of the joint piece. If no cracks are found, close the cowlings on the left and right engines.

(3) If any crack is found on one or more transcowl assemblies during the inspection required by paragraph (h)(2) of this AD, before further flight, repair and reinforce the cracked part(s) in accordance with paragraph (i)(1) of this AD.

Note 1: Procedure-Part 3 of Task 05–51–27–210–801 of Part 2, Volume 1, of the Bombardier CRJ Series Regional Jet AMM, CSP B–001, Revision 34, dated November 20, 2010, gives guidance for opening and closing the cowling on the left and right engines.

(i) For transcowl assemblies identified in paragraph (g)(2) of this AD: Except as required by paragraph (h) of this AD, within 5,000 flight hours or 24 months after the effective date of this AD, whichever comes first, do a detailed inspection for cracking on each transcowl assembly, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; or Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010. Accomplishment of the actions specified in paragraph (i)(1) or (i)(2) of this AD for all transcowl assemblies identified in paragraph (g)(2) of this AD terminates the requirements of paragraph (h) of this AD.

(1) If any cracking of the joint extrusion is found, before further flight, repair and reinforce the joint extrusion on each transcowl assembly, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; or Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010.

(2) If no cracking is found, before further flight, reinforce the joint extrusion on each transcowl assembly, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; or Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010.

Credit for Actions Accomplished in Accordance with Previous Service Information

(j) Inspections, repairs, and reinforcement of the joint extrusion on each transcowl is also acceptable for compliance with the corresponding requirements of paragraph (i) of this AD if done before the effective date of this AD in accordance with the service information listed in table 1 of this AD.

TABLE 1—SERVICE INFORMATION

Document	Revision	Date
Bombardier Service Bulletin 670BA–78–008	Original	September 19, 2008.
Bombardier Service Bulletin 670BA–78–008	A	July 10, 2009.
Bombardier Service Bulletin 670SH–78–029	Original	July 3, 2008.
Bombardier Service Bulletin 670SH–78–029	A	June 30, 2009.
Bombardier Service Bulletin 670SH–78–029	B	November 25, 2009.

Parts Installation

(k) As of the effective date of this AD, no replacement or spare transcowl assembly having P/N CN624–2001–XXX or KCN624–2001–X (XXX and X mean various dash numbers), with S/N SB0964 or lower, may be installed on any airplane, except for a transcowl assembly on which any repair listed in paragraph 1.D. of Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010, or paragraph 1.A. of Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010, has been done; and except for a transcowl that has been inspected as specified in paragraph (i) of this AD and all applicable actions specified in paragraph (i)(1) or (i)(2) of this AD, as applicable, have been done.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, 1600 Stewart Avenue, Suite 40, Westbury, N.Y. 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(m) Refer to MCAI Canadian Airworthiness Directive CF–2009–33, dated July 28, 2009; Bombardier Service Bulletin 670BA–78–008, Revision B, dated December 22, 2010; and Bombardier Service Bulletin 670SH–78–029, Revision C, dated November 10, 2010; for related information.

Issued in Renton, Washington, on March 24, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–8197 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0264; Directorate Identifier 2009–NM–244–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

[T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). * * *

Under this regulation, all holders of type certificates for passenger transport aeroplanes * * * are required to conduct a design review against explosion risks. The replacement of some types of P-clips and

improvement of the electrical bonding of the equipment in the fuel tanks [were] are rendered mandatory * * *.

* * * * *

Subsequently, an internal review * * * led * * * to * * * an additional check [for blue coat] of the bonding points in the centre tank. * * *

More recently, another internal review [introduced] additional work [installing bonding points] for aeroplanes under Configuration 03 * * * and additional work [bonding the fuel jettison system—blanking plates] on the wing tanks for aeroplanes under Configuration 07 * * *.

The unsafe condition is damage to wiring in the wing, center, and trim fuel tanks, due to failed P-clips used for retaining the wiring and pipes, which could result in a possible fuel ignition source in the wing, center, or trim fuel tanks. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by May 23, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0264; Directorate Identifier 2009–NM–244–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On January 18, 2008, we issued AD 2008–03–04, Amendment 39–15353 (73 FR 5731, January 31, 2008). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2008–03–04, internal reviews by the manufacturer have shown that additional work is necessary on the center and wing fuel tanks. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0074, dated April 16, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

[T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). In their letters referenced 04/00/02/07/01–L296, dated 04 March 2002, and 04/00/02/07/03–L024, dated 03 February 2003, the JAA recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aeroplanes with either a passenger capacity of 30 or more, or a payload capacity of 3,402 kg (7,500 lbs) or more which have received their certification since 01 January 1958, are required to conduct a design review against explosion risks. The replacement of some types of P-clips and improvement of the electrical bonding of the equipment in the fuel tasks are rendered mandatory by this AD.

Initially, EASA AD 2006–0325, which addressed the same unsafe condition, also applied to A300–600 aeroplanes. Airbus subsequently introduced additional work at Revision 1 of SB A300–28–6064 [dated April 3, 2007] applicable to A300–600 aeroplanes. As a result, EASA AD 2006–0325 was revised to remove A300–600 aeroplanes from the applicability, and concurrently EASA AD 2007–0233 was issued, applicable to A300–600 aeroplanes. Unfortunately, the 'Applicability' section of EASA AD 2007–0233 was not correctly defined, erroneously deleting one modification in the combination that would exclude aeroplanes from having to comply. Consequently, the AD 2007–0283 was issued, requiring the same actions as AD 2007–0233, which was superseded, but expanded the group of aeroplanes to which AD 2007–0283 applied [FAA AD 2008–03–04 corresponds with EASA AD 2007–0283].

Subsequently, an internal review of Airbus SB A300–28–6064 led the manufacturer to correct the figures of the SB. In particular, an additional check [for blue coat] of the bonding points in the centre tank was introduced in Revision 03 of Airbus SB A300–28–6064 [dated December 15, 2008], prompting EASA to issue AD 2009–0143.

More recently, another internal review of Airbus SB A300–28–6064 again resulted in corrected figures in the SB. Additional work on the center tank [installing bonding points] for aeroplanes under Configuration 03 (as defined in the SB [Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009]) and additional work [bonding the fuel jettison system—blanking plates] on the wing tanks for aeroplanes under Configuration 07 have been introduced in Revision 04 of Airbus SB A300–28–6064 [dated August 24, 2009].

For the reason described above, this new AD retains the requirements of EASA AD 2009–0143, which is superseded, and requires the additional work introduced in Revision 04 of Airbus SB A300–28–6064 [dated August 24, 2009].

The unsafe condition is damage to wiring in the wing, center, and trim fuel tanks, due to failed P-clips used for retaining the wiring and pipes, which could result in a possible fuel ignition source in the wing, center, or trim fuel tanks. The required actions also include checking the electrical bonding points of certain equipment in the center fuel tank for the presence of a blue coat and doing related investigative and corrective actions if necessary. The related investigative action is to measure the electrical resistance between the equipment and structure, if a blue coat is not present. The corrective action is to electrically bond the

equipment, if the measured resistance is greater than 10 milliohms. You may obtain further information by examining the MCAI in the AD docket.

We have also revised paragraphs (f)(4) and (f)(5) of AD 2008–03–04 (re-identified as paragraphs (g)(6) and (g)(7) in this NPRM) by replacing the term "service bulletin" with the full service bulletin citation.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A300–28–6064, Revision 03, dated December 15, 2008; and Revision 04, dated August 24, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 125 products of U.S. registry.

The actions that are required by AD 2008–03–04 and retained in this proposed AD take about 632 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $6,870 per product. Based on these figures, the estimated cost of the currently required actions is $60,590 per product.

We estimate that it would take about 9 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $100 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $108,125, or $865 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

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

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15353 (73 FR 5731, January 31, 2008) and adding the following new AD:

Airbus: Docket No. FAA–2011–0264; Directorate Identifier 2009–NM–244–AD.

Comments Due Date

(a) We must receive comments by May 23, 2011.

Affected ADs

(b) This AD supersedes AD 2008–03–04, Amendment 39–15353.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes (without trim tank), all serial numbers, certificated in any category, except airplanes on which Airbus Modifications 12226, 12365, 12490, and 12308 have been incorporated in production, or Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009; and Airbus Service Bulletin A300–28–6068, dated July 20, 2005; have been performed in service.

(2) Airbus Model A300 B4–605R, B4–622R, F4–605R, and F4–622R airplanes and A300 C4–605R Variant F airplanes (fitted with a trim tank), all serial numbers, certificated in any category, except airplanes on which Airbus Modifications 12226, 12365, 12490, 12308, 12294, and 12476 have been incorporated in production, or on which the service bulletins listed in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this AD have been performed in service.

(i) Airbus Mandatory Service Bulletin A300–28–6064, Revision 03, dated December 15, 2008.

(ii) Airbus Service Bulletin A300–28–6068, dated July 20, 2005.

(iii) Airbus Service Bulletin A300–28–6077, dated July 25, 2005; or A300–28–6077, Revision 01, dated October 26, 2006.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

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

[T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). * * *

Under this regulation, all holders of type certificates for passenger transport aeroplanes * * * are required to conduct a design review against explosion risks. The replacement of some types of P-clips and improvement of the electrical bonding of the equipment in the fuel tanks [were] are rendered mandatory * * *.

* * * * *

Subsequently, an internal review * * * led * * * to * * * an additional check [for blue coat] of the bonding points in the centre tank. * * *

More recently, another internal review [introduced] additional work [installing bonding points] for aeroplanes under Configuration 03 * * * and additional work [bonding the fuel jettison system—blanking plates] on the wing tanks for aeroplanes under Configuration 07 * * *.

The unsafe condition is damage to wiring in the wing, center, and trim fuel tanks, due to failed P-clips used for retaining the wiring and pipes, which could result in a possible fuel ignition source in the wing, center, or trim fuel tanks.

Compliance

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

Restatement of Requirements of AD 2008–03–04 With Revised Service Information

Actions and Compliance

(g) For airplanes identified in paragraphs (g)(1) and (g)(2) of this AD: Within 40 months after March 6, 2008 (the effective date of AD 2008–03–04), unless already done, do the applicable actions required by paragraphs (g)(3), (g)(4), and (g)(5) of this AD.

(1) Airbus Model A300 B4–600 series airplanes (without trim tank), all serial numbers, except airplanes on which Airbus Modifications 12226, 12365, 12490, and 12308 have been incorporated in production, or Airbus Service Bulletins A300–28–6064, Revision 01, dated April 3, 2007; and A300–28–6068, dated July 20, 2005; have been performed in service.

(2) Airbus Model A300 B4–600R, A300 C4–600R, and A300 F4–600R series airplanes (fitted with a trim tank), all serial numbers, except airplanes on which Airbus Modifications 12226, 12365, 12490, 12308, 12294, and 12476 have been incorporated in production, or on which the service bulletins listed in paragraphs (g)(2)(i), (g)(2)(ii), and (g)(2)(iii) of this AD have been performed in service.

(i) Airbus Service Bulletin A300–28–6064, Revision 01, dated April 3, 2007.

(ii) Airbus Service Bulletin A300–28–6068, dated July 20, 2005.

(iii) Airbus Service Bulletin A300–28–6077, dated July 25, 2005; or A300–28–6077, Revision 01, dated October 26, 2006.

(3) Remove NSA5516–XXND or NSA5516–XXNJ type P-clips, used in the wing and center fuel tanks to retain wiring and pipes, and replace them by NSA5516–XXNF type P-clips in accordance with the instructions of Airbus Service Bulletin A300–28–6068, dated July 20, 2005.

(4) Check the electrical bonding points in the center tank and do all applicable related investigative and corrective actions, and install additional bonding leads and electrical bonding points in the wing and center fuel tanks in accordance with the instructions of Airbus Service Bulletin A300–28–6064, Revision 01, dated April 3, 2007; Airbus Mandatory Service Bulletin A300–28–6064, Revision 02, dated March 10, 2008; Airbus Mandatory Service Bulletin A300–28–6064, Revision 03, dated December 15, 2008; or Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009. Do all applicable related investigative and corrective actions before further flight. As of the effective date of this AD, only use Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009.

(5) For airplanes fitted with a trim tank, in addition to the actions defined in paragraphs (g)(3) and (g)(4) of this AD, install bonding leads and electrical bonding points in the trim tanks, in accordance with the instructions of Airbus Service Bulletin A300–28–6077, Revision 01, dated October 26, 2006.

(6) Actions done before March 6, 2008, in accordance with Airbus Service Bulletin A300–28–6064, dated July 28, 2005, for aircraft under configuration 05, as defined Airbus Service Bulletin A300–28–6064, dated July 28, 2005, are considered acceptable for compliance with the requirements of paragraph (g)(4) of this AD.

(7) Actions done before March 6, 2008, in accordance with Airbus Service Bulletin A300–28–6077, dated July 25, 2005, for aircraft under configuration 05, as defined in Airbus Service Bulletin A300–28–6077, dated July 25, 2005, are considered acceptable for compliance with the requirements of paragraph (g)(5) of this AD.

New Requirments of This AD

Additional Actions

(h) Within 8 months after the effective date of this AD, do the applicable actions required by paragraphs (h)(1), (h)(2), and (h)(3) of this AD.

(1) For airplanes that have been modified before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–28–6064, dated July 28, 2005; Revision 01, dated April 3, 2007; or Airbus Mandatory Service Bulletin A300–28–6064, Revision 02, dated March 10, 2008: Do the additional work on the center tank specified in Airbus Mandatory Service Bulletin A300–28–6064, Revision 03, dated December 15, 2008, (*i.e.,* a check for blue coat at additional bonding points and all applicable related investigative and corrective actions), in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6064, Revision 03, dated December 15, 2008; or Revision 04, dated August 24, 2009. Do all applicable related investigative and corrective actions before further flight.

(2) For configuration 03 airplanes, as defined in Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009, that have been modified before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–28–6064, Revision 01, dated April 3, 2007; or Airbus Mandatory Service Bulletin A300–28–6064, Revision 02, dated March 10, 2008, or Revision 03, dated December 15, 2008: Do the additional work on the center tank (i.e., install bonding points), in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009.

(3) For configuration 07 airplanes, as defined in Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009, that have been modified before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–28–6064, dated July 28, 2005; Revision 01, dated April 3, 2007; or Airbus Mandatory Service Bulletin A300–28–6064, Revision 02, dated March 10, 2008, or Revision 03, dated December 15, 2008: Do the additional work on the wing tanks (*i.e.,* bond the fuel jettison system—blanking plates), in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6064, Revision 04, dated August 24, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD. AMOCs approved previously in accordance with AD 2008–03–04 are approved as AMOCs for the corresponding provisions of this AD.

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

Related Information

(j) Refer to MCAI EASA Airworthiness Directive 2010–0074, dated April 16, 2010, and the service information listed in Table 1 of this AD, for related information.

TABLE 1—SERVICE INFORMATION

Airbus service information	Revision level	Date
Airbus Mandatory Service Bulletin A300–28–6064	03	December 15, 2008.
Airbus Mandatory Service Bulletin A300–28–6064	04	August 24, 2009.
Airbus Service Bulletin A300–28–6068	Original	July 20, 2005.
Airbus Service Bulletin A300–28–6077	01	October 26, 2006.

Issued in Renton, Washington, on March 23, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–8198 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0326; Directorate Identifier 2011–CE–006–AD]

RIN 2120–AA64

Airworthiness Directives; Costruzioni Aeronautiche Tecnam srl Model P2006T Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

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

During Landing Gear retraction/extension ground checks performed on the P2006T, a loose Seeger ring was found on the nose landing gear hydraulic actuator cap.

The manufacturer has identified the root cause of this discrepancy in a design deficiency of the hydraulic actuator caps.

This condition, if not corrected, could determine uncommanded and improper extension of the nose or main landing gear.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by May 23, 2011.

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

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

For service information identified in this proposed AD, contact Costruzioni Aeronautiche TECNAM Airworthiness Office, Via Maiorise—81043 Capua (CE) Italy; telephone: +39 0823 620134; fax: +39 0823 622899; e-mail: *m.oliva@tecnam.com, p.violetti@tecnam.com;* Internet: *http://www.tecnam.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0326; Directorate Identifier 2011–CE–006–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No.: 2011–0042, dated March 11, 2011 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

During Landing Gear retraction/extension ground checks performed on the P2006T, a loose Seeger ring was found on the nose landing gear hydraulic actuator cap.

The manufacturer has identified the root cause of this discrepancy in a design deficiency of the hydraulic actuator caps.

This condition, if not corrected, could determine uncommanded and improper extension of the nose or main landing gear. To prevent this condition, this AD requires modifying each nose and main landing gear hydraulic actuator by installing security rings.

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

Relevant Service Information

Costruzioni Aeronautiche Tecnam has issued Service Bulletin No. SB 036–CS, 1st Edition, Rev 1, dated December 15, 2010. The actions described in this

service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

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

Differences Between This Proposed AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this proposed AD will affect 1 product of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $80 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $250, or $250 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

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

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Costruzioni Aeronautiche Tecnam srl: Docket No. FAA–2011–0326; Directorate Identifier 2011–CE–006–AD.

Comments Due Date

(a) We must receive comments by May 23, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Costruzioni Aeronautiche Tecnam srl P2006T airplanes, serial numbers 01 through 046, 047/US, and 049, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 32: Landing Gear.

Reason

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

During Landing Gear retraction/extension ground checks performed on the P2006T, a loose Seeger ring was found on the nose landing gear hydraulic actuator cap.

The manufacturer has identified the root cause of this discrepancy in a design deficiency of the hydraulic actuator caps.

This condition, if not corrected, could determine uncommanded and improper extension of the nose or main landing gear. To prevent this condition, this AD requires modifying each nose and main landing gear hydraulic actuator by installing security rings.

Actions and Compliance

(f) Unless already done, within 50 hours time-in-service after the effective date of this AD or within 60 days after the effective date of this AD, whichever occurs first, modify each nose and main landing gear hydraulic actuator in accordance with Costruzioni Aeronautiche Tecnam Service Bulletin No. SB 036–CS, 1st Edition, Rev 1, dated December 15, 2010.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) Reporting Requirements: For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for

failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2011–0042, dated March 11, 2011; and Costruzioni Aeronautiche Tecnam Service Bulletin No. SB 036–CS, 1st Edition, Rev 1, dated December 15, 2010, for related information. For service information related to this AD, contact Costruzioni Aeronautiche TECNAM Airworthiness Office, Via Maiorise—81043 Capua (CE) Italy; telephone: +39 0823 620134; fax: +39 0823 622899; e-mail: *m.oliva@tecnam.com, p.violetti@tecnam.com;* Internet: *http://www.tecnam.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Issued in Kansas City, Missouri, on March 29, 2011.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–8070 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 240

[Release Nos. 33–9199; 34–64149; File No. S7–13–11]

RIN 3235–AK95

Listing Standards for Compensation Committees

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing a new rule and rule amendments to implement the provisions of Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which adds Section 10C to the Securities Exchange Act of 1934 (the "Exchange Act"). Section 10C requires the Commission to adopt rules directing the national securities exchanges (the "exchanges") and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. In accordance with the statute, the proposed rule would direct the exchanges to establish listing standards that, among other things, require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent," as defined in the listing standards of the exchanges adopted in accordance with the proposed rule. In addition, Section 10C(c)(2) of the Exchange Act requires the Commission to adopt new disclosure rules concerning the use of compensation consultants and conflicts of interest.

DATES: Comments should be received on or before April 29, 2011.

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov*; or
- Use the Federal Rulemaking ePortal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

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

All submissions should refer to File Number S7–13–11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Nandini A. Acharya, Attorney-Adviser, or N. Sean Harrison, Special Counsel, at (202) 551–3430, in the Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are proposing to add new Rule 10C–1 under the Securities Exchange Act of 1934.[1] We are also proposing amendments to Item 407 [2] of Regulation S–K.[3]

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[1] 15 U.S.C. 78a *et seq.*

[2] 17 CFR 229.407.

[3] 17 CFR 229.10 *et seq.*

VIII. Statutory Authority and Text of the Proposed Amendments

I. Background and Summary

We are proposing a new rule and rule amendments to implement the provisions of Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"),[4] which adds Section 10C to the Securities Exchange Act of 1934 (the "Exchange Act"). Section 10C requires the Commission to direct the national securities exchanges [5] (the "exchanges") and national securities associations [6] to prohibit the listing of any equity) [7] security of an issuer, with certain exemptions, that does not comply with Section 10C's compensation committee and compensation adviser requirements.[8]

Specifically, Section 10C(a)(1) of the Exchange Act requires the Commission to adopt rules directing the exchanges to prohibit the listing of any equity security of an issuer, with certain exemptions, that is not in compliance with the independence requirements for members of the compensation committee of the board of directors of an issuer. In accordance with the statute, the rules, once adopted, would require the exchanges to establish listing standards that require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent." The term "independent" is not defined in Section 10C(a)(1). Instead, the section provides that "independent" is to be defined by the exchanges after taking into consideration "relevant factors." As provided in Section 10C(a)(1), the "relevant factors" are required to include (1) the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory, or other compensatory fee paid by the issuer to such member of the board of directors, and (2) whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer. Section 10C(a)(4) of the Exchange Act requires our rules to permit the exchanges to exempt particular relationships from the independence requirements, as each exchange determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

In addition to the independence requirements set forth in Section 10C(a), Section 10C(f) of the Exchange Act requires the Commission to adopt rules directing the exchanges to prohibit the listing of any security of an issuer that is not in compliance with the following requirements relating to compensation committees and compensation advisers, as set forth in paragraphs (b)–(e) of Section 10C:

- Each compensation committee must have the authority, in its sole discretion, to retain or obtain the advice of compensation consultants, independent legal counsel and other advisers (collectively, "compensation advisers"); [9]
- Before selecting any compensation adviser, the compensation committee must take into consideration specific factors identified by the Commission that affect the independence of compensation advisers;) [10]
- The compensation committee must be directly responsible for the appointment, compensation and oversight of the work of any compensation adviser; [11] and
- Each listed issuer must provide appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to compensation advisers.[12]

Finally, Section 10C(c)(2) requires each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting), in accordance with Commission regulations, whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed.

We are proposing new Exchange Act Rule 10C–1 to implement the compensation committee listing requirements of Sections 10C(a)–(g) [13] of the Exchange Act. To implement Section 10C(c)(2) of the Exchange Act, we are proposing rule amendments to Regulation S–K to require disclosure, in any proxy or information statement relating to an annual meeting of shareholders at which directors are to be elected (or special meeting in lieu of the annual meeting), of whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed. In connection with these amendments, we also propose to revise the current disclosure requirements with respect to the retention of compensation consultants.[14]

II. Discussion of the Proposals

A. Proposed Listing Requirements

1. Applicability of Listing Requirements

In enacting Section 10C of the Exchange Act, Congress intended to require that "board committees that set compensation policy will consist only of directors who are independent." [15] In addition, Congress sought to provide "shareholders in a public company" with "additional disclosures involving

[4] Public Law 111–203, 124 Stat. 1900 (2010).

[5] A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently fifteen national securities exchanges registered under Section 6(a) of the Exchange Act: NYSE Amex (formerly the American Stock Exchange), BATS Exchange, BATS Y-Exchange, NASDAQ OMX BX (formerly the Boston Stock Exchange), C2 Options Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, EDGA Exchange, EDGX Exchange, International Securities Exchange, The NASDAQ Stock Market, National Stock Exchange, New York Stock Exchange, NYSE Arca and NASDAQ OMX PHLX (formerly Philadelphia Stock Exchange). Certain exchanges are registered with the Commission through a notice filing under Section 6(g) of the Exchange Act for the purpose of trading security futures. *See* Section II.B.1, below, for a discussion of these types of exchanges.

[6] A "national securities association" is an association of brokers and dealers registered as such under Section 15A of the Exchange Act [15 U.S.C. 78o–3]. The Financial Industry Regulatory Authority ("FINRA") is the only national securities association registered with the Commission under Section 15A(a) of the Exchange Act. Because FINRA does not list equity securities, we refer only to the exchanges in this release.

In addition, Section 15A(k) of the Exchange Act [15 U.S.C. 78o–3(k)] provides that a futures association registered under Section 17 of the Commodity Exchange Act [7 U.S.C. 21] shall be registered as a national securities association for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products pursuant to Section 15(b)(11) of the Exchange Act [15 U.S.C. 78o(b)(11)]. *See* Section II.B.2, below, for a discussion regarding security futures products.

[7] *See* Section II.B.2, below, for a discussion of the scope of Section 10C, including our conclusion that it does not apply to issuers with only listed debt securities. That section also proposes an exemption for securities futures products and standardized options, and clarifies that national securities and futures associations that do not list securities do not have to adopt specific rules in accordance with this rulemaking and Section 10C of the Exchange Act.

[8] *See* Exchange Act Sections 10C(a) and (f).

[9] Exchange Act Sections 10C(c)(1)(A) and 10C(d)(1).

[10] Exchange Act Section 10C(b).

[11] Exchange Act Sections 10C(c)(1)(B) and 10C(d)(2).

[12] Exchange Act Section 10C(e).

[13] Section 10C(g) of the Exchange Act exempts controlled companies from the requirements of Section 10C.

[14] *See* Item 407(e) of Regulation S–K; Proxy Disclosure Enhancements, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334].

[15] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E "Accountability and Executive Compensation," at 872–873 (Conf. Rep.) (June 29, 2010).

compensation practices."[16] Although Section 10C includes numerous provisions applicable to the "compensation committees" of listed issuers, it does not require a listed issuer to have a compensation committee or a committee that performs functions typically assigned to a compensation committee. Nor does Section 10C include provisions that have the effect of requiring a compensation committee as a practical matter. For example, it does not require that the compensation of executives be approved by a compensation committee.

Neither the Act nor the Exchange Act defines the term "compensation committee."[17] Our rules do not currently require, and our proposed rules would not mandate, that an issuer establish a compensation committee. However, current exchange listing standards generally require listed issuers either to have a compensation committee or to have independent directors determine, recommend or oversee specified executive compensation matters.[18] For example, the New York Stock Exchange ("NYSE") requires a listed issuer to have a compensation committee composed solely of independent directors and to assign various executive compensation-related tasks to that committee.[19] On the other hand, the NASDAQ Stock Market ("Nasdaq") does not mandate that a listed issuer have a compensation committee, but requires that executive compensation be determined or recommended to the board for determination either by a compensation committee composed solely of independent directors or by a majority of the board's independent directors in a vote in which only independent directors participate.[20] Some of the other exchanges have standards comparable to the NYSE's and require their listed issuers to have independent compensation committees.[21] Other exchanges have standards comparable to Nasdaq's and, in the absence of an independent compensation committee, permit executive compensation determinations to be made or recommended by a majority of independent directors on the listed issuer's board.[22]

Proposed Rule 10C–1(b) would direct the exchanges to adopt listing standards that would be applicable to any committee of the board that oversees executive compensation, whether or not the committee performs multiple functions and/or is formally designated as a "compensation committee." We believe this is appropriate in order to capture board committees that perform these functions and to avoid the possibility that a listed issuer might avoid the proposed requirements merely by assigning a different name to a committee that is functionally equivalent to a compensation committee. For example, if a listed issuer has a designated "corporate governance committee" whose responsibilities include, among other matters, oversight of executive compensation, such committee would be subject to the compensation committee listing standards to be adopted pursuant to our new rules, as would a committee designated as a "human resources committee" whose responsibilities include oversight of executive compensation. However, proposed Rule 10C–1(b) would not require the listing standards to apply to those independent directors who oversee executive compensation in lieu of a board committee, since Section 10C refers only to compensation committees.[23]

Request for Comment

- Should the exchanges be required to only list issuers with compensation committees?
- Our proposed rules would apply to a listed issuer's compensation committee, or in the absence of such a committee, any other board committee that performs functions typically performed by a compensation committee, including oversight of executive compensation. Is this proposed functional approach appropriate and workable? If not, why not?
- As noted above, the listing standards of some exchanges permit a listed issuer to have its executive compensation matters be determined, or recommended to the board for determination, either by a compensation committee composed solely of independent directors or, in the absence of such a committee, by a majority of independent directors in a vote in which only independent directors participate. Should our rules implementing Section 10C require the exchanges to mandate that independent directors performing this function in the absence of a formal committee structure also be subject to our new rules? Would so doing be consistent with the mandate of Section 10C of the Exchange Act?

2. Independence Requirements

Most exchanges that list equity securities require that the board of directors of a listed issuer be composed of a majority of directors that qualify as "independent" under their listing standards.[24] As noted above, most

[16] *Id.*

[17] By contrast, Section 3(a)(58) of the Exchange Act defines an "audit committee" as a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and if no such committee exists with respect to an issuer, the entire board of directors of the issuer. Our proposed rules would not preclude the exchanges from defining "compensation committee."

[18] There are some exchanges registered under Section 6(a) of the Exchange Act that have not adopted listing standards that require executive compensation determinations for listed issuers to be made or recommended by an independent compensation committee or independent directors. However, these exchanges, which include the International Securities Exchange, LLC, EDGA Exchange, Inc., EDGX Exchange, Inc., BATS Exchange, Inc., BATS Y–Exchange, Inc. and C2 Options Exchange, Inc., currently either trade securities only pursuant to unlisted trading privileges or trade only standardized options. In addition, the listing standards of certain exchanges that are registered with the Commission for the purpose of trading security futures do not address executive compensation matters. *See* Section II.B.1, below, for a discussion of these types of exchanges.

[19] *See* NYSE Listed Company Manual Section 303A.05. Section 303A.05 permits a listed issuer's board to allocate the responsibilities of the compensation committee to another committee, provided that the committee is composed entirely of independent directors and has a committee charter. The NYSE exempts certain issuers from this requirement, including controlled companies, limited partnerships, companies in bankruptcy, and closed-end and open-end management investment companies registered under the Investment Company Act of 1940 ("Investment Company Act"). *See* NYSE Listed Company Manual Section 303A.00.

[20] *See* Nasdaq Rule 5605(d). We understand that less than 2% of Nasdaq listed issuers utilize the alternative of having independent board members, and not a committee, oversee compensation. *See also* Nasdaq IM 5605–6, stating that the Nasdaq structure is intended to provide flexibility for a company to choose an appropriate board structure and to reduce resource burdens, while ensuring independent director control of compensation decisions. Nasdaq exempts certain issuers from this requirement, including asset-backed issuers and other passive issuers, cooperatives, limited partnerships, and management investment companies registered under the Investment Company Act. *See* Nasdaq Rule 5615(a).

[21] NYSE Arca, Inc., National Stock Exchange, Inc., and NASDAQ OMX PHLX, Inc. *See* NYSE Arca Rule 5.3(k)(4); National Stock Exchange Rule 15.5(d)(5); and NASDAQ OMX PHLX Rule 867.05.

[22] NASDAQ OMX BX, Inc., NYSE Amex LLC, Chicago Board Options Exchange, Incorporated, and Chicago Stock Exchange, Inc. *See* NASDAQ OMX BX Rule 4350(c)(3); NYSE Amex Company Guide Section 805; Chicago Board Options Exchange Rule 31.10; and Chicago Stock Exchange Article 22, Rules 19(d) and 21.

[23] To the extent no board committee is authorized to oversee executive compensation, board determinations with respect to executive compensation matters may be made by the full board with only independent directors participating. In such cases, under state corporate law, we understand that action by the independent directors would generally be considered action by the full board, not action by a committee.

[24] *See* NYSE Listed Company Manual Section 303A.01; Nasdaq Rule 5605(b)(1); NYSE AMEX LLC

exchanges that list equity securities require directors on compensation committees or directors determining or recommending executive compensation matters to be "independent" under their general independence standards. Although independence requirements and standards for determining independence vary somewhat among the different exchanges, listing standards prescribe certain bright-line independence tests (including restrictions on compensation, employment and familial or other relationships with the listed issuer that could interfere with the exercise of independent judgment) that directors must meet in order to be considered independent. For example, both NYSE and Nasdaq rules preclude a finding of independence if the director is or recently was employed by the listed issuer,[25] the director's immediate family member is or recently was employed as an executive officer of the listed issuer,[26] or the director or director's family member received compensation from the listed issuer in excess of specified limits.[27] In addition, under both NYSE and Nasdaq rules, directors may be disqualified based on their or their family members' relationships with a listed issuer's auditor,[28] affiliation with entities that have material business relationships with the listed issuer,[29] or employment at a company whose compensation committee includes any of the listed issuer's executive officers.[30] We note, however, that with the exception of audit committee membership requirements, stock ownership alone will not automatically preclude a director from being considered independent under either NYSE or Nasdaq listing standards.[31]

In addition to requiring directors to meet objective criteria of independence, the NYSE and Nasdaq also require their listed issuers' boards to affirmatively determine that each independent director either, in NYSE's case, has no material relationship with the company[32] or, in Nasdaq's case, has no relationship which, in the opinion of the issuer's board of directors, would interfere with the director's exercise of independent judgment in carrying out his or her responsibilities.[33] The other exchanges have similar requirements.[34]

Under current Commission rules, listed issuers are required to identify each director who is independent, using the same definition of independence used for determining whether a majority of the board of directors is independent.[35] If an exchange has independence requirements for members of the compensation committee, then listed issuers are required to identify each member of the compensation committee who is not independent under those requirements.[36] If a listed issuer does not have a separately designated compensation committee or committee performing similar functions, then the issuer must identify all members of the board who do not meet the independence requirements for compensation committee members.[37]

In addition to meeting exchange listing standards, there are other reasons for members of the compensation committee to be independent. For example, in order for a securities transaction between an issuer and one of its officers or directors to be exempt from short-swing profit liability under Section 16(b) of the Exchange Act, the transaction must be approved by the full board of directors or by a committee of the board that is composed solely of two or more "Non-Employee Directors," as defined in Exchange Act Rule 16b–3(b)(3).[38] We understand that many issuers use their independent compensation committees to avail themselves of this exemption.[39] Similarly, if an issuer wishes to preserve the tax deductibility of the amounts of certain awards paid to executive officers, among other things, the performance goals of such awards must be determined by a compensation committee composed of two or more "outside directors," as defined in Section 162(m) of the Internal Revenue Code.[40] The definitions of "Non-Employee Director" and "outside director" are similar to the exchanges' definitions of director independence.

In order to implement the requirements of Section 10C(a)(1) of the Exchange Act, proposed Rule 10C–1(b)(1)(i) would require each member of a listed issuer's compensation committee to be a member of the issuer's board of directors and to be independent. As required by Section 10C(a)(1), proposed Rule 10C–1(b)(1)(ii) would direct the exchanges to develop a definition of independence applicable to compensation committee members after considering relevant factors, including, but not limited to, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to such director, and whether the director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a

Company Guide Section 802(a); Chicago Board Options Exchange Rule 31.10(a); Chicago Stock Exchange Article 22, Rules 19(a) and 21(a); NASDAQ OMX BX Rule 4350(c)(1); NASDAQ OMX PHLX Rule 867.01; National Stock Exchange Rule 15.5(d)(1). NYSE Amex and the Chicago Stock Exchange permit smaller issuers to have a 50% independent board. *See* NYSE Amex Company Guide Section 801(h); Chicago Stock Exchange Article 22, Rules 19(a), 19(b)(1)(C)(iii), and 21(a).

[25] *See* NYSE Listed Company Manual Section 303A.02(b)(i); Nasdaq Rule 5605(a)(2)(A).

[26] *See* NYSE Listed Company Manual Section 303A.02(b)(i); Nasdaq Rule 5605(a)(2)(C).

[27] *See* NYSE Listed Company Manual Section 303A.02(b)(ii); Nasdaq Rule 5605(a)(2)(B).

[28] *See* NYSE Listed Company Manual Section 303A.02(b)(iii); Nasdaq Rule 5605(a)(2)(F).

[29] *See* NYSE Listed Company Manual Section 303A.02(b)(v); Nasdaq Rule 5605(a)(2)(D).

[30] *See* NYSE Listed Company Manual Section 303A.02(b)(iv); Nasdaq Rule 5605(a)(2)(E).

[31] *See* Commentary to NYSE Listed Company Manual Section 303A.02(a); Nasdaq Rule 5605; Nasdaq IM–5605.

[32] *See* NYSE Rule 303A.02.a

[33] *See* Nasdaq Rule 4200(a)(15).

[34] *See, e.g.,* NYSE Arca Rule 5.3(k)(1) or NYSE AMEX LLC Company Guide Section 803.A.02.

[35] Item 407(a) of Regulation S–K.

[36] *Id.*

[37] *Id.*

[38] As defined in Exchange Act Rule 16b–3(b)(3)(i) [17 CFR 240.16b–3(b)(3)(i)], a "Non-Employee Director" is a director who is not currently an officer (as defined in Rule 16a–1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer; does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to Item 404(a) of Regulation S–K; and does not possess an interest in any other transaction for which disclosure would be required pursuant to Item 404(a) of Regulation S–K. In addition, Rule 16b–3(b)(3)(ii) provides that a Non-Employee Director of a closed-end investment company is a director who is not an "interested person" of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act [15 U.S.C. 80a–2(a)(19)].

[39] *See* letter from Sullivan and Cromwell LLP to Facilitating Shareholder Director Nominations, Release No. 34–60089, available at *http://www.sec.gov/comments/s7–10–09/s71009–430.pdf* ("In our experience, many compensation committee charters require their members to meet the requirements of Rule 16b–3 and Section 162(m)."); Ira G. Bogner & Michael Krasnovsky, *Exchange Rules Impact Compensation Committee Composition,* Metropolitan Corp. Couns., April 2004, at 17 ("Most compensation committees of public companies include at least two directors that are 'outside directors' under Section 162(m) of the Internal Revenue Code * * * and 'non-employee directors' under Rule 16b–3 of the Securities Exchange Act * * * .").

[40] A director is an "outside director" if the director (A) is not a current employee of the publicly held corporation; (B) is not a former employee of the publicly held corporation who receives compensation for prior services (other than benefits under a tax-qualified retirement plan) during the taxable year; (C) has not been an officer of the publicly held corporation; and (D) does not receive remuneration from the publicly held corporation, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services. Section 162(m) of the Internal Revenue Code of 1986, as amended. Treas. Reg. Section 1.162–27(e)(3).

subsidiary of the issuer. Other than the factors set out in Section 10C(a)(1), we do not propose to specify any additional factors that the exchanges must consider in determining independence requirements for members of compensation committees, although we request comment regarding whether there are any other such factors that should be included in our rule.

In proposing Rule 10C–1(b)(1), we considered the similarities and differences between Section 952 of the Act and Section 301 of the Sarbanes-Oxley Act of 2002.[41] Section 301 of the Sarbanes-Oxley Act added Section 10A(m)(1) to the Exchange Act,[42] which required the Commission to direct the exchanges to prescribe independence requirements for audit committee members. Although the independence factors in Section 10C(a)(1) are similar to those in Section 10A(m)(1)—and indeed, Section 952 of the Act essentially provides the compensation committee counterpart to the audit committee requirements of Section 301 of the Sarbanes-Oxley Act—there is one significant difference. Section 10C(a) requires only that the exchanges "*consider* relevant factors" (emphasis added), which include the source of compensation and any affiliate relationship, in developing independence standards for compensation committee members, whereas Section 10A(m) expressly states that certain relationships preclude independence: an audit committee member "*may not,* other than in his or her capacity as a member of the audit committee * * * [a]ccept any consulting, advisory, or other compensatory fee from the issuer; or [b]e an affiliated person of the issuer or any subsidiary thereof" (emphasis added).[43]

As a result, the exchanges have more discretion to determine the standards of independence that audit committee and compensation committee members are required to meet. Section 10A(m) prescribes minimum criteria for the independence of audit committee members and permits the exchanges to adopt more stringent independence criteria as they deem appropriate, subject to approval pursuant to Section 19(b) of the Exchange Act. In contrast, Section 10C gives the exchanges the flexibility to establish their own minimum independence criteria for compensation committee members after considering the relevant factors enumerated in Section 10C(a)(3)(A)–(B). The exchanges may add other factors, as each such exchange deems appropriate, subject to approval pursuant to Section 19(b) of the Exchange Act.

To comply with proposed Rule 10C–1, the exchanges' definitions of independence for compensation committee members would be implemented through proposed rule changes that the exchanges would file pursuant to Section 19(b) of the Exchange Act, which are subject to the Commission's approval.[44] Proposed Rule 10C–1(a)(4) would require that each proposed rule change submission include, in addition to any information required under Section 19(b) of the Exchange Act and the rules thereunder: a review of whether and how existing or proposed listing standards satisfy the requirements of this rule; a discussion of the exchange's consideration of factors relevant to compensation committee member independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt in light of such review.[45] The Commission would then consider, prior to final approval, whether the exchanges considered the relevant factors outlined in Section 10C(a) and whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) of the Exchange Act.

Because these relevant factors cover the same matters as the prohibitions in Section 10A(m)'s definition of audit committee independence, we believe the exchanges would likely consider whether those prohibitions should also be applicable to compensation committee members. The exchanges would not be required to adopt those prohibitions in their definitions and will have flexibility to consider other factors in developing their definitions. For example, we understand that there are concerns, as expressed by several commentators,[46] about a prohibition against allowing directors affiliated with significant investors (such as private equity funds or venture capital firms) to serve on compensation committees.[47] Some commentators have noted that such directors are highly motivated to rigorously oversee compensation and are well-positioned to exercise independent judgment regarding compensation.[48] In addition, some commentators have noted that, although there is a need for audit committee members to be able to exercise objective oversight of an issuer's financial reporting, with respect to the oversight of executive compensation, the interests of representatives of major shareholders are generally aligned with those of other shareholders.[49]

The exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees,

[41] Public Law 107–204, 116 Stat. 745 (2002).

[42] 15 U.S.C. 78j–1(m)(1).

[43] *See* Section 10A(m) of the Exchange Act. Exchange Act Rule 10A–3 states that in order to be considered "independent," an audit committee member cannot accept any consulting, advisory or other compensatory fee (other than receipt of fixed amounts under a retirement plan for prior service with the listed issuer) and, for non-investment company issuers, cannot be an affiliated person of the issuer or its subsidiaries. For investment company issuers, the audit committee member cannot be an "interested person" of the issuer as defined in Section 2(a)(19) of the Investment Company Act.

[44] The standard of review for approving proposed exchange listing standards is found in Section 19(b)(2)(C) of the Exchange Act, which provides that "[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization." Under Section 6(b) of the Exchange Act, the rules of an exchange must be "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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest."

[45] A filing would be required even if an exchange finds that its existing rules satisfy the requirements of proposed Rule 10C–1.

[46] To facilitate public input on the Act, the Commission has provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml.* The public comments we received are available on our Web site at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-8.pdf.* The public comments we have received on Section 952 of the Act are available on our Web site at *http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml.*

Several commentators have suggested that stock ownership alone should not automatically disqualify a board member from serving as an independent director on the compensation committee. *See, e.g.,* letters from American Bar Association, Brian Foley & Company, Inc, Compensia, Davis Polk & Wardwell, LLP and Frederick W. Cook & Co., Inc.

[47] One of these commentators noted that one or more venture capital firms sometimes hold significant equity positions and also have one of their partners serving as a director and member of the board's compensation committee. In this commentator's experience, these individuals, by virtue of their ongoing history with the listed company as well as their familiarity and experience with executive compensation practices in their industry sector, are valuable members of the compensation committee who can offer perspective and expertise which are largely in line with that of the company's shareholders. *See* letter from Compensia.

[48] *See* letter from Frederic W. Cook & Co., Inc. (stating that venture capital and private equity firms "will often have a more demanding pay-for-performance orientation than any other category of investor").

[49] *See, e.g.,* letters from Davis Polk & Wardwell LLP, American Bar Association, Compensia and Frederic W. Cook & Co., Inc.

such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve. The exchanges might also conclude that other relationships or factors linked more closely to executive compensation matters, such as relationships between the members of the compensation committee and the listed issuer's executive management, should be addressed in the definition of independence.

Because the compensation committee independence requirements of Section 10C, unlike the audit committee independence requirements of Section 10A(m), do not require that the exchanges prohibit all affiliates from serving on a compensation committee, we do not believe it is necessary to separately define the term "affiliate" for purposes of proposed Rule 10C–1. As our proposed rule does not establish required independence standards, we also believe it is unnecessary to create any safe harbors for particular relationships, as we did when we adopted our audit committee independence requirements.[50] Although each exchange must consider the affiliate relationships specified in the rule in establishing compensation committee independence standards, there is no requirement to adopt listing standards precluding compensation committee membership based on all such relationships. Accordingly, we do not propose a separate definition of "affiliate" for use in connection with proposed Rule 10C–1.

Request for Comment

- Rather than establishing minimum independence standards that the exchanges must apply to compensation committee members, our proposed rule would permit each exchange to establish its own independence criteria, provided the exchange considers the relevant factors specified in Section 10C relating to affiliate relationships and sources of compensation. Is this approach appropriate? Is there a better approach that would be consistent with the requirements of Section 10C?
- The proposed independence factors that must be considered relate to current relationships between the issuer and the compensation committee member, which is consistent with the approach in Rule 10A–3(b)(1) for audit committee members. Should the required factors also extend to a "look back" period before the appointment of the member to the compensation committee? (We note that the exchanges currently have look-back periods for their definitions of independence for purposes of determining whether a majority of the board of directors is independent.) For members already serving on compensation committees when the new listing standards take effect, should the required factors also extend to a "look back" period before the effective date of the new listing standards? If so, what period (*e.g.,* three years or five years) would be appropriate? Should there be different look-back periods for different relationships or different parties? If so, what should they be, and why?
- Should there be additional factors apart from the two proposed factors required to be considered? For example, should the exchanges be required to include business or personal relationships between a compensation committee member and an executive officer of the issuer as mandatory factors for consideration? Should the exchanges be required to include board interlocks or employment of a director at a company included in the listed issuer's compensation peer group as mandatory factors for consideration? Would any such requirements unduly restrain a company in setting the composition of its board of directors?
- Large shareholders may be deemed affiliates by virtue of the percentage of their shareholdings. As noted above, some commentators have expressed the view that directors affiliated with large shareholders should continue to be permitted to serve on compensation committees because their interests are aligned with other shareholders with respect to compensation matters. Would a director affiliated with a shareholder with a significant ownership interest who is otherwise independent be sufficiently independent for the purpose of serving on the compensation committee? Would the interests of all shareholders be aligned with the interests of large shareholders with respect to oversight of executive compensation? Should our rules implementing Section 10C provide additional or different guidance or standards for the consideration of the affiliated person factor?

3. Authority To Engage Compensation Advisers; Responsibilities; and Funding

Section 10C(c)(1) of the Exchange Act provides that the compensation committee of a listed issuer may, in its sole discretion, retain or obtain the advice of a "compensation consultant," [51] and Section 10C(d)(1) extends this authority to "independent legal counsel and other advisers" [52] (collectively, "compensation advisers"). Both sections also provide that the compensation committee shall be directly responsible for the appointment, compensation, and oversight of the work of compensation advisers. Sections 10C(c)(1)(C) and 10C(d)(3) provide that the compensation committee's authority to retain, and responsibility for overseeing the work of, compensation advisers may not be construed to require the compensation committee to implement or act consistently with the advice or recommendations of a compensation adviser or to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfillment of its duties. To ensure that the listed issuer's compensation committee has the necessary funds to pay for such advisers, Section 10C(e) provides that a listed issuer shall provide "appropriate funding," as determined by the compensation committee, for payment of "reasonable compensation" to compensation consultants, independent legal counsel and other advisers to the compensation committee.[53]

Proposed Rule 10C–1(b)(2) implements Sections 10C(c)(1) and (d)(1) by repeating the provisions set forth in those sections regarding the compensation committee's authority to retain or obtain a compensation adviser, its direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser, and the related rules of construction. In addition, proposed Rule 10C–1(b)(3) implements Section 10C(e) by repeating the provisions set forth in that section regarding the requirement that listed issuers provide for appropriate funding for payment of reasonable compensation to compensation advisers.

We note that while the statute provides that compensation committees of listed issuers shall have the express authority to hire "independent legal counsel," the statute does not require that they do so. Similar to our interpretation [54] of Section 10A(m) of

[50] *See* Exchange Act Rule 10A–3(e)(1)(ii) [17 CFR 240.10A–3(e)(1)(ii)] (providing that a person will be deemed not to be in control of a specified person for purposes of this section if the person "is not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person; and is not an executive officer of the specified person").

[51] *See* Exchange Act Section 10C(c)(1).

[52] *See* Exchange Act Section 10C(d)(1).

[53] *See* Exchange Act Section 10C(e).

[54] *See* Standards Relating to Listed Company Audit Committees, Release No. 33–8220 (Apr. 9, 2003) [68 FR 18788], at fn. 114 ("As proposed, the requirement does not preclude access to or advice

Continued

the Exchange Act, which gave the audit committee authority to engage "independent legal counsel,"[55] we do not construe the requirements related to independent legal counsel and other advisers as set forth in Section 10C(d)(1) of the Exchange Act as requiring a compensation committee to retain independent legal counsel or as precluding a compensation committee from retaining non-independent legal counsel or obtaining advice from in-house counsel or outside counsel retained by the issuer or management.

Request for Comment

- Is additional specificity in the proposed rule needed to provide clearer guidance to listed issuers? For example, should we define what constitutes an "independent legal counsel"? If so, how?
- Should we clarify more explicitly in the implementing rule that this provision is not intended to preclude the compensation committee from conferring with in-house legal counsel or the company's outside counsel or from retaining non-independent counsel?
- Our audit committee rules implementing Section 10A(m) provide that each listed issuer must provide funding for ordinary administrative expenses of the audit committee that are necessary or appropriate in carrying out its duties.[56] Would such a provision be helpful with respect to the compensation committee? Do compensation committees have administrative expenses? If so, are they significant?

4. Compensation Adviser Independence Factors

Section 10C(b) of the Exchange Act provides that the compensation committee may select a compensation adviser only after taking into consideration the factors identified by the Commission. In accordance with Section 10C(b), these factors would apply not only to the selection of compensation consultants, but also to the selection of legal counsel and other advisers to the committee. The statute does not require a compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting a compensation adviser. Section 10C(b) specifies that the independence factors identified by the Commission must be competitively neutral[57] and include, at minimum:

- The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser;
- The amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;
- The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and
- Any stock of the issuer owned by the compensation consultant, legal counsel or other adviser.

Because Exchange Act Section 10C does not require compensation advisers to be independent—only that the compensation committee consider factors that may bear upon independence—we do not believe that this provision contemplates that the Commission would necessarily establish materiality or bright-line numerical thresholds that would determine whether or when the factors listed in Section 10C of the Exchange Act, or any other factors added by the Commission or by the exchanges, must be considered germane by a compensation committee. For example, we do not believe that our rules should provide that a committee must consider stock owned by an adviser only if ownership exceeds a specified minimum percentage of the issuer's stock, or that a committee must consider the amount of revenues that the issuer's business represents for an adviser only if the percentage exceeds a certain percentage of the adviser's revenues. Therefore, proposed Rule 10C–1(b)(4) would require the listing standards developed by the exchanges to include the independence factors set forth in the statute and incorporated into the rule without any materiality or bright-line thresholds or cut-offs. Under the proposed rules, the exchanges may add other independence factors that must be considered by compensation committees of listed issuers.

We believe the factors set forth in Section 10C(b) are generally comprehensive. We are not proposing any additional compensation adviser independence factors at this time, although we are soliciting comment as to whether there are any additional independence factors that should be taken into consideration by a listed issuer's compensation committee when selecting a compensation adviser. We are also soliciting comment as to whether the factors set forth in Section 10C(b) and proposed Rule 10C–1(b)(4) are competitively neutral.

We have already received several comment letters with respect to the compensation adviser independence factors.[58] Commentators are generally supportive of the five factors listed in Section 10C(b), but believe that the factors should be used only in guiding the compensation committee in its selection process, not as an outright bar or prohibition against any one category of compensation adviser.[59] One commentator stated that in requiring the factors to be "competitively neutral," Congress sought to ensure that companies "have the flexibility to select the types of adviser[s] that best meet their particular needs."[60] Several commentators suggested that the stock ownership independence factor should relate only to shares of the listed issuer owned directly by the consulting firm or by advisers immediately engaged by the compensation committee.[61] Other commentators sought clarification on what constitutes a "business" or "personal" relationship between the compensation adviser and a member of the compensation committee.[62] In light of our overall approach to implementing the independence factors as provided in Section 10C(b), we are not proposing to address these points, but solicit comment below on whether we should.

from the company's internal counsel or regular outside counsel. It also does not require an audit committee to retain independent counsel.").

[55] *See* Exchange Act Section 10A(m)(5)("Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.").

[56] *See* Exchange Act Rule 10A–3(b)(5)(iii).

[57] Although there is no relevant legislative history, we assume this is intended to address the concern expressed by the multi-service compensation consulting firms that the disclosure requirements the Commission adopted last year are not competitively neutral because they do not address potential conflicts of interest presented by boutique consulting firms that are dependent on the revenues of a small number of clients. *See* letter from Towers Perrin, commenting on Proxy Disclosure and Solicitation Enhancements, Release No. 33–9052 (July 10, 2009), available at *http://www.sec.gov/comments/s7-13-09/s71309-90.pdf.* The list in Section 10C, which covers both multi-service firm "other services" conflicts and boutique firm "revenue concentration" conflicts, is consistent with this assumption.

[58] *See, e.g.,* letters from Mercer, Meridian Compensation Partners, LLC, Pay Governance LLC and Frederick W. Cook & Co., Inc.

[59] *See, e.g.,* letter from Pay Governance LLC.

[60] *See* letter from Towers Watson.

[61] *See, e.g.,* letters from Frederick W. Cook & Co., Inc and Mercer.

[62] *See, e.g.,* letters from Mercer and Pay Governance LLC.

Request for Comment

- Section 10C(b) specifies that the independence factors identified by the Commission must be competitively neutral, but does not state how we should determine whether a factor is competitively neutral. Are there any issues that should be considered to determine or assess whether a factor is competitively neutral?
- Are the five factors identified in Section 10C(b) of the Exchange Act competitively neutral among different types of compensation advisers? If not, what modifications or adjustments should be made in order to make these factors competitively neutral? Are there specific categories of compensation advisers that would be adversely affected by the compensation committee's use of these factors to assess independence?
- Are there any factors affecting independence that we should add to the list of factors identified in proposed Rule 10C–1(b)(4)? If so, what are they and why should they be included?
- Would the existence of a business or personal relationship between a compensation adviser and an executive officer of the issuer be relevant in considering whether to engage the compensation adviser? If so, why? Should we add this to the required list of factors that must be considered?
- Based on the language in Section 10C(b)(2), which distinguishes between the adviser and the person that employs the adviser, a personal or business relationship between the person employing the adviser and a member of the compensation committee would not be covered by the proposed rule (which, like Section 10C(b)(2)(D), only refers to relationships between the adviser and the compensation committee). Should the required list of factors also include a business or personal relationship between the person employing the compensation adviser and a member of the compensation committee? Along those lines, should it also cover a business or personal relationship between the person employing the adviser and an executive officer of the issuer?
- Should we provide materiality, numerical or other thresholds that would apply to whether or when the independence factors must be considered by a compensation committee? If so, what should they be? For example, should we require consideration of stock ownership only if the amount of stock owned constitutes a significant portion of an adviser's net worth, such as 10%?
- Would law firms be affected by the requirement to consider independence factors in a way that would be materially different than how compensation consultants would be affected?
- Should we clarify what is covered by "provision of other services" in proposed Rule 10C–1(b)(4)(i)?
- We interpret "any stock of the issuer owned by the compensation consultant, independent legal counsel or other adviser" in proposed Rule 10C–1(b)(4)(v) to include shares owned by the individuals providing services to the compensation committee and their immediate family members. We do not believe this factor is intended to extend to the person that employs the adviser since Section 10C(b) is specific when factors extend to the employer and that language is not included for stock ownership. Is this an appropriate interpretation of this factor? If not, why and how should this phrase be interpreted? Should it also cover the person that employs the adviser?
- Should we define or clarify the meaning of the phrase "business or personal relationship," as used in proposed Rule 10C–1(b)(4)(iv), and if so, how?
- Would the proposed requirements have any unintended effects on the compensation committee or its process to select a compensation adviser? If so, please explain.
- Should we adopt rule amendments to Regulation S–K to require listed issuers to describe the compensation committee's process for selecting compensation advisers pursuant to the new listing standards? Would information about the compensation committee's selection process—how it works, what it requires, who is involved, when it takes place, whether it is followed—provide transparency to the compensation adviser selection process and provide investors with information that may be useful to them as they consider the effectiveness of the selection process? Or, would such a requirement result in too much detail about this process in the context of disclosure regarding executive compensation?

5. Opportunity To Cure Defects

Section 10C(f)(2) of the Exchange Act specifies that our rules must provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that would be the basis for a prohibition of the listing of an issuer's securities as a result of its failure to meet the requirements set forth in Section 10C, before imposition of such a prohibition.[63] To implement this requirement, proposed Rule 10C–1(a)(3) would require the exchanges to establish such procedures (if their existing procedures are not adequate) before they prohibit the listing of, or delist, any security of an issuer.

As a preliminary matter, we believe that existing continued listing or maintenance standards and delisting procedures of most of the exchanges would satisfy the requirement for there to be reasonable procedures for an issuer to have an opportunity to cure any defects on an ongoing basis. Most exchanges have already adopted procedures to provide issuers with notice and opportunity for a hearing, an opportunity for an appeal and an opportunity to cure defects before their securities are delisted.[64] Nonetheless, we expect that the rules of each exchange would provide for definite procedures and time periods for compliance with the proposed requirements to the extent they do not already do so.

When we adopted Exchange Act Rule 10A–3(a)(3), which requires that issuers be given an opportunity to cure violations of the audit committee listing requirements, we noted that several commentators to the proposing release for those rules expressed concern regarding rare situations that may occur where an audit committee member ceases to be independent for reasons outside the member's reasonable control.[65] For example, a listed issuer's audit committee member could be a partner in a law firm that provides no services to the listed issuer, but the listed issuer could acquire another company that is one of the law firm's clients. Without an opportunity to cure such a defect, the audit committee member would cease to be independent. Additional time may be necessary to cure such defects, such as ceasing the issuer's relationship with the audit committee member's firm or replacing

[63] *See* Exchange Act Section 10C(f)(2).

[64] *See, e.g.,* NYSE Listed Company Manual Section 801–805; Nasdaq Equity Rules 5800 Series; NYSE AMEX LLC Company Guide Section 1009 and Part 12; Chicago Board Options Exchange Rule 31.94; Chicago Stock Exchange Article 22, Rules 4, 17A, and 22; Nasdaq OMX BX Rule 4800 series; Nasdaq OMX PHLX Rule 811. Neither NYSE Arca nor the National Stock Exchange has a rule that specifically requires listed companies to be given an opportunity to submit a plan to regain compliance with corporate governance listing standards other than audit committee requirements; issuers listed on these exchanges, however, are provided notice, an opportunity for a hearing, and an opportunity for an appeal prior to delisting. *See* NYSE Arca Rule 5.5(m); National Stock Exchange Rule 15.7 and Chapter X.

[65] *See* Standards Relating to Listed Company Audit Committees, Release No. 33–8220 (Apr. 9, 2003).

the audit committee member. Accordingly, in our final rule, we provided that the exchanges' rules may provide that if a member of an audit committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable national securities exchange or national securities association, may remain an audit committee member of the listed issuer until the earlier of the next annual meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.[66]

We are proposing that there should be the same opportunity to cure violations of the independence requirements for compensation committee members, for the same reasons we adopted such provisions for curing violations of the independence requirements for audit committee members. Accordingly, consistent with Rule 10A–3(a)(3), proposed Rule 10C–1(a)(3) provides that the exchanges' rules may provide that if a member of a compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

Request for Comment

- Should the exchanges be required to establish specific procedures for curing defects regarding compliance with compensation committee listing requirements apart from those proposed? If so, what should these procedures be? Should there be a specific course for redress other than the delisting process?
- Should our rule, as proposed, allow exchange rules that would permit the continued service of a compensation committee member who ceases to be independent for reasons outside the member's reasonable control? If so, should our rule impose a maximum time limit for such continued service? Should our rule require that the issuer use reasonable efforts to replace the member who is no longer independent as promptly as practicable?
- Should our rule include specific provisions that set time limits for an opportunity to cure defects other than for instances where a compensation committee member ceases to be independent for reasons outside the member's reasonable control? If so, what time limits would be appropriate?
- Should companies that have just completed initial public offerings be given additional time to comply with the requirements, as is permitted by Exchange Act Rule 10A–3(b)(1)(iv)(A) with respect to audit committee independence requirements?

B. Implementation of Listing Requirements

1. Exchanges Affected

Section 10C of the Exchange Act by its terms applies to all national securities exchanges and national securities associations.[67] These entities, to the extent that their listing standards do not already comply with the rules we adopt under Section 10C, will be required to issue or modify their rules, subject to Commission review, to conform their listing standards to our new rules. An exchange that lists or trades security futures products (as defined in Exchange Act Section 3(a)(56))[68] may register as a national securities exchange under Section 6(g) of the Exchange Act solely for the purpose of trading security futures products.[69] Because the Exchange Act definition of "equity security" includes security futures on equity securities,[70] we believe it is necessary to clarify the application of proposed Rule 10C–1 to those national securities exchanges registered solely pursuant to Section 6(g).

Given that Section 10C(f) of the Act makes no distinction between exchanges registered pursuant to Section 6(a) and those registered pursuant to Section 6(g), we have not proposed a wholesale exemption from the requirements of Rule 10C–1 for those exchanges registered solely pursuant to Section 6(g). However, as discussed below, we are proposing to exempt security futures products from the scope of proposed Rule 10C–1. Accordingly, to the extent our final rule exempts the listing of security futures products from the scope of Rule 10C–1, any national securities exchange registered as such solely pursuant to Section 6(g) of the Exchange Act and that lists and trades only security futures products would not be required to file a rule change in order to comply with Rule 10C–1.

Currently, the only registered national securities association under Section 15A(a) of the Exchange Act is FINRA.[71] However, FINRA does not list securities.[72] While we recognize that Section 10C of the Act specifically requires national securities associations to prohibit the listing of any equity security of an issuer that does not comply with the requirements of Section 10C, as FINRA does not list any securities and does not have listing standards under its rules, we do not expect FINRA to have to develop listing standards regarding compensation committees in compliance with proposed Rule 10C–1.[73] Nevertheless, as Section 10C specifically references national securities associations, proposed Rule 10C–1 would apply to any registered national securities association that lists equity securities in the future.

Request for Comment

- Should we exempt certain exchanges or associations from Section 10C of the Exchange Act? If so, why,

[66] *See* Exchange Act Rule 10A–3(a)(3) [17 CFR 240.10A–3(a)(3)].

[67] The OTC Bulletin Board (OTCBB) and the OTC Markets Group (previously known as the Pink Sheets and Pink OTC Markets) would not be affected by the proposed requirements, and therefore issuers whose securities are quoted on these interdealer quotation systems similarly would not be affected, unless their securities also are listed on an exchange. The OTCBB is an interdealer quotation system for the over-the-counter securities market operated by FINRA that collects and distributes market maker quotes to subscribers. It does not, however, have a listing agreement or arrangement with the issuers whose securities are quoted on the system. Although market makers may be required to review and maintain specified information about the issuer and to furnish that information to the OTCBB, the issuers whose securities are quoted on it are not required to file any information with the system. The OTC Markets Group is not a registered national securities exchange or association, nor is it operated by a registered national securities exchange or association, and thus is not covered by the terms of the proposed rule.

[68] Exchange Act Section 3(a)(56) defines the term "security futures product" to mean "a security future or any put, call, straddle, option, or privilege on any security future." 15 U.S.C. 78c(a)(56).

[69] Exchanges currently registered solely pursuant to Section 6(g) of the Exchange Act include the Board of Trade of the City of Chicago, Inc.; the CBOE Futures Exchange, LLC; the Chicago Mercantile Exchange, Inc.; One Chicago, LLC; the Island Futures Exchange, LLC; and NQLX LLC.

[70] Under Section 3(a)(11) of the Exchange Act, the term "equity security" is defined as any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

[71] Regarding the National Futures Association (NFA), *see* note 6, above, and note 73, below.

[72] *See* note 6, above.

[73] Similarly, we do not expect the NFA, which is registered under Section 15A(k) for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products, *see* note 6, above, to develop listing standards regarding compensation committees in compliance with proposed Rule 10C–1.

and which exchanges or associations should we exempt and why?

• Would we need to exempt an exchange from Section 10C if we also exempt the class of securities listed on such exchange?

2. Securities Affected

a. Listed Equity Securities

Section 10C of the Exchange Act specifies in one subsection that the compensation committee listing requirements are intended to apply to issuers with listed equity securities, but another subsection may suggest that it applies to issuers with any listed securities. Section 10C(a) provides that the Commission shall direct the exchanges to prohibit the listing of any "equity security" of an issuer (other than several types of exempted issuers) that does not comply with the compensation committee member independence requirements. Section 10C(f)(1), which states generally the scope of the compensation committee and compensation adviser listing requirements, provides that, "[n]ot later than 360 days after the date of enactment of this section, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of *any security* of an issuer that is not in compliance with the requirements of this section" (emphasis added).

The Senate-passed version of the bill did not distinguish between equity and non-equity securities, referencing only the prohibition against the listing of "any security" of an issuer not in compliance with the independence requirements. The House-passed version would have required the Commission to adopt rules to direct the exchanges to prohibit the listing of "any class of equity security" of an issuer that is not in compliance with the compensation committee independence standards, as well as with any of the other provisions of that section, including the provisions relating to compensation advisers. According to a press release from the House Financial Services Committee, this language was added during final House deliberations to clarify that the compensation committee independence standards would apply only to "public companies, not to companies that have only an issue of publicly-registered debt." [74]

Because the Senate-passed version of the bill (which did not specify "equity" securities) was used as the base for the conference draft, it appears that addition of "equity" securities in Section 10C(a) of the conference draft is deliberate. Unlike the House-passed bill, however, the final bill specifically references equity securities only in connection with compensation committee independence requirements.

Based on this legislative history, we believe that the compensation committee and other requirements in Section 10C are intended to apply only to issuers with listed equity securities.[75] As noted above, the provision governing compensation committee independence is specifically limited to issuers of equity securities. Against this backdrop, in our view, it is unlikely that Congress intended the remaining compensation committee provisions (compensation adviser independence factors, authority to retain compensation advisers, and responsibility for the appointment, compensation and oversight of the work of the compensation advisers) to apply to issuers with only listed debt securities. We note that the NYSE currently exempts debt-only listed issuers from the compensation committee listing requirements that apply to issuers listing equity securities.[76] In addition, Exchange Act Rule 3a12–11 exempts listed debt securities from most of the requirements in our proxy and information statement rules.[77] Finally, most, if not all, issuers with only listed debt securities, other than foreign private issuers, are privately held.[78] Thus, subjecting issuers of such securities to the requirements of proposed Rule 10C–1 would not serve the general intent of the Act's executive compensation provisions of protecting "shareholders in a public company." [79] In light of the legislative history and our and the exchanges' historical approach to issuers with only listed debt securities, we believe the new listing standards required by Section 10C are intended to apply only to issuers with listed equity securities.

Request for Comment

• We read Section 10C as applying only to issuers with listed equity securities, and our proposed rules are consistent with that view. Should we instead mandate that the requirements of Sections 10C(b) through (e) be applied to a broader range of issuers, including issuers with only listed debt securities or issuers with other types of listed securities? Why or why not?

b. Securities Futures Products and Standardized Options

The Exchange Act's definition of "equity security" includes any security future on any stock or similar security.[80] The Commodity Futures Modernization Act of 2000 (the "CFMA") [81] permits national securities exchanges registered under Section 6 of the Exchange Act [82] and national securities associations registered under Section 15A(a) of the Exchange Act [83] to trade futures on individual securities and on narrow-based security indices ("security futures") [84] without such securities being subject to the registration requirements of the Securities Act of 1933 (the "Securities Act") and Exchange Act so long as they are cleared by a clearing agency that is registered under Section 17A of the Exchange Act [85] or that is exempt from registration under Section 17A(b)(7)(A) of the Exchange Act. In December 2002, we

[74] *See http://www.house.gov/apps/list/press/financialsvcs_dem/press_072809.shtml.*

[75] Although Section 10C is, in many respects, similar to Section 10A(m), there are differences in some of the statutory language. In this regard, we note that the audit committee independence requirements included in Section 10A(m) of the Exchange Act, as set forth in Section 301 of the Sarbanes-Oxley Act, are applicable generally to "listed securities," and no reference is made to equity securities. Therefore, although Section 10A(m) applies to issuers whether they have listed debt or equity, we do not believe this should necessarily prescribe the scope of Section 10C.

[76] *See* NYSE Listed Company Manual Section 303A.00.

[77] In adopting this rule, the Commission determined that debt holders would receive sufficient protection from the indenture contract, the Trust Indenture Act, the proxy rules' antifraud proscriptions, and the Exchange Act rules that facilitate the transmission of materials to beneficial owners. *See* Exemptive Relief and Simplification of Filing Requirements for Debt Securities To Be Listed on a National Securities Exchange, Release No. 34–34922 (Nov. 1, 1994) [59 FR 55342].

[78] Based on information reported in the most recent annual reports on Forms 10–K, 20–F and 40–F that are available on EDGAR, and current public quotation and trade data on issuers whose debt securities are listed on an exchange, such as the *NYSE Listed and Traded Bonds* and *NYSE Amex Listed Bonds,* we estimate that there are approximately 76 issuers that list only debt securities on an exchange. Of these 76 issuers, approximately 21 are wholly-owned subsidiaries that would be exempt from proposed Exchange Act Rule 10C–1 pursuant to Section 10C(g) of the Act. None of these 76 issuers has a class of equity securities registered under Section 12 of the Exchange Act.

[79] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E "Accountability and Executive Compensation," at 872 (Conf. Rep.) (June 29, 2010) ("In this subtitle, Congress provides shareholders in a public company with a vote on executive compensation and additional disclosures regarding compensation practices.").

[80] Exchange Act Section 3(a)(11).

[81] Public Law 106–554, 114 Stat. 2763 (2000).

[82] 15 U.S.C. 78f.

[83] 15 U.S.C. 78o–3(a).

[84] Exchange Act Section 3(a)(56) [15 U.S.C. 78c(a)(56)], and Commodities Exchange Act Section 1a(32) [7 U.S.C. 1a(32)] define "security futures product" as a security future or any put, call, straddle, option, or privilege on any security future.

[85] 15 U.S.C. 78q–1.

adopted rules to provide comparable regulatory treatment for standardized options.[86]

The clearing agency for security futures products and standardized options is the issuer of these securities,[87] but its role as issuer is fundamentally different from an issuer of common stock of an operating company. The purchaser of these securities does not, except in the most formal sense, make an investment decision regarding the clearing agency. As a result, information about the clearing agency's business, its officers and directors and its financial statements is less relevant to investors in these securities than information about the issuer of the underlying security. Similarly, the investment risk in these securities is determined by the market performance of the underlying security rather than the performance of the clearing agency, which is a self-regulatory organization subject to regulatory oversight. Furthermore, unlike a conventional issuer, the clearing agency does not receive the proceeds from sales of security futures products or standardized options.[88]

In recognition of these fundamental differences, the Commission provided exemptions for security futures products and standardized options when it adopted the audit committee listing requirements in Exchange Act Rule 10A–3.[89] Specifically, Rule 10A–3(c) exempts the listing of a security futures product cleared by a clearing agency that is registered pursuant to Section 17A of the Exchange Act or that is exempt from registration pursuant to Section 17A(b)(7)(A) and the listing of a standardized option issued by a clearing agency that is registered pursuant to Section 17A of the Exchange Act. For the same reasons that we exempted these securities from Rule 10A–3, we propose to exempt these securities from Rule 10C–1, as we believe that there would be no benefit to investors or to the public interest in subjecting the issuers of these securities to the requirements of proposed Rule 10C–1.

Request for Comment

- Is our proposed exemption for securities futures products and standardized options necessary or appropriate in the public interest and consistent with the protection of investors?
- Alternatively, would it further the goal of investor protection to adopt Rule 10C–1 without the proposed exemption for securities futures products and standardized options?

3. Exemptions

a. General Approach to Exemptions

Section 10C of the Exchange Act has four different provisions relating to exemptions from some or all of the requirements of Section 10C:

- Section 10C(a)(1) provides that our rules shall direct the exchanges to prohibit the listing of any equity security of an issuer, other than an issuer that is in one of five specified categories, that is not in compliance with the compensation committee member independence requirements of Section 10C(a)(2);
- Section 10C(a)(4) provides that our rules shall authorize the exchanges to exempt a particular relationship from the independence requirements applicable to compensation committee members, as each exchange determines is appropriate, taking into consideration the size of the issuer and other relevant factors;
- Section 10C(f)(3) provides that our rules shall authorize the exchanges to exempt any category of issuer from the requirements of Section 10C, taking into account the potential impact of the requirements on smaller reporting companies; [90] and
- Section 10C(g) specifically exempts controlled companies, as defined in Section 10C(g), from all of the requirements of Section 10C.

We can exempt any person, security or transaction, or any class or classes of person, securities or transactions, from any of the requirements of the Exchange Act, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[91] In addition, as noted above, Section 10C(f)(3) provides that our rules shall authorize the exchanges to exempt any category of issuers from the requirements of Section 10C.[92] As with any listing standards, listing standards implementing this provision would be subject to Commission review pursuant to Section 19(b) of the Exchange Act. In view of this statutory approach, we are preliminarily of the view that it should be up to the exchanges to propose the categories of issuers to be exempted from Section 10C's requirements, subject to our review in the rule filing process. Because issuers frequently consult the exchanges regarding independence determinations and committee responsibilities, the exchanges may be in the best position to identify the types of common relationships that are likely to compromise the ability of an issuer's

[86] *See* Release No. 33–8171 (Dec. 23, 2002) [68 FR 188]. In that release, we exempted standardized options issued by registered clearing agencies and traded on a registered national securities exchange or on a registered national securities association from all provisions of the Securities Act, other than the antifraud provision of Section 17, as well as the Exchange Act registration requirements. Standardized options are defined in Exchange Act Rule 9b–1(a)(4) [17 CFR 240.9b–1(a)(4)] as option contracts trading on a national securities exchange, an automated quotation system of a registered securities association, or a foreign securities exchange which relate to option classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

[87] *See* Fair Administration and Governance of Self-Regulatory Organizations; Disclosure and Regulatory Reporting by Self-Regulatory Organizations; Recordkeeping Requirements for Self-Regulatory Organizations; Ownership and Voting Limitations for Members of Self-Regulatory Organizations; Ownership Reporting Requirements for Members of Self-Regulatory Organizations; Listing and Trading of Affiliated Securities by a Self-Regulatory Organization, Release No. 34–50699 (Nov. 18, 2004) [69 FR 71126], at n. 260 ("Standardized options and security futures products are issued and guaranteed by a clearing agency. Currently, all standardized options and security futures products are issued by the Options Clearing Corporation ('OCC').").

[88] However, the clearing agency may receive a clearing fee from its members.

[89] *See* Exchange Act Rules 10A–3(c)(4) and (5).

[90] Exchange Act Rule 12b–2 defines "smaller reporting company" as "an issuer that is not an investment company, an asset-backed issuer * * *, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or (2) In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or (3) In the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available." Whether or not an issuer is a smaller reporting company is determined on an annual basis.

[91] *See* Exchange Act Section 36.

[92] We are proposing to implement Section 10C(c)(2)'s compensation consultant disclosure requirements by amending Item 407(e)(3) of Regulation S–K. *See* Section II.C., below, for a discussion of these proposed amendments. Because Item 407 of Regulation S–K is not part of Section 10C, Section 10C(f)(3) would not permit exchanges to exempt any category of issuers from our proposed revisions to Item 407, if adopted. We request comment below on whether smaller reporting companies should be exempt from our proposed disclosure requirements in the event the exchanges exempt such companies from the listing standards required by Section 10C.

compensation committee to make impartial determinations on executive compensation and the types of issuers that should be exempted from the other compensation committee listing requirements. Accordingly, relying on the exchanges to exercise their exemptive authority under our rules may result in more efficient and effective determinations as to the types of relationships and the types of issuers that merit an exemption, whether in whole or in part, from the requirements of Section 10C.

We note that Section 10C of the Exchange Act makes no distinction between domestic and foreign issuers, other than to exempt from the independence requirements foreign private issuers that disclose in their annual reports the reasons why they do not have independent compensation committees. Many listed foreign private issuers maintain compensation committees, and other than the committee member independence requirements in proposed Rule 10C–1(b)(1), the proposed rule and rule amendments, therefore, would apply to foreign private issuers as well as domestic issuers.

Because the exchanges will be permitted to propose exemptions to the listing standards required by Section 10C and our rules, we do not propose to exempt any category of issuer or any relationship from rules implementing Section 10C, other than the five categories of issuers not subject to the compensation committee independence requirements, as directed by Section 10C(a)(1), securities futures products and standardized options, as discussed above in Section II.B.2.b, and the equity securities of controlled companies, as directed by Section 10C(g).

Instead of providing exemptions in our rules, consistent with Section 10C(f)(3), proposed Rule 10C–1(b)(5)(i) permits the exchanges to exempt a category of issuers from the requirements of Section 10C, as each exchange determines is appropriate. In determining appropriate exemptions, the exchanges are required by the statute to take into account the potential impact of the requirements of Section 10C on smaller reporting issuers.[93]

Request for Comment

- Should the Commission exempt any types of issuers, such as registered management investment companies, foreign private issuers or smaller reporting companies, from some or all of the requirements of Section 10C? If so, why? Instead, should the Commission, as proposed, defer to the exchanges for exemptions from Section 10C's requirements, rather than propose and adopt exemptions in our rules?
- Should the Commission issue additional guidance to the exchanges as to the factors that should weigh in favor of granting exemptions? What concerns, if any, should the Commission be aware of in reviewing exemptions proposed by the exchanges?
- Rather than exempt any category of issuers, should the Commission require the exchanges to give additional time to certain types of issuers to comply with the requirements of Section 10C, such as companies that have just completed initial public offerings? Or, should we defer to the exchanges to provide temporary exemptions, as proposed?

b. Issuers Not Subject to Independence Requirements

As noted above, Exchange Act Section 10C(a)(1) provides that our rules shall direct the exchanges to prohibit the listing of any equity security of an issuer, other than an issuer that is in one of five specified categories, that is not in compliance with the compensation committee member independence requirements of Section 10C(a)(2). These five categories include controlled companies, limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act[94] and foreign private issuers that provide annual disclosures to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee. Accordingly, proposed Rule 10C–1(b)(1)(iii) provides that these five categories of issuers are not subject to an exchange's compensation committee independence requirements and, therefore, an issuer that is in one of these categories cannot be delisted for not complying with such requirements.

Controlled Companies

Section 10C(g)(2) of the Exchange Act defines "controlled company" as an issuer that is listed on an exchange and holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group or another issuer. Proposed Rule 10C–1(c)(2) would incorporate this definition of "controlled company."

Limited Partnerships

Section 10C does not define the term "limited partnerships." In general, a limited partnership is a form of business ownership and association consisting of one or more general partners who are fully liable for the debts and obligations of the partnership and one or more limited partners whose liability is limited to the amount invested.[95] We do not propose to define this term in proposed Rule 10C–1(c), although we solicit comment on whether we should do so.

Companies in Bankruptcy Proceedings

Section 10C does not define the scope of "companies in bankruptcy proceedings." This term is used in Commission rules without definition.[96] We do not propose to define the scope of "companies in bankruptcy proceedings," although we solicit comment on whether we should do so.

Open-End Management Investment Companies

Section 10C does not define the term "open-end management investment company." Under the Investment Company Act, an open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer.[97] We propose to

[93] *See* Exchange Act Section 10C(f)(3)(B). Section 10C of the Exchange Act includes no express exemptions for smaller reporting companies. We note that neither NYSE nor Nasdaq currently exempts smaller reporting companies from their corporate governance requirements. Other than limited exemptions from requirements to have a majority independent board or three-member audit committee—for example, NYSE Amex and the Chicago Stock Exchange permit smaller issuers to have a 50% independent board and a minimum of two members on the issuer's audit committee—we are unaware of any corporate governance listing standards or related exemptions that are tailored to smaller reporting companies. *See* NYSE Amex Company Guide Section 801(h); Chicago Stock Exchange Article 22, Rules 19(a), 19(b)(1)(C)(iii), and 21(a). Section 10C(f)(3) requires the exchanges to take into account the potential impact of the listing requirements on smaller reporting issuers when exercising the exemptive authority permitted by our rules. Any such exemptions, rule changes and any other new listing requirements would be subject to Commission approval through the rule submission process under Section 19(b) of the Exchange Act.

[94] 15 U.S.C. 80a–1 *et seq.*

[95] *See* Unif. Ltd. P'ship Act §§ 102, 303 and 404 (2001).

[96] *See, e.g.,* Section 55(a)(3)(A) of the Investment Company Act [15 U.S.C. 80a–54(a)(3)(A)]; Item 1107(k) of Regulation AB [17 CFR 229.1107(k)]; and Rule 457 under the Securities Act [17 CFR 230.457].

[97] *See* Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a–4 and 80a–5(a)(1)]. Open-end and closed-end management investment companies registered under the Investment Company Act are generally exempt from current exchange listing standards that require listed issuers to either have a compensation committee or to have independent directors determine, recommend, or oversee specified executive compensation matters. *See, e.g.,* NYSE Listed

Continued

define this term by referencing Section 5(a)(1) of the Investment Company Act.

Foreign Private Issuers

Under Section 10C(a), a foreign private issuer that provides annual disclosure to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee would be exempt from the compensation committee independence requirements. Exchange Act Rule 3b–4 defines "foreign private issuer" as "any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents and any of the following: a majority of its officers and directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States."[98] Since this definition applies to all Exchange Act rules, we do not believe it is necessary to provide a cross-reference to Rule 3b–4 in our proposed rules.

We note that certain foreign private issuers have a two-tier board, with one tier designated as the management board and the other tier designated as the supervisory or non-management board. In this circumstance, we believe that the supervisory or non-management board would be the body within the company best equipped to comply with the proposed requirements. Consistent with our approach to Rule 10A–3, we propose to clarify that in the case of foreign private issuers with two-tier boards of directors, the term "board of directors" means the supervisory or non-management board. As such, to the extent the supervisory or non-management board forms a separate compensation committee, proposed Rule 10C–1 would apply to that committee, with the exception of the committee member independence requirements, assuming the foreign private issuer discloses why it does not have an independent compensation committee in its annual report.

Request for Comment

- Should we provide a definition of "limited partnership" in our proposed rules? If so, what should it be?
- Should we define the scope of "companies in bankruptcy proceedings"? If so, what should that scope be?
- Do we need to clarify, as proposed, that in the case of foreign private issuers with two-tier boards of directors, the term "board of directors" means the supervisory or non-management board?

c. Relationships Exempt From Independence Requirements

As noted above, Section 10C(a)(4) of the Exchange Act provides that the Commission's rules shall permit an exchange to exempt a particular relationship from the compensation committee independence requirements, as such exchange deems appropriate, taking into consideration the size of the issuer and any other relevant factors.[99] To implement this provision, proposed Rule 10C–1(b)(1)(iii)(B) would authorize the exchanges to establish listing standards under the Section 19(b) process that exempt particular relationships between members of the compensation committee and listed issuers that might otherwise impair the member's independence, taking into consideration the size of an issuer and any other relevant factors.

We do not propose to exempt any particular relationships from the independence requirements at this time. As with the authority to exempt particular categories of issuers, we are preliminarily of the view that it should be up to the exchanges to identify and propose the types of particular relationships that should be exempted from the independence requirements.

Request for Comment

- Should the Commission, as proposed, defer to the exchanges to identify and propose the types of particular relationships to be exempted from the independence requirements? If not, why not?
- Should we give guidance to the exchanges on how they should analyze relationships to determine whether an exemption is warranted or not?
- Some of the exchanges, in their existing compensation committee listing standards, permit a listed issuer with a compensation committee comprised of at least three members to include one director who is not independent and is not a current officer or employee, or immediate family member of a current officer or employee, on the compensation committee for no more than two years if the issuer's board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required in the best interests of the company and its shareholders.[100] Should our proposed rule expressly permit the exchanges to continue this practice by exempting certain relationships from the independence requirements, based on the conditions outlined above? Should our proposed rule expressly prohibit the exchanges from continuing this practice?
- What issues should an exchange consider in proposing an exemption?
- Exchange Act Rule 10A–3 requires listed issuers that avail themselves of an exemption from the audit committee independence requirements to disclose such reliance on an exemption in the listed issuer's proxy statement and Form 10–K or, in the case of a registered management investment company, Form N–CSR. Should we similarly require any issuer availing itself of any of the exemptions set forth directly in Section 10C(a)(1) of the Exchange Act or any exemption granted by the relevant exchange to disclose that fact in its proxy statement and Form 10–K or, in the case of a registered management investment company, Form N–CSR or another form? Under current rules, an issuer is required to identify any compensation committee members who are not independent. In light of this requirement, is a specific requirement to note reliance on an exemption unnecessary?
- If a listed issuer's board of directors determines, in accordance with applicable listing standards, to appoint a director to the compensation committee who is not independent, including as a result of exceptional or limited or similar circumstances, should we require the issuer to disclose the nature of the relationship that makes that individual not independent and the reasons for the board of directors' determination, as we do with respect to audit committee members in Item 407(d)(2) of Regulation S–K?

C. Compensation Consultant Disclosure and Conflicts of Interest

Section 10C(c)(2) of the Exchange Act requires that, in any proxy or consent solicitation material for an annual meeting (or a special meeting in lieu of the annual meeting), each issuer must disclose, in accordance with regulations of the Commission, whether:

- The compensation committee has retained or obtained the advice of a compensation consultant; and
- The work of the compensation consultant has raised any conflict of interest and, if so, the nature of the

Company Manual Section 303A.00; Nasdaq Rule 5615(a)(5); NYSE Arca Rule 5.3; NYSE AMEX LLC Company Guide Section 801.

[98] 17 CFR 240.3b–4(c).

[99] *See* Exchange Act Section 10C(a)(4).

[100] *See* NYSE Amex LLC Company Guide, Section 805(b); NYSE Arca Rule 5.3(k)(4); Nasdaq Rule 5605(d)(3); NASDAQ OMX BX Rule 4350(c)(3)(C); Chicago Board Options Exchange Rule 31.10(c)(3); and Chicago Stock Exchange Article 22, Rule 19(d)(3).

conflict and how the conflict is being addressed.

Item 407 of Regulation S–K currently requires Exchange Act registrants that are subject to the proxy rules to provide certain disclosures concerning their compensation committees and the use of compensation consultants.[101] Item 407(e)(3)(iii) generally requires registrants to disclose "any role of compensation consultants in determining or recommending the amount or form of executive and director compensation," including:

- Identifying the consultants;
- Stating whether such consultants were engaged directly by the compensation committee or any other person;
- Describing the nature and scope of the consultants' assignment, and the material elements of any instructions given to the consultants under the engagement; and
- Disclosing the aggregate fees paid to a consultant for advice or recommendations on the amount or form of executive and director compensation and the aggregate fees for additional services if the consultant provided both and the fees for the additional services exceeded $120,000 during the fiscal year.[102]

The current item excludes from the disclosure requirement any role of compensation consultants limited to consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors of the registrant and that is available generally to all salaried employees, or limited to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.[103]

Given the similarities between the disclosure required by Section 10C(c)(2) and the disclosure required by Item 407 of Regulation S–K for registrants subject to our proxy rules, we propose to integrate Section 10C(c)(2)'s disclosure requirements with the existing disclosure rule, rather than simply "tacking on" the new requirements to the existing ones. Section 10C(c)(2) specifies that these disclosures are to be required "in any proxy or consent solicitation material for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting)." By contrast, our proxy rules currently require issuers to provide disclosure relating to the retention of a compensation consultant and fees paid to consultants only in proxy or information statements for annual meetings at which directors are to be elected, and not for all annual meetings. However, Section 10C(c)(2) also provides that the compensation consultant disclosures be made "in accordance with regulations of the Commission." Because we view this disclosure as being most relevant in the context of a meeting at which directors will be elected, consistent with our current rules, we propose to require Section 10C(c)(2)'s compensation consultant and conflict of interest disclosure only for proxy and information statements for annual meetings (or a special meeting in lieu of an annual meeting) at which directors are to be elected.

Section 10C(f) of the Exchange Act requires us to adopt rules directing the exchanges to prohibit the listing of any security of an issuer that is not in compliance with the requirements of Section 10C, which include Section 10C(c)(2)'s disclosure requirements. Consequently, we are required to extend these disclosure requirements to listed issuers other than controlled companies,[104] but we are not required to extend them to all Exchange Act registrants subject to our proxy rules. However, given the similar nature of the disclosure required by current Item 407(e) and Section 10C(c)(2) and the apparent common purpose of these disclosure requirements, and to avoid any potential confusion that could arise from having different disclosure requirements on the same topic for listed issuers on one hand and for unlisted issuers and controlled companies on the other, we propose to combine the current Item 407(e) and Section 10C(c)(2) into one disclosure requirement that would apply to Exchange Act registrants subject to our proxy rules, whether listed or not, whether they are controlled companies or not.

We note that the trigger for disclosure about compensation consultants under Section 10C(c)(2) of the Exchange Act is worded differently from the trigger for disclosure under the amendments to Item 407 that we adopted in 2009.[105] Specifically, Section 10C(c)(2) states that the issuer must disclose whether the "compensation committee retained or obtained the advice of a compensation consultant." By contrast, as noted above, our current rule refers to whether compensation consultants played "any role" in the registrant's process for determining or recommending the amount or form of executive or director compensation. Once disclosure is required, the specifics of what must be disclosed are also different. With regard to conflicts of interest, our current rule requires detailed disclosure about fees in certain circumstances in which there may be a conflict of interest, whereas Section 10C(c)(2) is more open-ended and requires disclosure of any conflict of interest, the nature of the conflict and how the conflict is being addressed, which our existing rules do not require.

As proposed, revised Item 407(e)(3)(iii) would have a disclosure trigger that is consistent with the statutory language and would, therefore, require the registrant to disclose whether the compensation committee has "retained or obtained" the advice of a compensation consultant during the registrant's last completed fiscal year. We anticipate that the practical effect of the proposed change would be minimal, as we believe it would be unusual for a consultant to play a role in determining or recommending the amount of executive compensation without the compensation committee also retaining or obtaining the consultant's advice. And, we believe having a consistent trigger for disclosure would benefit issuers and investors by reducing potential confusion about the disclosure requirements.

Consistent with Section 10C(c)(2), disclosure of whether the compensation committee obtained or retained the advice of a compensation consultant during the registrant's last completed

[101] Registered investment companies are subject to separate proxy disclosure requirements set forth in Item 22 of Schedule 14A, which do not include the compensation committee disclosure described in Item 407(e) of Regulation S–K. *See* Item 7(g) of Schedule 14A. Consistent with our current regulations, registered investment companies would continue to provide disclosure under Item 22 and would not be subject to the amendments to Item 407(e) proposed in this release.

[102] *See* current Items 407(e)(3)(iii)(A) and (B) [17 CFR 229.407(e)(3)(iii)(A) and 229.407(e)(3)(iii)(B)]. Fee disclosure, however, is not required for compensation consultants that work with management if the compensation committee has retained a separate consultant. In promulgating these requirements, we recognized that in this situation the compensation committee may not be relying on the compensation consultant used by management, and, therefore, potential conflicts of interest are less of a concern.

[103] *See* Proxy Disclosure Enhancements, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334]. The Commission determined (based on comments it received on the rule proposal) that the provision of such work by a compensation consultant does not raise conflict of interest concerns that warrant disclosure of the consultant's selection, terms of engagement or fees.

[104] Section 10C(g) specifically exempts controlled companies, as defined in Section 10C(g), from all of the requirements of Section 10C. Controlled companies are subject to our existing Item 407(e)(3) disclosure requirements.

[105] *Id.*

fiscal year and whether the consultant's work raised any conflict of interest and, if so, the nature of the conflict and how it is being addressed, would be required without regard to the existing exceptions in Item 407(e)(3). For example, disclosure about the compensation consultant would be required even if the consultant provides only advice on broad-based plans or provides only non-customized benchmark data. In this regard, we would be broadening the scope of disclosure currently required by Item 407(e)(3)(iii). We believe this is consistent with the purposes of Section 10C(c)(2), which is to require disclosure about compensation consultants and any conflicts of interest they have in a competitively neutral fashion. We solicit comment, however, on whether any of the current exclusions should extend to this new disclosure requirement or, conversely, whether we should eliminate the exclusions with respect to the existing disclosure requirements. We also solicit comment on whether it would be preferable to retain the existing requirements without modification and add the new requirements without integrating them into the existing ones.

The other existing disclosure requirements of Item 407(e)(3) would remain the same, aside from amending the fee disclosure requirements to link the disclosure of fees to the compensation committee "retaining or obtaining the advice of a compensation consultant" and to management "retaining or obtaining the advice of a compensation consultant."[106] The disclosure of the aggregate fees paid to a compensation consultant is intended to enable security holders to assess the potential for conflicts of interest resulting from the compensation consultant's financial incentive to provide services to the issuer in addition to executive compensation consulting services. We believe that this disclosure benefits investors and complements the required Section 10C(c)(2) disclosures, and therefore propose to retain this existing disclosure requirement, modified as noted above.

To provide guidance to issuers as to whether the compensation committee or management has "obtained the advice" of a compensation consultant,[107] we are proposing an instruction to clarify this statutory language. This instruction would provide that the phrase "obtained the advice" relates to whether a compensation committee or management has requested or received advice from a compensation consultant, regardless of whether there is a formal engagement of the consultant or a client relationship between the compensation consultant and the compensation committee or management or any payment of fees to the consultant for its advice.

Currently, Item 407(e)(3) focuses on the conflicts of interest that may arise from a compensation consultant also providing other non-executive compensation consulting services to an issuer, which may lead the consultant to provide executive compensation advice favored by management in order to obtain or retain such other assignments. Section 10C(c)(2) is more open-ended about conflicts of interest in that it requires issuers to disclose whether the work of a compensation consultant raised "any conflict of interest" and, if so, the nature of the conflict and how the conflict is being addressed. The term "conflict of interest" is not defined in Section 10C(c)(2), and our proposed rule would not supply a definition.

As discussed above, Sections 10C(f) and 10C(b) of the Exchange Act require the Commission to adopt rules directing the exchanges to prohibit the listing of the securities of an issuer whose compensation committee does not consider the independence factors identified by the Commission when retaining compensation advisers. Section 10C(b)(2) identifies specific factors that must be included in these listing standards, and, as described above, we are proposing to include them in proposed Rule 10C–1(b)(4)(i) through (v).[108]

In light of the link between the requirement that the compensation committees of listed issuers consider independence factors before retaining compensation advisers and the disclosure requirements about compensation consultants and their conflicts of interest, we believe it would be appropriate to provide some guidance to issuers as to the factors that should be considered in determining whether there is a conflict of interest that would trigger disclosure under the proposed amendments. Therefore, we propose to include an instruction that identifies the factors set forth in proposed Rule 10C–1(b)(4)(i) through (v) as among the factors that issuers should consider in determining whether there is a conflict of interest that may need to be disclosed in response to our proposed amendments to Item 407(e)(3)(iii). Although only listed issuers will be required to consider the five independence factors before selecting a compensation consultant, we believe that these five factors will be helpful to all Exchange Act registrants subject to the proxy rules in assessing potential conflicts of interest.

We have not concluded that the presence or absence of any of these individual factors indicates that a compensation consultant has a conflict of interest that would require disclosure under the proposed amendments, nor have we concluded that there are no other circumstances or factors that might present a conflict of interest for a compensation consultant retained by a compensation committee. Moreover, if, under our rules, disclosure of fees paid to a compensation consultant is required, this does not reflect a conclusion that a conflict of interest is present.[109] In addition to considering the factors enumerated above and any other factors that the exchanges may highlight in applicable listing standards, the issuer would need to consider the specific facts and circumstances relating to a consultant's engagement to determine whether there may be a conflict of interest that would be required to be disclosed under our new rules.

If a compensation committee determines that there is a conflict of interest with the compensation consultant based on the relevant facts and circumstances, the issuer would be required to provide a clear, concise and understandable description of the specific conflict and how the issuer has addressed it. A general description of an issuer's policies and procedures to address conflicts of interest or the appearance of conflicts of interest would not suffice.

Request for Comment

- We request comment on our proposed implementation of the requirements of Section 10C(c)(2). Is it appropriate to limit Section 10C(c)(2)'s disclosure requirement to proxy and information statements for meetings at

[106] *See* proposed Items 407(e)(3)(iii)(A) and (B). The fee disclosure requirements would continue to include the existing exclusions for consulting on any non-discriminatory, broad-based plan or providing non-customized information.

[107] *See* letter from Compensia.

[108] *See* Section II.A.4, above, for a description of proposed Rule 10C–1(b)(4)(i) through (v).

[109] *See* Proxy Disclosure Enhancements, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] ("Our amendments as adopted are intended to facilitate investors' consideration of whether, in providing advice, a compensation consultant may have been influenced by a desire to retain other engagements from the company. This does not reflect a conclusion that we believe that a conflict of interest is present when disclosure is required under our new rule, or that a compensation committee or a company could not reasonably conclude that it is appropriate to engage a consultant that provides other services to the company requiring disclosure under our new rule.").

which directors are to be elected? If not, why not? Is it appropriate to extend Section 10C(c)(2)'s disclosure requirement to controlled companies and those Exchange Act registrants that are not listed issuers, as proposed? If not, why not?

- Should we amend Forms 20–F and 40–F to require foreign private issuers that are not subject to our proxy rules to provide annual disclosure of the type required by Section 10C(c)(2)? Why or why not?
- Is it preferable to integrate the Section 10C(c)(2) disclosure requirements with the existing requirements of Item 407(e)(3), as proposed, or, instead, should we add the new requirements without modifying the existing requirements of the item?
- Should we extend any of the current exclusions under Item 407(e)(3) to the new Section 10C(c)(2) disclosures? Conversely, should we eliminate altogether the exclusions under Item 407(e)(3)?
- Are there any additional disclosures concerning conflicts of interest involving the activities of compensation consultants that would be beneficial to investors?
- Is additional clarification necessary regarding the phrase "obtained the advice"? Does our proposed instruction provide adequate guidance to issuers on how to interpret that phrase?
- Do the five factors in proposed Rule 10C–1(b)(4)(i) through (v) help issuers determine whether there is a "conflict of interest"? Should we define the term "conflict of interest"? If so, how? Are there other factors that should be considered in determining whether there is a conflict of interest? If so, should these factors also be identified in the proposed instruction?
- Because a compensation committee may be reluctant or unable to definitively conclude whether a conflict of interest exists, should we also include the appearance of a conflict of interest in our interpretation of what constitutes a "conflict of interest" that must be disclosed under our proposed rules? Why or why not? Should we include potential conflicts of interest in our interpretation? Why or why not? We note that our 2009 amendments to Item 407(e) did not conclude that there was a conflict of interest posed by a consultant providing additional services to the issuer, only that there was a potential conflict of interest.
- Should we should require fee disclosure for other types of potential conflicts of interest, such as revenue concentration, in light of Section 10C(c)(2)'s requirement that the factors considered by the compensation committee before engaging compensation advisers be "competitively neutral"? For example, to address revenue concentration, we could require disclosure of an adviser's fees received from the issuer (in percentage terms) if such fees comprise more than 10% of the adviser's annual revenues. Would this be appropriate?
- Although a listed issuer's compensation committee is required to consider independence factors before selecting any compensation adviser, Section 10C(c)(2) requires conflict of interest disclosure only as to compensation *consultants.* Should we also extend this disclosure requirement to other types of advisers to the compensation committee, such as legal counsel? Why or why not?
- As proposed, and consistent with current rules, Item 407(e)(3) would apply to smaller reporting companies. Should we exempt such companies from these disclosure requirements? Do many smaller reporting companies' compensation committees retain or obtain the advice of compensation consultants? Should an exemption be provided if the exchanges exempt such companies from the listing standards required by Section 10C?

D. Transition and Timing

The Act requires us to issue rules directing the exchanges to prohibit the listing of issuers not in compliance with Section 10C "not later than 360 days after" the enactment of Section 10C, or by July 16, 2011.[110] The Act did not establish a specific deadline by which the listing standards promulgated by the exchanges must be in effect. To facilitate timely implementation of the proposals, we propose that each exchange must provide to the Commission, no later than 90 days after publication of our final rule in the **Federal Register**, proposed rules or rule amendments that comply with our final rule. Further, each exchange would need to have final rule or rule amendments that comply with our final rule approved by the Commission no later than one year after publication of our final rule in the **Federal Register**. We request comment below on the appropriateness of these periods.

Section 10C(c)(2) requires that each issuer disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed. Although the statute specifies that this disclosure would be required with respect to meetings occurring on or after the date that is one year after the enactment of Section 10C, which would be July 21, 2011, the statute also requires these disclosures to be "in accordance with regulations of the Commission," and our regulations do not currently require such disclosures to be made. Consequently, Section 10C(c)(2)'s compensation consultant and conflict of interest disclosures would not be required for proxy or information statements filed in definitive form before the effective date of our rules implementing Section 10C(c)(2).

Request for Comment

- Do the proposed implementation dates provide sufficient time for exchanges to propose and obtain Commission approval for new or amended rules to meet the requirements of our proposed rules? If not, what other dates would be appropriate, and why?
- What factors should the Commission consider in determining these dates?
- Should our rules also specify the dates by which listed issuers must comply with an exchange's new or amended rules meeting the requirements of our proposed rules? If so, what dates would be appropriate? Should there be uniformity among the exchanges with respect to the dates by which their listed issuers must comply with the exchanges' new or amended rules?
- Would a period beyond the proposed date be necessary or appropriate for compliance by smaller reporting companies? Are there special considerations that we should take into account for foreign private issuers?

General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

[110] *See* Section 10C(f)(1) of the Exchange Act [15 U.S.C. 78j-3(f)(1)]. The Act was enacted on July 21, 2010. The 360th day following enactment would be July 16, 2011.

III. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule and rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[111] We are submitting the proposed rule and rule amendments to the Office of Management and Budget (OMB) for review in accordance with the PRA.[112] The titles for the collection of information are:

(1) "Regulation 14A and Schedule 14A" (OMB Control No. 3235–0059);

(2) "Regulation 14C and Schedule 14C" (OMB Control No. 3235–0057); and

(3) "Regulation S–K" (OMB Control No. 3235–0071).[113]

Regulation S–K was adopted under the Securities Act and Exchange Act; Regulations 14A and 14C and the related schedules were adopted under the Exchange Act. The regulations and schedules set forth the disclosure requirements for proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending the schedules constitute reporting and cost burdens imposed by each collection of information. 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. Compliance with the proposed rule and rule amendments would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

B. Summary of Proposed Rule and Rule Amendments

As discussed in more detail above, we are proposing new Rule 10C–1 under the Exchange Act and amendments to Item 407(e) of Regulation S–K. Proposed Rule 10C–1 would implement the requirements of Section 10C of the Exchange Act, as added by Section 952 of the Act. Specifically, proposed Rule 10C–1 would direct the exchanges to prohibit the listing of any equity security of an issuer, with certain exemptions, that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. We are proposing to adopt several limited exemptions from the requirements of proposed Rule 10C–1 and to authorize the exchanges to include other exemptions in their listing standards, pursuant to the rule filing process under Section 19(b) of the Exchange Act, as each exchange determines is appropriate, taking into consideration the size of the issuer and any other relevant factors.

To implement Section 10C(c)(2), we are proposing to amend Item 407(e)(3) of Regulation S–K to require disclosure, in any proxy or information statement relating to an annual meeting of shareholders (or a special meeting in lieu of an annual meeting) at which directors are to be elected, of whether the issuer's compensation committee (or another board committee performing similar functions) retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed.[114] We also propose to combine and streamline these disclosure requirements with the existing disclosure requirements of Item 407(e)(3).

C. Burden and Cost Estimates Related to the Proposed Amendments

The proposed amendments to Item 407(e)(3) of Regulation S–K would require, if adopted, additional disclosure in proxy or information statements filed on Schedule 14A or Schedule 14C relating to an annual meeting of shareholders (or a special meeting in lieu of an annual meeting) at which directors are to be elected and would increase the burden hour and cost estimates for each of those forms. For purposes of the PRA, we estimate the total annual increase in the paperwork burden for all affected issuers to comply with our proposed collection of information requirements to be approximately 23,940 hours of in-house personnel time and approximately $3,192,000 for the services of outside professionals.[115] These estimates include the time and the cost of collecting the information, preparing and reviewing disclosure, filing documents, and retaining records. In deriving our estimates, we assumed that the burden hours of the proposed disclosure requirements would be comparable to the burden hours related to similar disclosure requirements under our current rules regarding compensation consultants.[116] Based on our assumptions, we estimated that the proposed amendments to Item 407(e)(3)(iii) of Regulation S–K would impose on average four incremental burden hours.[117]

The table below shows the total annual compliance burden, in hours and in costs, of the collection of information pursuant to the proposed amendments to proxy and information statements and to Regulation S–K.[118] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the proposed disclosure requirements. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. For purposes of the PRA, we estimate that 75% of the burden of preparation of Schedules 14A and 14C is carried by the issuer internally and that 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. There is no change to the estimated burden of the collections of information under Regulation S–K because the burdens that this regulation imposes are reflected in our burden estimates for Schedules 14A and 14C.

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[111] 44 U.S.C. 3501 *et seq.*

[112] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[113] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosure requirements in Regulation S–K and is reflected in the analysis of these forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burden imposed by Regulation S–K to be a total of one hour.

[114] Section 10C(c)(2) requires listed issuers to provide this disclosure; we propose to extend this disclosure requirement to non-listed issuers as well. We have not, however, proposed to require comparable disclosure from foreign private issuers, as foreign private issuers are not subject to Exchange Act Sections 14(a) and 14(c). *See* Exchange Act Rule 3a12–3.

[115] Our estimates represent the average burden for all issuers, both large and small.

[116] *See* Proxy Disclosure Enhancements, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] (in which the Commission estimated the average incremental disclosure burden for the rule amendments to Item 407(e)(3) relating to compensation consultants to be three hours).

[117] These four incremental burden hours would be in addition to the three incremental burden hours relating to our current compensation consultant disclosure rules. *Id.*

[118] For convenience, the estimated hour and cost burdens in the table have been rounded to the nearest whole number.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR SCHEDULES 14A AND 14C.

	Number of responses (A) [119]	Incremental burden hours/ form (B)	Total incremental burden hours (C)=(A)*(B)	Internal company time (D)	External professional time (E)	Professional costs (F)=(E)*$400
Sch. 14A	7,300	4	29,200	21,900	7,300	$2,920,000
Sch. 14C	680	4	2,720	2,040	680	$272,000
Total	7,980		31,920	23,940	7,980	$3,192,000

D. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our assumptions and estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–13–11. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–13–11 and be submitted to the U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington DC 20549–0213. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

[119] The number of responses reflected in the table equals the actual number of schedules filed with the Commission during the 2010 fiscal year.

IV. Cost-Benefit Analysis

A. Introduction and Objectives of Proposals

We are proposing rulemaking to implement and supplement the provisions of the Act relating to compensation committees and compensation advisers. Section 952 of the Act amends the Exchange Act by adding new Section 10C. Section 10C(a)(1) requires the Commission to adopt rules directing the exchanges to prohibit the listing of any equity security of an issuer, with certain exemptions, that is not in compliance with the independence requirements for members of the compensation committee. In accordance with the statute, the rules, once adopted, would require the exchanges to establish listing standards that require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent." The term "independent" is not defined in Section 10C(a)(1). Instead, the section provides that "independent" is to be defined by the exchanges after taking into consideration relevant factors, including, but not limited to, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director, and whether the director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

In addition to the independence requirements set forth in Section 10C(a), Section 10C(f) requires the Commission to adopt rules directing the exchanges to prohibit the listing of any security of an issuer that is not in compliance with the following requirements relating to compensation committees and compensation advisers, as set forth in paragraphs (b) through (e) of Section 10C:

- Each compensation committee must have the authority, in its sole discretion, to retain or obtain the advice of compensation consultants, independent legal counsel and other advisers (collectively, "compensation advisers"); [120]
- Before selecting any compensation adviser, the compensation committee must take into consideration specific factors identified by the Commission that affect the independence of compensation advisers; [121]
- The compensation committee must be directly responsible for the appointment, compensation and oversight of the work of any compensation adviser; [122] and
- Each listed issuer must provide appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to compensation advisers.[123]

Finally, Section 10C(c)(2) requires each listed issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting), in accordance with Commission regulations, whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed.

Under Section 10C, our rules must permit the exchanges to exempt particular categories of issuers from the requirements of Section 10C and particular relationships from the compensation committee independence requirements of Section 10C(a). Our rules must also provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that might otherwise result in the delisting of the issuer's securities.

[120] Exchange Act Sections 10C(c)(1)(A) and 10C(d)(1) [15 U.S.C. 78j–3(c)(1)(A) and (d)(1)].

[121] Exchange Act Section 10C(b) [15 U.S.C. 78j–3(b)].

[122] Exchange Act Sections 10C(c)(1)(B) and 10C(d)(2) [15 U.S.C. 78j–3(c)(1)(B) and (d)(2)].

[123] Exchange Act Section 10C(e) [15 U.S.C. 78j–3(e)].

We are proposing new Exchange Act Rule 10C–1 to implement the compensation committee listing requirements of Sections 10C(a)–(g) of the Exchange Act. Proposed Rule 10C–1 closely tracks the statutory requirements of Section 10C. To implement Section 10C(c)(2) of the Exchange Act, we are proposing rule amendments to Regulation S–K to require disclosure, in any proxy or information statement relating to an annual meeting of shareholders at which directors are to be elected (or special meeting in lieu of the annual meeting), of whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed. In connection with these amendments, we also propose to revise the current disclosure requirements relating to the retention of compensation consultants by providing a uniform trigger for when compensation consultant disclosures will be required. In addition, our proposed amendments would eliminate the existing exception from the requirement to identify compensation consultants and describe their engagements for those cases in which a consultant's role is limited to consulting on a broad-based plan or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

The Commission is sensitive to the costs and benefits imposed by the proposed rule and rule amendments. The discussion below focuses on the costs and benefits of the proposals made by the Commission to implement the Act within its permitted discretion, rather than the costs and benefits of the Act itself.

B. Benefits

The proposed rulemaking is intended to implement and supplement the requirements of Section 10C of the Exchange Act as set forth in Section 952 of the Act.

Required Listing Standards

Under proposed Rule 10C–1, the exchanges would be directed to adopt listing standards that would apply to any committee of the board that oversees executive compensation, whether or not such committee performs other functions or is formally designated as a "compensation committee." We believe this aspect of the rule proposal may help achieve the objectives of the Act by providing clarity and reducing any uncertainty about the application of Section 10C. Moreover, this may benefit investors because it would limit the ability of listed issuers to circumvent the compensation committee independence requirements under Section 10C by delegating oversight of executive compensation to a board committee that is not formally designated as the "compensation committee," but performs that function.

As directed by Section 10C, proposed Rule 10C–1 directs the exchanges to develop a definition of independence applicable to compensation committee members after considering the relevant factors set forth in Exchange Act Section 10C(a)(3). We do not propose to specify any additional factors that the exchanges must consider in determining independence requirements for compensation committee members. We believe that permitting exchanges greater latitude in crafting the required independence standards, subject to Commission review pursuant to Section 19(b) of the Exchange Act, may result in more efficient and effective determinations as to what types of relationships should preclude a finding of independence with respect to membership on a board committee that oversees executive compensation. Because issuers frequently consult the exchanges regarding independence determinations, the exchanges may be in the best position to identify the types of common relationships that are likely to compromise the ability of an issuer's compensation committee to make impartial determinations on executive compensation.

Disclosure Amendments

Our proposed amendments to Item 407(e)(3) of Regulation S–K would require the specific disclosures mandated by Section 10C(c)(2). While no other disclosures are proposed to be required, our proposed amendments would extend the disclosure requirement of Section 10C(c)(2) to issuers, whether listed or not, that file proxy or information statements relating to an election of directors. Although controlled companies are exempt from the requirements of Section 10C, we propose to extend the disclosure requirements of Section 10C(c)(2) to controlled companies in order to have uniform compensation consultant disclosure requirements for all issuers subject to our proxy rules. Under the proposed amendments, in addition to the disclosure currently required by Item 407(e)(3), issuers would be required to disclose whether the compensation committee has retained or obtained the advice of a compensation consultant, whether the work of the compensation consultant has raised any conflict of interest, and, if so, the nature of the conflict and how the conflict is being addressed.

We believe that requiring these disclosures of issuers subject to the proxy rules will benefit investors by providing them with easily understandable and uniform disclosure regarding compensation consultant conflicts of interest. Under our existing disclosure rules, these issuers must already discuss the selection of compensation consultants and disclose the nature and scope of their assignment, including any material instructions or directions governing their performance under the engagement. We believe the proposed amendment would complement these existing disclosure requirements by increasing the transparency of issuers' policies regarding compensation consultant conflicts of interest. To the extent that the relationships between an issuer and a compensation consultant are more transparent under the proposed amendments, investors should benefit through their ability to better monitor the process of recommending and determining executive and director pay. The increased disclosure should improve the ability of investors to monitor performance of directors responsible for overseeing compensation consultants, thus enabling them to make more informed voting and investment decisions.

We also propose to harmonize current Item 407(e)(3)(iii)'s disclosure triggers with the requirements of Section 10C(c)(2). Our goal in proposing uniform disclosure triggers is to prevent the adoption of potentially duplicative or overlapping disclosure requirements; we also believe that providing a uniform standard for when these disclosures will be required will benefit issuers by allowing them to streamline their procedures for ensuring proper disclosure compliance.

The proposed amendments also include an instruction that provides guidance to issuers as to whether the compensation committee has "obtained the advice" of a compensation consultant. This instruction should benefit issuers by providing clarity and reducing any uncertainty about whether disclosure under the new rules is required. In addition, we propose to include an instruction that identifies the factors set forth in proposed Rule 10C–

1(b)(4)(i) through (v) as among the factors to be considered in determining whether there is a conflict of interest that may need to be disclosed in response to our proposed amendments to Item 407(e)(3)(iii). Although only listed issuers will be required to consider the five independence factors before selecting a compensation consultant, we believe that identifying these five factors as factors that should be considered in determining whether conflict of interest disclosure is required will aid all Exchange Act registrants subject to the proxy rules in complying with their proxy disclosure obligations.

C. Costs

Required Listing Standards

Under our proposed rules, exchanges would be required to adopt independence requirements that apply to members of listed issuer compensation committees or committees performing equivalent functions, but not to directors who oversee executive compensation matters in the absence of such committees. Some exchange listing standards currently require issuers to form compensation or equivalent committees; others require independent directors to oversee specified compensation matters but do not require the formation of a compensation or equivalent committee. Exchanges that do not require the formation of a compensation or equivalent committee could, on their own initiative, determine to apply the same independence standards to directors who oversee compensation matters in the absence of a compensation committee as they do to formally organized compensation committees. In the event they do not, however, issuers could seek to list on such exchanges in order to avoid having to comply with the compensation committee independence standards that would apply at the exchanges that require the formation of a compensation or equivalent committee. Further, to the extent exchanges compete for listings, they may have an incentive to propose standards that issuers may find less onerous. This could result in costs to exchanges to the extent they lose issuer listings, as well as costs to issuers to the extent they choose to alter their existing committee structure to avoid having to comply with the new standards.

Our decision not to exempt additional categories of issuers, beyond those specified in Section 10C(a)(1), from the independence requirements of our proposed rule and instead to rely on the various exchanges to propose additional exemptions for appropriate categories of issuers, may also result in certain direct or indirect costs. For example, the exchanges will bear the direct cost of evaluating whether additional exemptions would be appropriate and including such exemptions in the rule filings that they are required to make in order to comply with our proposed rule.

Disclosure Amendments

As noted above, our proposal implements the requirements of Section 10C(c)(2). In addition, although not required by Section 10C(c)(2), we propose to require all issuers subject to our proxy rules, rather than only listed issuers, to provide the disclosures called for by Section 10C(c)(2). We also propose to combine and streamline the new disclosure requirements with the existing compensation consultant disclosure requirements. Specifically, we propose to provide a uniform trigger for when compensation consultant disclosures will be required and eliminate the existing exception from the requirement to identify compensation consultants and describe their engagements for those cases in which a consultant's role is limited to consulting on a broad-based plan or providing non-customized benchmark compensation information.

As a result, controlled companies and non-listed issuers will incur costs in disclosing all compensation consultant engagements and in determining and disclosing whether the work of any compensation consultant has raised any conflict of interest, the nature of the conflict, and how the conflict is being addressed. These costs, which would not be required to be incurred by Section 10C(c)(2), may be mitigated to an extent because our existing rules already require issuers subject to our proxy rules to disclose, with limited exceptions, any role of compensation consultants in determining or recommending the amount or form of executive and director compensation. As a result, these issuers will already have developed procedures for collecting and analyzing information about the use of compensation consultants.

For purposes of the PRA, we estimate the aggregate annual cost of the proposed compensation consultant and related conflicts of interest disclosure to be approximately 23,940 hours of company personnel time and approximately $3,192,000 for the services of outside professionals. However, this amount includes the costs associated with the disclosure requirements of Section 10C(c)(2) of the Exchange Act, as well as our proposed extension of the disclosure requirement to controlled companies and non-listed issuers and the revisions proposed for the purpose of integrating the new disclosure requirements with existing Item 407(e)(3). As a result, a portion of the reporting costs are attributable to the requirements of the Act rather than to our proposed amendments to Item 407.

We have not proposed that compensation committees of non-listed issuers be required to consider the independence of compensation consultants or other compensation advisers before they are selected; nonetheless, in light of our proposal that issuers subject to our proxy rules will be required to identify and disclose how they manage any conflicts of interest raised by the work of compensation consultants that serve as advisers to the compensation committee, non-listed issuers may incur additional costs to develop more formalized selection processes than they otherwise would have absent such a disclosure requirement. For example, to prepare for the disclosure requirement, at the time any compensation consultant is selected, compensation committees of non-listed issuers may devote additional time and resources to analyzing and assessing the independence of the compensation consultant and addressing and resolving potential conflicts of interest. Although our proposed disclosure requirement will not preclude compensation committees from selecting the compensation consultant of their choosing, such committees may elect to engage new, alternative or additional compensation advisers after considering what disclosure might be required under our proposed rules. Such decisions could result in additional costs to issuers, including costs related to termination of existing services and search and engagement costs to retain new advisers. In addition, costs may increase if an issuer decides to engage multiple compensation consultants for services that had previously been provided by a single consultant.

As a mitigating factor, our proposed rules would require issuers to provide narrative disclosure regarding the management of conflicts of interest. To the extent a non-listed issuer's compensation committee determines to retain a compensation consultant, despite potential conflicts of interest, this provision provides the issuer a means to communicate to investors both the reasons why the committee believes that retaining the consultant and managing the potential conflict of interest is the best approach and the methods employed by the issuer to manage or address the potential conflict.

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition.[124] In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b) of the Securities Act [125] and Section 3(f) of the Exchange Act [126] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Our proposed rule and rule amendments would implement the requirements of Section 952 of the Act, which added Section 10C to the Exchange Act. Among other provisions, Section 10C requires us to direct the exchanges to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. It is possible that some listed issuers might find the proposed requirements too onerous and seek to list on foreign exchanges or other markets to avoid compliance. This could cause U.S. exchanges to lose trading volume. We do not believe our proposed rules are likely to have this effect, as issuers listed on U.S. exchanges must, for the most part, already provide for executive compensation oversight by independent directors.[127] It is also possible that, in competing for listings, the exchanges could adopt different definitions of independence for compensation committee members, which could affect an issuer's decision about where to list its securities.

Section 10C also requires disclosure from listed issuers, other than controlled companies, as to their use and oversight of compensation consultants. We propose to require companies subject to our proxy rules, including controlled companies, to provide this disclosure, whether listed or not. We believe this expansion of the statutory disclosure requirement will promote uniform disclosure on these topics among reporting companies and may allow investors to better understand the process by which compensation committees select compensation consultants and manage conflicts of interest.

Our proposals may promote efficiency and competitiveness of the U.S. capital markets by increasing the transparency of executive compensation decision-making processes and by improving the ability of investors to make informed voting and investment decisions, which may encourage more efficient capital formation. The proposals also may affect competition among compensation consultants. By requiring disclosure of the existence and management of potential compensation consultant conflicts of interest, our proposed rules may lead compensation committees to engage in more thorough and deliberative analyses of adviser independence. If this results in the selection of compensation advisers that are more independent or impartial than might otherwise be chosen, this could in turn promote more efficient executive compensation determinations. The proposed disclosure also could incent consultants to compete on the basis of their policies that serve to minimize any potential conflicts of interest or, to the extent other consultants are available, lead compensation committees to avoid hiring consultants perceived as having a conflict of interest.

We request comment on whether the proposed amendments, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their views, to the extent possible.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[128] we solicit data to determine whether the proposed rule amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (1) The potential annual effect on the economy; (2) any increase in costs or prices for consumers or individual industries; and (3) any potential effect on competition, investment or innovation.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act.[129] This IRFA involves proposals to direct the national securities exchanges and national securities associations to prohibit the listing of an equity security of an issuer that is not in compliance with several requirements relating to the issuer's compensation committee, and to revise the disclosure requirements of Regulation S–K Item 407 related to compensation consultants.

A. Reasons for, and Objectives of, the Proposed Action

We are proposing amendments to implement Section 10C of the Exchange Act as added by Section 952 of the Act. The proposals would direct the exchanges to prohibit the listing of equity securities of any issuer that does not comply with Section 10C's compensation committee and compensation adviser requirements. Our proposed amendments would also require issuers to provide certain disclosures regarding their use of compensation consultants and management of compensation consultant conflicts of interest.

B. Legal Basis

We are proposing the amendments pursuant to Sections 6, 7, 10, and 19(a) of the Securities Act; and Sections 10C, 12, 13, 14, 15(d), 23(a) and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Action

The proposals would affect exchanges that list equity securities and issuers subject to our proxy rules. The Regulatory Flexibility Act defines "small

[124] 15 U.S.C. 78w(a)(2).

[125] 15 U.S.C. 77b(b).

[126] 15 U.S.C. 78c(f).

[127] *See, e.g.,* NYSE Listed Company Manual Section 303A.05(a) and Nasdaq Rule 5605(d).

[128] 5 U.S.C. 801 *et seq.*

[129] 5 U.S.C. 603.

entity" to mean "small business," "small organization," or "small governmental jurisdiction."[130] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Exchange Act Rule 0–10(e) provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Exchange Act Rule 601;[131] and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined under Exchange Act Rule 0–10. No exchanges are small entities because none meet these criteria. Securities Act Rule 157[132] and Exchange Act Rule 0–10(a)[133] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,207 registrants, other than registered investment companies, that may be considered small entities. The proposed amendments would affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act. An investment company, including a business development company, is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[134] We believe that the amendments to Item 407(e) of Regulation S–K would affect small entities that are business development companies that have a class of securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 31 business development companies that may be considered small entities.

D. Reporting, Recordkeeping and Other Compliance Requirements

Under the proposals, the exchanges will be directed to prohibit the listing of an equity security of an issuer that does not comply with Section 10C's compensation committee and compensation adviser requirements. These requirements relate to: the independence of compensation committee members; the authority of the compensation committee to engage compensation advisers; the compensation committee's responsibility for considering factors that affect the independence of compensation advisers prior to their selection; the compensation committee's responsibility for the appointment, compensation, and oversight of the work of compensation advisers; funding for advisers engaged by the compensation committee; and the opportunity to cure defects.

The proposals would also require additional disclosure about the use of compensation consultants and conflicts of interest. Large and small entities would be subject to the same disclosure requirements. The proposals would require small entities subject to the proxy rules to provide disclosure of whether:

- The compensation committee has retained or obtained the advice of a compensation consultant; and
- The work of a compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

The proposals will impose additional costs on small entities in order to comply with the new listing standards and to collect, record and report the disclosures that we propose to require. Our existing disclosure rules require small entities to disclose information regarding any compensation consultant that plays a role in determining or recommending the amount and form of executive and director compensation in proxy and information statements. The additional information concerning compensation consultants that would be required under the proposals should be readily available to these small entities. Also, we believe that many small entities do not use the services of a compensation consultant, which would significantly minimize the impact of the reporting and recordkeeping requirements under the proposals on small entities. In addition, we believe that the impact of the proposals on small entities will be lessened because most aspects of the proposals apply only to listed issuers, and the quantitative listing standards applicable to issuers listing securities on an exchange, such as market capitalization, minimum revenue, and shareholder equity requirements, will serve to limit the number of small entities that would be affected.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards;
- Exempting small entities from all or part of the requirements; and
- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities.

We believe that our proposed amendments would require clear and straightforward disclosure of the use of compensation consultants and the management of compensation consultant conflicts of interest. We believe that our proposed rules will promote consistent disclosure among all companies without creating a significant new burden for small entities.

The proposals attempt to clarify, consolidate and simplify the compliance and reporting requirements for all entities, including small entities, by including instructions to the amendments to clarify the circumstances under which disclosure is required. We have used a mix of design and performance standards in developing the proposed disclosure requirements. Based on our past experience, we believe the amendments will be more useful to investors if there are specific disclosure requirements; however, we have not proposed specific procedures or arrangements that an issuer must develop to comply with the proposed amendments. The additional disclosure requirements are intended to result in more comprehensive and clear disclosure.

Although we preliminarily believe that an exemption for small entities from coverage of the proposals would not be appropriate at this time, we seek comment on whether we should exempt small entities from any of the proposed disclosure requirements or scale the proposed amendments to reflect the characteristics of small entities and the needs of their investors. Further, as

[130] 5 U.S.C. 601(6).
[131] 17 CFR 242.601.
[132] 17 CFR 230.157.
[133] 17 CFR 240.0–10(a).
[134] 17 CFR 270.0–10(a).

directed by Exchange Act Section 10C, our proposed rules would permit the exchanges to exempt particular categories of issuers from the requirements of Section 10C and particular relationships from the compensation committee membership requirements of Section 10C(a), taking into account the potential impact of the requirements on smaller reporting companies. To the extent exchanges adopt such exemptions for small entities, the compliance burden would be reduced.

At this time, we do not believe that different compliance methods or timetables for small entities would be appropriate. The proposals are intended to improve the accountability for and transparency of executive compensation determinations. The specific disclosure requirements in the proposals will promote consistent disclosure among all issuers, including small entities. Separate compliance requirements or timetables for small entities could interfere with achieving the goals of the statute and our proposals. Nevertheless, we solicit comment on whether different compliance requirements or timetables for small entities would be appropriate, and consistent with the purposes of Section 952 of the Dodd-Frank Act.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities that may be affected by the proposed amendments;
- Whether small entities should be exempt from the rules;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Statutory Authority and Text of the Proposed Amendments

The amendments contained in this release are being proposed under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act and Sections 10C, 12, 13, 14, 15(d), 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 229 and 240

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78*l,* 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78*ll,* 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

2. In § 229.407, revise paragraph (e)(3)(iii) and add instructions 1 and 2 to item 407(e)(3) to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(e) * * *

(3) * * *

(iii) Whether the compensation committee (or another board committee performing equivalent functions) retained or obtained the advice of a compensation consultant during the registrant's last completed fiscal year, identifying such consultants, stating whether such consultants were engaged directly by the compensation committee (or another board committee performing equivalent functions), describing the nature and scope of the consultant's assignment and the material elements of the instructions or directions given to the consultant with respect to the performance of the consultant's duties under the engagement, and discussing whether the work of the consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed:

(A) If the compensation committee (or another board committee performing equivalent functions) retained or obtained the advice of a compensation consultant and the consultant's services were not limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees, or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice, and the compensation consultant or its affiliates also provided additional services to the registrant or its affiliates in an amount in excess of $120,000 during the registrant's last completed fiscal year, then disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services. Disclose whether the decision to engage the compensation consultant or its affiliates for these other services was made, or recommended, by management, and whether the compensation committee (or another board committee performing equivalent functions) or the board approved such other services of the compensation consultant or its affiliates.

(B) If the compensation committee (or another board committee performing equivalent functions) has not retained or obtained the advice of a compensation consultant, but management has retained or obtained the advice of a compensation consultant and the consultant's services were not limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees, or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice, and such compensation consultant or its affiliates has provided additional services to the registrant in an amount in excess of $120,000 during the registrant's last completed fiscal year, then disclose the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for any additional services provided

by the compensation consultant or its affiliates.

Instruction 1 to Item 407(e)(3). For purposes of this paragraph, a compensation committee (or another board committee performing equivalent functions) or management has "obtained the advice" of a compensation consultant if such committee or management has requested or received advice from a compensation consultant, regardless of whether there is a formal engagement of the consultant or a client relationship between the compensation consultant and the compensation committee or management or any payment of fees to the consultant for its advice.

Instruction 2 to Item 407(e)(3). For purposes of this paragraph, the factors outlined in § 240.10C–1(b)(4)(i) through (v) of this chapter are among the factors that should be considered in determining whether a conflict of interest exists.

* * * * *

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

3. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-3, 78k, 78k-1,78*l,* 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78*ll,* 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.;* and 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

4. Add an undesignated center heading following § 240.10A–3 to read as follows:

Requirements Under Section 10C

5. Add § 240.10C–1 to read as follows:

§ 240.10C–1 Listing standards relating to compensation committees.

(a) Pursuant to section 10C(a) of the Act (15 U.S.C. 78j-3(a)) and section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203, 124 Stat. 1900):

(1) *National securities exchanges.* The rules of each national securities exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f), to the extent such national securities exchange lists equity securities, must, in accordance with the provisions of this section, prohibit the initial or continued listing of any equity security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(2) *National securities associations.* The rules of each national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3), to the extent such national securities association lists equity securities in an automated inter-dealer quotation system, must, in accordance with the provisions of this section, prohibit the initial or continued listing in an automated inter-dealer quotation system of any equity security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(3) *Opportunity to cure defects.* The rules required by paragraphs (a)(1) and (a)(2) of this section must provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for a prohibition under paragraph (a) of this section, before the imposition of such prohibition. Such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of this section for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable national securities exchange or national securities association, may remain a compensation committee member of the listed issuer until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

(4) *Implementation.* (i) Each national securities exchange and national securities association that lists equity securities must provide to the Commission, no later than 90 days after publication of this section in the **Federal Register**, proposed rules or rule amendments that comply with this section. Each submission must include, in addition to any other information required under section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, a review of whether and how existing listing standards satisfy the requirements of this rule, a discussion of the consideration of factors relevant to compensation committee independence conducted by the national securities exchange or national securities association, and the definition of independence applicable to compensation committee members that the national securities exchange or national securities association proposes to adopt in light of such review.

(ii) Each national securities exchange and national securities association that lists equity securities must have rules or rule amendments that comply with this section approved by the Commission no later than one year after publication of this section in the **Federal Register**.

(b) *Required standards.* The requirements of this section apply to the compensation committees of listed issuers. If a listed issuer has a committee of the board performing functions typically performed by a compensation committee, including oversight of executive compensation, then such committee, even if it is not designated as a compensation committee or performs other functions, shall be fully subject to the requirements of this section.

(1) *Independence.* (i) Each member of the compensation committee must be a member of the board of directors of the listed issuer, and must otherwise be independent.

(ii) *Independence requirements.* In determining independence requirements for members of compensation committees, the national securities exchanges and national securities associations shall consider relevant factors, including, but not limited to:

(A) The source of compensation of a member of the board of directors of an issuer, including any consulting, advisory or other compensatory fee paid by the issuer to such member of the board of directors; and

(B) Whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

(iii) *Exemptions from the independence requirements.* (A) The listing of equity securities of the following categories of listed issuers are not subject to the requirements of paragraph (b)(1) of this section:

(*1*) Controlled companies;

(*2*) Limited partnerships;

(*3*) Companies in bankruptcy proceedings;

(*4*) Open-end management investment companies registered under the Investment Company Act of 1940; and

(*5*) Any foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.

(B) In addition to the issuer exemptions set forth in paragraph (b)(1)(iii)(A) of this section, a national securities exchange or a national securities association, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of paragraph (b)(1) of this section a particular relationship with respect to members of the compensation committee, as each national securities exchange or national securities

association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

(2) *Authority to engage compensation consultants, independent legal counsel and other compensation advisers.* The compensation committee of a listed issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser. The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser to the compensation committee. Nothing in this paragraph (b) shall be construed:

(i) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or

(ii) To affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

(3) *Funding.* Each listed issuer must provide for appropriate funding, as determined by the compensation committee, in its capacity as a committee of the board of directors, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser to the compensation committee.

(4) *Independence of compensation consultants and other advisers.* The compensation committee of a listed issuer may select a compensation consultant, legal counsel, or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

(i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser;

(ii) The amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;

(iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

(iv) Any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and

(v) Any stock of the issuer owned by the compensation consultant, legal counsel or other adviser.

(5) *General exemptions.* (i) The national securities exchanges and national securities associations, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of this section certain categories of issuers, as the national securities exchange or national securities association determines is appropriate, taking into consideration the potential impact of such requirements on smaller reporting issuers.

(ii) The requirements of this section shall not apply to any controlled company.

(iii) The listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q–1(b)(7)(A)) is not subject to the requirements of this section.

(iv) The listing of a standardized option, as defined in § 240.9b–1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) is not subject to the requirements of this section.

(c) *Definitions.* Unless the context otherwise requires, all terms used in this section have the same meaning as in the Act. In addition, unless the context otherwise requires, the following definitions apply for purposes of this section:

(1) In the case of foreign private issuers with a two-tier board system, the term *board of directors* means the supervisory or non-management board.

(2) The term *controlled company* means an issuer:

(i) That is listed on a national securities exchange or by a national securities association; and

(ii) That holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group or another issuer.

(3) The terms *listed* and *listing* refer to equity securities listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association or to issuers of such securities.

(4) The term *open-end management investment company* means an open-end company, as defined by Section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–5(a)(1)), that is registered under that Act.

Dated: March 30, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–7948 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No.: PTO–P–2011–0014]

RIN 0651–AC56

Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (Office) is proposing to revise the patent term adjustment and extension provisions of the rules of practice in patent cases. The patent term adjustment provisions of the American Inventors Protection Act of 1999 (AIPA) and the patent term extension provisions of the Uruguay Round Agreements Act (URAA) each provide for patent term extension or adjustment if the issuance of the patent was delayed due to appellate review by the Board of Patent Appeals and Interferences (BPAI) or by a Federal court and the patent was issued pursuant to or under a decision in the review reversing an adverse determination of patentability. The Office is proposing to change the rules of practice to indicate that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a decision in the review reversing an adverse determination of patentability for purposes of patent term adjustment or extension purposes. Therefore, in such situations, patentees would be entitled to patent term extension or adjustment. In addition, the AIPA provides for a reduction of any patent term adjustment if the applicant failed to engage in reasonable efforts to conclude prosecution of the application. The Office is also proposing to change the rules of practice pertaining to the reduction of patent term adjustment for applicant delays to exclude information disclosure statements resulting from the citation of information by a foreign patent office in a counterpart

application that are promptly filed with the Office. For example, under the proposed rule, there would not be a reduction of patent term adjustment in the following situations: When applicant promptly submits a reference in an information disclosure statement after the mailing of a notice of allowance if the reference was cited by the Office in another application, or when applicant promptly submits a copy of an Office communication (*e.g.,* an Office action) in an information disclosure statement after the mailing of a notice of allowance if the Office communication was issued by the Office in another application or by a foreign patent office in a counterpart foreign application.

DATES: Written comments must be received on or before May 6, 2011. No public hearing will be held.

ADDRESSES: Comments concerning this proposed rule should be sent by electronic mail message over the Internet addressed to *AC56.comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. *See* the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Internet (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at 571–272–7757, by mail addressed to: Box Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kery A. Fries.

SUPPLEMENTARY INFORMATION: Section 532(a) of the URAA (Pub. L. 103–465, 108 Stat. 4809 (1994)) amended 35 U.S.C. 154 to provide that the term of a patent ends on the date that is twenty years from the filing date of the application, or the earliest filing date for which a benefit is claimed under 35 U.S.C. 120, 121, or 365(c). The URAA also contained provisions, codified at 35 U.S.C. 154(b), for patent term extension due to certain examination delays. Under the patent term extension provisions of 35 U.S.C. 154(b) as amended by the URAA, an applicant is entitled to patent term extension for delays due to interference, secrecy order, or successful appellate review. *See* 35 U.S.C. 154(b) (1995). The Office implemented the patent term extension provisions of the URAA in a final rule published in April of 1995. *See Changes to Implement 20-Year Patent Term and Provisional Applications,* 60 FR 20195 (Apr. 25, 1995) (twenty-year patent term final rule).

The AIPA (Pub. L. 106–113, 113 Stat. 1501, 1501A–552 through 1501A–591 (1999)) further amended 35 U.S.C. 154(b) to include additional bases for patent term extension (characterized as "patent term adjustment" in the AIPA). Original utility and plant patents issuing from applications filed on or after May 29, 2000, may be eligible for patent term adjustment if issuance of the patent is delayed due to one or more of the enumerated administrative delays listed in 35 U.S.C. 154(b)(1). Specifically, under the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, an applicant is entitled to patent term adjustment for the following reasons: (1) If the Office fails to take certain actions during the examination and issue process within specified time frames (35 U.S.C. 154(b)(1)(A)); (2) if the Office fails to issue a patent within three years of the actual filing date of the application (35 U.S.C. 154(b)(1)(B)); and (3) for delays due to interference, secrecy order, or successful appellate review (35 U.S.C. 154(b)(1)(C)). *See* 35 U.S.C. 154(b)(1). The AIPA, however, sets forth a number of conditions and limitations on any patent term adjustment accrued under 35 U.S.C. 154(b)(1). Specifically, 35 U.S.C. 154(b)(2)(C) provides, in part, that "[t]he period of adjustment of the term of a patent under [35 U.S.C. 154(b)(1)] shall be reduced by a period equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application" and that "[t]he Director shall prescribe regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application." 35 U.S.C. 154(b)(2)(C)(i) and (iii). The Office implemented the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, including setting forth the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application, in a final rule published in September of 2000. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR 56365 (Sept. 18, 2000) (patent term adjustment final rule).

The patent term adjustment provisions of the AIPA apply to original (*i.e.,* non-reissue) utility and plant applications filed on or after May 29, 2000. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR at 56367. The patent term extension provisions of the URAA (for delays due to secrecy order, interference or successful appellate review) continue to apply to original utility and plant applications filed on or after June 8, 1995, and before May 29, 2000. *See id.*

Revision of Patent Term Extension and Patent Term Adjustment Provisions Relating to Decisions During Appellate Review: Under the patent term adjustment final rule published in 2000, the Office initially stated that for a decision by the BPAI to be "a decision in the review reversing an adverse determination of patentability" within the meaning of 35 U.S.C 154(b)(1)(C)(iii), the decision must sustain or reverse the rejection(s) of claims(s) on appeal. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR at 56368. The Office further stated that a remand or other administrative order by the BPAI even if by a merits panel would not be considered "a decision in the review reversing an adverse determination of patentability" in the 35 U.S.C. 154(b)(1)(C)(iii). *See id.* at 56369.

The Office subsequently determined that there were a number of BPAI panel remands that conveyed the weakness in the examiner's adverse patentability determination in a manner tantamount to a decision reversing the adverse patentability determination. *See Revision of Patent Term Adjustment and Extensions,* 69 FR 21704 (April 22, 2004) (2004 patent term adjustment/extension final rule). Generally, the remands resulted in the examiner allowing the application (either with or without further action by applicant) without returning the application to the

BPAI for a decision on the appeal. The 2004 patent term adjustment/extension final rule addressed the situation in which an examiner responds to a remand by a BPAI panel by allowing the application (either with or without further action by applicant), rather than returning the application to the BPAI for a decision on the appeal. *See id.* at 21705. In that situation, the BPAI panel remand was considered "a decision in the review reversing an adverse determination of patentability" for patent term extension and patent term adjustment purposes. *See id.; see also* 37 CFR 1.701(a)(3) and 1.702(e). This change in the 2004 patent term adjustment/extension final rule, however, did not apply if, after the BPAI panel remand, appellant filed a request for continued examination under 35 U.S.C. 132(b) (37 CFR 1.114) that was not first preceded by the mailing, after such remand, of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. *See id.; see also* 37 CFR 1.701(a)(3) and 1.702(e).

In 2005, the Office instituted a pilot program to provide an appellant the opportunity to request that a panel of examiners formally review the legal and factual bases of the rejections in his or her application prior to the filing of an appeal brief. *See New Pre-Appeal Brief Conference Pilot Program,* 1260 *Off. Gaz. Pat. Office* 67 (July 12, 2005). In the pilot program, the Office indicated that a decision by a pre-appeal brief conference panel to withdraw any or all of the claims on appeal is not a decision by the panel of the BPAI, and as such, would not result in any patent term adjustment or extension under 35 U.S.C. 154(b). *See id.*

This pilot program has resulted in a number of situations in which prosecution is reopened. The Office has now concluded that it may and, in most situations, should treat a decision in a pre-appeal brief review reopening prosecution and issuing an Office action or notice of allowance as a "decision in the review reversing an adverse determination of patentability" under 35 U.S.C. 154(b)(1)(C)(iii). Prior to 2005, the vast majority of applications in which a notice of appeal and appeal brief were filed were forwarded to the BPAI for a decision on the appeal. That is, prior to 2005, the only notable "decision in the review" of an application on appeal was a decision by the BPAI. Under current Office practice, however, the application in which a notice of appeal has been filed may be subject to a pre-appeal brief review and will be subject to a post-appeal brief review before the application will be forwarded to the BPAI for a decision by the BPAI. Thus, under current Office practice, the process for seeking appellate review by the BPAI involves at least one decision in the review before the application is forwarded to the BPAI, and a decision in these pre-BPAI reviews may result in the reopening of prosecution and issuance of an Office action or notice of allowance. Since in many such situations the reopening of the application after notice of appeal has been filed is the result of a decision in the pre-BPAI review that there is some weakness in the adverse patentability determination from which the appeal was taken, the Office now considers it appropriate to treat such situations as a "decision in the review reversing an adverse determination of patentability" under 35 U.S.C. 154(b)(1)(C)(iii). Consequently, the Office has determined that it is prudent as a matter of policy to allow for a correspondent positive patent term adjustment when an examiner reverses his or her prior rejection under these circumstances.

Accordingly, the Office is proposing to revise the patent term adjustment and extension provisions to provide, with certain exceptions, that an examiner reopening prosecution will be considered a "decision in the review reversing an adverse determination of patentability," and therefore result in the possibility of patent term adjustment under 35 U.S.C. 154(b). The Office notes that not all reopening of prosecution after the filing of a notice of appeal will be considered a "decision in the review reversing an adverse determination of patentability." For example, the reopening of prosecution after a notice of appeal resulting from an applicant filing a request for continued examination (RCE) (proper or improper) will not be considered a "decision in the review reversing an adverse determination of patentability" and will not result in patent term adjustment under 35 U.S.C. 154(b). Furthermore, any reopening of prosecution or issuance of a notice of allowance under 35 U.S.C. 151 resulting from an applicant filing an amendment pursuant to 37 CFR 41.33 canceling all claims on appeal will not be considered a "decision in the review reversing an adverse determination of patentability" and will not result in patent term adjustment under 35 U.S.C. 154(b). Moreover, any reopening of prosecution or issuance of a notice of allowance under 35 U.S.C. 151 resulting from the applicant filing a request to dismiss or withdraw the appeal will not be considered a "decision in the review reversing an adverse determination of patentability" and will not result in patent term adjustment under 35 U.S.C. 154(b).

If the patent issues after an examiner reopens prosecution after the filing of a notice of appeal, and the reopening of prosecution is considered "a decision in the review reversing an adverse determination of patentability," then the reopening of prosecution is deemed by the Office to be the "final decision in favor of the applicant" for purposes of a patent term extension or adjustment calculation under 37 CFR 1.701(c)(3) or 1.703(e) (as applicable). The period of extension or adjustment calculated under 37 CFR 1.701(c)(3) or 1.703(e) (as applicable) would equal the number of days in the period beginning on the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and 37 CFR 41.31 and ending on the date of mailing of the Office action under 35 U.S.C.132 or a notice of allowance under 35 U.S.C. 151.

Revisions of Patent Term Extension and Patent Term Adjustment Provisions Relating to Information Disclosure Statements: Section 1.704(c) provides that the submission of an information disclosure statement either that is after a notice of allowance or that requires a supplemental Office action results in a reduction of any patent term adjustment under 37 CFR 1.703. *See* 37 CFR 1.704(c)(6), 1.704(c)(8), 1.704(c)(9), and (c)(10). Section 1.704(d) provides that an information disclosure statement will not result in a patent term adjustment reduction under 37 CFR 1.704(c)(6), 1.704(c)(8), 1.704(c)(9), or (c)(10) if it is accompanied by a certification (statement) that each item of information contained in the information disclosure statement was first cited in a communication from a foreign patent office in a counterpart application and that this communication was not received by any individual designated in 37 CFR 1.56(c) more than thirty days prior to the filing of the information disclosure statement. 37 CFR 1.704(d) permits applicants to submit information first cited in a communication from a foreign patent office in a counterpart application to the Office without a reduction in patent term adjustment if an information disclosure statement is promptly (within thirty days of receipt of the communication) submitted to the Office.

Recent decisions by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) underscore the importance of making information cited and Office actions issued in related copending foreign and domestic applications of record. *See Dayco Products, Inc.* v. *Total Containment, Inc.,* 329 F.3d 1358 (Fed.

Cir. 2003) and *McKesson Info. Solutions, Inc.* v. *Bridge Medical, Inc.,* 487 F.3d 897 (Fed. Cir. 2007); *see also Larson Mfg. Co.* v. *Aluminart Products Ltd.,* 559 F.3d 1317 (Fed. Cir. 2009) (relating to disclosure in a U.S. reexamination proceeding of U.S. Office actions that were issued in a continuation application of the patent under reexamination). The Office is proposing to revise 37 CFR 1.704(d) to also embrace information first cited in a communication from the Office, as well as the communication (*e.g.,* Office action) in a counterpart foreign or international application or from the Office itself.

Obviously, meeting the conditions set forth in 37 CFR 1.704(d) does not substitute for compliance with any relevant requirement of 37 CFR 1.97 or 1.98.

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

Section 1.701: Section 1.701(a)(3) is proposed to be amended to take into account the situation in which the Office reopens prosecution after a timely notice of appeal has been filed but before any decision by the BPAI and issues an Office action under 35 U.S.C. 132 (*i.e.,* a new non-final or final Office action) or notice of allowance under 35 U.S.C. 151. The reopening of prosecution in this situation will in most circumstances also be considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(2) as amended by the URAA, and a final decision in favor of the applicant under § 1.701(c)(3). An examiner's answer containing a new ground of rejection is not an Office action under 35 U.S.C. 132, and is not the Office reopening prosecution. Section 1.701(a)(3) is also proposed to be amended by adding a sentence to provide that a reopening of prosecution after a notice of appeal has been filed will not be considered a decision in the review reversing an adverse determination of patentability as provided in § 1.701(a)(3) if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

Section 1.702: Section 1.702(e) is proposed to be amended to take into account the situation in which the Office reopens prosecution after a timely notice of appeal has been filed but before any decision by the BPAI and issues an Office action under 35 U.S.C. 132 (*i.e.,* a new non-final or final Office action) or notice of allowance under 35 U.S.C. 151. The reopening of prosecution in this situation will in most circumstances also be considered a decision by the BPAI as that phrase is used in 35 U.S.C. 154(b)(1)(A)(iii), a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(1)(C)(iii), and a final decision in favor of the applicant under § 1.703(e). An examiner's answer containing a new ground of rejection is not an Office action under 35 U.S.C. 132, and is not the Office reopening prosecution. Section 1.702(e) is further amended by adding a sentence to provide that a reopening of prosecution after a notice of appeal has been filed will not be considered a decision in the review reversing an adverse determination of patentability as provided in § 1.702(e) if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

Section 1.704: Section 1.704(d) is amended to change "any communication from a foreign patent office in a counterpart application" to "any communication from a patent office in a counterpart foreign or international application or from the Office" and add " or is a communication that was issued by a patent office in a counterpart foreign or international application or by the Office." This change revises § 1.704(d) to also embrace information first cited in a communication from the Office, as well as the communication (*e.g.,* Office action) in a counterpart foreign or international application or from the Office itself. For example, under the proposed rule, there would not be a reduction of patent term adjustment in the following situations: (1) When applicant promptly submits a reference in an information disclosure statement after the mailing of a notice of allowance if the reference was cited by the Office in another application, or (2) when applicant promptly submits a copy of an Office communication (*e.g.,* an Office action) in an information disclosure statement after the mailing of a notice of allowance if the Office communication was issued by the Office in another application or by a foreign patent office in a counterpart foreign application.

Rulemaking Considerations

A. Regulatory Flexibility Act: For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this proposed rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

This rule making involves: (1) Indicating that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a "decision in the review reversing an adverse determination of patentability" for patent term adjustment or extension purposes; and (2) indicating that the exception to the patent term adjustment reduction for filing an information disclosure statement after a notice of allowance or that requires a supplemental Office action for information disclosure statements for information cited by a foreign patent office in a counterpart application that are promptly filed with the Office is expanded to also embrace information first cited by the Office in another application. This proposed rule does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the changes proposed in this proposed rule will not have a significant economic impact on a substantial number of small entities.

B. Executive Order 12866 (Regulatory Planning and Review): This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

C. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563. Specifically, the Office has: (1) Used the best available techniques to quantify costs and benefits, and has considered values such as equity, fairness and distributive impacts; (2) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rule making, and provided on-line access to the rule making docket; (3) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (4) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (5) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

D. Executive Order 13132 (Federalism): This rule making does not contain policies with federalism

implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

E. Executive Order 13175 (Tribal Consultation): This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

F. Executive Order 13211 (Energy Effects): This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

G. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

H. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

I. Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

J. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this proposed rule are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this proposed rule is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

K. Unfunded Mandates Reform Act of 1995: The changes proposed in this proposed rule do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

L. National Environmental Policy Act: This rulemaking will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

M. National Technology Transfer and Advancement Act: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

N. Paperwork Reduction Act: The rules of practice pertaining to patent term adjustment and extension have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under OMB control number 0651–0020. As discussed previously, this rulemaking involves: (1) Indicating that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a "decision in the review reversing an adverse determination of patentability" for patent term adjustment or extension purposes; and (2) indicating that the exception to the patent term adjustment reduction for filing an information disclosure statement after a notice of allowance or that requires a supplemental Office action for information disclosure statements for information cited by a foreign patent office in a counterpart application that are promptly filed with the Office is expanded to also embrace information first cited by the Office in another application. This proposed rule does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the Office is not resubmitting information collection packages to OMB for its review and approval because the changes proposed in this proposed rule do not affect the information collection requirements associated with the information collections under OMB control number 0651–0020.

Notwithstanding any other provision of law, no person is required to respond to nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and record keeping requirements, Small Businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

2. Section 1.701 is amended by revising paragraph (a)(3) to read as follows:

§ 1.701 Extension of patent term due to examination delay under the Uruguay Round Agreements Act (original applications, other than designs, filed on or after June 8, 1995, and before May 29, 2000).

(a) * * *

(3) Appellate review by the Board of Patent Appeals and Interferences or by a Federal court under 35 U.S.C. 141 or 145, if the patent was issued pursuant to a decision in the review reversing an adverse determination of patentability and if the patent is not subject to a terminal disclaimer due to the issuance of another patent claiming subject matter that is not patentably distinct from that under appellate review. If an application is remanded by a panel of the Board of Patent Appeals and Interferences and the remand is the last action by a panel of the Board of Patent Appeals and Interferences prior to the mailing of a notice of allowance under 35 U.S.C. 151 in the application or if the Office reopens prosecution after a notice of appeal has been filed but before any decision by the Board of Patent Appeals and Interferences and issues an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151, the remand or issuance of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 shall be

considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(2) as amended by section 532(a) of the Uruguay Round Agreements Act, Public Law 103–465, 108 Stat. 4809, 4983–85 (1994), and a final decision in favor of the applicant under paragraph (c)(3) of this section. A remand by a panel of the Board of Patent Appeals and Interferences shall not be considered a decision in the review reversing an adverse determination of patentability as provided in this paragraph if there is filed a request for continued examination under 35 U.S.C. 132(b) that was not first preceded by the mailing, after such remand, of at least one of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. A reopening of prosecution after a notice of appeal has been filed shall not be considered a decision in the review reversing an adverse determination as provided in this paragraph if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 of this chapter canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

* * * * *

3. Section 1.702 is proposed to be amended by revising paragraph (e) to read as follows:

§ 1.702 Grounds for adjustment of patent term due to examination delay under the Patent Term Guarantee Act of 1999 (original applications, other than designs, filed on or after May 29, 2000).

* * * * *

(e) Delays caused by successful appellate review. Subject to the provisions of 35 U.S.C. 154(b) and this subpart, the term of an original patent shall be adjusted if the issuance of the patent was delayed due to review by the Board of Patent Appeals and Interferences under 35 U.S.C. 134 or by a Federal court under 35 U.S.C. 141 or 145, if the patent was issued under a decision in the review reversing an adverse determination of patentability. If an application is remanded by a panel of the Board of Patent Appeals and Interferences and the remand is the last action by a panel of the Board of Patent Appeals and Interferences prior to the mailing of a notice of allowance under 35 U.S.C. 151 in the application or if the Office reopens prosecution after a notice of appeal has been filed but before any decision by the Board of Patent Appeals and Interferences and issues an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151, the remand or issuance of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 shall be considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(1)(C)(iii), and a final decision in favor of the applicant under § 1.703(e). A remand by a panel of the Board of Patent Appeals and Interferences shall not be considered a decision in the review reversing an adverse determination of patentability as provided in this paragraph if there is filed a request for continued examination under 35 U.S.C. 132(b) that was not first preceded by the mailing, after such remand, of at least one of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. A reopening of prosecution after a notice of appeal has been filed shall not be considered a decision in the review reversing an adverse determination as provided in this paragraph if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 of this title canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

* * * * *

4. Section 1.704 is amended by revising paragraph (d) to read as follows:

§ 1.704 Reduction of period of adjustment of patent term.

* * * * *

(d)(1) A paper containing only an information disclosure statement in compliance with §§ 1.97 and 1.98 will not be considered a failure to engage in reasonable efforts to conclude prosecution (processing or examination) of the application under paragraphs (c)(6), (c)(8), (c)(9), or (c)(10) of this section if it is accompanied by a statement that each item of information contained in the information disclosure statement:

(i) Was first cited in any communication from a patent office in a counterpart foreign or international application or from the Office and this communication was not received by any individual designated in § 1.56(c) more than thirty days prior to the filing of the information disclosure statement; or

(ii) Is a communication that was issued by a patent office in a counterpart foreign or international application or by the Office and this communication was not received by any individual designated in § 1.56(c) more than thirty days prior to the filing of the information disclosure statement.

(2) The thirty-day period set forth in paragraph (d)(1) of this section is not extendable.

* * * * *

Teresa Stanek Rea,

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

[FR Doc. 2011–8275 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 168

[EPA–HQ–OPP–2009–0607; FRL–8862–2]

RIN 2070–AJ53

Pesticides; Regulation to Clarify Labeling of Pesticides for Export

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revise the regulations on labeling of pesticides and devices intended for export. Internal review of the regulations revealed that the current regulations needed clarification and restructuring to increase understandability and ease of use.

DATES: Comments must be received on or before June 6, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ—OPP–2009–0607, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0607. EPA's policy is that all comments received will be included in the docket without change and may be made

available on-line at *hitp://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *regulations.gov* or e-mail. The *regulations.gov* 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 *regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Vera Au, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9069; fax number: (703) 305–5884; e-mail address: *au.vera@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you export a pesticide product, a pesticide device, or an active ingredient used in producing a pesticide. Potentially affected entities may include, but are not limited to: Pesticide and other agricultural chemical manufacturing (NAICS code 325320), e.g., Pesticides manufacturing, Insecticides manufacturing, Herbicides manufacturing, Fungicides manufacturing, etc.

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the agency taking?

Section 17(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requires that unregistered pesticides and devices intended for export be subject to several provisions that include labeling, production reports, inspection of establishments, and reporting and recordkeeping. These provisions are contained in 40 CFR 168.65 and 168.85. FIFRA section 17(a) further requires that exporters obtain a purchaser acknowledgement statement (PAS) before exporting an unregistered pesticide (but not a device). The requirements related to PAS are contained in 40 CFR 168.75.

On February 18, 1993, regulations interpreting the FIFRA requirements about the export of unregistered pesticides and devices were published in the **Federal Register** (58 FR 9085) as subpart D of 40 CFR part 168. Subpart D implements FIFRA sections 17(a) and 17(b).

The current regulations in subpart D have not been changed since 1993. Recently, an EPA internal review determined that the 1993 regulations are not as clear as EPA intended and that the resulting ambiguity might have led to uncertainty in compliance. To clarify the regulations in order to aid compliance, EPA decided to propose adding a more specific labeling requirement. In addition, EPA is restructuring the regulations to increase ease of use. Clarification and restructuring of the current regulations are administrative actions with no significant policy issues.

This proposed rule will supplement the requirements of 40 CFR 168.65 *Pesticide export label and labeling requirements.*

B. What is the agency's authority for taking this action?

EPA is authorized under FIFRA to regulate the sale, distribution, and use

of pesticide products and devices through a licensing (registration) scheme. This action is issued under the authority of section 17 of FIFRA (7 U.S.C. 136–136y).

Executive Order 12988, entitled Civil Justice Reform (61 FR 4729, February 7, 1996), requires agencies that are reviewing existing regulations take the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

III. Purpose and Scope of Proposal

EPA is proposing to clarify, restructure, and add specificity to labeling regulations for the export of unregistered pesticide products and devices according to Executive Order 12988 to eliminate ambiguity and simplify EPA regulations. This action is discretionary and is not subject to a statutory, judicial, or administrative deadline. Clarification, restructuring, and adding specificity will not change the substance of the current requirements.

EPA is also proposing to include a specific indication that these requirements also pertain to unregistered export pesticide products and devices shipped between registered establishments operated by the same producer pursuant to 40 CFR 152.30(a). Section 152.30(a) states that an unregistered pesticide product transferred between registered establishments operated by the same producer must be labeled according to 40 CFR part 156. However, there are additional label requirements at § 168.65 that also apply to a subset of the products covered by § 152.30(a), specifically, unregistered export pesticide products. For example, part 156 does not require that the label indicate that the pesticide product or device is not registered for use in the United States, while § 168.65 requires the statement "Not Registered for Use in the United States" to appear on the label of any unregistered export pesticide product or device. This statement may be further amplified by adding the reason for the unregistered status. For example:

1. Not Registered for Use in the United States of America because the product is exempt from registration;

2. Not Registered for Use in the United States of America because pesticide devices are not required to be registered;

3. Not Registered for Use in the United States of America because [insert crop name] is not grown in the United States.

EPA believes that including the information required by § 168.65 on the label while an export product moves within the United States prior to its actual export further protects public health and the environment by contributing to safer and more appropriate handling and distribution of unregistered pesticide products and devices. EPA also believes that unregistered pesticide products and devices intended for export must be clearly marked with the labeling according to § 168.65 to prevent them from inadvertently entering the U.S. market. EPA requests comment on the amplifications of the phrase "Not Registered for Use in the United States."

IV. Overview of Proposed Changes

A. Clarification and Restructuring of Current Regulations

The clarifications and added specificity are consistent with section 1(b)(12) of Executive Order 12866; this section requires each agency to draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty. Certainty can also contribute to increased compliance with the requirements.

B. Definitions

In order to clarify and distinguish between the labeling requirements for pesticide products from the requirements for pesticide devices, two definitions are proposed for 40 CFR part 168, subpart D: Export pesticide product, and export pesticide device. Export pesticide products include registered export pesticide products and unregistered export pesticide products. The requirements for registered export pesticide products, unregistered export pesticide products, and export pesticide devices are presented in separate categories. This way the producer and/or exporter can more easily determine the status of the product and follow the specific directions for its category.

C. Labeling Export Shipments of Unregistered Pesticides and Devices Between Establishments Operated by Same Producer

EPA believes the minimal identity and safety information required for export labeling in FIFRA section 17(a)(1) is important in ensuring unregistered pesticide products and devices are properly identified during transportation both within the United States and upon arrival in the importing country. The current regulations in 40 CFR 152.30(a) allow the transfer of unregistered pesticide products between registered establishments operated by the same producer. The notification of identity and safety measures of products intended for export is not only important between the time the unregistered pesticide product or device leaves a U.S. port and the time it arrives in the importing country; this labeling is equally important while the unregistered pesticide product or device is shipped between registered establishments operated by the same producer within the United States.

EPA intended that the labeling requirements in § 168.65 be followed for each unregistered export pesticide product as it makes its way towards the importing country. However, the regulations promulgated in 1993 inadvertently failed to explicitly state that the § 168.65 labeling requirements applied to unregistered pesticide products and devices intended for export as they move between registered establishments operated by the same producer in the United States, including transfers authorized by § 152.30(a).

If the producer exports an unregistered pesticide product or device directly, then it is clear that the label that must accompany the unregistered pesticide product or device when it leaves the production facility must comply with § 168.65.

The requirement to label the unregistered pesticide product and pesticide device as it begins to move between registered establishments operated by the same producer may transfer the responsibility for the label to the producer from the exporter/reformulator/repackager if the latter was primarily responsible for the label before export.

Therefore, EPA is proposing to explicitly require labeling as prescribed by § 168.65 to accompany the unregistered export pesticide product or device at all times, even when they are being shipped between registered establishments operated by the same producer. Section 168.65 has been replaced by a proposed new numbering of sections to accommodate the new categories of products and accompanying regulations. EPA invites public comment on the requirement for labeling unregistered pesticide products and devices being shipped between establishments operated by the same producer.

V. Implementation

This proposal addresses the future labeling of unregistered pesticide products and devices shipped between establishments operated by the same producer. The proposed labeling

requirements, once final, would apply to all pesticide products and devices intended for export that are produced after the effective date of the rule. The Agency believes that producers do not frequently redesign the labels they use on unregistered pesticide products and devices, so producers will have time to plan and implement any changes to their current products or practices.

Therefore, the Agency is proposing an effective date of 1 year after the date of publication of the final rule. The Agency requests comment on the proposed effective date.

VI. FIFRA Review Requirements

In accordance with FIFRA section 25(a), EPA submitted a draft of the proposed rule to the FIFRA Scientific Advisory Panel (SAP), the Secretary of Agriculture (USDA), and appropriate Congressional Committees. The FIFRA SAP waived its review of this proposal on December 8, 2010, because this proposal does not raise scientific issues. USDA waived the opportunity to review the draft proposal on November 29, 2010, because clarification and restructuring of the current regulations are administrative actions with no scientific or policy issues.

VII. Statutory and Executive Order Reviews

A. Regulatory Planning and Review

This action is not a "significant regulatory action" subject to review by the Office of Management and Budget (OMB) under the terms of Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

EPA has determined that the cost is minimal to comply with the new requirement that the unregistered pesticide product or device shipped between registered establishments operated by the same producer be labeled with the statement "Not Registered for Use in the United States." This determination was made given that labeling is already in place under existing requirements and the burden of adding the additional statement to unregistered products or devices shipped between establishments would be negligible. EPA believes that this labeling change may be easily accomplished using commonly available word processing software; in addition, this label change does not require label submission to or approval by EPA, and shall be phased in as part of normal business operations. EPA concludes that the per firm and industry level impact of the rule is not significant.

B. Information Collection Burdens

This action does not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* OMB previously approved the information collection requirements contained in the existing regulations, 40 CFR 168.65, and has assigned OMB control number 2070–0027 (EPA ICR No. 0161). Burden is defined at 5 CFR 1320.3(b). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are displayed in the **Federal Register** and are listed in 40 CFR part 9.

C. Small Entity Impacts

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Agency hereby certifies that this action will not have a significant adverse economic impact on a substantial number of small entities.

Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined in accordance with section 601 of the RFA as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201. A small business that manufactures pesticides and other agricultural chemicals as defined by NAICS code 325320, has 500 or fewer employees based on the SBA standards.

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.

3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The small entities directly regulated by this proposed rule are small manufacturers of pesticides which export unregistered pesticide products or devices.

EPA has determined that the cost is minimal to comply with the new requirements that the unregistered pesticide product or device be labeled with "Not Registered for Use in the United States." This is because the labeling is already in place under existing requirements and the burden of adding the additional statement to unregistered pesticide products or devices shipped between establishments operated by the same producer would be negligible. EPA believes this labeling change may be easily accomplished using commonly available word processing software; in addition, this label change does not require label submission to or approval by EPA, and shall be phased in as part of normal business operations. EPA concludes that the per firm and industry level impact of the proposed rule is insignificant.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, EPA believes that increasing the specificity of the current regulations will minimally affect all manufacturers of export pesticide products and devices, not just small entities. The more specific indication that "Not Registered for Use in the United States" will be required while unregistered pesticides products and devices are shipped between establishments operated by the same manufacturer; this is the identical information that is required before the unregistered pesticide product or device is exported to another country.

The Agency continues to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates

This rule does not contain a Federal mandate as described in the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1531–1538, 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. This action is expected to only affect producers, transporters, formulators, packagers, and exporters of unregistered pesticide products and devices but not resulting in expenditures of $100 million or more. Since no State, local, or tribal government is known to produce, transport, formulate, package, or export unregistered pesticide products or devices, this rule is not expected to affect State, local, and tribal governments individually, much less in the aggregate. 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. Since no small government is known to produce, transport, formulate, package, or export unregistered pesticide products or devices, this rule is not

subject to the requirements of section 203 of UMRA.

E. Federalism

This action does not have federalism implications because it is not expected to 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, entitled *Federalism* (64 FR 43255, August 10, 1999). This action is expected to only affect producers, transporters, formulators, packagers, and exporters of unregistered pesticide products and devices. Since no State or local government is known to produce, transport, formulate, package, or export unregistered pesticide products or devices, there is no effect on a State, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

F. Indian Tribal Implications

This action does not have tribal implications, as specified in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). This action is expected to only affect producers, transporters, formulators, packagers, and exporters of unregistered pesticide products and devices. Since no Indian tribal government is known to produce, transport, formulate, package, or export unregistered pesticide products or devices, this action has no tribal implications. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Children's Health Protection

EPA interprets Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks, nor is it an "economically significant regulatory action" as defined in Executive Order 12866. The clarification and restructuring of current regulations for the export of unregistered pesticide products and devices do not present a disproportionate risk to children. Requiring that such unregistered pesticide products and devices shipped between establishments operated by the same producer be labeled according to the current regulations in § 168.65 prevents them from inadvertently entering the U.S. market and provides compliance assistance. This requirement further protects public health and the environment by ensuring safe and appropriate handling and distribution without presenting a disproportionate risk to children.

H. Effect on Energy Supply, Distribution or Use

This action is not a "significant energy action" as defined in Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not likely to have any effect on the supply, distribution, or use of energy.

I. Technical Standards

Because this action does not involve any technical standards, section 12(d) of The National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note), does not apply to this action.

J. Environmental Justice

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This rule is proposing to clarify, restructure, and add specificity to the current regulations and thus add an extra margin of safety for all affected populations as shipments of unregistered pesticides and devices move between establishments operated by the same producer. Labeling regulations at 40 CFR 152.30(a) currently require that an unregistered pesticide transferred between establishments operated by the same producer must follow labeling requirements in 40 CFR part 156. EPA believes that requiring the registration status information from 40 CFR168.65 on the label further protects public health and the environment by contributing to safer and more appropriate handling and distribution of unregistered pesticide products and devices. EPA believes that unregistered pesticide products and devices intended for export must be clearly marked with the labeling according to § 168.65 to prevent them from inadvertently entering the U.S. market.

List of Subjects in 40 CFR Part 168

Environmental protection, Exports, Labeling, Pesticides and pests.

Dated: March 25, 2011.

Lisa P. Jackson,

Administrator.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 168—STATEMENTS OF ENFORCEMENT POLICIES AND INTERPRETATION

1. The authority citation for part 168 continues to read as follows:

Authority: 7 U.S.C. 136–136y.

§ 168.65 [Removed and Reserved].

2. Remove and reserve § 168.65.

3. Add §§ 168.66 through 168.71 to read as follows:

* * * * *

Sec.

168.66 Labeling of pesticide products and devices for export.
168.67 Definitions.
168.68 Applicability.
168.69 Registered export pesticide products.
168.70 Unregistered export pesticide products.
168.71 Export pesticide devices.

* * * * *

§ 168.66 Labeling of pesticide products and devices for export.

(a) This subpart describes the labeling requirements applicable to pesticide products and devices that are intended solely for export from the United States under the provisions of FIFRA sec. 17(a). The requirements for pesticide production reporting, recordkeeping and inspection and purchaser

acknowledgement provisions can be found in the following parts:

(1) Pesticide production reporting requirements under FIFRA sec. 7 are located in part 167 of this chapter (or § 168.85(b));

(2) Recordkeeping and inspection requirements under FIFRA sec. 8 are located in part 169 of this chapter (or § 168.85(a));

(3) Purchaser acknowledgement statement provisions under FIFRA sec. 17(a) are located in § 168.75.

(b) The required label information may be fully met by:

(1) The product label attached to the immediate product;

(2) The product label and supplemental labeling; or

(3) Supplemental labeling that must be:

(i) Attached at all times during shipping or while being held for shipping; or

(ii) Attached to the immediate product container or to the shipping container.

§ 168.67 Definitions.

Terms used in this subpart have the same meaning as in the Act. The definitions of terms in § 152.3 of this chapter apply to this subpart unless defined in this section,

Export pesticide device means a device, as defined in FIFRA sec. 2(h), that is intended solely for export from the United States to another country.

Export pesticide product means a pesticide product, as defined in § 152.3 of this chapter, that is intended solely for export from the United States to another country.

§ 168.68 Applicability.

This subpart applies to all export pesticide products and export pesticide devices regardless of the purpose of the export.

§ 168.69 Registered export pesticide products.

(a) Each export pesticide product that is registered under FIFRA sec. 3 or FIFRA sec. 24(c) must bear a label or be accompanied by labeling approved by EPA for its registration.

(b) For the purposes of this subpart, a registered export pesticide product is considered to be any of the following:

(1) A pesticide product of composition, packaging and labeling as described in its registration under FIFRA sec. 3;

(2) A pesticide product that has been modified in compliance with the notification or non-notification provisions of § 152.46 of this chapter, and any associated procedures issued under § 156.10(e) of this chapter, regardless of whether such modification has been made for the pesticide product's registration under FIFRA sec. 3;

(3) A pesticide product initially registered by a State under FIFRA sec. 24(c), and whose Federal registration has not been disapproved by EPA under § 162.164 of this chapter.

(c) The text of the label or supplemental labeling of the registered pesticide product must be provided in one of the following languages besides English:

(1) The language of the country of final destination, if known;

(2) The language predominantly used in the importing country; or

(3) The language in which official government business is conducted in the importing country.

§ 168.70 Unregistered export pesticide products.

(a) Any export pesticide product that does not meet the terms of § 168.69 is an unregistered export pesticide for purposes of this subpart.

(b) Each unregistered export pesticide product must bear a label or be accompanied by supplemental labeling that complies with all requirements of this section and § 168.66(b).

(1) The label or supplemental labeling must comply with all of the prominence and legibility requirements of § 156.10(a)(2) of this chapter.

(2) The label or supplemental labeling must comply with all the language requirements in § 168.69(c) and § 156.10(a)(3) of this chapter.

(3) The label or supplemental labeling must bear the following information:

(i) The name and address of the producer, in accordance with the requirements of § 156.10(c) of this chapter;

(ii) The net weight or measure of contents, in accordance with the requirements of § 156.10(d) of this chapter;

(iii) The pesticide producing establishment number, in accordance with the requirements of § 156.10(f) of this chapter;

(iv) An ingredients statement, in accordance with the requirements of § 156.10(g) of this chapter, except that:

(A) The ingredients statement need not appear in a second language besides English if the English language version is likely to be understood by the ordinary individual in the importing country; and

(B) An export pesticide product intended solely for research and development purposes, (and which bears the statement "For research and development purposes only. Not for distribution, sale or use," or similar language) may bear coded ingredient information to protect confidentiality.

(v) Human health and precautionary statements in accordance with the requirements of subpart D of part 156 of this chapter. If a translated U.S. precautionary statement is inappropriate in the importing country, an equivalent statement appropriate to the importing country must be substituted;

(vi) The statement "Not Registered for Use in the United States of America," which may be amplified by additional statements describing the reason(s) why the export pesticide product is not registered in the United States, or is not registered for particular uses.

(c) This section also applies to all unregistered pesticide products and devices that are transferred, distributed, or sold between registered establishments operated by the same producer under the exemptions provided by § 152.30(a) of this chapter if:

(1) The transfer, distribution or sale occurs between a point in the United States and a point outside the United States, or

(2) The transfer occurs within the United States solely for the purpose of export from the United States.

§ 168.71 Export pesticide devices.

(a) Each export pesticide device sold or distributed anywhere in the United States must bear a label or be accompanied by supplemental labeling that complies with all requirements of this section and § 168.66(b).

(b) The label or supplemental labeling of each export pesticide device must meet all of the prominence and legibility requirements of § 156.10(a)(2) of this chapter.

(c) The label or supplemental labeling must also comply with all the language requirements in § 168.69(c) and § 156.10(a)(3) of this chapter.

(d) The label or supplemental labeling must bear the following information:

(1) The name and address of the producer, meeting the requirements of § 156.10(c) of this chapter;

(2) The producing establishment number, meeting the requirements of § 156.10(f) of this chapter;

(3) The statement "Not Registered for Use in the United States of America," which may be amplified by additional statements describing the reason why the export pesticide device is not registered in the United States.

(e) An export pesticide device is not required to bear an ingredients statement.

[FR Doc. 2011–7900 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0174; FRL–8867–9]

Sulfuryl Fluoride; Addendum to Proposed Order Granting Objections to Tolerances and Denying Request for a Stay; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed order and extension of comment period.

SUMMARY: In this document, EPA is supplementing its proposed order published January 19, 2011, regarding sulfuryl fluoride and fluoride tolerances promulgated under the Federal Food, Drug, and Cosmetic Act (FFDCA) to include proposed effective dates for the termination of tolerances for rice commodities. In order to provide a 90-day comment period on the proposed effective date for terminating the rice tolerances, while also maintaining a consistent closing date for all comments on the proposed sulfuryl fluoride actions and accommodating several comment period extension requests, the Agency will accept comment on both the proposed order and this addendum for 90 days following publication of this notice in the **Federal Register**. In addition, EPA is clarifying that all tolerances for sulfuryl fluoride and the associated fluoride tolerances were intended to be covered by the proposed order despite discrepancies in the way those tolerances are described in EPA's regulations.

DATES: Comments must be received on or before July 5, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0174, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2005–0174. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Meredith Laws, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–7038; e-mail address: *laws.meredith@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Food manufacturing (NAICS code 311), e.g., grain and oilseed milling; animal food manufacturing; flour milling; bread and bakery product manufacturing; cookie, cracker, and pasta manufacturing; snack food manufacturing.
- Pesticide manufacturing (NAICS code 32532), e.g., pesticide manufacturers; commercial applicators.
- Community Food Services (NAICS code 624210), e.g., food banks.
- Farm Product Warehousing and Storage (NAICS 493130), e.g., grain elevators, private and public food warehousing and storage.

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not

contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Supplement to the Proposed Order

On January 19, 2011 (76 FR 3422, Jan. 19, 2011), EPA issued a proposed order granting objections and denying a stay request filed by the Fluoride Action Network (FAN), Beyond Pesticides/National Coalition Against the Misuse of Pesticides, and the Environmental Working Group with regard to all tolerances established for sulfuryl fluoride and all tolerances for fluoride associated with the use of sulfuryl fluoride. In that order, EPA proposed a range of effective dates for termination of sulfuryl fluoride and fluoride tolerances that were based on several factors, including the potential for disruption or contamination of some commodities in the food supply and the availability of alternatives. For cancelled uses, EPA proposed to terminate tolerances associated with those uses immediately upon publication of the final order. For commodities for which there is little to no use of sulfuryl fluoride, EPA proposed to make the effective date for termination of the tolerances associated with those uses 90 days following publication of the final order in the **Federal Register**. For direct commodity treatments and for structural fumigation for which there is significant sulfuryl fluoride use and no readily available alternative, EPA proposed an effective date of 3 years following publication of the final order in the **Federal Register**.

In proposing effective dates, EPA inadvertently failed to address the sulfuryl fluoride/fluoride tolerances for rice commodities associated with direct fumigation of rice that were covered by the objections and came within the scope of EPA's proposed order to grant the objections. In this document, EPA is supplementing its proposed order to add a proposed effective date of the grant of the objections as to these rice commodities (rice, bran, postharvest; rice, flour, postharvest; rice, grain, postharvest; rice, hulls, postharvest; rice, polished rice, postharvest; and rice, wild, grain, postharvest). (40 CFR 180.145(a)(3), 180.575). Based on available information, EPA concludes that very little to no sulfuryl fluoride is being used on rice. Most rice is fumigated with aluminum phosphide (or phosphine) rather than sulfuryl fluoride. (*See* Office of Prevention, Pesticides, and Toxic Substances, US EPA, Memorandum from Colwell A. Cook, Jonathan Becker, and Elisa Rim to Kable Davis/Venus Eagle and Michael Doherty/Christina Swartz, "Revised Assessment of Percent Commodity Treated Values used in the Registrant's Dietary Exposure Assessment for Fluoride (DP# 361041)" (May 1, 2009).

Therefore, EPA is proposing that termination of the rice tolerances be effective 90 days following publication of the final order in the **Federal Register**. Given the low level of sulfuryl fluoride usage on rice and the availability of phosphine as an alternative, 90 days should be sufficient for affected parties to come into compliance. This proposed termination date applies to the rice tolerances associated with direct fumigation of rice. The proposed termination date for commodities receiving incidental treatment as a result of structural fumigation of food processing facilities remains unchanged from the January 19, 2011 proposed order.

As with the effective dates contained in its proposed order, EPA requests public comment on the effective date for terminating tolerances associated with rice.

In addition, to avoid potential confusion, EPA is clarifying that it intended to cover all existing tolerances for sulfuryl fluoride and all associated fluoride tolerances despite some discrepancies in the way tolerances for sulfuryl fluoride and fluoride are described in 40 CFR 180.575 and 180.145, respectively. In its proposed order, EPA proposed 90-day effective dates for termination of the coffee, bean, green, postharvest and oats, groats/rolled oats tolerances. This language is used to describe the fluoride tolerances for these commodities (§ 180.145(a)(3)). The similar tolerances for sulfuryl fluoride are described as coffee, bean, roasted bean, postharvest and oats, groats/rolled oats, postharvest (§ 180.575). EPA clarifies that it intended to propose a 90-day effective date for termination of these tolerances as well. EPA also proposed a 90-day effective date for termination of the grape, raisin, postharvest and a 3-year effective date for dried fruit other than raisins. EPA's regulation lists distinct tolerances for these commodities for fluoride (§ 180.145(a)(3)), whereas EPA's regulation for sulfuryl fluoride lists a single tolerance for dried fruit (§ 180.575). EPA clarifies that it intended to propose that 90 days following publication of a final order, the sulfuryl fluoride dried fruit tolerance would be revised to narrow its coverage to dried fruit, except grape, raisin, postharvest, and that the effective date for termination of this narrowed dried fruit tolerance would be 3 years following publication of a final order. Finally, EPA clarifies that the 3-year effective date for cocoa applies to the sulfuryl fluoride/fluoride tolerances for cacao bean, roasted bean, postharvest (§ 180.145(a)(3), and § 180.575).

III. Request of Extension of Comment Period

EPA has received four requests for a 90-day extension of the comment period on the January 19, 2011, proposed order. The requests were filed by the National Pest Management Association, The American Farm Bureau Federation, the North American Millers' Federation, and Dow AgroSciences LLC. They have requested additional time in order to gather, process, and report to EPA information relevant to the proposed order. In response, EPA notes that it established a comment period longer than the statutory minimum in issuing its proposed order. Nonetheless, given that the comment period is being extended to address the issue discussed above with regard to the rice commodity tolerances and the overall complexity of this matter, EPA has decided to extend the overall comment period on the January 19, 2011, proposed order so that all comments on the proposed order are due at the same time. Thus, comments on the proposed termination date of the rice commodity tolerances as well as all other comments on the January 19,

2011, proposed order are now due on July 5, 2011.

IV. Regulatory Assessment Requirements

As indicated in the proposed order, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

V. Submission to Congress and the Comptroller General

The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

List of Subjects in 40 CFR Part 180

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

Dated: March 30, 2011.

William R. Diamond,

Acting Director, Office of Pesticide Programs.

[FR Doc. 2011–8183 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[EPA–HQ–RCRA–2010–0851; FRL–9290–5]

Land Disposal Restrictions: Nevada and California; Site Specific Treatment Variances for Hazardous Selenium Bearing Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to issue both a site-specific treatment variance to U.S. Ecology Nevada (USEN) located in Beatty, Nevada and withdraw an existing site-specific treatment variance issued to Chemical Waste Management, Inc. (CWM) located in Kettleman Hills, California. This proposal pertains to the treatment of a hazardous waste generated by the Owens-Brockway Glass Container Company in Vernon, California that is unable to meet the concentration-based treatment standard for selenium established under the Land Disposal Restrictions program. The site-specific treatment variance proposed to be issued to USEN would provide an alternative treatment standard of 59 mg/L for selenium as measured by the Toxicity Characteristic Leaching Procedure. EPA has determined that the treatment performed by USEN provides the best demonstrated treatment available for this waste by reducing the amount of selenium potentially released to the environment, while minimizing the total volume of hazardous waste land disposed. In the "Rules and Regulations" section of this **Federal Register**, EPA has also published a direct final rule granting a site-specific treatment variance to USEN, and withdrawing the site-specific treatment variance previously granted to CWM for this same waste without a prior proposed rule. If we receive no adverse comment, we will not take further action on this proposed rule and the direct final rule will become effective as provided in that action.

DATES: Written comments must be received by May 6, 2011. Comments postmarked after the close of the comment period will be stamped "late" and may or may not be considered by the Agency.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2010–0851, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov and miller.jesse@epa.gov.* Attention Docket ID No. EPA–HQ–RCRA–2010–0851.
- *Fax:* 202–566–9744. Attention Docket ID No. EPA–HQ–RCRA–2010–0851.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–RCRA–2010–0851. Please include a total of 2 copies.
- *Hand Delivery:* Please deliver 2 copies to EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2010–0851. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 HQ–Docket Center, Docket ID No. EPA–HQ–RCRA–2010–0851, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Docket Facility 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 RCRA Docket is (202) 566–0270. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For more information on this rulemaking, contact Jesse Miller, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery (MC 5304 P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone (703) 308–1180; fax (703) 308–0522; or *miller.jesse@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA issuing this proposed rule?

This action proposes to issue both a site-specific treatment variance to U.S. Ecology Nevada (USEN) located in Beatty, Nevada and withdraw an existing site-specific treatment variance issued to Chemical Waste Management, Inc. (CWM) located in Kettleman Hills, California. This proposal pertains to the treatment of a hazardous waste generated by the Owens-Brockway Glass Container Company in Vernon, California that is unable to meet the concentration-based treatment standard for selenium established under the Land Disposal Restrictions program. The site-specific treatment variance proposed to be issued to USEN would provide an alternative treatment standard of 59 mg/L for selenium as measured by the Toxicity Characteristic Leaching Procedure. EPA has determined that the treatment performed by USEN provides the best demonstrated treatment available for this waste by reducing the amount of selenium potentially released to the environment, while minimizing the total volume of hazardous waste land disposed.

In the Rules and Regulations section of this **Federal Register**, we have also published a direct final rule granting a site-specific treatment variance to USEN and withdrawing the site-specific treatment variance previously granted to CWM for this same waste. We are issuing a direct final rule for this action because we view this as noncontroversial and anticipate no adverse comment. We have explained our reasons for this in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule and the direct final rule will become effective as provided in that action. If we do receive adverse comment, we will publish a timely notice in the **Federal Register** withdrawing the direct final rule and it will not take effect. We will address all public comments in any subsequent final rule based on this proposed rule. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, *see* the **ADDRESSES** section of this document.

II. Does this action apply to me?

This proposal applies only to U. S. Ecology Nevada located in Beatty, Nevada and Chemical Waste Management located in Kettleman Hills, California.

III. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

Direct Final Rule Location of Regulatory Text for This Proposal

The regulatory text for this proposal is identical to that for the direct final rule published in the Rules and Regulations section of this **Federal Register**. For further supplemental information, the detailed rationale for the proposal, and the regulatory revisions, see the information provided in the direct final rule published in the Rules and Regulations section of today's **Federal Register**.

Statutory and Executive Order Reviews

For a complete discussion of all the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of this **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the 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.

This site-specific treatment variance, as proposed, does not create any new requirements. Rather, it proposes an alternative treatment standard for a specific waste that applies to only one facility, USEN and proposes to withdraw an existing site-specific treatment variance for the same waste at CWM in Kettleman Hills, California. Therefore, we hereby certify that this action, as proposed would not add any new regulatory requirements to small entities. This proposal rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 268

Environmental Protection, Hazardous Waste, Variances.

Dated: March 31, 2011.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 2011–8180 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R06–RCRA–2010–0307; FRL–9290–9]

Oklahoma: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The State of Oklahoma has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant Final

authorization to the State of Oklahoma. In the "Rules and Regulations" section of this **Federal Register**, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we receive comments that oppose this action, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by May 6, 2011.

ADDRESSES: Send written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, (6PD–O), Multimedia Planning and Permitting Division, at the address shown below. You can examine copies of the materials submitted by the State of Oklahoma during normal business hours at the following locations: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533; or Oklahoma Department of Environmental Quality, 707 North Robinson, Oklahoma City, Oklahoma 73101–1677, (405) 702–7180. Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Alima Patterson (214) 665–8533.

SUPPLEMENTARY INFORMATION:

For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this **Federal Register**.

Dated: March 19, 2011.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2011–8172 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–05–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1187]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before July 5, 2011.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1187, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Sussex County, Delaware, and Incorporated Areas				
Butler Mill Branch	Approximately 500 feet downstream of Woodland Road.	None	+5	Unincorporated Areas of Sussex County.
	At the Horsepen Branch confluence	None	+22	
Chapel Branch	Approximately 0.16 mile downstream of Woodland Road.	None	+5	Unincorporated Areas of Sussex County.
	Approximately 0.67 mile upstream of Boyce Road	None	+34	
Gravelly Branch	At the Nanticoke River confluence	None	+10	Unincorporated Areas of Sussex County.
	Approximately 0.06 mile upstream of Deer Forest Road.	None	+33	
Gum Branch	At the Nanticoke River confluence	None	+22	Unincorporated Areas of Sussex County.
	Approximately 1.22 miles upstream of Wolf Road	None	+43	
Hitch Pond Branch	At the James Branch confluence	None	+19	Unincorporated Areas of Sussex County.
	Approximately 0.24 mile upstream of Wooten Road	None	+39	
Iron Branch	Approximately 450 feet downstream of Handy Road	None	+18	Unincorporated Areas of Sussex County.
	Approximately 0.3 mile upstream of Hickory Hill Road	None	+30	
James Branch	Approximately 0.36 mile downstream of Laurel Road	None	+9	Unincorporated Areas of Sussex County.
	Approximately 0.51 mile upstream of Whitesville Road	None	+39	
Marshy Hope Branch	Approximately 0.87 mile downstream of Noble Road	None	+26	Unincorporated Areas of Sussex County.
	Approximately 0.16 mile upstream of Hickman Road	None	+33	
Nanticoke River	Approximately 586 feet downstream of Old Furnace Road.	+7	+6	Town of Greenwood, Unincorporated Areas of Sussex County.
	Approximately 0.8 mile upstream of Greenhurst Farm Road.	None	+47	
Smith-Short and Willing Ditch.	At the Gravelly Branch confluence	None	+30	Unincorporated Areas of Sussex County.
	Approximately 0.05 mile upstream of Russell Road	None	+32	
Thompson Branch	At the Hitch Pond Branch confluence	None	+33	Unincorporated Areas of Sussex County.
	Approximately 0.07 mile upstream of Whaleys Road	None	+38	
Toms Dam Branch	At the Gum Branch confluence	None	+27	Unincorporated Areas of Sussex County.
	Approximately 0.31 mile upstream of Beach Highway	None	+44	
Unnamed Tributary of White Marsh Branch.	At the White Marsh Branch confluence	None	+43	Unincorporated Areas of Sussex County.
	Approximately 0.52 mile upstream of Dupont Parkway	None	+53	
White Marsh Branch	At the Nanticoke River confluence	None	+43	Unincorporated Areas of Sussex County.
	Approximately 0.55 mile upstream of Woodyard Road	None	+47	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

ADDRESSES

Town of Greenwood
Maps are available for inspection at the Town Hall, 100 West Market Street, Greenwood, DE 19950.

Unincorporated Areas of Sussex County
Maps are available for inspection at the Sussex County Administrative Office, 2 The Circle, Georgetown, DE 19947.

Gladwin County, Michigan (All Jurisdictions)

Lake Lancer	Entire shoreline	None	+841	Township of Butman.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Butman
Maps are available for inspection at 5005 North Hockaday Road, Gladwin, MI 48624.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 23, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–8111 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1185]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before July 5, 2011.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1185, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are

used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Sedgwick County, Kansas, and Incorporated Areas				
Calfskin Creek	Approximately 200 feet downstream of Maize Road	+1316	+1317	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 1.25 miles upstream of Pawnee Road	None	+1339	
Dry Creek North of Cowskin Creek.	Approximately 250 feet downstream of 135th Street	+1347	+1349	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 0.41 mile upstream of 167th Street	None	+1392	
Middle Fork Calfskin Creek	At the North Fork Calfskin Creek confluence	+1325	+1326	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 0.56 mile upstream of 151st Street	None	+1407	
North Fork Calfskin Creek	Approximately 175 feet downstream of Maple Street	+1322	+1323	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 1.1 miles upstream of 151st Street	None	+1387	
Tributary to Calfskin Creek	At the Calfskin Creek confluence	None	+1333	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 450 feet upstream of Pawnee Road	None	+1353	
Tributary to North Fork Calfskin Creek.	Approximately 700 feet downstream of 135th Street	+1348	+1347	City of Wichita, Unincorporated Areas of Sedgwick County.
	Approximately 0.66 mile upstream of North Aksarben Street.	None	+1369	
Unnamed Tributary (backwater effects from Tributary to North Fork Calfskin Creek).	From approximately 550 feet upstream of the Tributary to North Fork Calfskin Creek confluence to approximately 800 feet upstream of 13th Street.	None	+1362	City of Wichita, Unincorporated Areas of Sedgwick County.

* National Geodetic Vertical Datum.

+ North American Vertical Datum.

Depth in feet above ground.

∧ Mean Sea Level, rounded to the nearest 0.1 meter.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

ADDRESSES

City of Wichita

Maps are available for inspection at the Office of Storm Water Management, 455 North Main Street, 8th Floor, Wichita, KS 67202.

Unincorporated Areas of Sedgwick County

Maps are available for inspection at the Sedgwick County Bureau of Public Services, 1250 South Seneca Street, Wichita, KS 67213.

Stearns County, Minnesota, and Incorporated Areas

Clearwater River	Approximately 60 feet upstream of State Highway 55	None	+1010	Unincorporated Areas of Stearns County.
	Approximately 1,600 feet upstream of State Highway 55.	None	+1011	

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+ North American Vertical Datum.
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ADDRESSES

Unincorporated Areas of Stearns County

Maps are available for inspection at the Stearns County Administration Center, 705 Courthouse Square, St. Cloud, MN 56303.

Sanders County, Montana, and Incorporated Areas

Clark Fork River	Approximately 0.9 mile downstream of Montana Highway 200.	None	+2480	Unincorporated Areas of Sanders County.
	Approximately 0.5 mile upstream of Montana Highway 200.	None	+2495	
Flathead River	Approximately 0.4 mile upstream of the Clark Fork River confluence.	None	+2492	Unincorporated Areas of Sanders County.
	Approximately 3.8 miles upstream of the Clark Fork River confluence.	None	+2494	
Hot Springs Creek	Approximately 0.5 mile downstream of Camas Road ..	None	+2792	Town of Hot Springs.
	Approximately 0.5 mile upstream of Hot Springs Creek Road.	None	+2990	

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ADDRESSES

Town of Hot Springs

Maps are available for inspection at the Town Hall, 109 Main Street, Hot Springs, MT 59845.

Unincorporated Areas of Sanders County

Maps are available for inspection at the Sanders County Courthouse, 1111 Main Street, Thompson Falls, MT 59873.

Lebanon County, Pennsylvania (All Jurisdictions)

Killinger Creek	Approximately 0.59 mile downstream of Brandt Road	None	+413	Township of North Londonderry.
	Approximately 0.52 mile downstream of Brandt Road	None	+415	
Little Swatara Creek	At the Swatara Creek confluence	+410	+408	Borough of Jonestown.
	Approximately 1,000 feet upstream of South Lancaster Street.	+412	+408	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Quittapahilla Creek	Approximately 750 feet downstream of U.S. Route 422 (Cumberland Street).	None	+393	Borough of Cleona, Township of Annville, Township of North Annville, Township of South Lebanon.
	Approximately 700 feet upstream of U.S. Route 422 (Cumberland Street).	None	+473	
Swatara Creek	Approximately 0.8 mile upstream of Ono Road	None	+397	Borough of Jonestown, Township of East Hanover, Township of North Annville, Township of Union.
	Approximately 0.24 mile upstream of I–81	None	+448	
Tributary B	Approximately 85 feet downstream of West Main Avenue.	None	+458	Borough of Myerstown.
	Approximately 105 feet downstream of U.S. Route 422.	None	+468	

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+ North American Vertical Datum.
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ADDRESSES

Borough of Cleona

Maps are available for inspection at the Borough Hall, 140 West Walnut Street, Cleona, PA 17042.

Borough of Jonestown

Maps are available for inspection at the Borough Building, 295 South Mill Street, Jonestown, PA 17038.

Borough of Myerstown

Maps are available for inspection at the Municipal Center, 101 East Washington Avenue, Myerstown, PA 17067.

Township of Annville

Maps are available for inspection at the Township Hall, 36 North Lancaster Street, Annville, PA 17003.

Township of East Hanover

Maps are available for inspection at the East Hanover Township Building, 1117 School House Road, Annville, PA 17003.

Township of North Annville

Maps are available for inspection at the North Annville Township Building, 1020 North Route 934, Annville, PA 17003.

Township of North Londonderry

Maps are available for inspection at the North Londonderry Township Building, 655 East Ridge Road, Palmyra, PA 17078.

Township of South Lebanon

Maps are available for inspection at the South Lebanon Township Building, 1800 South 5th Avenue, Lebanon, PA 17042.

Township of Union

Maps are available for inspection at the Union Township Building, 3111 State Route 72, Jonestown, PA 17038.

Wyoming County, Pennsylvania (All Jurisdictions)

Bowman Creek	Approximately 250 feet upstream of Keelersburg Road.	+606	+605	Township of Eaton, Township of Monroe.
	Approximately 1.02 miles upstream of the most upstream crossing of State Route 29 (Joseph W. Hunter Highway).	+937	+931	
Buttermilk Creek	Approximately 1.1 miles downstream of State Route 2027.	None	+784	Township of Falls.
	Approximately 460 feet upstream of Oak Drive	None	+961	
South Branch Tunkhannock Creek.	Approximately 0.4 mile downstream of State Route 2012.	+714	+713	Borough of Factoryville, Township of Clinton.
	Approximately 0.6 mile upstream of Church Street	+842	+838	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Susquehanna River	Approximately 1.0 mile upstream of Falls-Exeter State Route 92 crossing.	None	+585	Township of North Moreland.
	Approximately 2.5 miles upstream of Falls-Exeter State Route 92 crossing.	None	+589	
Swale Brook	At the downstream side of the railroad bridge	+610	+609	Borough of Tunkhannock.
	Approximately 0.7 mile upstream of Bridge Street	+665	+655	Township of Tunkhannock.
Tributary No. 1 to Swale Brook.	At the Swale Brook confluence	+622	+617	Borough of Tunkhannock.
	Approximately 75 feet upstream of North Bridge Street.	+729	+723	
Tunkhannock Creek	Approximately 425 feet downstream of 2nd U.S. Route 6 crossing.	+610	+609	Township of Tunkhannock.
	Approximately 1.7 miles upstream of the most upstream U.S. Route 6 crossing.	+642	+643	

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Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Borough of Factoryville

Maps are available for inspection at the Borough Municipal Building, 161 College Avenue, Factoryville, PA 18419.

Borough of Tunkhannock

Maps are available for inspection at the Borough Municipal Building, 126 Warren Street, Tunkhannock, PA 18657.

Township of Clinton

Maps are available for inspection at the Clinton Municipal Building, 256 Creek Road, Factoryville, PA 18419.

Township of Eaton

Maps are available for inspection at the Eaton Township Municipal Building, 1331 State Route 29 South, Tunkhannock, PA 18657.

Township of Falls

Maps are available for inspection at the Township Municipal Building, 220 Buttermilk Road, Falls, PA 18615.

Township of Monroe

Maps are available for inspection at the Township Municipal Building, 2605 State Route 29 South, Monroe, PA 18657.

Township of North Moreland

Maps are available for inspection at the North Moreland Township Municipal Building, 15 Municipal Lane, Dallas, PA 18612.

Township of Tunkhannock

Maps are available for inspection at the Township Municipal Building, 113 Tunkhannock Township Drive, Tunkhannock, PA 18657.

Williamsburg County, South Carolina, and Incorporated Areas

Apple Orchard Slough	Approximately 1.4 miles upstream of the Great Pee Dee River confluence.	None	+29	Unincorporated Areas of Williamsburg County.
	Approximately 2.6 miles upstream of the Great Pee Dee River confluence.	None	+29	
Bennett Swamp	At the Dickey Swamp confluence	None	+50	Unincorporated Areas of Williamsburg County.
	Approximately 1.2 miles upstream of Eddie Woods Road.	None	+61	
Big Dam Swamp	At the upstream side of County Line Road	None	+20	Unincorporated Areas of Williamsburg County.
	Approximately 2.6 miles upstream of County Line Road.	None	+24	
Birch Creek	At the downstream side of Thurgood Marshall Highway.	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.5 mile upstream of Birch Creek Road	None	+31	
Black Mingo Creek	At the upstream side of County Line Road	None	+14	Unincorporated Areas of Williamsburg County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 2.3 miles upstream of Battery Park Road.	None	+27	
Boggy Swamp A	At the Black Mingo Creek confluence	None	+25	Unincorporated Areas of Williamsburg County.
	Approximately 0.9 mile upstream of Hemingway Highway.	None	+33	
Boggy Swamp B	Approximately 0.9 mile upstream of the Black River confluence.	None	+35	Unincorporated Areas of Williamsburg County.
	Approximately 3.7 miles upstream of Thurgood Marshall Highway.	None	+58	
Burnett Swamp	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of Nesmith Road	None	+23	
Cain Branch	At the Newman Branch confluence	None	+63	Unincorporated Areas of Williamsburg County.
	At the upstream side of McIntosh Road	None	+67	
Camden Swamp	Approximately 0.4 mile downstream of Sims Reach Road.	None	+28	Unincorporated Areas of Williamsburg County.
	Approximately 0.4 mile upstream of Sims Reach Road.	None	+34	
Campbell Swamp	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of Turner Road	None	+25	
Cedar Branch	At the Soccee Swamp confluence	None	+32	Unincorporated Areas of Williamsburg County.
	Approximately 511 feet upstream of Cockfield Road	None	+51	
Cedar Swamp	At the Black Mingo Creek confluence	None	+28	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of Cedar Swamp Road.	None	+45	
Clapps Swamp	Approximately 0.4 mile upstream of the Black River confluence.	None	+51	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of Hebron Road	None	+69	
Clarks Creek	At the Great Pee Dee River confluence	None	+29	Unincorporated Areas of Williamsburg County.
	Approximately 2.8 miles upstream of the Great Pee Dee River confluence.	None	+29	
Dickey Swamp	Approximately 0.7 mile downstream of Old Gapway Road.	None	+41	Unincorporated Areas of Williamsburg County.
	Approximately 416 feet downstream of Williamsburg County Highway South.	None	+48	
Flat Creek	At the Johnsons Swamp confluence	None	+35	Unincorporated Areas of Williamsburg County.
	Approximately 0.9 mile upstream of Aimwell Road	None	+43	
Grahams Mills Branch	At the Smiths Swamp confluence	None	+57	Unincorporated Areas of Williamsburg County.
	Approximately 160 feet upstream of McClary Road	None	+59	
Gully Branch	At the Black Mingo Creek confluence	None	+17	Unincorporated Areas of Williamsburg County.
	Approximately 0.8 mile upstream of the Black Mingo Creek confluence.	None	+23	
Headless Creek	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.3 mile upstream of Nesmith Road	None	+22	
Hell Hole Branch	At the Birch Creek confluence	None	+32	Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of the Hell Hole Branch Tributary 1 confluence.	None	+43	
Home Swamp	At the Cedar Swamp confluence	None	+40	Unincorporated Areas of Williamsburg County.
	Approximately 1.0 mile upstream of the Cedar Swamp confluence.	None	+46	
Hughs Branch	At the Poplar Hill Branch confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 67 feet upstream of State Highway 41/51.	None	+28	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Indiantown Swamp	At the Black Mingo Creek confluence	None	+19	Unincorporated Areas of Williamsburg County.
	Approximately 0.9 mile upstream of Mount Carmel Road.	None	+36	
Jacks Creek	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.8 mile upstream of Nesmith Road	None	+28	
James Branch	At the Indiantown Swamp confluence	None	+33	Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of the Indiantown Swamp confluence.	None	+36	
Johnson Branch	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of the Black Mingo Creek confluence.	None	+20	
Johnsons Swamp	Approximately 1.2 miles downstream of Gapway Road.	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.5 mile upstream of Earle Road	None	+34	
Kingstree Swamp	At the Black River confluence	None	+43	Town of Kingstree, Unincorporated Areas of Williamsburg County.
	Approximately 0.3 mile upstream of Sandy Bay Road	None	+48	
Lake Swamp	At the upstream side of Old Georgetown Road	None	+42	Unincorporated Areas of Williamsburg County.
	At the upstream side of Five Bridges Road	None	+58	
Log Branch	At the Johnsons Swamp confluence	None	+35	Unincorporated Areas of Williamsburg County.
	Approximately 0.3 mile upstream of the Johnsons Swamp confluence.	None	+37	
Long Branch	At the Clapps Swamp confluence	None	+69	Unincorporated Areas of Williamsburg County.
	Approximately 1.4 miles upstream of Twin Lakes Road.	None	+77	
McGirts Swamp	At the Dickey Swamp confluence	None	+42	Unincorporated Areas of Williamsburg County.
	Approximately 101 feet upstream of Nelson Hill Road	None	+60	
McKnight Swamp	At the Paisley Swamp confluence	None	+32	Unincorporated Areas of Williamsburg County.
	Approximately 3.1 miles upstream of the Paisley Swamp confluence.	None	+42	
McNamee Swamp	At the Singleton Swamp confluence	None	+53	Unincorporated Areas of Williamsburg County.
	Approximately 1.8 miles upstream of Cade Road	None	+64	
Mill Branch B	At the Johnsons Swamp confluence	None	+27	Unincorporated Areas of Williamsburg County.
	Approximately 0.5 mile upstream of Earle Road	None	+34	
Mill Branch Tributary 1	At the Mill Branch B confluence	None	+28	Unincorporated Areas of Williamsburg County.
	Approximately 110 feet upstream of Earle Road	None	+35	
Mill Creek A	At the Muddy Creek confluence	None	+29	Unincorporated Areas of Williamsburg County.
	Approximately 100 feet upstream of Muddy Creek Road.	None	+42	
Mount Hope Swamp	Approximately 2.9 miles upstream of the Santee River confluence.	None	+56	Unincorporated Areas of Williamsburg County.
	Approximately 0.8 mile upstream of Old Forreston Road.	None	+74	
Muddy Creek	At the Clarks Creek confluence	None	+29	Town of Hemingway, Unincorporated Areas of Williamsburg County.
	Approximately 0.3 mile upstream of East Broad Street	None	+50	
Mulberry Branch	At the Dickey Swamp confluence	None	+50	Unincorporated Areas of Williamsburg County.
	Approximately 745 feet upstream of Mulberry Road	None	+52	
Murray Swamp	At the Johnsons Swamp confluence	None	+18	Unincorporated Areas of Williamsburg County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 125 feet upstream of Tad Road	None	+41	
Newman Branch	At the Pudding Swamp confluence	None	+62	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of the Pudding Swamp confluence.	None	+64	
Ox Swamp	At the Black River confluence	None	+29	Unincorporated Areas of Williamsburg County.
	Approximately 1,635 feet upstream of U.S. Route 521	None	+30	
Paisley Swamp	At the Black Mingo Creek confluence	None	+28	Unincorporated Areas of Williamsburg County.
	At the McKnight Swamp confluence	None	+31	
Paisley Swamp Tributary 1	At the Paisley Swamp confluence	None	+31	Unincorporated Areas of Williamsburg County.
	Approximately 1,300 feet upstream of Cade Road	None	+36	
Paisley Swamp Tributary 2	At the Paisley Swamp confluence	None	+32	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of the Paisley Swamp confluence.	None	+34	
Poplar Hill Branch	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of Radio Road	None	+26	
Pudding Swamp	At the Black River confluence	None	+54	Unincorporated Areas of Williamsburg County.
	Approximately 2.0 miles upstream of Burgess Crossing Road.	None	+64	
Rocky Ford Swamp	At the McGirts Swamp confluence	None	+48	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of the McGirts Swamp confluence.	None	+58	
Roper Branch	At the Big Dam Swamp confluence	None	+21	Unincorporated Areas of Williamsburg County.
	At the upstream side of County Line Road	None	+21	
Singleton Swamp	At the Lake Swamp confluence	None	+48	Unincorporated Areas of Williamsburg County.
	Approximately 0.8 mile upstream of Five Bridges Road.	None	+56	
Sleeper Branch	At the Big Dam Swamp confluence	None	+21	Unincorporated Areas of Williamsburg County.
	Approximately 0.4 mile upstream of the Big Dam Swamp confluence.	None	+21	
Smith Swamp	At the downstream side of Browns Ferry Road	None	+9	Unincorporated Areas of Williamsburg County.
	Approximately 3.6 miles upstream of Browns Ferry Road.	None	+28	
Smiths Swamp	At the Singleton Swamp confluence	None	+57	Unincorporated Areas of Williamsburg County.
	Approximately 2.4 miles upstream of Tomlinson Road	None	+74	
Soccee Swamp	At the Clarks Creek confluence	None	+29	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of Hemingway Highway.	None	+35	
Spring Branch A	At the Clapps Swamp confluence	None	+65	Unincorporated Areas of Williamsburg County.
	Approximately 826 feet upstream of Spring Bank Road.	None	+71	
Spring Gully	At the Black River confluence	None	+23	Unincorporated Areas of Williamsburg County.
	Approximately 1.5 miles upstream of the Black River confluence.	None	+28	
Stony Run Branch	Approximately 1,013 feet downstream of U.S. Route 521.	None	+37	Unincorporated Areas of Williamsburg County.
	Approximately 3.0 miles upstream of U.S. Route 521	None	+54	
Thorntree Swamp	Approximately 0.5 mile downstream of U.S. Route 521.	None	+38	Town of Lane, Unincorporated Areas of Williamsburg County.
	Approximately 0.8 mile upstream of 10th Street	None	+70	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Turkey Creek	At the Black Mingo Creek confluence	None	+27	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of Battery Park Road.	None	+33	
Unnamed Tributary 1	At the Pudding Swamp confluence	None	+58	Unincorporated Areas of Williamsburg County.
	Approximately 0.7 mile upstream of McIntosh Road	None	+77	
Unnamed Tributary 10	At the Mount Hope Swamp confluence	None	+56	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of the Mount Hope Swamp confluence.	None	+61	
Unnamed Tributary 18	At the Johnsons Swamp confluence	None	+25	Unincorporated Areas of Williamsburg County.
	At the upstream side of Oakridge Road	None	+29	
Unnamed Tributary 2	At the Singleton Swamp confluence	None	+48	Unincorporated Areas of Williamsburg County.
	Approximately 0.5 mile upstream of the Singleton Swamp confluence.	None	+54	
Unnamed Tributary 20	At the Johnsons Swamp confluence	None	+23	Unincorporated Areas of Williamsburg County.
	At the upstream side of County Line Road	None	+23	
Unnamed Tributary 22	At the Johnsons Swamp confluence	None	+20	Unincorporated Areas of Williamsburg County.
	Approximately 0.4 mile upstream of the Johnsons Swamp confluence.	None	+22	
Unnamed Tributary 24	At the Birch Creek confluence	None	+19	Unincorporated Areas of Williamsburg County.
	Approximately 0.4 mile upstream of the Birch Creek confluence.	None	+24	
Unnamed Tributary 27	At the Smith Swamp confluence	None	+25	Unincorporated Areas of Williamsburg County.
	At the downstream side of County Line Road	None	+31	
Unnamed Tributary 29	At the Burnett Swamp confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 0.9 mile upstream of the Burnett Swamp confluence.	None	+37	
Unnamed Tributary 3	At the Lake Swamp confluence	None	+48	Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of the Lake Swamp confluence.	None	+50	
Unnamed Tributary 37	At the Black Mingo Creek confluence	None	+16	Unincorporated Areas of Williamsburg County.
	Approximately 1.3 miles upstream of the Black Mingo Creek confluence.	None	+24	
Unnamed Tributary 44	At the Soccee Swamp confluence	None	+29	Unincorporated Areas of Williamsburg County.
	At the upstream side of County Line Road	None	+37	
Unnamed Tributary 49	At the Muddy Creek confluence	None	+34	Town of Hemingway, Unincorporated Areas of Williamsburg County.
	Approximately 1,160 feet upstream of East Broad Street.	None	+49	
Unnamed Tributary 50	At the Black River confluence	None	+42	Town of Kingstree, Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of Eastland Avenue	None	+61	
Unnamed Tributary 50_2	At the Unnamed Tributary 50 confluence	None	+46	Town of Kingstree, Unincorporated Areas of Williamsburg County.
	Approximately 0.6 mile upstream of Eastland Avenue	None	+60	
Unnamed Tributary 6	Approximately 200 feet downstream of County. Line Road.	None	+38	Unincorporated Areas of Williamsburg County.
	Approximately 250 feet upstream of Claire Road	None	+44	
Unnamed Tributary 7	At the Soccee Swamp confluence	None	+29	Unincorporated Areas of Williamsburg County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 0.6 mile upstream of East Lawrimore Road.	None	+43	
Unnamed Tributary 9	At the Mount Hope Swamp confluence	None	+70	Unincorporated Areas of Williamsburg County.
	Approximately 0.4 mile upstream of Old Forreston Road.	None	+76	
Walden Branch	At the Black Mingo Creek confluence	None	+15	Unincorporated Areas of Williamsburg County.
	Approximately 1.0 mile upstream of the Black Mingo Creek confluence.	None	+17	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
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Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Hemingway

Maps are available for inspection at 110 South Main Street, Hemingway, SC 29554.

Town of Kingstree

Maps are available for inspection at 401 North Longstreet Street, Kingstree, SC 29556.

Town of Lane

Maps are available for inspection at 345 South Lane Road, Lane, SC 29564.

Unincorporated Areas of Williamsburg County

Maps are available for inspection at 147 West Main Street, Kingstree, SC 29556.

Sumner County, Tennessee, and Incorporated Areas

East Camp Creek	Approximately 1,110 feet downstream of U.S. Route 31.	+452	+453	City of Gallatin
	At the downstream side of State Route 25	+487	+486	
North Donoho Branch	At the upstream side of the railroad	None	+794	City of Portland.
	Approximately 0.6 mile upstream of the railroad	None	+794	
Sink Hole Creek	At the downstream side of Newton Lane	+474	+475	City of Gallatin, Unincorporated Areas of Sumner County.
	Approximately 0.4 mile upstream of Airport Driveway	None	+571	
Sink Hole Creek Tributary	Approximately 320 feet upstream of the Sink Hole Creek confluence.	+499	+498	City of Gallatin, Unincorporated Areas of Sumner County.
	Approximately 580 feet upstream of Airport Road	None	+547	
Station Camp Creek	At the upstream side of Lower Station Camp Road	+455	+452	City of Gallatin, City of Hendersonville, Unincorporated Areas of Sumner County.
	Approximately 0.8 mile downstream of the Strother Branch confluence.	+555	+554	

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ADDRESSES

City of Gallatin

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Maps are available for inspection at City Hall, 132 West Main Street, Gallatin, TN 37066.

City of Hendersonville

Maps are available for inspection at City Hall, Planning and Zoning, 1 Executive Park Drive, Hendersonville, TN 37075.

City of Portland

Maps are available for inspection at City Hall, 100 South Russell Street, Portland, TN 37148.

Unincorporated Areas of Sumner County

Maps are available for inspection at the Sumner County Building Department, 355 North Belvedere Drive, Room 202, Gallatin, TN 37066.

Prince George County, Virginia, and Incorporated Areas

Harrison Creek	Approximately 0.39 mile downstream of Puddledock Road.	None	+11	Unincorporated Areas of Prince George County.
	Approximately 1,405 feet upstream of Puddledock Road.	None	+29	

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ADDRESSES

Unincorporated Areas of Prince George County

Maps are available for inspection at the Prince George County. Planning Department, 6602 Courts Drive, Prince George, VA 23875.

Thurston County, Washington, and Incorporated Areas

Deschutes River	Approximately 615 feet downstream of Waldrick Road Southeast.	+237	+240	Unincorporated Areas of Thurston County.
	At the downstream side of Waldrick Road Southeast	+237	+243	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
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** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

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ADDRESSES

Unincorporated Areas of Thurston County

Maps are available for inspection at the Thurston County. Courthouse, 2000 Lakeridge Drive Southwest, Olympia, WA 98502.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 21, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–8113 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Docket ID FEMA–2011–0002
[Internal Agency Docket No. FEMA–B–1179]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before July 5, 2011.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1179, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation **	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Larimer County, Colorado, and Incorporated Areas				
Boxelder Creek Overflow Downstream.	Approximately 914 feet downstream of Highway 14 ...	+4935	+4933	Unincorporated Areas of Larimer County.

Flooding source(s)	Location of referenced elevation **	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 0.6 mile upstream of Highway 14	+4949	+4947	
Boxelder Creek Overflow West.	Approximately 235 feet downstream of I–25 Frontage Road.	+4927	+4928	Unincorporated Areas of Larimer County.
	Approximately 185 feet downstream of Mulberry Street.	None	+4933	
Business Park Denrose	Approximately 135 feet upstream of Denrose Court ...	+4933	+4932	Unincorporated Areas of Larimer County.
	Approximately 360 feet upstream of Denrose Court ...	+4933	+4934	
Business Park Middle	Approximately 550 feet downstream of Denrose Court	+4929	+4930	Unincorporated Areas of Larimer County.
	Approximately 75 feet downstream of Denrose Court	+4933	+4931	
Business Park South	Approximately 140 feet downstream of Denrose Court	+4933	+4931	Unincorporated Areas of Larimer County.
	At the downstream side of Denrose Court	+4933	+4934	
Business Park West	Approximately 260 feet downstream of Denrose Court	+4929	+4930	Unincorporated Areas of Larimer County.
	At the upstream side of Denrose Court	+4933	+4932	
Cache La Poudre L Path	Approximately 350 feet downstream of Prospect Road	+4890	+4886	City of Fort Collins, Unincorporated Areas of Larimer County.
	Approximately 440 feet downstream of Timberline Road.	+4912	+4910	
Cache La Poudre Lowflow Channel.	Approximately 450 feet downstream of County Road 9.	+4881	+4882	City of Fort Collins.
	Approximately 300 feet downstream of County Road 9.	+4882	+4883	
Cache La Poudre River	Approximately 800 feet downstream of County Road 9.	+4882	+4883	City of Fort Collins.
	Approximately 680 feet downstream of Prospect Road	+4897	+4898	
Shields Street Divided Flow Path—Windtrail Swale (backwater effects from Spring Creek).	From the Spring Creek confluence to approximately 600 feet upstream of the Spring Creek confluence.	+5001	+5000	City of Fort Collins.
Shields Street Overflow	Approximately 190 feet downstream of Hill Pond Road.	+5019	+5020	City of Fort Collins.
	Approximately 360 feet upstream of Hill Pond Road ...	+5025	+5024	
Spring Canyon Park Diversion.	At the upstream side of Spring Canyon Park Weir	+5114	+5122	City of Fort Collins.
	Approximately 1,450 feet upstream of Spring Canyon Park Weir.	+5124	+5125	
Spring Creek	Approximately 970 feet downstream of Prospect Road	+4906	+4904	City of Fort Collins, Unincorporated Areas of Larimer County.
	Approximately 0.7 mile upstream of Spring Canyon Park Pedestrian Trail.	+5168	+5167	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
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Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Fort Collins

Maps are available for inspection at the Stormwater Utilities Department, 700 Wood Street, Fort Collins, CO 80521.

Unincorporated Areas of Larimer County

Maps are available for inspection at 200 West Oak Street, Fort Collins, CO 80521.

Washtenaw County, Michigan (All Jurisdictions)				
Huron River	Approximately 620 feet downstream of the railroad	None	+718	Township of Superior.

Flooding source(s)	Location of referenced elevation **	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 630 feet upstream of Superior Road	None	+719	

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ADDRESSES

Township of Superior

Maps are available for inspection at 3040 North Prospect Road, Ypsilanti, MI 49198.

Bennington County, Vermont (All Jurisdictions)

Batten Kill	Approximately 0.65 mile downstream of River Road ...	+522	+524	Town of Arlington, Town of Manchester, Town of Sunderland, Village of Manchester.
	Approximately 100 feet upstream of Union Street	+682	+683	
Furnace Brook	Approximately 100 feet downstream of Percy Road ...	+577	+578	Town of Bennington.
	Approximately 135 feet upstream of Park Street	+650	+648	
Hoosic River	At the Rensselaer County, New York, boundary	+500	+498	Town of Pownal.
	At the Berkshire County, Massachusetts, boundary	+566	+567	
South Stream	At the downstream side of Hunt Street	+621	+620	Town of Bennington.
	Approximately 0.5 mile upstream of the Jewett Brook confluence.	None	+753	
Walloomsac River	Approximately 1,000 feet downstream of Murphy Road.	+551	+550	Town of Bennington.
	Approximately 2,050 feet downstream of Town Highway 32.	+580	+578	
Walloomsac River	Approximately 90 feet upstream of River Road	None	+542	Village of North Bennington.
	Approximately 0.53 mile downstream of Murphy Road	None	+546	
Warm Brook	Approximately 1.28 miles upstream of Ubu Lane	+773	+772	Town of Arlington, Town of Shaftsbury.
	Approximately 2.54 miles upstream of Ubu Lane	None	+781	
West Branch Batten Kill	Approximately 50 feet upstream of Depot Street	+698	+699	Town of Manchester.
	Approximately 1.09 miles upstream of Rec Park Road	None	+775	
Winhall River	At the Windham County boundary	+1250	+1249	Town of Winhall.
	Approximately 1,800 feet upstream of Arthur Court	None	+1511	

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ADDRESSES

Town of Arlington

Maps are available for inspection at 3828 Vermont Route 7A, Arlington, VT 05250.

Town of Bennington

Maps are available for inspection at 205 South Street, Bennington, VT 05201.

Town of Manchester

Maps are available for inspection at 6039 Main Street, Manchester, VT 05255.

Town of Pownal

Maps are available for inspection at 467 Center Street, Pownal, VT 05261.

Town of Shaftsbury

Maps are available for inspection at 61 Buck Hill Road, Shaftsbury, VT 05262.

Flooding source(s)	Location of referenced elevation **	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Town of Sunderland				
Maps are available for inspection at 181 South Road, East Arlington, VT 05252.				
Town of Winhall				
Maps are available for inspection at 3 River Road, Bondville, VT 05340.				
Village of Manchester				
Maps are available for inspection at 45 Union Street, Manchester, VT 05254.				
Village of North Bennington				
Maps are available for inspection at the Bennington Train Depot, Main Street, North Bennington, VT 05257.				
Lewis County, Washington, and Incorporated Areas				
Chehalis River	Approximately 0.84 mile upstream of Prather Road	+150	+151	City of Centralia, City of Chehalis, Unincorporated Areas of Lewis County.
	Approximately 0.7 mile upstream of Elk Creek Road	None	+324	
China Creek (backwater effects from Chehalis River).	Approximately 220 feet downstream of I–5	+176	+177	City of Centralia.
	Approximately 80 feet downstream of Cedar Street	+176	+177	
China Creek (backwater effects from Skookumchuck River).	Approximately 74 feet upstream of North Gold Street	+188	+190	City of Centralia.
	Approximately 1,335 feet upstream of North Gold Street.	+189	+190	
Coal Creek (backwater effects from Salzer Creek).	At the Salzer Creek confluence	+179	+181	City of Chehalis.
	At the downstream side of National Avenue	+179	+181	
Coffee Creek (backwater effects from Skookumchuck River).	At the Skookumchuck River confluence	+186	+187	City of Centralia, Unincorporated Areas of Lewis County.
	At the upstream side of Reynolds Avenue	+187	+191	
Eagle Creek (backwater effects from Lincoln Creek).	At the Lincoln Creek confluence	None	+155	Unincorporated Areas of Lewis County.
	Approximately 2.3 miles upstream of Lincoln Creek Road.	None	+155	
Elk Creek (backwater effects from Chehalis River).	At the Chehalis River confluence	+305	+317	Unincorporated Areas of Lewis County.
	Approximately 0.43 mile upstream of Elk Creek Road	+316	+317	
Hanaford Creek	At the Skookumchuck River confluence	+201	+202	Unincorporated Areas of Lewis County.
	Approximately 0.46 mile upstream of the Packwood Creek confluence.	None	+217	
Lincoln Creek	Approximately 722 feet upstream of the Chehalis River confluence.	+154	+155	Unincorporated Areas of Lewis County.
	At the downstream side of Teague Road	None	+159	
Salzer Creek	At the Chehalis River confluence	+179	+181	City of Centralia, City of Chehalis, Unincorporated Areas of Lewis County.
	Approximately 0.32 mile upstream of Proffitt Road	+190	+191	
Skookumchuck River	At the upstream side of Reynolds Street	+187	+191	City of Centralia, Unincorporated Areas of Lewis County.
	Approximately 0.98 mile upstream of Downing Road	+207	+212	

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Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

Flooding source(s)	Location of referenced elevation **	*Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

ADDRESSES

City of Centralia

Maps are available for inspection at 118 West Maple Street, Centralia, WA 98531.

City of Chehalis

Maps are available for inspection at 1321 South Market Boulevard, Chehalis, WA 98532.

Unincorporated Areas of Lewis County

Maps are available for inspection at 351 Northwest North Street, Chehalis, WA 98532.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 7, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–8116 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 11–05]

RIN 3072–AC43

Rules of Practice and Procedure

AGENCY: Federal Maritime Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (FMC or Commission) is seeking comments on possible amendments to its Rules of Practice and Procedure to update and clarify its rules, and to reduce the burden on parties to proceedings before the Commission.

DATES: Submit comments on or before May 6, 2011.

ADDRESSES: Address all comments concerning this advance notice of proposed rulemaking to Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001. Submit electronic comments to *secretary@fmc.gov.*

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001, Tel.: (202) 523–5725. E-mail: *secretary@fmc.gov.* Rebecca A. Fenneman, General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001, Tel.: (202) 523–5740. E-mail: *generalcounsel@fmc.gov.*

SUPPLEMENTARY INFORMATION: The Commission proposes to amend part 502 of title 46 of the Code of Federal Regulations to update and improve its Rules of Practice and Procedure, 46 CFR part 502. The rules in 46 CFR 502.1–502.991 are designed to secure just, speedy, and inexpensive resolution of proceedings before the Commission. On February 24, 2011, certain changes to subparts A, H, I, S, and T of part 502 were published in the **Federal Register**, 76 FR 10258 (February 24, 2011) and are now in effect. The Commission intends to update and revise the rest of its Rules of Practice and Procedure. By this advance notice, it seeks public comment addressing existing rules that should be updated to reflect current practices and technologies, or could be improved to bring about more efficient and user-friendly procedures. Following receipt and consideration of comments, the Commission intends to issue specific proposed rules in a Notice of Proposed Rulemaking and solicit additional public comment on its proposal.

A. Modernization and Efficiency Enhancement

The Commission proposes to amend and update any rules in part 502 that may be appropriate in order to improve their effectiveness and enhance administrative efficiency, both in use of material and human resources. In line with this goal, the recent revision to subpart A requests all filings to be submitted in electronic PDF format, as well as paper. This first step towards accepting documents in electronic form will give the Commission an opportunity to develop new internal procedures that reduce paper and staff time. The Commission is interested in suggestions and information from the public regarding electronic filing and docket systems they have used and found most efficient and user-friendly. The Commission intends to make the best use of electronic resources currently at its disposal and recognizes the importance of electronic communications.

The Commission contemplates editorial revisions to clarify language as well as substantive changes to make the rules more effective and efficient for the industry and the Commission. All procedural rules are being examined for possible revision. At the outset, some of the initial candidates for change are: qualification of non-attorney practitioners, 46 CFR 502.27; content of filed complaints and answers, 46 CFR 502.62–502.64; intervention by the Bureau of Enforcement in complaint proceedings, 46 CFR 502.42; rules governing computation of time, time of filing, and enlargements of time, 46 CFR subpart G; hearing procedures, 46 CFR subpart J; requirements for filing briefs, including the time periods for filing exceptions, page limits, and contents, 46 CFR subpart M; and the functions and authorities of the presiding officer in proceedings. Consideration will also be given to the possible addition of rules for the use of summary judgment in proceedings; voluntary and involuntary dismissal of complaints in line with the Federal Rules of Civil Procedure (FRCP); and the use of cross-claims and third-party complaints in Commission proceedings.

Additionally, the Commission seeks comment on whether it should amend its rules on filing and service of documents. Several federal agencies now require physical receipt of documents to meet filing and/or service deadlines. Currently the Commission's rule provides that "the date of filing shall be either the date on which the pleading, document, or paper is physically delivered to the Commission

by a party, the date on which a party certifies it to have been deposited in the mail or delivered to a courier, or the date of email transmission." 46 CFR 502.2(b) (previously 46 CFR 114(c)).

The Commission also seeks comment on the possible applicability of the FRCP to proceedings before the Commission consistent with its responsibilities under the Administrative Procedure Act. 5 U.S.C. 551–559. The Commission's rules currently provide that the FRCP will apply in situations that are not covered by a specific Commission rule to the extent the federal rules are consistent with sound administrative practice. 46 CFR 502.12. The presiding officer also has discretion to waive any rules "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 CFR 502.10. The Commission desires to ensure that procedures are consistent with modern practice while giving due regard to limitations on its resources and the nuances of its own procedures and requirements.

B. Modernization of Discovery Rules

The Shipping Act of 1984 provides: "In an investigation or adjudicatory proceeding under this part—* * * (2) a party may use depositions, written interrogatories, and discovery procedures under regulations prescribed by the Commission that, to the extent practicable, shall conform to the Federal Rules of Civil Procedure (28 App. U.S.C.)." 46 U.S.C. 41303(a). In 1984, the Commission promulgated discovery rules based primarily on the federal rules as they then existed. 49 FR 44369 (November 6, 1984). The Commission also promulgated minor amendments to Rule 201 in 1999 and Rule 203 in 1993, but in all other respects the rules are unchanged since 1984. The Commission's discovery rules are set forth in 46 CFR subpart L.

The Federal rules regulating discovery have been amended many times since 1984. Some amendments concerned matters that hardly existed in 1984, such as electronic discovery. FRCP 26, 34. Other amendments altered established discovery procedures, including the scope of discovery (compare FRCP 26(b)(1) with 46 CFR 502.201(h)); the requirement to provide initial disclosures, including identification of expert witnesses (FRCP 26(a)); procedures for claiming privilege or protecting trial-preparation materials (FRCP 26(b)(5)); a limitation of number (FRCP 30(a)(2)) and conduct of depositions (FRCP 30(d)); and a limitation on the number of interrogatories (FRCP 33(a)(1)). The thirty-day period to respond to interrogatories and requests for production of documents that existed in the FRCP in 1984 was not included in the Commission's rules.

The Commission seeks public comments on whether to revise its discovery rules to conform more closely to the FRCP as they are formulated today. The Commission believes that to achieve the optimum result, any revision should consider the views of the parties and attorneys who would be subject to the revised rules. Therefore, it seeks their views through this advance notice of proposed rulemaking.

Interested parties may address the following questions or other concerns:

1. What specific problems, if any, have you experienced with the Commission's current rules of discovery?

2. What specific problems, if any, would you foresee if the Commission were to adopt particular provisions of the discovery rules as they currently exist in the FRCP, giving due regard to the differences in the nature of the proceedings and practice before the federal courts and before the Commission?

C. Informal Docket or Small Claims Procedures

Subpart S of the Commission's rules, 46 CFR 502.301–502.305, governs informal procedures for adjudication of small claims. These procedures were established for use by complainants when the amount in controversy is $50,000 or less. In those cases, an appointed settlement officer will make a decision without necessity of formal proceedings. A complainant may request a Subpart S proceeding, but a respondent can elect not to consent to such proceeding. If a respondent does not consent, the matter will be heard by an administrative law judge under Subpart T, Formal Procedure for Adjudication of Small Claims.

The Commission is seeking comment on Subpart S proceedings, in particular as to: effecting service when parties make themselves unavailable for service of claims and decisions, or become unreachable after initially participating in a proceeding; dismissal of claims if service on the respondent cannot be achieved; and if the Commission's rules on ex parte communications, 46 CFR 502.11, should apply to Informal Docket proceedings. The Commission is particularly interested in commenters' experience with small claims procedures used by other government entities that the Commission might use as guidance when amending its own rules.

The Commission will be able to better consider whether and how its Rules of Practice and Procedure should be amended if commenters provide specific examples regarding the current rules and possible improvement of the rules. Commenters transmitting comments by e-mail should indicate "FMC 502 ANPR" in the subject line of the e-mail. All e-mail comments should be sent to *secretary@fmc.gov*.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2011–8204 Filed 4–5–11; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 384

[Docket No. FMCSA–2011–0039]

RIN 2126–AB33

Commercial Driver's License Information System State Procedures Manual, Release 5.2.0

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to incorporate by reference the most recent version of the American Association of Motor Vehicle Administrators, Inc.'s (AAMVA) Commercial Driver's License Information System (CDLIS) State Procedures Manual (the Manual). All State driver licensing agencies would use this updated version of the Manual to develop the process required in transmitting, receiving, recording and updating information on a CDLIS driver record. Such information includes, but is not limited to, the commercial driver's license (CDL) holder's physical description, commercial and noncommercial driving status, medical certification status, convictions, disqualifications and accidents. The purpose of this proposal is to enhance the safety of commercial motor vehicle (CMV) operations on our nation's highways.

DATES: Comments must be received by June 6, 2011.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–

2011–0039 using any of the following methods:

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

Instructions: All submissions must include the Agency name and docket number (FMCSA–2011–0039) for this rulemaking. To avoid duplication, please use only one of these four methods. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please refer to the Privacy Act heading for further information.

Comments received after the comment closing date will be included in the docket and we will consider late comments only to the extent practicable. FMCSA may issue a final rule at any time after the close of the comment period.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may 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** notice published on April 11, 2000 (65 FR 19476).

FOR FURTHER INFORMATION CONTACT: Mr. Robert Redmond, Senior Transportation Specialist, Commercial Driver's License Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001; Telephone: (202) 366–5014; E-mail address: *robert.redmond@dot.gov.*

SUPPLEMENTARY INFORMATION This NPRM is organized as follows:

I. Legal Basis
II. Background
III. Purpose and Scope of the CDLIS State Procedures Manual
IV. Incorporation By Reference
V. Implementation Date
VI. Section Analysis
VII. Regulatory Analyses

I. Legal Basis

Section 206 of the Motor Carrier Safety Act of 1984 (MCSA) (Pub. L. 98–554, title II, 98 Stat. 2832, 2834, codified at 49 U.S.C. 31136) directed the Secretary of Transportation to regulate commercial motor vehicles (CMVs) and the drivers and motor carriers that operate them. The Secretary was also directed to issue regulations governing the physical condition of drivers. The Secretary delegated these authorities to FMCSA (*see* 49 CFR 1.73(g)).

The Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Pub. L. 99–570, title XII, 100 Stat. 3207–170, codified at 49 U.S.C. chapter 313) required the Secretary of Transportation, after consultation with the States, to prescribe regulations on minimum uniform standards for State issuance of CDLs. The Act also specified information States must include on each CDL (49 U.S.C. 31308).

FMCSA, in accordance with 49 U.S.C. 31308, has authority to prescribe procedures and requirements the States must observe in issuing CDLs and CDL learner permits. To avoid loss of Federal-aid highway funds, 49 U.S.C. 31314 requires each State to comply substantially with 49 U.S.C. 31311(a), which prescribes the requirements for State participation in the CDL program. To ensure that the States are able to exchange information about CDL holders efficiently and effectively through CDLIS, as required by 49 U.S.C. 31311(a)(5)–(9), (15), (18)-(19), and (21), the rule proposed today would require States issuing CDLs and CDL learner permits to follow all the procedures described in Version 5.2.0 of the CDLIS State Procedures Manual when posting, transmitting, and receiving all information on a CDL driver's CDLIS driver record.

II. Background

FMCSA is required by statute to maintain an information system that serves as the clearinghouse and depository of information about the licensing, identification and disqualification of operators of CMVs. (49 U.S.C. 31309). CDLIS is the information system that serves that function.

In 1988, the Federal Highway Administration (FHWA) entered into a designation agreement with AAMVA's affiliate AAMVAnet, Inc. to create and operate CDLIS. Under that agreement, CDLIS must contain all the information required in 49 U.S.C. 31309(b). The 1988 agreement states that AAMVAnet will "cooperate fully with FHWA with respect to the operation of CDLIS including, but not limited to, information content and the development of standards relating to access to CDLIS by States and various employers and employees." Pursuant to section 106(b) of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 113 Stat. 1748, 1757, 49 U.S.C. 113 note), the 1988 agreement automatically transferred to FMCSA upon the Agency's establishment and remained in effect until FMCSA and AAMVA, the party that inherited the responsibilities of its affiliate AAMVAnet, Inc. entered into a superseding agreement in 2008. Copies of the 1988 and 2008 agreements are in the public docket for this rulemaking.

In August 2005, section 4123 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) authorized FMCSA to establish a modernization plan for CDLIS (Pub. L. 109–59, 119 Stat. 1144, 1734, partly codified at 49 U.S.C. 31309(e) *et seq.*). Section 4123 also authorized grants to States or organizations representing States for the modernization of CDLIS. (49 U.S.C. 31309(f)).

On May 2, 2006, FMCSA published the CDLIS Modernization Plan in the **Federal Register** (71 FR 25885). The Plan detailed the statutory requirements for modernization, the phases of the modernization plan, and the availability of grant funding for AAMVA and the States to comply with CDLIS modernization requirements. Since May 2006, AAMVA has received grants from FMCSA to complete the tasks enumerated in the Modernization Plan.

On June 9, 2008, FMCSA and AAMVA entered into a new cooperative agreement regarding the operation, maintenance, and modernization of CDLIS. While FMCSA authorizes AAMVA to maintain and operate CDLIS, FMCSA does not own CDLIS and it is not a Federal system of records. FMCSA and AAMVA work closely together to monitor State compliance with the CDLIS specifications, as set forth in the May 2, 2006 **Federal Register** notice, and their annual grant agreements. FMCSA has awarded AAMVA Federal financial assistance grants to maintain an active Help Desk for State personnel, to conduct regularly occurring CDLIS training courses for State personnel, and to provide States with regular CDLIS transaction and

error reports to improve their compliance efforts.

The goals of the 2008 agreement, to which any amendments must be made in writing and signed by all parties, are to provide a framework for the ongoing operation, maintenance, administration, enhancement, and modernization of CDLIS by AAMVA. The modernization will ensure compliance with applicable Federal information technology security standards; electronic exchange of all information including the posting of convictions; self-auditing features to ensure that data are being posted correctly and consistently by the States; and integration of an individual's CDL and the medical certificate as required in the final rule on "Medical Certification Requirements as Part of CDL." (73 FR 73096, December 1, 2008). Finally, the agreement provides a schedule for modernization of the system. The updated Version 5.2.0 of the State Procedures Manual implements the CDLIS modernization effort.

III. Purpose and Scope of the CDLIS State Procedures Manual

The CDLIS State Procedures Manual (Release 5.2.0) outlines the standard administrative practices required of the fifty States and the District of Columbia when participating in CDLIS. The 13 Canadian provinces and territories and the Mexican General Directorship of Federal Motor Carrier Transportation (DGAF) will also adopt the Version 5.2.0 update of the State Procedures Manual. Version 5.2.0 of the State Procedures Manual supersedes the CDLIS State Procedures Manual (Release 4.1.0) of September 2007.

The primary audience for this Manual is State personnel involved in CDL programs, and their counterparts in Canada and Mexico, including administrative employees involved in driver licensing and computer-technology staff supporting the CDLIS transactions. The Manual contains background information about the laws mandating CDLIS and discusses types of CDLIS users. The Manual also includes descriptions, excerpted from the CDLIS System Specifications (Release 5.2.0), of the nation-wide computerized data-exchange transactions used to electronically record and report driver information. Further, the Manual provides guidance on administrative driver licensing procedures that involve CDLIS, including issuing, renewing, transferring withdrawing, and reinstating a driver's license, and posting convictions. The Manual does not address CDL or CDL learner's permit program requirements outside the scope of CDLIS.

The CDLIS State Procedures Manual (Release 5.2.0) addresses changes that were made as part of the modernization effort to make CDLIS more efficient in handling the increasing number of driver records and data transactions. These changes include new rules for processing transactions, procedures for handling data transaction errors and clarifications of existing rules and procedures for processing data transactions. The following is a summary of the changes:

Comply with applicable Federal information technology security standards:

- The network was upgraded to comply with National Institute of Standards and Technology (NIST) and other Federal standards, including the encryption of messages (note: all States have completed this upgrade).
- FMCSA has encouraged States to follow the NIST standards in their internal systems that maintain driver history information used in messages sent via CDLIS.
- Because the CDLIS Central Site stores a significant accumulation of personally identifiable information (PII), FMCSA has overseen a Certification and Accreditation by independent auditors to ensure that it provides sufficient safeguards and mitigates the risk of that data being compromised or accessed by unauthorized personnel.

Provide for the electronic exchange of all information, including posting of convictions:

- Medical Certificate information, driver self-certification of operating status, medical certification status, information regarding variances and exemptions from medical requirements have all been added to the driver history record exchanged via CDLIS.
- A new nationwide driver license restriction code of 'V' was created to be used on the license document and CDLIS messages to ensure law enforcement would ask the driver to provide variance information during a traffic stop.
- A new CDLIS message will allow FMCSA to quickly locate a driver's State and license number after a crash.

Contain self-auditing features to ensure that data is being posted correctly and consistently by the States:

- Message edit-checks were added to ensure that data in driver history is being posted correctly and consistently by the States.
- Reports have been created to assist FMCSA in monitoring State compliance with Federal regulations related to timeliness, data quality, and various capabilities.
- States will be required to provide data from their licensing systems to verify that it matches the information on the Central Site; States will be provided error reports to take action to correct any data conflicts.
- Non-PII data will be used to create statistical reports related to the national CDL program.

The Manual also addresses the rules and procedures for recording and transmitting the new medical certification data that is being added to CDLIS driver records.

IV. Incorporation by Reference

When the regulatory requirements for State participation in the CDL program were adopted as 49 CFR part 384 (59 FR 26029, May 18, 1994), they included the provision that the States must adhere to program requirements specified by the Agency and the designated operator of CDLIS. Section 384.231(d) states that each "State shall maintain such driver records and cause such driver identification data to be retained on the CDLIS as the operator of the CDLIS specifies are necessary to the implementation and enforcement of the disqualifications called for in §§ 384.215 through 384.219." In fact, the information collection requirements built into CDLIS were specified broadly by FHWA in 1988 and more precisely by FMCSA in 2008. Those requirements have formed the basis for several editions of the CDLIS State Procedures Manual. In 2002, FMCSA, therefore, incorporated by reference into § 384.231(d) Version 2.0 of the Manual (67 FR 49742, July 31, 2002) and later updated the rule to incorporate Version 4.1.0 (73 FR 73096, December 1, 2008).

FMCSA believes that uniform practices among the States can only be ensured by incorporating by reference the latest CDLIS State Procedures Manual (Release 5.2.0), published in February 2011. This most recent version of the Manual will be made available for inspection at the Department of Transportation Library and the National Archives and Records Administration. Copies of the Manual may also be obtained through AAMVA. Further details and contact addresses and telephone numbers are provided in 49 CFR 384.107. AAMVA plans to update this Manual as needed to reflect changing legal requirements and best practices in the operation of CDLIS. Incorporating Release 5.2.0 by reference, however, should ensure that each State complies with the specific version required by FMCSA.

FMCSA is providing the public an opportunity to comment on the incorporation by reference of Release 5.2.0 of the Manual.

Section 552(a)(1) of title 5, United States Code, authorizes agencies, with the approval of the Director of the Federal Register, to incorporate by reference into regulations materials already published elsewhere. This reduces the volume of material published in the **Federal Register** and the Code of Federal Regulations. This NPRM is part of the process of incorporating the AAMVA CDLIS State Procedures Manual by reference. The legal effect of incorporation by reference is that the material is treated as if it were published in the **Federal Register**. This material, like any other properly issued rule, would then have the force and effect of law.

V. Implementation Date

The Agency is currently working with AAMVA and the States to modernize CDLIS, as required by section 4123 of SAFETEA–LU. The modernization plan requires all States to use Release 5.2.0 of the CDLIS State Procedures Manual by January 30, 2012. Both the CDLIS modernization effort and inclusion of information from the medical examiner's certificate on CDLIS driver records will require States to update their CDLIS computer programs.

This NPRM would require States to comply with Release 5.2.0 of the CDLIS State Procedures Manual by January 30, 2012. The Agency believes the standard 3-year phase-in period is unnecessary because, under the modernization plan, the States are currently working to pass required implementing legislation, modify their information systems to comply with the new modernized CDLIS, begin recording the medical examiner's certificate information onto the CDLIS driver record, and making that information available from the CDLIS driver record.

VI. Section Analysis

Part 384

Section 384.107. The Agency would revise paragraph (b) to incorporate by reference the Release 5.2.0 version of the CDLIS State Procedures Manual.

Section 384.301. The agency would add, as a conforming amendment, a new paragraph (e) specifying that the State must comply with requirements of this rule by January 30, 2012.

VII. Regulatory Analyses

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA has determined that this action is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866 and the Department of Transportation regulatory policies and procedures (DOT Order 2100.5, 44 FR 11034, February 26, 1979). These proposed regulations will not have an effect of $100 million or more on the economy. They will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. These proposed regulations will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. These proposed regulations do not alter the budgetary effects of entitlements, grants, use fees, or loan programs or the right or obligations of their recipients; nor do they raise novel legal or policy issues.

This rule is directed to State driver licensing agencies. This NPRM would merely incorporate the CDLIS State Procedures Manual (Release 5.2.0). Separate regulations require States to comply with the substantive requirements of the Manual. Release 5.2.0 merely sets processes and procedures to ensure that these other regulations are uniformly implemented. As a result, the rule would not impose significant costs on the States.

The only new statutory requirements that are addressed in the Manual are related to the merging of the medical examiner's certificate into the CDLIS driver record and those listed in the May 2, 2006 **Federal Register** notice detailing the plan to modernize CDLIS. The costs associated with the implementation of the new medical examiner's certificate requirements were addressed in the final rule on "Medical Certification Requirements as Part of the CDL" published on December 1, 2008 (72 FR 73096). The costs associated with the modernization of CDLIS were addressed in the "CDLIS Modernization Plan" published on May 2, 2006 (71 FR 25885).

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act, as amended, 5 U.S.C. 601–612, FMCSA has considered the effects of this proposed regulatory action on small entities and determined that this proposed rule would not have a significant impact on a substantial number of small entities, as defined by the U.S. Small Business Administration. This rulemaking proposal would primarily affect States and their processes and procedures for maintaining electronic driver history records.

Unfunded Mandates Reform Act of 1995

This rulemaking would not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, *et seq.*), that will result in the expenditure by State, local, or tribal governments or the private sector, in the aggregate, of $140.8 million (which is the value of $100 million in 2009 after adjusting for inflation) or more in any one year.

The Unfunded Mandates Reform Act requires new Federal regulations to be accompanied by an analysis of their fiscal impacts on State, local, and tribal governments and on private industry. As discussed above in the section on "Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures," the only new requirements in the CDLIS State Procedures Manual relate to the merging of the medical examiner's certificate into the CDLIS driver record and the modernization of CDLIS. Any costs associated with the implementation of the merging of the medical examiner's certificate into CDLIS were addressed in the final rule on "Medical Certification Requirements as Part of the CDL" published on December 1, 2008 (72 FR 73096). The costs associated with the modernization of CDLIS were addressed in the "CDLIS Modernization Plan" published on May 2, 2006 (71 FR 25885).

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

FMCSA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We have determined preliminarily that this rulemaking would not create an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This proposed rulemaking would not affect a taking of private property or

otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

FMCSA has analyzed this proposed rule in accordance with the principles and criteria of Executive Order 13132, "Federalism," and has determined that this rulemaking does not have federalism implications.

The Federalism Executive Order applies to "policies that have federalism implications," which is defined as regulations and other actions that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Section 1(a). Further, Section 3(b) of the Federalism Order provides that "[n]ational action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance."

The proposed rule would amend the CDL program authorized by CMVSA. States have been issuing CDLs in accordance with Federal standards for over two decades. The CDL program does not have preemptive effect because it is voluntary. States may withdraw at any time, although doing so would result in the loss of certain Federal-aid highway funds pursuant to 49 U.S.C. 31314. Because this rule would make only small, though numerous, incremental changes to the requirements already imposed on participating States, FMCSA has determined that it would not have substantial direct effects on the States, on the relationship between the Federal and State governments, or on the distribution of power and responsibilities among the various levels of government.

Privacy Impact Assessment

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108–447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note) requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rulemaking would require States to adopt uniform processes and procedures to maintain electronic driver history records in CDLIS, but would not require the collection of PII.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program. The CDLIS records, however, are not transferred from FMCSA to the States; they are created and maintained by the States. FMCSA has determined this proposed rule would not result in a new or revised Privacy Act System of Records for FMCSA.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rulemaking would not affect a currently-approved information collection covered by the OMB Control No. 2126–0011 titled, "Commercial Driver Licensing and Test Standards" or create the need for any new information collection.

National Environmental Policy Act

The Agency analyzed this proposed rulemaking for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under its environmental procedures Order 5610.1, published March 1, 2004 in the **Federal Register** (69 FR 9680), that this action is categorically excluded (CE) under Appendix 2, Paragraph 6(s) and (t) of the Order (69 FR 9703) from further environmental documentation. That CE relates to regulations regarding the CDL and related activities to assure CDL information is exchanged between States. In addition, the Agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

We have also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

Executive Order 13211 (Energy Effects)

FMCSA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. We have determined preliminarily that it would not be a "significant energy action" under that Executive Order because it would not be economically significant and would not likely have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 49 CFR Part 384

Administrative practice and procedure, Highway safety, and Motor carriers.

In consideration of the foregoing, FMCSA proposes to amend part 384 of title 49, Code of Federal Regulations (49 CFR part 384) as follows:

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

1. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

2. Revise § 384.107(b) to read as follows:

§ 384.107 Matter incorporated by reference.

* * * * *

(b) *Materials incorporated.* The AAMVA "Commercial Driver License Information System (CDLIS) State Procedures Manual," Release 5.2.0, February 2011, IBR approved for §§ 384.225(f) and 384.231(d).

* * * * *

3. Revise § 384.301 to add a new paragraph (e) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(e) A State must come into substantial compliance with the requirements of subpart B of this part, which is effective as of June 6, 2011, as soon as practicable, but not later than January 30, 2012.

Issued on: March 28, 2011.

Anne S. Ferro,

Administrator.

[FR Doc. 2011–8061 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

RIN 0648–AW66

Western Pacific Pelagic Fisheries; Purse Seine Prohibited Areas Around American Samoa

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

ACTION: Notice of availability of fishery ecosystem plan amendment; request for comments.

SUMMARY: NMFS announces that the Western Pacific Fishery Management Council (Council) proposes to amend the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (FEP). If approved by the Secretary of Commerce, Amendment 3 would prohibit purse seine fishing in the U.S. Exclusive Economic Zone (EEZ) within 75 nautical miles (nm) of shore around American Samoa. The proposed action is intended to reduce catch competition between purse seine vessels and local trolling and longline fleets due to possible localized stock depletion by purse seine fishing, and to minimize gear conflicts between the local longline fleet and domestic purse seine vessels.

DATES: Comments on Amendment 3, including an environmental assessment, must be received by June 6, 2011.

ADDRESSES: Copies of Amendment 3, including an environmental assessment, are available from *http://www.regulations.gov,* or the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, *http://www.wpcouncil.org.* Comments on the amendment, including the environmental assessment, identified by 0648–AW66, may be sent to either of the following addresses:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov;* or
- *Mail:* Mail written comments to Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: Comments must be submitted to one of the above two addresses to ensure that the comments are received, documented, and considered by NMFS. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. 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, etc.) submitted voluntarily 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 name and organization fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Adam Bailey, NMFS PIR Sustainable Fisheries Division, 808–944–2248.

SUPPLEMENTARY INFORMATION: Pelagic fisheries in the U.S. western Pacific are managed under the FEP, developed by the Council, and approved and implemented by NMFS. The Council submitted Amendment 3 to NMFS for review under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Council prepared Amendment 3 to address pelagic fishing concerns in American Samoa. Local, pelagic trolling vessels target skipjack and yellowfin tuna in the EEZ around American Samoa. These vessels are usually small and incapable of safely traveling long distances from shore or holding large quantities of fish and are, therefore, limited to day trips in nearshore areas (less than 50 nm (93 km)) from shore.

Local pelagic longline vessels target albacore tuna and retain non-target skipjack. Small longline vessels (less than 50 ft) are limited to fishing within 50 nm (93 km) of shore and large longline vessels (50 ft and longer) can travel throughout the EEZ around American Samoa, and beyond, to fish. Longline gear is deployed in the morning, left to fish, and brought back on board starting in the late afternoon extending into the early morning of the next day. The length of mainline averages 40 nm (74 km), is deployed horizontally with floats at the surface, and drifts with the current. Individual vessels usually set one line per day.

Purse seine vessels also target skipjack tuna, but are much larger, and more sophisticated and efficient. Fish aggregating devices (FADs), either natural or man-made, are deployed to drift around the ocean, until sufficient quantities of fish are accumulated to them. Purse seines are then deployed near or around FADs. Conditions for purse seine fishing in the EEZ around American Samoa are less favorable than other areas, and most domestic purse seine fishing is conducted outside the EEZ, to the north and northwest. There are 11 vessels in the U.S. purse seine fleet with an endorsement to fish within the U.S. EEZ. The average skipjack tuna catch per set is approximately 2.4 mt (5,308 lb).

The Council is concerned about possible impacts on other pelagic fisheries if U.S. purse seine vessels were to increase activity in the EEZ around American Samoa near areas fished by troll and pelagic longline vessels. Localized fish depletion can occur when a stock in a small area is reduced by the removal of large amounts of fish, thereby temporarily depleting the availability of the stock to fishing activity or other predators in that area. Research suggests localized depletion may occur when large scale fishing operations, such as purse seine, competes with small-scale fishing operations, triggering catch competition for a single resource in a limited area. Reductions in fish density and catch rate could cause small vessels to travel farther to maintain catch rates, resulting in lost revenue due to increased expenses and possible safety-at-sea issues if vessels fish farther from port and for longer durations. Amendment 3 could also reduce gear conflicts by separating purse seine operations from trolling longline activity closer to shore. All other measures currently applicable to the purse seine fishery, including large vessel prohibited areas of 50 nm, would remain unchanged.

Comments on Amendment 3 must be received by June 6, 2011 to be considered by NMFS in the decision to approve, partially approve, or disapprove the amendment. NMFS soon expects to publish and request public comment on a proposed rule that would implement the measures recommended in Amendment 3.

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

Dated: April 1, 2011.

Emily H. Menashes,

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

[FR Doc. 2011–8212 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 66
Wednesday, April 6, 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

April 1, 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 and 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.

Forest Service

Title: Commercial Use of Woodsy Owl Symbol—36 CFR Part 272.

OMB Control Number: 0596–0087.

Summary of Collection: The Forest Service National Symbols Coordinator will evaluate the data to determine if an individual corporation, or organization, requesting a license to use the Woodsy Owl symbol commercially should be granted a license or, if currently licensed, to determine the royalty fee the licensed entity must pay to the agency based on a percentage of the licensee's total sales and whether the licensed entity has met its stated objectives. Part 272 of Title 36 CFR authorizes the Chief of the Forest Service to approve commercial use of the Woodsy Owl symbol and to collect royalty fees for such use. An individual or corporation may apply for a Woodsy Owl license by contacting Forest Service personnel by telephone, fax, and e-mail or by writing.

Need and Use of the Information: FS will collect information to determine how long the individual, corporation, or organization has been in business; the products the individual, corporation, or organization sells or plans to see; the geographical location from which the products will be sold; the projected sales volume; and how the individual, corporation, or organization plans to market the products. If information is not collected royalty fees would not be collected in keeping with federal cash management policies, and quantity of merchandise objectives would not be effectively monitored.

Description of Respondents: Business or other for-profit.

Number of Respondents: 36.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 178.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–8206 Filed 4–5–11; 8:45 am]

BILLING CODE 3410–11–

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 1, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Evaluation of SNAP–Nutrition Education Practices, Wave II.

OMB Control Number: 0584–0554.

Summary of Collection: The Food and Nutrition Service (FNS) of the U.S. Department of Agriculture promotes

optimal health and well-being of low-income individuals through improved nutrition and well-designed nutrition education efforts within the Supplemental Nutrition Assistance Program (SNAP). Under Section 17 of the Food and Nutrition Act of 2008 (7 U.S.C. 2026) the Secretary may undertake research that will help improve the administration and effectiveness of the SNAP. The nutrition assistance programs are a critical component to attaining FNS' goals. FNS defines SNAP–Education (SNAP–Ed) activities as those designed to increase the likelihood of healthy food choices by SNAP recipients and those eligible for but who are currently not participating in the program. SNAP has a significant stake in ensuring that nutrition education works to meet these goals. The proposed study titled "Evaluation of SNAP Education Practices, Wave II," entails the evaluation of three additional model projects and represents an expansion of the ongoing FNS Wave I study.

Need and Use of the Information: FNS will use the collected information to (1) determine which, if any, of the three demonstration projects can serve as good examples of SNAP–Ed delivery that meet the previously described FNS criteria; (2) identify lessons learned in terms of the design, planning, and implementation process and provide recommendations to FNS on how these interventions could be improved to potentially enhance outcomes; and (3) determine which, if any, of the demonstration project-led assessments provide methodologically robust yet logistically practical examples of project-level SNAP–Ed evaluation efforts. If this data collection was not conducted or conducted less frequently, FNS will not be able to determine or improve the administration or effectiveness of SNAP.

Description of Respondents: Individuals or households; State, Local or Tribal Government.

Number of Respondents: 4,717.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 2,133.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–8207 Filed 4–5–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lyon & Mineral County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lyon and Mineral County Resource Advisory Committee will meet in Smith Valley, Nevada. 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 hold the first meeting of the newly formed committee.

DATES: The meeting will be held April 25, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Smith Valley Library at 32 Day Lane, Smith Valley, NV 89444. Written comments should be sent to Mike Crawley, Bridgeport Ranger District, Humboldt-Toiyabe National Forest, HC 62 Box 1000, Bridgeport, CA 93517. Comments may also be sent via e-mail to *mcrawley@fs.fed.us,* or via facsimile to 760–932–5899.

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 Bridgeport Ranger District, Humboldt-Toiyabe National Forest, HC 62 Box 1000, Bridgeport, CA 93517. Visitors are encouraged to call ahead to 760–932–7070 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Sherri Lisius, RAC coordinator, Bridgeport Ranger District, Humboldt-Toiyabe National Forest, HC 62 Box 1000, Bridgeport, CA 93517; 760–932–7070; *sherrilisius@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel. (2) Selection of a chairperson by the committee members. (3) Receive materials explaining the process for considering and recommending Title II projects; 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. Public input sessions will be provided and individuals who made written requests by April 18, 2011 will have the opportunity to address the Comittee at those sessions.

Dated: March 31, 2011.

Jeanne M. Higgins,

Forest Supervisor.

[FR Doc. 2011–8131 Filed 4–5–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers To Be Used for Publication of Legal Notice of Appealable Decisions and Publication of Notice of Proposed Actions for Southern Region; Alabama, Kentucky, Georgia, Tennessee, Florida, Louisiana, Mississippi, Virginia, West Virginia, Arkansas, Oklahoma, North Carolina, South Carolina, Texas, Puerto Rico

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: Deciding Officers in the Southern Region will publish notice of decisions subject to administrative appeal under 36 CFR parts 215 and 219 in the legal notice section of the newspapers listed in the **SUPPLEMENTARY INFORMATION** section of this notice. As provided in 36 CFR 215.5 and 36 CFR 219.14 the public shall be advised through **Federal Register** notice, of the newspaper of record to be utilized for publishing legal notice of decisions. Newspaper publication of notice of decisions is in addition to direct notice of decisions to those who have requested it and to those who have participated in project planning. Responsible Officials in the Southern Region will also publish notice of proposed actions under 36 CFR 215.5 in the newspapers that are listed in the **SUPPLEMENTARY INFORMATION** section of this notice. As provided in 36 CFR 215.5, the public shall be advised, through **Federal Register** notice, of the newspaper of record to be utilized for publishing notices on proposed actions. Additionally, the Deciding Officers in the Southern Region will publish notice of the opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR 218.4 or developing, amending or revising land management plans under 36 CFR 219.9 in the legal notice section of the newspapers listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Use of these newspapers for purposes of publishing legal notice of

decisions subject to appeal under 36 CFR part 215 and § 219.14, notices of proposed actions under 36 CFR part 215, and notices of the opportunity to object under 36 CFR part 218 and 36 CFR part 219 shall begin the first day after the date of this publication.

FOR FURTHER INFORMATION CONTACT: James W. Bennett, Regional Appeal Coordinator, Southern Region, Planning, 1720 Peachtree Road, NW., Atlanta, Georgia 30309, Phone: 404/347–2788.

SUPPLEMENTARY INFORMATION: Deciding Officers in the Southern Region will give legal notice of decisions subject to appeal under 36 CFR 219.14, the Responsible Officials in the Southern Region will give notice of decisions subject to appeal under 36 CFR part 215 and opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR part 218 or developing, amending or revising land management plans under 36 CFR 219.9 in the following newspapers which are listed by Forest Service administrative unit. Responsible Officials in the Southern Region will also give notice of proposed actions under 36 CFR 215.5 in the following newspapers of record which are listed by Forest Service administrative unit. The timeframe for comment on a proposed action shall be based on the date of publication of the notice of the proposed action in the newspaper of record. The timeframe for appeal shall be based on the date of publication of the legal notice of the decision in the newspaper of record for 36 CFR part 215 and § 219.14. The timeframe for an objection shall be based on the date of publication of the legal notice of the opportunity to object for projects subject to 36 CFR part 218 or 36 CFR part 219.

Where more than one newspaper is listed for any unit, the first newspaper listed is the newspaper of record that will be utilized for publishing the legal notice of decisions and calculating timeframes. Secondary newspapers listed for a particular unit are those newspapers the Deciding Officer/Responsible Official expects to use for purposes of providing additional notice.

The following newspapers will be used to provide notice.

Southern Region

Regional Forester Decisions

Affecting National Forest System lands in more than one Administrative unit of the 15 in the Southern Region, *Atlanta Journal-Constitution,* published daily in Atlanta, GA. Affecting National Forest System lands in only one Administrative unit or only one Ranger District will appear in the newspaper of record elected by the National Forest, National Grassland, National Recreation Area, or Ranger District as listed below.

National Forests in Alabama, Alabama

Forest Supervisor Decisions

Affecting National Forest System lands in more than one Ranger District of the 6 in the National Forests in Alabama, *Montgomery Advertiser,* published daily in Montgomery, AL. Affecting National Forest System lands in only one Ranger District will appear in the newspaper of record elected by the Ranger District as listed below.

District Ranger Decisions

Bankhead Ranger District: Northwest Alabamian, published bi-weekly (Wednesday & Saturday) in Haleyville, AL.

Conecuh Ranger District: The Andalusia Star News, published daily (Tuesday through Saturday) in Andalusia, AL.

Oakmulgee Ranger District: The Tuscaloosa News, published daily in Tuscaloosa, AL.

Shoal Creek Ranger District: The Anniston Star, published daily in Anniston, AL.

Talladega Ranger District: The Daily Home, published daily in Talladega, AL.

Tuskegee Ranger District: Tuskegee News, published weekly (Thursday) in Tuskegee, AL.

Chattahoochee-Oconee National Forest, Georgia

Forest Supervisor Decisions

The Times, published daily in Gainesville, GA.

District Ranger Decisions

Blue Ridge Ranger District: The News Observer (newspaper of record) published bi-weekly (Tuesday & Friday) in Blue Ridge, GA.

North Georgia News, (newspaper of record) published weekly (Wednesday) in Blairsville, GA.

The Dahlonega Nuggett, (secondary) published weekly (Wednesday) in Dahlonega, GA.

Towns County Herald, (secondary) published weekly (Thursday) in Hiawassee, GA.

Conasauga Ranger District: Daily Citizen, published daily in Dalton, GA.

Chattooga River Ranger District: The Northeast Georgian, (newspaper of record) published bi-weekly (Tuesday & Friday) in Cornelia, GA.

Clayton Tribune, (newspaper of record) published weekly (Thursday) in Clayton, GA.

The Toccoa Record, (secondary) published weekly (Thursday) in Toccoa, GA.

White County News, (secondary) published weekly (Thursday) in Cleveland, GA.

Oconee Ranger District: Eatonton Messenger, published weekly (Thursday) in Eatonton, GA.

Cherokee National Forest, Tennessee

Forest Supervisor Decisions

Knoxville News Sentinel, published daily in Knoxville, TN.

District Ranger Decisions

Nolichucky-Unaka Ranger District: Greeneville Sun, published daily (except Sunday) in Greeneville, TN.

Ocoee-Hiwassee Ranger District: Polk County News, published weekly (Wednesday) in Benton, TN.

Tellico Ranger District: Monroe County Advocate & Democrat, published tri-weekly (Wednesday, Friday, and Sunday) in Sweetwater, TN.

Watauga Ranger District: Johnson City Press, published daily in Johnson City, TN.

Daniel Boone National Forest, Kentucky

Forest Supervisor Decisions

Lexington Herald-Leader, published daily in Lexington, KY

District Ranger Decisions

Cumberland Ranger District: Lexington Herald-Leader, published daily in Lexington, KY.

London Ranger District: The Sentinel-Echo, published tri-weekly (Monday, Wednesday, and Friday) in London, KY.

Redbird Ranger District: Manchester Enterprise, published weekly (Thursday) in Manchester, KY.

Stearns Ranger District: McCreary County Record, published weekly (Tuesday) in Whitley City, KY.

El Yunque National Forest, Puerto Rico

Forest Supervisor Decisions

El Nuevo Dia, published daily in Spanish in San Juan, PR.

Puerto Rico Daily Sun, published daily in English in San Juan, PR.

National Forests in Florida, Florida

Forest Supervisor Decisions

The Tallahassee Democrat, published daily in Tallahassee, FL.

District Ranger Decisions

Apalachicola Ranger District: Calhoun-Liberty Journal, published weekly (Wednesday) in Bristol, FL.

Lake George Ranger District: The Ocala Star Banner, published daily in Ocala, FL.

Osceola Ranger District: The Lake City Reporter, published daily (Monday–Saturday) in Lake City, FL.

Seminole Ranger District: The Daily Commercial, published daily in Leesburg, FL.

Wakulla Ranger District: The Tallahassee Democrat, published daily in Tallahassee, FL.

Francis Marion & Sumter National Forests, South Carolina

Forest Supervisor Decisions

The State, published daily in Columbia, SC.

District Ranger Decisions

Andrew Pickens Ranger District: The Daily Journal, published daily (Tuesday through Saturday) in Seneca, SC.

Enoree Ranger District: Newberry Observer, published tri-weekly (Monday, Wednesday, and Friday) in Newberry, SC.

Long Cane Ranger District: Index-Journal, published daily in Greenwood, SC.

Wambaw Ranger District: Post and Courier, published daily in Charleston, SC.

Witherbee Ranger District: Post and Courier, published daily in Charleston, SC.

George Washington and Jefferson National Forests, Virginia and West Virginia

Forest Supervisor Decisions

Roanoke Times, published daily in Roanoke, VA.

District Ranger Decisions

Clinch Ranger District: Coalfield Progress, published bi-weekly (Tuesday and Friday) in Norton, VA.

North River Ranger District: Daily News Record, published daily (except Sunday) in Harrisonburg, VA.

Glenwood-Pedlar Ranger District: Roanoke Times, published daily in Roanoke, VA.

James River Ranger District: Virginian Review, published daily (except Sunday) in Covington, VA.

Lee Ranger District: Shenandoah Valley Herald, published weekly (Wednesday) in Woodstock, VA.

Mount Rogers National Recreation Area: Bristol Herald Courier, published daily in Bristol, VA.

Eastern Divide Ranger District: Roanoke Times, published daily in Roanoke, VA.

Warm Springs Ranger District: The Recorder, published weekly (Thursday) in Monterey, VA.

Kisatchie National Forest, Louisiana

Forest Supervisor Decisions

The Town Talk, published daily in Alexandria, LA.

District Ranger Decisions

Calcasieu Ranger District: The Town Talk, (newspaper of record) published daily in Alexandria, LA.

The Leesville Daily Leader, (secondary) published daily in Leesville, LA.

Caney Ranger District: Minden Press Herald, (newspaper of record) published daily in Minden, LA.

Homer Guardian Journal, (secondary) published weekly (Wednesday) in Homer, LA

Catahoula Ranger District: The Town Talk, published daily in Alexandria, LA.

Kisatchie Ranger District: Natchitoches Times, published daily (Tuesday thru Friday and on Sunday) in Natchitoches, LA.

Winn Ranger District: Winn Parish Enterprise, published weekly (Wednesday) in Winnfield, LA.

Land Between The Lakes National Recreation Area, Kentucky and Tennessee

Area Supervisor Decisions:

The Paducah Sun, published daily in Paducah, KY.

National Forests in Mississippi, Mississippi

Forest Supervisor Decisions

Clarion-Ledger, published daily in Jackson, MS.

District Ranger Decisions

Bienville Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Chickasawhay Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Delta Ranger District: Clarion-Ledger, published daily in Jackson, MS.

De Soto Ranger District: Clarion Ledger, published daily in Jackson, MS.

Holly Springs Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Homochitto Ranger District: Clarion-Ledger, published daily in Jackson, MS.

Tombigbee Ranger District: Clarion-Ledger, published daily in Jackson, MS.

National Forests in North Carolina, North Carolina

Forest Supervisor Decisions

The Asheville Citizen-Times, published Wednesday thru Sunday, in Asheville, NC.

District Ranger Decisions

Appalachian Ranger District: The Asheville Citizen-Times, published Wednesday thru Sunday, in Asheville, NC.

Cheoah Ranger District: Graham Star, published weekly (Thursday) in Robbinsville, NC.

Croatan Ranger District: The Sun Journal, published daily in New Bern, NC.

Grandfather Ranger District: McDowell News, published daily in Marion, NC.

Nantahala Ranger District: The Franklin Press, published bi-weekly (Tuesday and Friday) in Franklin, NC.

Pisgah Ranger District: The Asheville Citizen-Times, published Wednesday thru Sunday, in Asheville, NC.

Tusquitee Ranger District: Cherokee Scout, published weekly (Wednesday) in Murphy, NC.

Uwharrie Ranger District: Montgomery Herald, published weekly (Wednesday) in Troy, NC.

Ouachita National Forest, Arkansas and Oklahoma

Forest Supervisor Decisions

Arkansas Democrat-Gazette, published daily in Little Rock, AR.

District Ranger Decisions

Caddo-Womble Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Jessieville-Winona-Fourche Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Mena-Oden Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Oklahoma Ranger District (Choctaw; Kiamichi; and Tiak) Tulsa World, published daily in Tulsa, OK.

Poteau-Cold Springs Ranger District: Arkansas Democrat-Gazette, published daily in Little Rock, AR.

Ozark-St. Francis National Forests, Arkansas

Forest Supervisor Decisions

The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

District Ranger Decisions

Bayou Ranger District: The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

Boston Mountain Ranger District: Southwest Times Record, published daily in Fort Smith, AR.

Buffalo Ranger District: The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

Magazine Ranger District: Southwest Times Record, published daily in Fort Smith, AR.

Pleasant Hill Ranger District: Johnson County Graphic, published weekly (Wednesday) in Clarksville, AR.

St. Francis National Forest: The Daily World, published daily (Sunday through Friday) in Helena, AR.

Sylamore Ranger District: Stone County Leader, published weekly (Wednesday) in Mountain View, AR.

National Forests and Grasslands in Texas, Texas

Forest Supervisor Decisions

The Lufkin Daily News, published daily in Lufkin, TX.

District Ranger Decisions

Angelina National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Caddo & LBJ National Grasslands: Denton Record-Chronicle, published daily in Denton, TX.

Davy Crockett National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Sabine National Forest: The Lufkin Daily News, published daily in Lufkin, TX.

Sam Houston National Forest: The Courier, published daily in Conroe, TX.

Dated: March 30, 2011.

Jerome Thomas,

Deputy Regional Forester.

[FR Doc. 2011–8192 Filed 4–5–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Credit International Trading Co. Ltd; In the Matter of: Credit International Trading Co, Ltd (11th Institute), No. 2 Zhong Guan Cun Nan Street, Haidian District, Beijing 100039, People's Republic of China and No 9A Dongtucheng Road, Heping Street, Chaoyang District, Beijing, People's Republic of China;

Order Making Order Denying Export Privileges of Ruo Ling Wang Applicable to Related Person Credit International Trading Company

Pursuant to Sections 766.25(h) and 766.23 of the Export Administration Regulations [1] ("EAR"), the Bureau of Industry and Security ("BIS"), U.S. Department of Commerce, through its Office of Export Enforcement ("OEE"), has requested that I make the Denial Order that was imposed against the individual Ruo Ling Wang ("Wang") on April 18, 2006 (71 Fed. Reg. 23897, April 25, 2006) applicable to Credit International Trading Co, Ltd (11th Institute), ("Credit International"), with addresses at: No. 2 Zhong Guan Cun Nan Street, Haidian District, Beijing 100039, People's Republic of China, and No 9A Dongtucheng Road, Heping Street, Chaoyang District, Beijing, People's Republic of China, (hereinafter, the "Related Person"), as a person related to Wang.

Section 766.23 of the EAR provides that "[i]n order to prevent evasion, certain types of orders under this part may be made applicable not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business. Orders that may be made applicable to related persons include those that deny or affect export privileges * * *." 15 CFR 766.23(a).

On April 18, 2006, then Director of Office of Exporter Services issued an Order pursuant to Section 11(h) of the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C. app. §§ 2401–2420 (2000)) ("Act") [2] and Section 766.25 of the EAR denying the export privileges under the Regulations of Wang for 10 years. The Order was based on Wang's conviction of violating the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)) ("IEEPA"). Wang was convicted of knowingly and willfully making a false statement and concealing a material fact from the Bureau of Industry Security ("BIS") and the former U.S. Customs Service.

BIS has presented evidence that indicates that Credit International is related to Wang by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business, and that it is necessary to add this entity to the Wang Denial Order in order to avoid evasion of that Order. The basis for naming Credit International to the Wang Denial Order is that Wang acting for, as, or on behalf of Credit International, is actively involved in attempting to procure items for export from the United States.

As provided in Section 766.23 of the EAR, I gave notice to Credit International that its export privileges under the EAR could be denied for up to 10 years due to its relationship with Wang and that BIS believes naming Credit International as a related party to Wang would be necessary to prevent evasion of a denial order imposed against Wang. In providing such notice, I gave Credit International an opportunity to oppose its addition to the Wang Denial Order as a related party. Having received no submission, I have decided, following consultations with BIS's Office of Export Enforcement, including its Director, to name Credit International as a Related Person to the Wang Denial Order, thereby denying Credit International export privileges for 10 years from the date of Wang's conviction.

I have also decided to revoke all licenses issued pursuant to the Act or EAR in which Credit International had an interest at the time of Wang's conviction. The 10-year denial period will end on May 2, 2015.

Accordingly, it is hereby

Ordered

First, that having been provided notice and opportunity for comment as provided in Sections 766.25 and 766.23 of the Export Administration Regulations (the "Regulations"), the following entity, Credit International Trading Co., Ltd. (11th Institute) ("Credit International"), with last known addresses at No. 2 Zhong Guan Cun Nan Street, Haidian District, Beijing 100039, People's Republic of China, and No 9A Dongtucheng Road, Heping Street, Chaoyang District, Beijing, People's Republic of China has been determined to be related to Wang by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services, and it has been deemed necessary to make the Order denying the export privileges of Wang applicable to Credit International in order to prevent evasion of the Wang Denial Order.

Second, that the denial of export privileges described in the Wang Denial Order, which was published in the **Federal Register** on April 25, 2006 at 71 FR 23896, shall be made applicable to Credit International until its expiration on May 2, 2015, as follows:

I. Credit International, with last known addresses at No. 2 Zhong Guan Cun Nan Street, Haidian District, Beijing 100039, People's Republic of China, and No 9A Dongtucheng Road, Heping Street, Chaoyang District, Beijing, People's Republic of China, and when

[1] The EAR are currently codified at 15 CFR parts 730–774 (2010).

[2] 50 U.S.C. app. §§ 2401–2420 (2000). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 12, 2010 (75 FR 50681 (Aug. 16, 2010)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)).

acting for or on behalf of Credit International, its representatives, agents, officers or employees (collectively, "Related Person") may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Related Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Related Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Related Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Related Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Related Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Related Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Related Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that in accordance with the provisions of Section 766.23(c) of the Regulations, the Related Person may, at any time, make an appeal related to this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Fifth, that this Order is effective immediately and shall remain in effect until May 2, 2015.

Sixth, that this Order shall be published in the **Federal Register** and a copy served on the Related Person.

Issued this 30 day of March 2011.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2011–8194 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce preliminarily determines that countervailable subsidies are being provided to producers and exporters of multilayered wood flooring from the People's Republic of China. For information on the estimated subsidy rates, see the "Suspension of Liquidation" section of this notice.

DATES: *Effective Date*: April 6, 2011.

FOR FURTHER INFORMATION CONTACT: Shane Subler, Matthew Jordan, Patricia Tran, or Joshua Morris, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone*: (202) 482–0189, (202) 482–1540, (202) 482–1503, and (202) 482–1779, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The following events have occurred since the publication of the Department of Commerce's ("Department") notice of initiation in the **Federal Register**. *See Multilayered Wood Flooring from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 75 FR 70719 (November 18, 2010) ("*Initiation Notice*"), and the accompanying Initiation Checklist.

On November 18, 2010, the Department released the U.S. Customs and Border Protection ("CBP") data for the instant investigation under administrative protective order ("APO") to all parties with APO access. *See* Memorandum to File from Matthew Jordan, International Trade Compliance Analyst, "Release of Customs and Border Protection Entry Data to Interested Parties for Comment" (November 18, 2010) at Attachment 1. This memorandum is on file in the Department's Central Records Unit ("CRU") in Room 7046 of the main Department building. We received comments on this CBP data from Fine Furniture (Shanghai) Ltd. ("Fine Furniture") on November 19, 2010, and Dun Hua City Jisen Wood Industry Co., Ltd. and Chinafloors Timber (China) Co., Ltd. on November 24, 2010. We received comments from Shanghai Lizhong Wood Product Co., Ltd. and the Coalition for American Hardwood Parity (Anderson Hardwood Floors, LLC; Award Hardwood Floors; Baker's Creek Wood Floors, Inc.; From the Forest; Howell Hardwood Flooring; Mannington Mills, Inc.; Nydree Flooring; Shaw Industries Group, Inc.) (collectively, "Petitioner") on November 26, 2010.

In their comments, the interested parties unanimously requested that the Department forgo using CBP data for its selection of mandatory respondents. Instead, the parties stated, the Department should issue quantity and value ("Q&V") questionnaires to the companies identified by Petitioner as potential producers/exporters of the subject merchandise. After examining the CBP data, the Department agreed that the data did not provide a basis for selecting respondents and determined it was necessary to issue Q&Vs.

On December 2, 2010, and December 3, 2010, the Department issued Q&Vs to the 174 companies listed in the Petition, plus two additional companies that identified themselves via requests for

voluntary treatment as producers and/or exporters of subject merchandise before the Q&Vs were issued, for a total of 176 questionnaires issued. In total, the Department received 70 responses.

On December 30, 2010, the Department selected three Chinese producers/exporters of multilayered wood flooring ("wood flooring") as mandatory respondents: (1) Fine Furniture; (2) Zhejiang Layo Wood Industry Co., Ltd. ("Layo"); and (3) Zhejiang Yuhua Timber Co., Ltd. ("Yuhua"). *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Selection of Respondents for the Countervailing Duty Investigation of Multilayered Wood Flooring from the People's Republic of China" (December 30, 2010) ("Respondent Selection Memo") at 4.

On January 3, 2011, we issued questionnaires to the Government of the People's Republic of China ("GOC"), Fine Furniture, Layo, and Yuhua. Also on January 3, 2011, the Department published a postponement of the deadline for the preliminary determination in this countervailing duty ("CVD") investigation until March 21, 2011. *See Multilayered Wood Flooring from the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation,* 76 FR 92 (January 3, 2011).

On February 7, 2011, Petitioner requested an extension of time to submit new subsidy allegations to the Department. On February 7, 2011, we partially extended the deadline; however, no new subsidy allegations were submitted.

On February 14, 2011, we received responses to our questionnaires from the GOC, Fine Furniture, Layo, and Yuhua. *See* the GOC's Initial CVD Questionnaire Response ("GQR"), the Countervailing Duty Questionnaire Response of Fine Furniture (Shanghai) Limited ("FFQR"), Layo's Questionnaire Response ("LQR") (as well as affiliated trading company Jiaxing Brilliant Import & Export Co., Ltd.'s Questionnaire Response "LQR (Brilliant)"), and Yuhua's CVD Questionnaire Response ("YQR"). We sent supplemental questionnaires to the GOC, Fine Furniture, Layo, and Yuhua on February 18, 2011. We received responses to these supplemental questionnaires from the GOC, Layo, and Yuhua on February 25, 2011, and Fine Furniture on March 2, 2011. *See* the GOC's First Supplemental CVD Questionnaire Response ("G1SR"), the First Supplemental Countervailing Duty Questionnaire Response of Fine Furniture (Shanghai) Limited ("FF1SR"), Layo's Supplemental Questionnaire Response ("L1SR"), and Yuhua's Supplemental CVD Response ("Y1SR"). We sent a second supplemental questionnaire to Fine Furniture on March 8, 2011. We received a response to the second supplemental questionnaire on March 11, 2011. *See* Fine Furniture's Second Supplemental Questionnaire Response ("FF2SR").

Scope Comments

In accordance with the preamble to the Department's regulations, we set aside a period of time in our *Initiation Notice* for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of that notice. *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997), and *Initiation Notice*, 75 FR at 70719. We received numerous comments concerning the scope of the antidumping duty ("AD") and CVD investigations of wood flooring from the People's Republic of China ("PRC"), including requests to exclude certain products from the scope of the investigations.

On March 14, 2011, Petitioner submitted a response to the individual scope comments and exclusion requests. *See* letter from Petitioner to the Department, "Multilayered Wood Flooring from the People's Republic of China" (March 14, 2011).

Because of the timing of the scope comments and Petitioner's response to the comments, we did not have time to analyze the issues raised by parties prior to this preliminary determination. Therefore, after this preliminary determination, we intend to issue a preliminary analysis with respect to the scope issues raised by interested parties.

Scope of the Investigation

Multilayered wood flooring is composed of an assembly of two or more layers or plies of wood veneer(s) [1] in combination with a core. The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product. Multilayered wood flooring is often referred to by other terms, *e.g.*, "engineered wood flooring" or "plywood flooring." Regardless of the particular terminology, all products that meet the description set forth herein are intended for inclusion within the definition of subject merchandise.

All multilayered wood flooring is included within the definition of subject merchandise, without regard to: Dimension (overall thickness, thickness of face ply, thickness of back ply, thickness of core, and thickness of inner plies; width; and length); wood species used for the face, back and inner veneers; core composition; and face grade. Multilayered wood flooring included within the definition of subject merchandise may be unfinished (*i.e.*, without a finally finished surface to protect the face veneer from wear and tear) or "prefinished" (*i.e.*, a coating applied to the face veneer, including, but not exclusively, oil or oil-modified or water-based polyurethanes, ultra-violet light cured polyurethanes, wax, epoxy-ester finishes, moisture-cured urethanes and acid-curing formaldehyde finishes.) The veneers may be also soaked in an acrylic-impregnated finish. All multilayered wood flooring is included within the definition of subject merchandise regardless of whether the face (or back) of the product is smooth, wire brushed, distressed by any method or multiple methods, or hand-scraped. In addition, all multilayered wood flooring is included within the definition of subject merchandise regardless of whether or not it is manufactured with any interlocking or connecting mechanism (for example, tongue-and-groove construction or locking joints). All multilayered wood flooring is included within the definition of the subject merchandise regardless of whether the product meets a particular industry or similar standard.

The core of multilayered wood flooring may be composed of a range of materials, including but not limited to hardwood or softwood veneer, particleboard, medium-density fiberboard ("MDF"), high-density fiberboard ("HDF"), stone and/or plastic composite, or strips of lumber placed edge-to-edge.

Multilayered wood flooring products generally, but not exclusively, may be in the form of a strip, plank, or other geometrical patterns (*e.g.*, circular, hexagonal). All multilayered wood flooring products are included within this definition regardless of the actual or nominal dimensions or form of the product.

Specifically excluded from the scope are cork flooring and bamboo flooring, regardless of whether any of the sub-surface layers of either flooring are made from wood. Also excluded is laminate flooring. Laminate flooring consists of a top wear layer sheet not

[1] A "veneer" is a thin slice of wood, rotary cut, sliced or sawed from a log, bolt, or flitch. Veneer is referred to as a ply when assembled.

made of wood, a decorative paper layer, a core-layer of high-density fiberboard, and a stabilizing bottom layer.

Imports of the subject merchandise are provided for under the following subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS"): 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4070; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.3175; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0560; 4412.32.2510; 4412.32.2520; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3171; 4412.94.4100; 4412.94.5100; 4412.94.6000; 4412.94.7000; 4412.94.8000; 4412.94.9000; 4412.94.9500; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5100; 4412.99.5710; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.99.9500; 4418.71.2000; 4418.71.9000; 4418.72.2000; and 4418.72.9500.

In addition, imports of subject merchandise may enter the U.S. under the following HTSUS subheadings: 4409.10.0500; 4409.10.2000; 4409.29.0515; 4409.29.0525; 4409.29.0535; 4409.29.0545; 4409.29.0555; 4409.29.0565; 4409.29.2530; 4409.29.2550; 4409.29.2560; 4418.71.1000; 4418.79.0000; and 4418.90.4605.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the subject merchandise is dispositive.

Injury Test

On December 17, 2010, the U.S. International Trade Commission ("ITC") published its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of allegedly subsidized imports of wood flooring from the PRC. *See Multilayered Wood Flooring From China*, 75 FR 79019 (December 17, 2010).

Period of Investigation

The period for which we are measuring subsidies, *i.e.*, the period of investigation ("POI"), is January 1, 2009, through December 31, 2009.

Application of the Countervailing Duty Law to Imports From the PRC

On October 25, 2007, the Department published *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) ("*CFS from the PRC*"), and the accompanying Issues and Decision Memorandum ("CFS Decision Memorandum"). In *CFS from the PRC*, the Department found that

> given the substantial difference between the Soviet-style economies and China's economy in recent years, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as {a} bar to proceeding with a CVD investigation involving products from China.

See CFS Decision Memorandum, at Comment 6. The Department has affirmed its decision to apply the CVD law to the PRC in subsequent final determinations. *See, e.g., Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008), and accompanying Issues and Decision Memorandum ("CWP Decision Memorandum") at Comment 1.

Additionally, for the reasons stated in the CWP Decision Memorandum, we are using the date of December 11, 2001, the date on which the PRC became a member of the WTO, as the date from which the Department will identify and measure subsidies in the PRC. *See* CWP Decision Memorandum at Comment 2.

Use of Facts Otherwise Available and Adverse Inferences

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended ("the Act"), provide that the Department shall apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) Withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

GOC—Electricity

The GOC did not provide a complete response to the Department's January 3, 2011, questionnaire regarding the alleged provision of electricity for less than adequate remuneration ("LTAR"). Specifically, the Department requested that the GOC provide the original Provincial Price Proposals for 2006 and 2008 for each province in which a mandatory respondent or any reported "cross-owned" company is located. Because the requested price proposals are core documents for the GOC's electricity price adjustment process, the documents are necessary for the Department's analysis of the program.

At page 48 of the GQR, the GOC responded that the proposals are drafted by the provincial governments and submitted to the National Development and Reform Commission ("NDRC"). The GOC stated it is unable to provide the internal working documents from the NDRC with its response. On February 18, 2011, the Department issued a supplemental questionnaire and reiterated its request for this information. In response, the GOC stated, the "GOC maintains its position that the requested original provincial proposals are internal working documents for NDRC's review and cannot be provided." *See* G1SR at 4.

Consequently, we preliminarily determine that the GOC has withheld necessary information that was requested of it and, thus, that the Department must rely on "facts available" in making our preliminary determination. *See* section 776(a)(1), section 776(a)(2)(A), and section 776(a)(2)(B) of the Act. Moreover, we preliminarily determine that the GOC has failed to cooperate by not acting to the best of its ability to comply with our request for information as it did not respond by the deadline dates, nor did it explain why it was unable to provide the requested information. Consequently, an adverse inference is warranted in the application of facts available. *See* section 776(b) of the Act. In drawing an adverse inference, we find that the GOC's provision of electricity constitutes a financial

contribution within the meaning of section 771(5)(D) of the Act and is specific within the meaning of section 771(5A) of the Act. We have also relied on an adverse inference in selecting the benchmark for determining the existence and amount of the benefit. *See* sections 776(b)(2) and 776(b)(4) of the Act. The benchmark rates we have selected are derived from information from the record of the instant investigation and are the highest electricity rates on this record for the applicable rate and user categories. *See* GQR at Exhibit E–4 and E–5.

For details on the calculation of the subsidy rate for the respondents, *see* below at section I.4., "Provision of Electricity for LTAR."

Non-Cooperative Companies

In this investigation, 127 companies did not provide a response to the Department's Q&V questionnaire issued during the respondent selection process. These companies are listed below in the "Suspension of Liquidation" section. We confirmed that each of these companies either received the Q&V questionnaire sent via United Parcel Service and did not respond, or refused delivery of the Q&V questionnaire. *See* Memorandum to the File from Matthew Jordan, International Trade Compliance Analyst, AD/CVD Operations, Office 1, dated March 21, 2011, re: Adverse Facts Available Rate for Non-Cooperating Companies ("AFA Memo").

These non-cooperating companies withheld requested information and significantly impeded this proceeding. Specifically, by not responding to requests for information concerning the quantity and value of their sales, the companies impeded the Department's ability to select the most appropriate respondents in this investigation. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A) and (C) of the Act, we are basing the CVD rate for these non-cooperating companies on facts otherwise available.

We further preliminarily determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. By failing to submit responses to the Department's Q&V questionnaires, these companies did not cooperate to the best of their ability in this investigation. Accordingly, we preliminarily find that an adverse inference is warranted to ensure that the non-cooperating companies will not obtain a more favorable result than had they fully complied with our request for information.

In deciding which facts to use as adverse facts available ("AFA"), section 776(b) of the Act and 19 CFR 351.308(c)(1) and (2) authorize the Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any other information placed on the record. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.

For this preliminary determination, consistent with the Department's recent practice, we are computing a total AFA rate for the non-cooperating companies using program-specific rates calculated for the cooperating respondents in the instant investigation. *See, e.g., Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 74 FR 37012 (July 27, 2009) and accompanying Issues and Decision Memorandum ("Shelving Decision Memorandum") at 4–5. Specifically, for programs other than those involving income tax exemptions and reductions, we are applying the highest calculated rate for the identical program in this investigation.

As explained in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 73 FR 42324 (July 21, 2008) and accompanying Initiation Checklist, where the GOC can demonstrate through complete, verifiable, positive evidence that non-cooperating companies (including all their facilities and cross-owned affiliates) are not located in particular provinces whose subsidies are being investigated, the Department will not include those provincial programs in determining the countervailable subsidy rate for the non-cooperating companies. *See, e.g.*, Shelving Decision Memorandum at "Use of Facts Otherwise Available and Adverse Facts Available." In this investigation, the GOC has not provided any such information. Therefore, we are making the adverse inference that the non-cooperating companies had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs on which the Department initiated.

Consistent with this, we have calculated the non-cooperating companies" countervailable subsidies as follows:

Income Tax Reduction and Exemption Programs

For the income tax rate reduction or exemption programs, we are applying an adverse inference that the non-cooperating companies paid no income taxes during the POI. The three programs are: (1) Two Free, Three Half Tax Exemptions for Foreign-Invested Enterprises ("FIEs"); (2) Local Income Tax Exemption and Reduction Program for Productive FIEs; and (3) Income Tax Benefits for FIEs Based on Geographical Location.

The standard income tax rate for corporations in the PRC is 25 percent. *See* GQR at 12. The highest possible benefit for all income tax reduction or exemption programs combined is 25 percent. Therefore, we are applying a CVD rate of 25 percent on an overall basis for these three income tax programs (*i.e.*, these three income tax programs combined provide a countervailable benefit of 25 percent). This approach is consistent with the Department's past practice. *See, e.g., Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination,* 75 FR 54302, 54306 (September 7, 2010), *Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 73 FR 57323 (October 2, 2008) ("LWTP from the PRC"), and accompanying Issues and Decision Memorandum ("LWTP Decision Memorandum") at "Selection of the Adverse Facts Available Rate," and CWP Decision Memorandum at 2.

Value-Added Tax ("VAT") and Tariff Reduction Programs

Among the responding companies in this investigation, Fine Furniture had the highest calculated rate for the VAT and Tariff Exemptions on Imported Equipment program. Therefore, we are using, as AFA, Fine Furniture's rate of 0.56 percent.

Provision of Goods and Services for LTAR

Among the responding companies in this investigation, Fine Furniture had the highest calculated rate for the Provision of Electricity for LTAR program. Therefore, we are using, as AFA, Fine Furniture's rate of 1.45 percent.

For further explanation of the derivation of the AFA rates, *see* the AFA Memo.

On this basis, we preliminarily determine the AFA countervailable subsidy rate for the non-cooperating companies to be 27.01 percent ad valorem. *See* AFA Memo.

Application of All-Others Rate to Companies Not Selected as Mandatory Respondents

In addition to Fine Furniture, Layo, and Yuhua, we received responses to the Q&V questionnaire from 67 other companies. *See* Respondent Selection Memo at 4. Though these 67 companies were not chosen as mandatory respondents, they did cooperate fully with the Department's request for quantity and value information. We, therefore, are applying the all-others rate to them.

Subsidies Valuation Information

Allocation Period

The average useful life ("AUL") period in this proceeding, as described in 19 CFR 351.524(d)(2), is 10 years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System, as revised. *See* U.S. Internal Revenue Service Publication 946 (2008), *How to Depreciate Property,* at Table B–2: Table of Class Lives and Recovery Periods. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulations at 19 CFR 351.525(b)(6)(i) state that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)–(v) directs that the Department will attribute subsidies received by certain other companies to the combined sales of the recipient and other companies if: (1) Cross-ownership exists between the companies; and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the downstream product, or transfer a subsidy to a cross-owned company.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The preamble to the Department's regulations further clarifies the Department's cross-ownership standard. According to the preamble, relationships captured by the cross-ownership definition include those where

> the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) * * * Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership.

See Countervailing Duties; Final Rule, 63 FR 65348 (November 25, 1998), at 65401.

Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

The CIT has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. *See Fabrique de Fer de Charleroi, SA* v. *United States,* 166 F. Supp. 2d 593, 600–604 (CIT 2001).

Fine Furniture

Fine Furniture responded to the Department's original and supplemental questionnaires on behalf of itself and its affiliated parties Great Wood (Tonghua) Ltd. ("Great Wood") and Fine Furniture Plantation (Shishou) Ltd. ("FF Plantation"). These companies are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi) by virtue of common ownership. *See* FFQR at 4 and 6.

Because Fine Furniture is a producer of subject merchandise, we are preliminarily attributing subsidies received by Fine Furniture to its sales, in accordance with 19 CFR 351.525(b)(6).

Fine Furniture identified Great Wood as a supplier of kiln dried lumber, cut-to-size lumber, and face veneer for furniture and flooring. *See* FFQR at 4. Because these products are primarily dedicated to the production of the downstream product, we are preliminarily attributing subsidies received by Great Wood to the combined sales of Great Wood and Fine Furniture (excluding intercompany sales), in accordance with 19 CFR 351.525(b)(6)(iv).

Fine Furniture identified FF Plantation as a supplier of plywood cores to Fine Furniture for the production of wood flooring. *See* FFQR at 6. Because these products are primarily dedicated to the production of the downstream product, we are preliminarily attributing subsidies received by FF Plantation to the combined sales of FF Plantation and Fine Furniture (excluding intercompany sales), in accordance with 19 CFR 351.525(b)(6)(iv).

Entered Value ("EV") Adjustment

Fine Furniture has reported that its affiliate, Double F Ltd. ("Double F"), issued invoices for Fine Furniture's sales of subject merchandise to the United States. Thus, Fine Furniture has requested the Department make an adjustment to the calculated subsidy rate to account for the mark-up between the export value from the PRC and the entered value of subject merchandise into the United States.

Citing the Coated Paper Decision Memorandum, Fine Furniture states that the adjustment is appropriate for six reasons. *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination,* 75 FR 59209 (September 27, 2010) and accompanying Issues and Decision Memorandum ("Coated Paper Decision Memorandum") at Comment 32. The six reasons are: (1) The U.S. invoice is issued through Fine Furniture's affiliate, Double F, and includes a mark-up from the invoice issued from Fine Furniture to Double F; (2) the exporter, Fine Furniture, and the party that invoices the customer, Double F, are affiliated; (3) the U.S. invoice establishes the customs value to which CVDs are applied; (4) there is a one-to-one correlation between the Double F invoice and the Fine Furniture invoice; (5) the merchandise is shipped directly to the United States; and (6) the invoices can be tracked as back-to-back invoices that are identical except for price. *See* FFQR at 26.

As indicated by the determination cited by Fine Furniture, the Department has a practice of making an adjustment to the calculated subsidy rate when the sales value used to calculate that subsidy rate does not match the entered value of the merchandise, *i.e.*, where subject merchandise exported to the United States is exported with a mark-up from an affiliated company, and where the respondent can provide data to demonstrate that the six criteria above are met. In the instant case, the information submitted by Fine Furniture supports its claim and the information also permits an accurate calculation of the adjustment. Therefore, we have made the adjustment for this preliminary determination.

The information submitted by Fine Furniture in support of its claim and the amounts used to calculate the adjustment are business proprietary. *See* Memorandum from Matthew Jordan, International Trade Compliance Analyst, "Preliminary Results Calculations for Fine Furniture," (March 21, 2011).

Layo

Layo responded on behalf of itself, a producer of subject merchandise, as well as on behalf of Jiaxing Brilliant Import & Export Co., Ltd. ("Brilliant"), an affiliated trading company. *See* LQR at 3.

Because Layo is a producer of subject merchandise, we are preliminarily attributing subsidies received by Layo to its sales, in accordance with 19 CFR 351.525(b)(6).

Layo reported that it made export sales of subject merchandise to the United States during the POI through Brilliant. *See* LQR (Brilliant) at 2. Thus, in accordance with 19 CFR 351.525(c), we are preliminarily cumulating the benefit from subsidies provided to Brilliant with the benefit from subsidies provided to Layo.

Yuhua

Yuhua responded on behalf of itself, a producer of subject merchandise. Yuhua identified affiliated companies but reported that these affiliates do not produce the subject merchandise or provide inputs primarily dedicated to the production of the downstream products. *See* YQR at Exhibit 1. Because these companies do not fall within the situations described in 19 CFR 351.525(b)(6)(iii)–(v), we do not reach the issue of whether these companies and Yuhua are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi), and we are not including these companies in our subsidy calculations.

Discount Rates for Allocating Non-Recurring Subsidies

Consistent with 19 CFR 351.524(d)(3)(i)(C), we have used, as our discount rate, the long-term interest rate calculated according to the methodology described below for the year in which the government agreed to provide the subsidy.

Short-Term RMB Interest Rate Benchmark

The Department's regulations at 19 CFR 351.524(d)(3) state that Department will use as a discount rate the following, in order of preference: (A) The cost of long-term, fixed-rate loans of the firm in question, excluding any loans that the Department has determined to be countervailable subsidies; (B) the average cost of long-term, fixed-rate loans in the country in question; or (C) a rate that the Department considers to be most appropriate. For the reasons explained in *CFS from the PRC*, loans provided by Chinese banks reflect significant government intervention in the banking sector and do not reflect rates that would be found in a functioning market. *See* CFS Decision Memorandum at Comment 10. Because of this, any loans received by respondents from private Chinese or foreign-owned banks would be unsuitable for use as a discount rate under 19 CFR 351.524(d)(3)(i)(A). Similarly, we cannot use a national interest rate for commercial loans as envisaged by 19 CFR 351.524(d)(3)(i)(A).

Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting an external market-based benchmark interest rate. The use of an external benchmark is consistent with the Department's practice. For example, in lumber from Canada, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada. *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum at "Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit."

We are calculating the external benchmark using the regression-based methodology first developed in *CFS from the PRC* and updated in *LWTP from the PRC*. *See* CFS Decision Memorandum at Comment 10 and LWTP Decision Memorandum at 8–10. This benchmark interest rate is based on the inflation-adjusted interest rates of countries with per capita gross national incomes ("GNIs") similar to the PRC, and takes into account a key factor involved in interest rate formation, that of the quality of a country's institutions, that is not directly tied to the state-imposed distortions in the banking sector discussed above.

Following the methodology developed in *CFS from the PRC*, we first determined which countries are similar to the PRC in terms of GNI, based on the World Bank's classification of countries as low income, lower-middle income, upper-middle income, and high income. The PRC falls in the lower-middle income category, a group that includes 55 countries. *See* The World Bank Country Classification, *http://econ.worldbank.org/*. As explained in *CFS from the PRC*, this pool of countries captures the broad inverse relationship between income and interest rates.

Many of these countries reported lending and inflation rates to the International Monetary Fund, and they are included in that agency's international financial statistics ("IFS"). With the exceptions noted below, we have used the interest and inflation rates reported in the IFS for the countries identified as "low middle income" by the World Bank. First, we did not include those economies that the Department considered to be non-market economies for AD purposes for any part of the years in question, for example: Armenia, Azerbaijan, Belarus, Georgia, Moldova, Turkmenistan. Second, the pool necessarily excludes any country that did not report both lending and inflation rates to IFS for those years. Third, we removed any country that reported a rate that was not a lending rate or that based its lending rate on foreign-currency denominated instruments. For example, Jordan reported a deposit rate, not a lending rate, and the rates reported by Ecuador and Timor L'Este are dollar-denominated rates; therefore, the rates for these three countries have been excluded. Finally, for each year the Department calculated an inflation-adjusted short-term benchmark rate, we have also excluded any countries with aberrational or negative real interest rates for the year in question.

The resulting inflation-adjusted benchmark lending rates are provided in the Memorandum from Shane Subler to the File, "Discount Rates for Allocating Non-recurring Subsidies" (March 10, 2011).

Benchmarks for Long-Term Loans

The lending rates reported in the IFS represent short- and medium-term

lending, and there are not sufficient publicly available long-term interest rate data upon which to base a robust benchmark for long-term loans. To address this problem, the Department has developed an adjustment to the short- and medium-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB-rated bond rates. *See, e.g., Light-Walled Rectangular Pipe and Tube From People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination*, 73 FR 35642 (June 24, 2008) and accompanying Issues and Decision Memorandum at 8. In *Citric Acid from the PRC*, this methodology was revised by switching from a long-term mark-up based on the ratio of the rates of BB-rated bonds to applying a spread which is calculated as the difference between the two-year BB bond rate and the n-year BB bond rate, where n equals or approximates the number of years of the term of the loan in question. *See Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009) ("*Citric Acid from the PRC*") and accompanying Issues and Decision Memorandum ("Citric Acid Decision Memorandum") at Comment 14.

Analysis of Programs

Based upon our analysis of the petition and the responses to our questionnaires, we preliminarily determine the following:

I. Programs Preliminarily Determined To Be Countervailable

Income Tax Subsidies for FIEs Based on Geographic Location

To promote economic development and attract foreign investment, "productive" FIEs located in coastal economic zones, special economic zones or economic and technical development zones in the PRC were subject to preferential tax rates of 15 percent or 24 percent, depending on the zone. *See* GQR at Exhibit A–1. These preferential rates were established on June 15, 1988, pursuant to the *Provisional Rules on Exemption and Reduction of Corporate Income Tax and Business Tax of FIEs in Coastal Economic Development Zone* issued by the Ministry of Finance, and continued under Article 7 of the *FIE Tax Law* on July 1, 1991. The Department has previously found the preferential tax rates for FIEs based on geographic location to be countervailable. *See* Citric Acid Decision Memorandum at 14–15 and CFS Decision Memorandum at 12.

As a result of the transition provisions of the new Enterprise Income Tax Law, which came into force on January 1, 2008, enterprises that were eligible for the reduced rates of 15 percent or 24 percent are to be gradually transitioned to the uniform rate of 25 percent over a five-year period. *See* G1SR at SGQ1–2.

Fine Furniture reported using this program during the POI. *See* FFQR at 18. In particular, because of its location Fine Furniture was entitled to a 15 percent rate until December 31, 2007. See FFQR at 18. Under the transition rules, the *State Council Notice on Implementation of Transnational Preferential Policies,* Fine Furniture's maximum tax rate increased to 18 percent in 2008. *See* G1SR at SGQ1–2.

We preliminarily determine that the reduced income tax rate paid by productive FIEs under this program confers a countervailable subsidy. The reduced rate is a financial contribution in the form of revenue forgone by the GOC and it provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determine preliminarily that the reduction afforded by this program is limited to enterprises located in designated geographic regions and, hence, is specific under section 771(5A)(D)(iv) of the Act.

To calculate the benefit, we treated the income tax savings enjoyed by Fine Furniture as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the income tax Fine Furniture would have paid in the absence of the program (*i.e.*, 25 percent) with the maximum tax rate applicable to the company for the tax return filed during the POI (*i.e.*, 18 percent).

We divided the benefits received by Fine Furniture in the POI by its sales during the POI, in accordance with 19 CFR 351.525(b)(6)(i). On this basis, we preliminarily determine that Fine Furniture received a countervailable subsidy of 0.09 percent *ad valorem* under this program.

2. Income Tax Exemption/Reduction Under the Two Free/Three Half Program

Under Article 8 of the *FIE Tax Law*, an FIE that is "productive" and is scheduled to operate for more than ten years may be exempted from income tax in the first two years of profitability and pay income taxes at half the standard rate for the subsequent three years. *See* GQR at Exhibit A–1. The Department has previously found this program countervailable. *See, e.g.*, CFS Decision Memorandum at 10–11.

Fine Furniture reported that it and Great Wood used this program during the POI. *See* FFQR at 14. Specifically, in 2008, Fine Furniture was in the second year of paying taxes at half its normal tax rate. *See* FFQR at 16. Great Wood was in its first of two tax-free years. *See* FFQR at 16.

We preliminarily determine that the exemption or reduction of the income tax paid by productive FIEs under this program confers a countervailable subsidy. The exemption/reduction is a financial contribution in the form of revenue forgone by the GOC, and it provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily determine that the exemption/reduction afforded by this program is limited as a matter of law to certain enterprises, *i.e.*, "productive" FIEs and, hence, is specific under section 771(5A)(D)(i) of the Act. *See* CFS Decision Memorandum at Comment 14.

To calculate the benefit, we treated the income tax savings enjoyed by Fine Furniture and Great Wood as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the income tax the above companies would have paid in the absence of the program (*i.e.*, at the rates of 18 percent for Fine Furniture and 25 percent for Great Wood) with the income tax the companies actually paid during the POI (*i.e.*, at the rates of nine percent for Fine Furniture and zero percent for Great Wood).

For Fine Furniture, we divided the benefits received in the POI by its sales during the POI, in accordance with 19 CFR 351.525(b)(6)(i). For Great Wood, we divided the benefits received in the POI by the combined sales of Fine Furniture and Great Wood, less intercompany sales, in accordance with 19 CFR 351.525(b)(6)(iv). On this basis, we preliminarily determine that Fine Furniture received a countervailable subsidy of 0.15 percent *ad valorem* under this program.

3. VAT and Tariff Exemptions on Imported Equipment

Enacted in 1997, the *Circular of the State Council on Adjusting Tax Policies on Imported Equipment* (GUOFA No. 37) exempts both FIEs and certain domestic enterprises from the value added tax ("VAT") and tariffs on imported equipment used in their production so long as the equipment does not fall into prescribed lists of non-eligible items. Qualified enterprises receive a certificate of entitlement either from the NDRC or its provincial branch.

The Department has previously found this program to be countervailable. *See* Citric Acid Decision Memorandum at 19–20, CFS Decision Memorandum at 14, and *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, Final Affirmative Critical Circumstances Determination, 75 FR 57444 (September 21, 2010) and accompanying Issues and Decision Memorandum at 23–25.

Fine Furniture and Great Wood reported using this program and provided a list of VAT and tariff exemptions that they received for imported capital equipment since December 11, 2001. *See* FFQR at 21 and Exhibit 14.

We preliminarily determine that VAT and tariff exemptions on imported equipment confer a countervailable subsidy. The exemptions are a financial contribution in the form of revenue forgone by the GOC and they provide a benefit to the recipients in the amount of the VAT and tariff savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a)(1). We further determine the VAT and tariff exemptions under this program are specific under section 771(5A)(D)(i) because the program is limited to certain enterprises, *i.e.*, FIEs and domestic enterprises with government-approved projects. See CFS Decision Memorandum at Comment 16.

Normally, we treat exemptions from indirect taxes and import charges, such as the VAT and tariff exemptions, as recurring benefits, consistent with 19 CFR 351.524(c)(1), and expense these benefits in the year in which they were received. However, when an indirect tax or import charge exemption is provided for, or tied to, the capital structure or capital assets of a firm, the Department may treat it as a non-recurring benefit and allocate the benefit to the firm over the AUL. *See* 19 CFR 351.524(c)(2)(iii) and 19 CFR 351.524(d)(2). Because these VAT and tariff exemptions were received for capital equipment, we are applying the allocation rules described in 19 CFR 351.524(b), as explained below.

For Fine Furniture and Great Wood, we applied the "0.5 percent test," pursuant to 19 CFR 351.524(b)(2), for each of the years in which exemptions were reported (treating the year of receipt as the year of approval). For the years in which the amount was less than 0.5 percent, we have expensed the exempted amounts in the year of receipt, consistent with 19 CFR 351.524(b)(2). For those years in which the VAT and tariff exemptions were greater than or equal to 0.5 percent, we have allocated the benefit over the AUL, consistent with 19 CFR 351.524(b)(1). We used the discount rate described above in the "Benchmarks and Discount Rates" section to calculate the amount of the benefit for the POI.

For Fine Furniture, we divided the benefits received in or allocated to the POI by its sales during the POI, in accordance with 19 CFR 351.525(b)(6)(i). For Great Wood, we divided the benefits received in or allocated to the POI by the combined POI sales of Fine Furniture and Great Wood, less intercompany sales, in accordance with 19 CFR 351.525(b)(6)(iv).

On this basis, we preliminarily determine that Fine Furniture received a countervailable subsidy of 0.56 percent *ad valorem*.

4. Electricity for LTAR

For the reasons explained in the "Use of Facts Otherwise Available and Adverse Inferences"tion above, we are basing our determination regarding the government's provision of electricity in part on AFA.

In a CVD case, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific. However, where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit to the extent that those records are useable and verifiable.

Consistent with this practice, the Department finds that the GOC's provision of electricity confers a financial contribution, under section 771(5)(D)(iii) of the Act, and is specific, under section 771(5A) of the Act. To determine the existence and amount of any benefit from this program, we relied on the companies" reported information on the amounts of electricity they purchased and the amounts they paid for electricity during the POI. We compared the rates paid by Fine Furniture, Layo, and Yuhua for their electricity to the highest rates that they would have paid in the PRC during the POI. Specifically, we compared respondents" electricity payments to what the respondents would have paid under the highest rates on the record for the same user category (*e.g.*, "large industrial users") and time period category (*e.g.*, peak, normal, and valley). This benchmark reflects the adverse inference we have drawn as a result of the GOC's failure to act to the best of its ability in providing requested information about its provision of electricity in this investigation.

On this basis, we preliminarily determine the countervailable subsidy rate to be 1.45 percent *ad valorem* for Fine Furniture. Because the preliminary countervailable subsidy rate for both Layo and Yuhua is less than 0.005 percent, we did not include this program in our preliminary net countervailing duty rates for these companies. See, *e.g.*, CFS Decision Memorandum at 15.

II. Programs for Which More Information Is Required: Potential Subsidies in Layo's and Yuhua's Financial Statements

Layo's and Yuhua's financial statements indicate that both companies may have received certain additional subsidies. *See* L1SR at 6; *see also* Y1SR at 3–4. Because the companies did not disclose these potential subsidies in their original questionnaire responses, we did not have time to request and analyze information from the GOC on these programs prior to the preliminary determination. We intend to request this information from the GOC and address these programs after this preliminary determination.

III. Programs Preliminarily Determined To Be Not Used by Respondents

We preliminarily determine that the respondent companies did not apply for or receive benefits during the POI under the programs listed below.

1. *Local Income Tax Exemption and Reductions for* "*Productive*" *FIEs*

2. *Provision of Electricity at LTAR for FIEs and* "*Technologically Advanced*" *Enterprises by Jiangsu Province*

Verification

In accordance with section 782(i)(1) of the Act, we will verify the information submitted by the respondents prior to making our final determination.

Suspension of Liquidation

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated an individual rate for each producer/exporter of the subject merchandise individually investigated. We preliminarily determine the total estimated net countervailable subsidy rates to be:

Exporter/manufacturer	Net subsidy rate
Fine Furniture (Shanghai) Ltd.; Great Wood (Tonghua) Ltd.; Fine Furniture Plantation (Shishou) Ltd.	2.25
Zhejiang Layo Wood Industry Co., Ltd.; Jiaxing Brilliant Import & Export Co., Ltd.	Zero
Zhejiang Yuhua Timber Co., Ltd	Zero
9 Miles Oak Flooring (China)	27.01
Anhui Hupo Wood Industry Co., Ltd.	27.01
Anji Tianpeng Bamboo & Wooden Floor Co., Ltd.	27.01
Anlian Wood Co., Ltd	27.01
Beijing Forever Strong Construction & Decoration Material Co., Ltd.	27.01
Beijing New Building Material (Group) Co., Ltd.	27.01
Beijing W.A. Wood Co., Ltd	27.01
Cairun Floor Building Material Co., Ltd.	27.01
Changchun Zhongyi Wood Co., Ltd.	27.01
Changzhou Credit International Trade Co., Ltd.	27.01
Changzhou Green Spot Wood Industry Co., Ltd.	27.01
Changzhou Jiahao Wood Trade Co., Ltd.	27.01
Changzhou Leili Wood Industry Co., Ltd.	27.01
Changzhou Opls Decoration Materials Co., Ltd.	27.01
Chaohu Great Mainland Flooring Co., Ltd.	27.01
Chaohu Vgreen Timber Co., Ltd	27.01
China Xuzhou Tengmao Wood Co., Ltd.	27.01
Chuangfu Wood Flooring Cld., Co.	27.01
Complete Flooring Supply Corporation.	27.01
Dalian Brilliant Future International Trade Co., Ltd.	27.01
Dalian Hongjia Imp. & Exp. Co., Ltd.	27.01
Dalian Luming Group	27.01
Dalian Maruni Wood Works Co., Ltd.	27.01
Dalian Ontime International Trade Co.	27.01
Dalian Taiyangshi International Trading Co., Ltd.	27.01
Dalian Turuss Wood Industry Co., Ltd.	27.01
Dongguan Forest Century Wooden Co., Ltd.	27.01
Elegant Living Corporation	27.01
Foshan Linguan Wood Products Co., Ltd.	27.01
Foshan Pengbang Wood Manufacturer Co., Ltd.	27.01
Foshan Shunde Hechengchuangzhan Wood Co., Ltd.	27.01
Foshan Tocho Timber Co., Ltd	27.01
Fujian Jianou Huayu Bamboo Industry Co., Ltd.	27.01
Fuzhou Floors China Co., Ltd	27.01
Gao'an City Kangli Bamboo And Wooden Products Co., Ltd.	27.01
Giant Flooring	27.01
Glassical Industrial Limited	27.01
Great Forest Wood Limited	27.01
Green Elf Flooring (Also Dba Hong Ding Lumber Co.).	27.01
Guangdong Guangyang Hi-Tech Industry Co., Ltd.	27.01
Guangdong Yingran Wood Industry.	27.01
Guangzhou Fnen Wood Flooring	27.01
Guangzhou Homewell Trade Co., Ltd.	27.01
Guangzhou Quanfeng Wood Industry Co., Ltd.	27.01
Handan Global Wood Limited	27.01
Hangzhou Dazhuang Floor Co	27.01
Hangzhou Fuyang Zhongjian Wood Industry Co., Ltd.	27.01
Hangzhou Kingdom Imp & Exp Trading Corp., Ltd.	27.01
Hangzhou Singular Group Co., Ltd.	27.01
Hangzhou Tianlin Industrial Co., Ltd.	27.01
Heze Lv Sen Wood Co., Ltd	27.01
Homewell (Xiamen) Industry Co., Ltd.	27.01
Huidong Weikang Rubber & Plastic Products Co., Ltd.	27.01
Hu'made Group	27.01
Huzhou Boge Import And Export Co., Ltd.	27.01
Huzhou Jinjie Industrial Co., Ltd	27.01
Huzhou Natural Forest Flooring Co., Ltd.	27.01
Huzhou Tianlong Wood Co., Ltd	27.01
Huzhou Top Wood Co., Ltd	27.01
Huzhou Yaxin Arts & Crafts Co., Ltd.	27.01
Jiangmen Xinhui Yinhu Woodwork Co., Ltd.	27.01
Jiangsu Happy Wood Industrial Group Co., Ltd.	27.01
Jiangsu Horizon Trade Co., Ltd	27.01
Jiangsu Kentier Wood Co., Ltd	27.01
Jiangsu Nanyang Wood Co., Ltd	27.01
Jiangsu Wanli Wooden Co., Ltd	27.01
Jiangxi Kangtilong Bamboo Products Co., Ltd.	27.01
Jiashan Greenland International Trading Co., Ltd.	27.01
Jiashan Huayu Lumber Co., Ltd	27.01
Jiashan Longsen Lumbering Co., Ltd.	27.01
Jiashan On-Line Lumber Co., Ltd.	27.01
Jiaxing Hengtong Wood Co., Ltd	27.01
Jilin Newco Wood Industries Co., Ltd.	27.01
Jining Sensen Wood Industry Co., Ltd.	27.01
Jining Sunny Wood Co., Ltd	27.01
Kingswood Timber	27.01
Kornbest Enterprises Ltd	27.01
Lianyungang Shuntian Timber Co., Ltd.	27.01
Longeron I&E Co., Ltd	27.01
Lord Parquet Industry Co., Limited.	27.01
Lyowood Industrial Co., Ltd	27.01
Macdouglas Wood Flooring (Suzhou) Co., Ltd.	27.01
Nanjing Dimac Wood Industry Co., Ltd.	27.01
Qiaosen Wood Flooring Industry Company.	27.01
Qichuang Wood Industrial Co., Ltd.	27.01
Qingdao Fuguichao Wood Co., Ltd.	27.01
Quanfa Woodwork (Shenzhen) Co., Ltd.	27.01
Shandong Fuma Commerce & Trade Co., Ltd.	27.01
Shandong Yuncheng Jinyang Wood Industry Co., Ltd.	27.01
Shanghai Chunna Industrial Co., Ltd.	27.01
Shanghai Eswell Enterprise Co., Ltd.	27.01
Shanghai Feihong Wood Products Co.	27.01
Shanghai Guangri Flooring Co., Ltd.	27.01
Shanghai Pinsheng Wood Industry Co., Ltd.	27.01
Shanghai Pujiang United Wood Co., Ltd.	27.01
Shanghai Yiming Wooden Industry Co., Ltd.	27.01
Shenyang Bask Industry Co., Ltd	27.01
Shenzhen Jianyuanxin Trade Co., Ltd.	27.01
Shenzhen Shi Huanwei Woods Co., Ltd.	27.01
Shuanghai Shuai Yuan Wood Industry Co., Ltd.	27.01
Sterling Pacific Wood Products Co., Ltd.	27.01
Suifenhe Sanmulin Economic And Trade Co., Ltd.	27.01
Suzhou Duolun Wood Industry Co., Ltd.	27.01
Tengmao Wood Co., Ltd	27.01
Tianjin Zeyuan Wood Industry Co., Ltd.	27.01
Times Flooring Co., Ltd	27.01
Twowins Bamboo & Wood Products Co., Ltd.	27.01
Ua Wood Floors	27.01
Weifang Jiayuan Imp & Exp Co., Ltd.	27.01
Wenzhou Timber Group Company.	27.01
Wuhan Nanhong Materials & Goods Fitting Co., Ltd.	27.01
Wuxi Haisen Decorates Material Co., Ltd.	27.01
Xiamen Homeshining Industry Co., Ltd.	27.01
Xuzhou Fuxiang Wood Co., Ltd	27.01
Xuzhou Huanqiu Import & Export Trade Co., Ltd.	27.01
Xuzhou Tengmao Wood Co., Ltd	27.01
Xuzhou Yijia Manufacture Co., Ltd.	27.01
Xuzhou Yijia Wood Manufacture Co., Ltd.	27.01
Yinlong Wood Products Co., Ltd	27.01
Ys Nature International Trading Co., Ltd.	27.01
Zhejiang Assun Wood Co., Ltd	27.01
Zhejiang Gaopai Wood Co., Ltd	27.01

Exporter/manufacturer	Net subsidy rate
Zhejiang Huayue Wooden Products Co., Ltd.	27.01
Zhejiang Yongji Wooden Co., Ltd.	27.01
Zhejiang Yongyu Bamboo Development.	27.01
Zhongshan New Oasis Wood Industry Co., Ltd.	27.01
Zhongyi Bamboo Industrial Co., Ltd. Fujian.	27.01
All Others	2.25

* Non-cooperative company receiving the AFA rate. *See* "Non-Cooperative Companies" section, above.

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing CBP to suspend liquidation of all entries of wood flooring from the PRC that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit or bond for such entries of merchandise in the amounts indicated above. However, because the estimated CVD rate for Layo and Yuhua is *de minimis*, liquidation will not be suspended and no cash deposits or bonds are required for merchandise produced and exported by Layo or Yuhua.

In accordance with sections 703(d) and 705(c)(5)(A) of the Act, for companies not investigated, we apply an "all-others" rate, which is normally calculated by weighting the subsidy rates of the individual companies selected as respondents by those companies" exports of the subject merchandise to the United States. The "all-others" rate does not include zero and *de minimis* rates or any rates based solely on the facts available. In this investigation, because we have only one rate that can be used to calculate the "all-others" rate, Fine Furniture's rate, we have assigned that rate to "all-others."

ITC Notification

In accordance with section 703(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

In accordance with section 705(b)(2) of the Act, if our final determination is affirmative, the ITC will make its final determination within 45 days after the Department makes its final determination.

Disclosure and Public Comment

In accordance with 19 CFR 351.224(b), we will disclose to the parties the calculations for this preliminary determination within five days of its announcement. Due to the anticipated timing of verification and issuance of verification reports, case briefs for this investigation must be submitted no later than one week after the issuance of the last verification report. *See* 19 CFR 351.309(c)(i) (for a further discussion of case briefs). Rebuttal briefs must be filed within five days after the deadline for submission of case briefs, pursuant to 19 CFR 351.309(d)(1). A list of authorities relied upon, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. *See* 19 CFR 351.309(c)(2) and (d)(2).

Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will be held two days after the deadline for submission of the rebuttal briefs, pursuant to 19 CFR 351.310(d), at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, 14th Street and Constitution Avenue, NW., Washington, DC 20230, within 30 days of the publication of this notice, pursuant to 19 CFR 351.310(c). Requests should contain: (1) The party's name, address, and telephone; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. *Id.*

This determination is published pursuant to sections 703(f) and 777(i) of the Act.

Dated: March 21, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–8173 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–894]

Certain Tissue Paper Products From the People's Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

Preliminary Determination

We preliminarily determine that certain tissue paper products (tissue paper) produced and/or exported by Max Fortune (Vietnam) Paper Products Company, Limited (MFVN) [1] to the United States from Vietnam are made from jumbo rolls and/or cut sheets of tissue paper produced in the People's Republic of China (PRC), and are circumventing the antidumping duty order on tissue paper from the PRC, as provided in section 781(b) of the Tariff Act of 1930, as amended (the Act). *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 16223 (March 30, 2005) (*PRC Tissue Paper Order*).

DATES: *Effective Date:* April 6, 2011.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–1766 or (202) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 19, 2010, the Seaman Paper Company of Massachusetts, Inc. (the petitioner) requested that the Department of Commerce (the Department) initiate an anti-circumvention inquiry pursuant to section 781(b) of the Act, and 19 CFR 351.225(h), to determine whether U.S.

[1] MFVN is a company located in Vietnam and is a wholly owned subsidiary of Max Fortune Industrial Co., Ltd. (Max Fortune HK) located in Hong Kong.

imports of tissue paper exported from Vietnam by MFVN were made from jumbo rolls and/or cut sheets of tissue paper produced in the PRC, and thus circumventing *PRC Tissue Paper Order. See* the petitioner's February 19, 2010, anti-circumvention inquiry request (February 19 Submission) at pages 13–14; and *PRC Tissue Paper Order.* Specifically, the petitioner alleged that Chinese-produced jumbo rolls and/or cut sheets of tissue paper sent to Vietnam for completion or assembly into merchandise of the same class or kind as that covered by the *PRC Tissue Paper Order* constituted circumvention pursuant to section 781(b) of the Act. The petitioner also alleged in its February 19 Submission that MFVN had been obtaining Chinese-produced tissue paper jumbo rolls and/or cut sheets and using that merchandise in its U.S. tissue paper sales since it commenced its operations in 2005.

On March 29, 2010, the Department initiated an anti-circumvention inquiry on imports of tissue paper from Vietnam produced and/or exported by MFVN. *See Certain Tissue Paper Products from the People's Republic of China: Notice of Initiation of Anti-circumvention Inquiry,* 75 FR 64 (April 5, 2010) (*Initiation Notice*).

On April 23, 2010, the Department issued an anti-circumvention questionnaire to MFVN, asking for sales and production information with respect to the period January 1, 2005, to the present (April 23 Questionnaire). On May 13, 2010, MFVN entered a notice of appearance in this proceeding. Also, on May 13, 2010, MFVN requested additional time to file a response to the anti-circumvention questionnaire. Pursuant to this request, the Department extended the questionnaire response deadline until June 28, 2010, and MFVN submitted its response to the questionnaire on that date (June 28 Response). In its June 28 Response, MFVN admitted that it was possible that it manufactured some tissue paper in Vietnam from PRC-origin jumbo rolls before and during 2007. MFVN also stated that its records before 2008 were incomplete and unreliable. However, MFVN asserted that it could conclusively demonstrate that as of January 1, 2008, it did not convert any PRC-origin jumbo rolls and/or cut sheets of tissue paper in Vietnam into its own tissue paper products. *See* pages 3 and 12 of MFVN's June 28 Response.

In the April 23 Questionnaire, the Department requested factors of production (FOP) information for purposes of determining whether the value of the processing performed in Vietnam represented a small portion of the value of the merchandise imported into the United States. MFVN responded that it would not submit FOP data to the Department because it claimed that since January 1, 2008, it no longer included Chinese-origin tissue paper jumbo rolls and/or cut sheets in its U.S. sales. *See* pages 14–15 of MFVN's June 28 Response.

The Department issued a supplemental questionnaire to MFVN on July 23, 2010, and received MFVN's supplemental questionnaire response on September 1, 2010.

Also on September 1, 2010, MFVN filed a submission in which it rebutted the petitioner's February 19, 2010, allegations and provided information with respect to certain transactions with an affiliated Chinese company, Fuzhou Tian Jun Trading Co., Ltd. (Tian Jun), during the 2008–2009 period, which were alleged by the petitioner in its February 19 Submission to have involved tissue paper.

The Department issued an additional supplemental questionnaire to MFVN on October 12, 2010, and received MFVN's supplemental questionnaire response on November 12, 2010.

On November 16, 2010, the Department placed on the record certain data from the 2008–2009 administrative review of tissue paper from the PRC. *See* Memorandum from Brian Smith, Senior Analyst, to The File, dated November 16, 2010.

On November 18, 2010, the Department issued a verification outline to MFVN.

On November 22, 2010, the Department met with the petitioner's counsel to discuss agenda items in the verification outline issued to MFVN.[2]

The petitioner submitted pre-verification comments on November 24, 2010.

Pursuant to section 782(i) of the Act, the Department conducted verification of the questionnaire responses submitted by MFVN and its affiliates Max Fortune HK, Tian Jun, and Max Fortune (FZ) Paper Products Co., Ltd., from November 30 to December 16, 2010.[3] This verification report is on file and available in the Central Records Unit (CRU) of the Department's main building.

On January 18, 2011, the Department notified the parties by letter that it was postponing the final determination of this inquiry until August 1, 2011.[4]

Scope of the Antidumping Duty Order

The tissue paper products subject to this order are cut-to-length sheets of tissue paper having a basis weight not exceeding 29 grams per square meter. Tissue paper products subject to this order may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die cut. The tissue paper subject to this order is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch. Subject tissue paper may be flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of tissue paper subject to this order may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.

The merchandise subject to this order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may be under one or more of several different subheadings, including: 4802.30; 4802.54; 4802.61; 4802.62; 4802.69; 4804.31.1000; 4804.31.2000; 4804.31.4020; 4804.31.4040; 4804.31.6000; 4804.39; 4805.91.1090; 4805.91.5000; 4805.91.7000; 4806.40; 4808.30; 4808.90; 4811.90; 4823.90; 4820.50.00; 4802.90.00; 4805.91.90; 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.[5]

Excluded from the scope of this order are the following tissue paper products: (1) Tissue paper products that are coated in wax, paraffin, or polymers, of a kind used in floral and food service applications; (2) tissue paper products

[2] *See* Memorandum to The File from Brian Smith, Senior Analyst, entitled "Ex-Parte Meeting with Petitioner's Counsel," dated November 22, 2010.

[3] *See* Memorandum to The File from Case Analysts entitled "Verification of the Questionnaire Response of Max Fortune (Vietnam) Paper Products Co., Ltd. and Its Affiliates in the Anti-circumvention Inquiry and 2009–2010 Antidumping Duty Administrative Review of Certain Tissue Paper Products from the People's Republic of China," dated March 31, 2011 (MFVN verification report).

[4] *See* Letter to the Interested Parties from James Maeder, Office Director, entitled "Anti-Circumvention Inquiry on Certain Tissue Paper Products from the People's Republic of China: Extension of Final Determination," dated January 18, 2011.

[5] On January 30, 2007, at the direction of U.S. Customs and Border Protection (CBP), the Department added the following HTSUS classifications to the AD/CVD module for tissue paper: 4802.54.3100, 4802.54.6100, and 4823.90.6700. However, we note that the six-digit classifications for these numbers were already listed in the scope.

that have been perforated, embossed, or die-cut to the shape of a toilet seat, *i.e.,* disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel or napkin stock, paper of a kind used for household or sanitary purposes, cellulose wadding, and webs of cellulose fibers (HTSUS 4803.00.20.00 and 4803.00.40.00).

Scope of the Circumvention Inquiry

The products covered by this inquiry are tissue paper products, as described above in the "Scope of the Antidumping Duty Order" section, which are produced in Vietnam from Chinese-origin jumbo rolls and/or cut sheets of tissue paper, and exported from Vietnam to the United States by MFVN.

Statutory Provisions Regarding Circumvention

Section 781(b) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting anti-circumvention inquiries under section 781(b)(1) of the Act, the Department relies upon the following criteria: (A) Merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

Section 781(b)(2) of the Act provides the criteria for determining whether the process of assembly or completion is minor or insignificant. These criteria are: (a) The level of investment in the foreign country; (b) the level of research and development (R&D) in the foreign country; (c) the nature of the production process in the foreign country; (d) the extent of the production facilities in the foreign country; and (e) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316, at 893 (1994), provides some guidance with respect to these criteria. It explains that no single factor listed in section 781(b)(2) of the Act will be controlling. Accordingly, it is the Department's practice to evaluate each of the factors as they exist in the foreign country depending on the particular circumvention scenario. Therefore, the importance of any one of the factors listed under section 781(b)(2) of the Act can vary from case to case depending on the particular circumstances unique to each circumvention inquiry.

Section 781(b)(3) of the Act further provides that, in determining whether to include merchandise assembled or completed in a foreign country in an antidumping duty order, the Department shall consider: (A) The pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise described in accordance with section 781(b)(1)(B) of the Act is affiliated with the person who uses the merchandise described in accordance with section 781(b)(1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States; and (C) whether imports into the foreign country of the merchandise described in accordance with section 781(b)(1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order.

In this case, the *PRC Tissue Paper Order* covers cut-to-length sheets of tissue paper equal to or greater than 0.5 inches in width, with a basis weight not exceeding 29 grams per square meter and other specified characteristics of the scope. The merchandise subject to this inquiry is tissue paper products exported to the United States by MFVN produced from Chinese-origin jumbo rolls and/or cut sheets of tissue paper. The list of products MFVN provided in its questionnaire responses indicates that the tissue paper products it exported to the United States meet the written description of the products subject to the *PRC Tissue Paper Order. See* June 28 Response at Exhibit 6. Accordingly, we find that the merchandise subject to this inquiry is the same class or kind of merchandise as that subject to the *PRC Tissue Paper Order,* pursuant to section 781(b)(1)(A) of the Act. With respect to the remaining statutory criteria for determining whether circumvention exists, the Department finds it necessary to rely on facts available, as the respondent failed to provide necessary, verifiable information upon which the Department could rely. Further, as discussed in detail below, we find it appropriate in this inquiry to apply facts available with an adverse inference, as the respondent failed to cooperate to the best of its ability in providing the necessary information.

Adverse Facts Available

Section 776(a) of the Act, provides that, if (1) necessary information is not available on the record or (2) an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Furthermore, section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority * * *, the administering authority * * *, in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See also* SAA, H.Rep. No. 103–316 at 870 (1994). It is the Department's practice to make an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

In this case, MFVN informed the Department that it could not provide any information with respect to the production of the merchandise exported from Vietnam during the period January 1, 2005, to December 31, 2007. In fact, MFVN admitted that "it is possible that MFVN might have made tissue paper in Vietnam from jumbo rolls from the PRC" during this time period. *See* MFVN's June 28 Response at page 3. Furthermore, the data provided in the petitioner's February 19 Submission

show that MFVN obtained a significant amount of Chinese-origin jumbo rolls and/or cut sheets of tissue paper during this time period. *See* February 19 Submission at pages 13–14. This is the extent of information on the record with regard to MFVN's production during this time period.

Absent any further information on the record, pursuant to section 776(a) of the Act, the Department has concluded that the application of facts available is warranted with respect to exports of tissue paper from MFVN to the United States from January 1, 2005, to December 31, 2007 (2005–2007 period). Production information for the 2005–2007 period is necessary for purposes of this anti-circumvention inquiry and without it on the administrative record, the Department cannot conduct its anti-circumvention analysis for the 2005–2007 period. MFVN claims that it was unable to maintain such records during the above-referenced time period. However, we find this claim to be unreasonable. A company is expected to maintain its production records in the normal course of business. For companies doing business in Vietnam, the Vietnamese Government has even issued regulations which require companies like MFVN to retain such records for up to 10 years.[6] This is especially true in this case where MFVN demonstrated at verification that it maintained such records in both 2009 and 2010. Therefore, because MFVN did not provide the Department with necessary information with respect to MFVN's exports of tissue paper during the 2005–2007 period, the application of facts available pursuant to sections 776(a)(1) and (2) of the Act is warranted.

Furthermore, MFVN's admission that it "possibly" made tissue paper in Vietnam from Chinese-origin jumbo rolls, coupled with the fact that the petitioner's data show that MFVN obtained PRC-origin jumbo rolls and/or cut sheets from January 1, 2005, to December 31, 2007, leads us to conclude that MFVN failed to cooperate by not acting to the best of its ability to comply with the Department's request for information with respect to its commercial activities during this period. Therefore, pursuant to section 776(b) of the Act, an adverse inference is warranted. Accordingly, as adverse facts available (AFA), the Department preliminarily finds that all tissue paper produced and/or exported by MFVN to the United States from January 1, 2005, to December 31, 2007, was made with Chinese-origin jumbo rolls and/or cut sheets of tissue paper.

With respect to MFVN's exports of tissue paper to the United States during the calendar year 2008, the Department also concludes that the application of AFA is warranted. Although MFVN stated in its June 28 Response that it could conclusively demonstrate through its accounting and production records that it did not use Chinese-origin tissue paper jumbo rolls and/or cut sheets in its U.S. sales during 2008, the Department was unable to verify this claim. In fact, at verification, MFVN provided inadequate and incomplete accounting records for calendar year 2008. Specifically, MFVN did not support its claim that it had ceased using Chinese-origin jumbo rolls and/or cut sheets of tissue paper in its U.S. sales during 2008, nor did it provide the necessary accounting records at verification to show the type and origin of the materials it used in its tissue paper exports to the United States from January 1, 2008, to December 31, 2008. *See* MFVN verification report at pages 2, 35–36, and 39–40.

For example, at verification, MFVN provided a worksheet which reconciled the cost-of-sales figure in its 2008 audited financial statements to its purchases, beginning and ending inventory values and conversion costs, as reflected in its annual summary trial balance for 2008. We subsequently requested that MFVN reconcile its monthly trial balances or other monthly general ledger-type reports to the annual summary trial balance for 2008. MFVN, however, claimed at verification that it could not locate its monthly trial balances or any other detailed accounting records for 2008 to support its annual summary trial balance amounts. *See* MFVN verification report at pages 35–36.

In addition, we requested that MFVN provide the company's 2008 monthly inventory movement ledgers for raw materials, work in process (WIP), and finished goods. While MFVN provided its detailed inventory ledger as of December 31, 2008, the company informed Department officials at verification that it could not provide any of the other requested 2008 monthly detailed inventory movement ledgers. Without the detailed trial balances or inventory movement ledgers, Department officials were unable to rely on the company's monthly production cost and inventory movement activity (for raw materials, WIP and finished goods) noted in its warehouse records for purposes of testing at verification the production quantity data contained in MFVN's submissions for calendar year 2008. *See* MFVN verification report at pages 35–36.

Also, MFVN did not provide at verification, upon request, details of its raw material and WIP inventory as of January 1, 2008. Thus, Department officials were unable to obtain details of the amounts reflected in MFVN's beginning inventory value noted in its 2008 audited financial statements (*e.g.,* quantity of pulp versus Chinese-sourced jumbo rolls in the beginning raw material inventory amount reflected in the 2008 audited financial statements). *See* MFVN verification report at pages 35–37.

All of the above examples demonstrate that MFVN did not provide to the Department verifiable production data for calendar year 2008, was unable to tie its export sales data to its production data for calendar year 2008, and did not respond fully to the Department's questionnaires with regard to its production during that period. The absence of verifiable production data on the record for 2008 impeded the conduct of this anti-circumvention inquiry. Therefore, pursuant to section 776(a)(2) of the Act, the Department concludes that the use of facts available is warranted with regard to MFVN's U.S. tissue paper sales transactions from January 1 to December 31, 2008.

Furthermore, because MFVN did not provide verifiable data showing that it used only non-Chinese-origin jumbo rolls and/or sheets in its production of all of the tissue paper it exported to the United States from its facility during 2008, the Department concludes that MFVN did not act to the best of its ability in this inquiry. As noted above, a company is expected to maintain its production records in the normal course of business. MFVN was aware that these records were necessary for the Department's anti-circumvention analysis, but did not provide them at verification, as requested. Therefore, pursuant to section 776(b) of the Act, an adverse inference is warranted because MFVN did not provide all of the necessary information on the record and failed to provide at verification the accounting records the Department needed to analyze the relevant production data for the calendar year 2008. Accordingly, as AFA, the Department preliminarily concludes that all of MFVN's exports of tissue paper to the United States during 2008 were produced with Chinese-origin jumbo rolls and/or cut sheets of tissue paper.

[6] *See* Memorandum to the File dated March 31, 2011 which contains the following document, "Decree No. 129/2004/ND–CP of May 31, 2004 Detailing and Guiding the Implementation of a Number of Articles of the Accounting Law, Applicable to Business Activities," issued by the Government of the Socialist Republic of Vietnam on May 31, 2004.

In addition, MFVN's books and records, as verified, reflect that on January 1, 2009, the company had significant amounts of tissue paper in finished goods and WIP inventory. This entire inventory was produced and/or purchased during 2008 or earlier. At verification, MFVN stated that it did not have records to show the source of the material it used in the production of that inventory. Furthermore, Department officials discovered in the records MFVN provided at verification that there were jumbo rolls of Chinese-origin in inventory at the end of December 2008, which remained in inventory throughout 2009, and were later withdrawn from inventory in March 2010. *See* MFVN verification report at pages 40–41. Therefore, the Department finds that adverse facts available is also warranted with respect to the beginning inventory amount in 2009. Accordingly, as AFA, the Department determines that any tissue paper exported by MFVN to the United States on or after January 1, 2009, which was withdrawn from, or produced from merchandise in, finished goods or WIP inventory as of January 1, 2009, was produced from Chinese jumbo rolls and/or cut sheets.

Based on the foregoing analysis, as AFA, the Department preliminarily finds that MFVN used Chinese-origin jumbo rolls and/or cut-sheets of tissue paper in its production of tissue paper that it exported to the United States from January 1, 2005, to December 31, 2008, and that MFVN continued to use such merchandise from inventory during that period to produce and/or sell tissue paper on or after January 1, 2009. Accordingly, the Department preliminarily concludes that MFVN's tissue paper exports to the United States during 2009 and 2010 included tissue paper produced from Chinese jumbo rolls and/or cut sheets.

However, the Department was able to verify based on its examination of Vietnamese Customs data from January 1, 2008, to December 10, 2010, MFVN had not imported any additional Chinese-origin jumbo rolls and/or cut sheets of tissue paper. *See* MFVN verification report at page 3. In light of these verified data and the Department's observation of MFVN's tissue-paper production operations at verification, we find that MFVN now has the capacity and ability to produce tissue paper for export.

In determining whether circumvention of an order is occurring, section 781(b)(1) of the Act directs the Department to address, among other things, whether before importation into the United States, the imported merchandise is completed or assembled in another country from merchandise which is subject to the order or produced in the foreign country that is subject to the order. *See* section 781(b)(1)(B) of the Act. Based on the preceding analysis, there is little dispute that during the period of analysis of this inquiry, MFVN completed some tissue paper in Vietnam using jumbo rolls and/or cut sheets produced in the PRC.

Section 781(b)(1) of the Act also directs the Department to examine whether (1) the process of assembly or completion in the foreign country (*i.e.,* Vietnam) is minor or insignificant and (2) the value of the merchandise produced in the country subject to the order (*i.e.,* the PRC) is a significant portion of the total value of the merchandise exported to the United States. *See* sections 781(b)(1)(C) and (D) of the Act. Because the PRC and Vietnam are non-market economies, in any review of merchandise produced in those countries, section 773(c)(4) of the Act provides that the Department shall value the FOP utilizing prices or costs in one or more market-economy countries that are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise. Pursuant to this provision, in its questionnaire to MFVN, the Department requested the FOP data for both the Chinese-origin jumbo rolls and/or sheets imported by MFVN, and the processing and packaging operations performed by MFVN in Vietnam. *See* the Department's April 23 Questionnaire at pages 9–10. *See also Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 73 FR 57591 (October 3, 2008); and *Circumvention and Scope Inquiries on the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Affirmative Final Determination of Circumvention of the Antidumping Duty Order, Partial Final Termination of Circumvention Inquiry and Final Rescission of Scope Inquiry,* 71 FR 38608 (July 7, 2006).

In determining whether the process of assembly or completion of tissue paper from jumbo rolls and/or cut sheets is "minor or insignificant" as required by section 781(b)(1), section 781(b)(2) of the Act directs the Department to consider various factors including (a) MFVN's level of investment in Vietnam; (b) MFVN's level of R&D in Vietnam; (c) the nature of MFVN's production process in Vietnam; (d) the extent of MFVN's production facilities in Vietnam; and (e) whether the value of the processing performed in Vietnam represents a small proportion of the value of the merchandise MFVN exported to the United States. With respect to the first criterion, the Department verified that the level of investment by MVFN for equipment used in converting the PRC-origin jumbo rolls and/or cut sheets into finished tissue paper is minor or insignificant. *See* MFVN verification report at page 6. Moreover, the record evidence for this circumvention inquiry demonstrates that MFVN has not undertaken a significant level of R&D in order to process tissue paper products. *See* June 28 Response at pages 12–13. Furthermore, the production process conducted by MFVN in converting the PRC-origin jumbo rolls or sheets to cut-to-length tissue paper is limited and minor when compared to the production process of the jumbo rolls or sheets. *See* June 28 Response at pages 13–14. In addition, the Department did verify that MFVN has production facilities in Vietnam in terms of the capital equipment and the types of employees used in the production process. *See* MFVN verification report at pages 6 and 19–20. However, as noted above, MFVN was unable to provide evidence that, before January 1, 2009, it used its full capacity of production to manufacture tissue paper.

With respect to the criterion of section 781(b)(2)(e) of the Act, however, MFVN did not provide the Department with sufficient information to determine whether the value of the processing MFVN performed in Vietnam represents a small proportion of the value of the merchandise MFVN exported to the United States. In response to our questionnaire, MFVN refused to submit FOP information, because it stated that it could definitively demonstrate through its books and records that as of January 1, 2008, it did not use Chinese-origin jumbo rolls and/or cut sheets of tissue paper in its U.S. tissue paper sales. *See* June 28 Response at pages 3 and 12. However, as explained above, MFVN was unable to substantiate this claim at verification. Accordingly, for this factor, the application of facts available is also warranted pursuant to section 776(a) of the Act.

In its February 19 Submission, the petitioner provided evidence based on foreign market research that the conversion by MFVN of jumbo rolls and/or sheets of tissue paper produced in the PRC into finished tissue paper products in Vietnam is a minor or insignificant process as defined under sections 781(b)(1)(C) and (b)(2) of the Act, and that the value of the processing performed by MFVN is a minor portion

of the value of the completed merchandise. Accordingly, the petitioner reasoned that the value of the PRC-origin jumbo rolls and/or sheets used by MFVN is a significant portion of the total value of the merchandise exported to the United States, pursuant to section 781(b)(1)(D) of the Act. *See Initiation Notice,* 75 FR 17128–17131. Further, in a prior anti-circumvention segment of this proceeding, the Department determined that the process of converting Chinese-origin jumbo rolls in Vietnam was minor or insignificant, and that the value of the Chinese-origin jumbo rolls was a significant portion of the total value of the finished tissue paper products the respondent exported to the United States.[7]

Therefore, based on data contained in the petitioner's February 19 Submission, as well as our findings in a prior anti-circumvention segment of the PRC tissue paper proceeding, the Department determines in this case, as facts available, that the value of the processing MFVN performed in Vietnam represents a small proportion of the value of the merchandise MFVN exported to the United States.

Taking into consideration all of the factors under section 781(b)(2) of the Act, the Department concludes that the process of converting the jumbo rolls and/or cut sheets of tissue paper into the finished tissue paper products in Vietnam is minor or insignificant, pursuant to sections 781(b)(1)(C) of the Act. Accordingly, the Department concludes, based on the facts available, that the value of the jumbo rolls and/or cut sheets produced in the PRC is a significant portion of the total value of the finished tissue paper products MFVN exported to the United States, pursuant to section 781(b)(1)(D) of the Act.

Furthermore, in accordance with section 781(b)(1)(E) of the Act, we find that action is appropriate to prevent evasion of the *PRC Tissue Paper Order.*

In conclusion, the Department preliminarily determines under section 781(b) of the Act, that exports to the United States of tissue paper products produced from PRC-origin jumbo rolls and/or cut sheets and further processed in Vietnam by MFVN constitute circumvention of the *PRC Tissue Paper Order.*

The Department notes that this represents the third instance in which the Department has found an exporting company to have circumvented the *PRC Tissue Paper Order. See also Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 74 FR 29172 (June 19, 2009); and *Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 73 FR 57591 (October 3, 2008). The Department has an obligation to administer the law in a manner that prevents evasion of the order. *See Tung Mung Development* v. *United States,* 219 F. Supp. 2d 1333, 1343 (CIT 2002), affirmed 354 F.3d 1371 (January 15, 2004) (finding that the Department has a responsibility to prevent the evasion of payment of antidumping duties). Further, section 781(b)(1)(E) of the Act directs the Department to take necessary action to "prevent evasion" of antidumping or countervailing duty orders when it concludes that "merchandise has been completed or assembled in other foreign countries" and is circumventing an order. Accordingly, to prevent future evasion of the *PRC Tissue Paper Order,* in light of our preliminary determination, the Department will instruct CBP to suspend liquidation of all entries of tissue paper produced and/or exported by MFVN that were entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the circumvention inquiry.

As noted above, the Department did determine that MFVN now has the capacity and ability to produce tissue paper for export from domestically-sourced input materials. Should the Department conduct an administrative review in the future, and determine in the context of that review that MFVN has not produced for export tissue paper using Chinese-origin jumbo rolls and/or cut sheets, the Department will consider initiating a changed circumstances review pursuant to section 751(b) of the Act to determine if the continued suspension of merchandise produced and/or exported by MFVN from Vietnam is warranted.

Suspension of Liquidation

In accordance with section 733(d) of the Act, the Department will direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the PRC-wide rate of 112.64 percent, on all unliquidated entries of tissue paper produced and/or exported by MFVN that were entered, or withdrawn from warehouse, for consumption on or after March 29, 2010, the date of initiation of the circumvention inquiry.

Notification to the International Trade Commission

The Department, consistent with section 781(e) of the Act and 19 CFR 351.225(f)(7)(i)(B), has notified the International Trade Commission (ITC) of this preliminary determination to include the merchandise subject to this inquiry within the *PRC Tissue Paper Order.* Pursuant to section 781(e) of the Act, the ITC may request consultations concerning the Department's proposed inclusion of the subject merchandise. If, after consultations, the ITC believes that a significant injury issue is presented by the proposed exclusion, it will have 15 days to provide written advice to the Department.

Public Comment

Case briefs from interested parties may be submitted no later than 30 days from the date of publication of this notice. A list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. *See* 19 CFR 351.309(c). This summary should be limited to five pages total, including footnotes. Rebuttal briefs limited to issues raised in the case briefs may be filed no later than 35 days after the date of publication of this notice. *See* 19 CFR 351.309(d).

Interested parties, who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days after the date of publication of this notice. *See* 19 CFR 351.310. Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. At the hearing, each party may make an affirmative presentation only on issues raised in that party's case brief and may make rebuttal presentations only on arguments included in that party's rebuttal brief. We intend to hold a hearing, if requested, no later than 40 days after the date of publication of this notice.

Final Determination

The final determination with respect to this circumvention inquiry, including the results of the Department's analysis of any written comments, will be issued no later than August 1, 2011.

This preliminary affirmative circumvention determination is published in accordance with section 781(b) of the Act and 19 CFR 351.225.

[7] The Department came to this conclusion based on its analysis of both the qualitative and quantitative data submitted by the respondent. *See Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 73 FR 57591 (October 3, 2008).

March 31, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–8213 Filed 4–5–11; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–894]

Certain Tissue Paper Products From the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department is conducting an administrative review of the antidumping duty (AD) order on certain tissue paper products (tissue paper) from the People's Republic of China (PRC) for the period of review (POR) of March 1, 2009, to February 28, 2010, with respect to Max Fortune (Vietnam) Paper Products Company Limited (MFVN). MFVN claimed in this administrative review that it made no sales/shipments during the POR of tissue paper products produced from Chinese-origin jumbo rolls/sheets. Contrary to MFVN's claim and based on our verification findings, we preliminarily determine, as adverse facts available (AFA), that during the POR MFVN made sales/shipments to the United States of tissue paper products produced using Chinese-origin jumbo rolls/sheets. Further, based on AFA, we find that no substantial transformation is occurring as a result of further processing in Vietnam, and thus the country of origin for AD purposes of the tissue paper products produced by MFVN from Chinese-origin jumbo rolls/sheets is China.

If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to collect cash deposits on all future entries of tissue paper produced and/or exported by MFVN.

Interested parties are invited to comment on these preliminary results. We will issue the final results no later than 120 days from the date of publication of this notice.

DATES: *Effective Date:* April 6, 2011.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1766 or (202) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 30, 2005, the Department published in the **Federal Register** the antidumping duty order on certain tissue paper products from the PRC. *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products From the People's Republic of China,* 70 FR 16223 (March 30, 2005) (*Tissue Paper Order*). On March 1, 2010, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on certain tissue paper products from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 9162 (March 1, 2010).

In response, the petitioner [1] timely requested an administrative review of the antidumping duty order on certain tissue paper products from the PRC with respect to entries of the subject merchandise during the POR from MFVN. Therefore, on April 21, 2010, the Department initiated an administrative review of MFVN.[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 75 FR 22107 (April 27, 2010). MFVN is a company located in Vietnam which exports tissue paper to the U.S. market through its parent company based in Hong Kong—Max Fortune Industrial Limited (Max Fortune HK). MFVN is also a respondent in an on-going anti-circumvention inquiry involving the subject merchandise from the PRC.[3]

In its June 28, 2010, response to the Department's April 23, 2010, questionnaire in the anti-circumvention inquiry (June 28 Response), MFVN claimed that it had not exported tissue paper to the United States produced from jumbo rolls or cut sheets imported from the PRC since January 2008. MFVN also filed this questionnaire response on the record of this administrative review. Similarly, in its August 17, 2010, response to the Department's May 7, 2010, questionnaire in this review, MFVN claimed that it did not export subject merchandise from the PRC or Vietnam during the POR.

The Department postponed the preliminary results in this review until March 31, 2011, in order to have sufficient time to conduct verification of MFVN's "no-shipment" claim. *See PRC.*

Tissue Paper Partial Rescission Notice.

Pursuant to 19 CFR 351.221(b)(3) and 351.225(f)(iii)(2), the Department conducted a verification of the "no-shipment" claim MFVN made in this administrative review and in the anti-circumvention inquiry, and met with Vietnamese Customs on this matter in December 2010. Both the verification report and meeting memorandum are on the record of this segment,[4] and are available in the Central Records Unit (CRU) of the Department's main building.

Period of Review

The period of review (POR) is March 1, 2009, through February 28, 2010.

Scope of the Order

The tissue paper products covered by this order are cut-to-length sheets of tissue paper having a basis weight not exceeding 29 grams per square meter. Tissue paper products subject to this order may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die cut. The tissue paper subject to this order is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch. Subject tissue paper may be flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate

[1] The petitioner is Seaman Paper Company of Massachusetts, Inc.

[2] Also on this date, the Department initiated a review of Max Fortune Industrial Limited, Max Fortune (FZ) Paper Products Co., Ltd. (formerly known as Max Fortune (FETDE) Paper Products Co., Ltd.), Max Fortune HK, and Fujian Provincial Shaowu City Huaguang Special Craft Co., Ltd. based on the petitioner's timely request for review of these companies, but subsequently rescinded the review with respect to these companies pursuant to the petitioner's timely withdrawal of its request for review. *See Certain Tissue Paper Products From the People's Republic of China: Notice of Partial Rescission and Extension of Time Limit for Preliminary Results of 2009–2010 Administrative Review,* 75 FR 73040 (November 29, 2010) (*PRC Tissue Paper from China Partial Rescission Notice*).

[3] On March 29, 2010, the Department initiated an anti-circumvention inquiry on certain imports of tissue paper from Vietnam produced and/or exported by MFVN. *See Certain Tissue Paper Products From the People's Republic of China: Initiation of Anti-circumvention Inquiry,* 75 FR 17127 (April 5, 2010).

[4] *See* Memorandum to The File entitled "Verification of the Questionnaire Response of Max Fortune (VN) Paper Products Co., Ltd. (MFVN) and Its Affiliates in the Anti-circumvention Inquiry and 2009–2010 Administrative Review of Certain Tissue Paper Products from the People's Republic of China (PRC)," dated March 31, 2011 (MFVN Verification Report); and Memorandum to The File entitled "Meeting with Vietnamese Customs," dated March 31, 2011.

consumer. Packages of tissue paper subject to this order may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.

The merchandise subject to this order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may be under one or more of several different subheadings, including: 4802.30, 4802.54, 4802.61, 4802.62, 4802.69, 4804.31.1000, 4804.31.2000, 4804.31.4020, 4804.31.4040, 4804.31.6000, 4804.39, 4805.91.1090, 4805.91.5000, 4805.91.7000, 4806.40, 4808.30, 4808.90, 4811.90, 4823.90, 4802.50.00, 4802.90.00, 4805.91.90, 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.[5]

Excluded from the scope of this order are the following tissue paper products: (1) Tissue paper products that are coated in wax, paraffin, or polymers, of a kind used in floral and food service applications; (2) tissue paper products that have been perforated, embossed, or die-cut to the shape of a toilet seat, *i.e.,* disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel or napkin stock, paper of a kind used for household or sanitary purposes, cellulose wadding, and webs of cellulose fibers (HTSUS 4803.00.20.00 and 4803.00.40.00).

Separate Rates

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (NME) country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review,* 71 FR 66304 (November 14, 2006). None of the parties to this proceeding have contested such treatment.

In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control, and thus, should be assigned a single antidumping duty deposit rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (de jure) and in fact (de facto), with respect to its export activities. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588, 20589 (May 6, 1991). MFVN is a company located in Vietnam and is a wholly-owned subsidiary of Max Fortune HK. Max Fortune HK is a wholly foreign-owned company registered and located in Hong Kong. *See* MFVN Verification Report at pages 1 and 7, and Verification Exhibit 1A. Consequently, no additional separate-rate analysis is necessary for MFVN. *See Notice of Final Determination of Sales at Less than Fair Value: Bicycles From the People's Republic of China,* 61 FR 19026 (April 30, 1996). Accordingly, we are treating MFVN as separate from the NME entity.

Adverse Facts Available

Section 776(a) of the Act, provides that, if (1) necessary information is not available on the record or (2) an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Furthermore, section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority * * *, the administering authority * * *, in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Rep. No. 103–316 at 870 (1994) (SAA). It is the Department's practice to make an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

As mentioned above, MFVN claimed in response to the Department's questionnaire in this administrative review that during the POR it did not export to the United States tissue paper products produced using Chinese-origin jumbo rolls/sheets. In its June 28 Response, MFVN also stated that although it was possible that it sold tissue paper produced from Chinese-origin jumbo rolls and/or cut sheets before and during 2007, it could conclusively demonstrate that as of January 1, 2008, it did not do so. *See* MFVN's June 28 Response at pages 3 and 12. In addition, MFVN stated that it could not provide any information with respect to the production of the merchandise exported from Vietnam during the period January 1, 2005, to December 31, 2007, but it could do so for the period beginning January 1, 2008, through the POR. *See* June 28 Response at pages 3 and 12. However, as explained further below, MFVN was unable to demonstrate through its accounting records at verification that all of the tissue paper it sold to the United States during the POR was produced using non-Chinese-origin jumbo rolls or cut sheets. *See* MFVN Verification Report at pages 35–38.

According to MFVN's accounting records, as of the beginning of the POR, MFVN had significant amounts of tissue paper in finished goods and work-in-progress (WIP) inventory and this entire inventory was produced and/or purchased during 2008 or earlier. *See* MFVN Verification Report at pages 36–38. MFVN was unable to provide accounting records for its production of tissue paper prior to January 1, 2009, and therefore was unable to show the source of the material it used in the production of tissue paper in inventory as of January 1, 2009. As the verification report shows, MFVN withdrew some of that inventory for sale during the POR. *See* MFVN Verification Report at pages 35–36.

As a result, for tissue paper exported by MFVN to the United States on or after January 1, 2009, which was withdrawn from, or produced from merchandise in, finished goods or WIP inventory as of January 1, 2009, the Department preliminarily finds that MFVN failed to demonstrate that it did not use Chinese-origin jumbo rolls and/or cut sheets in the production of such merchandise. As discussed further below, based on AFA, the Department preliminarily finds that such tissue paper exported to the United States was

[5] On January 30, 2007, at the direction of CBP, the Department added the following HTSUS classifications to the AD/CVD module for tissue paper: 4802.54.3100, 4802.54.6100, and 4823.90.6700. However, we note that the six-digit classifications for these numbers were already listed in the scope.

produced from Chinese-origin jumbo rolls and/or cut sheets.

Normally, in administrative reviews involving situations where subject merchandise is further processed in a third country prior to importation into the United States, the Department conducts a substantial transformation analysis to determine the proper country of origin for antidumping/countervailing-duty (AD/CVD) purposes, either in the context of a scope proceeding or an administrative review. *See Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review,* 69 FR 74495 (December 14, 2004). However, because MFVN consistently claimed that no Chinese-origin jumbo rolls/sheets were used in the production of the tissue paper products it exported to the United States during the POR, in this instance, the Department was precluded from collecting and analyzing the information necessary to conduct a substantial transformation analysis to determine the proper country of origin for AD/CVD purposes. Therefore, because MFVN did not provide the Department with necessary information with respect to the production of its tissue paper in inventory as of January 1, 2009, the Department's ability to conduct the administrative review of MFVN was impeded, and the application of facts available pursuant to sections 776(a)(1) and 776(a)(2) of the Act is warranted with respect to exports of tissue paper from MFVN to the United States during the POR.

Because MFVN did not provide verifiable information demonstrating that all of its tissue paper sales to the United States during the POR were made from non-Chinese-origin jumbo rolls and/or cut sheets, as claimed, the Department also concludes that MFVN did not act to the best of its ability in this review. MFVN's inability to provide its production accounting records for the Department's review at verification is unreasonable, as a company is expected to maintain such records in the normal course of business. For companies doing business in Vietnam, the Vietnamese Government has issued regulations which require companies like MFVN to retain such records for up to ten years.[6] For example, Article 31 of a regulation issued by the Vietnamese government on May 31, 2004, states that companies doing business in Vietnam must retain their accounting records for at least ten years. *See Id.* This is especially true in this case where MFVN demonstrated at verification that it maintained such records for both 2009 and 2010. *See* MFVN Verification Report at pages 21, 27–28, and 36–37. MFVN claimed it made no shipments of Chinese-origin tissue paper during the POR, but then failed to provide the necessary documentation at verification, as requested, to substantiate this claim. Therefore, pursuant to section 776(b) of the Act, an adverse inference is warranted because MFVN failed to provide information the Department needed to make its determination. Accordingly, as AFA, the Department determines that during the POR MFVN exported to the United States tissue paper products produced from Chinese-origin jumbo rolls/sheets. Further, as AFA, the Department determines that tissue paper products produced in Vietnam by MFVN from Chinese-origin jumbo rolls/sheets are not substantially transformed as a result of further processing in Vietnam, and thus, the proper country of origin of such goods for AD purposes is China.

Because the Department preliminarily finds that tissue paper products produced by MFVN from Chinese-origin jumbo rolls/sheets are not substantially transformed as a result of further processing in Vietnam and thus constitute subject merchandise, we must assign a rate to MFVN for cash deposit purposes with respect to future entries. As discussed, below, the Department is preliminarily assigning a rate of 112.64 percent to MFVN.

Selection of Adverse Facts Available Rate

Section 776(b) of the Act authorizes the Department to use as AFA, information derived from the petition, the final determination in the less-than-fair-value (LTFV) investigation, any previous administrative review, or any information placed on the record. In selecting an AFA rate in reviews, the Department's practice has been to assign the highest margin on the record of any segment of the proceeding. *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review,* 68 FR 19504 (April 21, 2003). The Court of International Trade (CIT) and the Federal Circuit have consistently upheld the Department's practice in this regard. *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*); *NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a LTFV investigation); *see also Kompass Food Trading Int'l* v. *United States,* 24 CIT 678, 689 (July 31, 2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Static Random Access Memory Semiconductors from Taiwan; Final Determination of Sales at Less than Fair Value,* 63 FR 8909, 8932 (February 23, 1998). As discussed above, the Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* SAA at 870; *see also Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil,* 69 FR 76910 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 22.

Consistent with the statute, court precedent, and numerous other cases,[7] as AFA, we are assigning to exports of tissue paper from MFVN, as described in the "Cash Deposit Requirements" section below, the highest rate on the record of any segment of this proceeding, *i.e.,* 112.64 percent. As discussed further below, this rate has been corroborated.

Corroboration of Adverse Fact Available Rate

Section 776(c) of the Act provides that when the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent

[6] *See* Memorandum to the File dated March 31, 2011 which contains the following document, "Decree No. 129/2004/ND–CP of May 31, 2004 Detailing and Guiding the Implementation of a Number of Articles of the Accounting Law, Applicable to Business Activities," issued by the Government of the Socialist Republic of Vietnam on May 31, 2004.

[7] *See, e.g., Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Preliminary Results of New Shipper Reviews,* 70 FR 69942, 69946 (November 18, 2005); and *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews,* 71 FR 26329, 26330 (May 4, 2006).

practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA states that "corroborate" means to determine that the information used has probative value. *See* SAA at 870. The Department has determined that to have probative value, information must be reliable and relevant. *See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review,* 72 FR 58642 (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 6.

To be considered corroborated, information must be found to be both reliable and relevant. The AFA rate of 112.64 percent that we are applying in the current review represents the highest rate from the petition in the LTFV investigation segment of this proceeding. *See Tissue Paper Order.* The Department corroborated the information used to calculate the 112.64 percent rate in the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 7475 (February 14, 2005). Furthermore, this rate was applied in several administrative reviews subsequent to the LTFV investigation, and no information has been presented in this segment of the proceeding that calls into question the reliability of this information. *See Certain Tissue Paper from the People's Republic of China: Preliminary Results and Preliminary Rescission of the 2007–2008 Administrative Review and Intent Not to Revoke Order in Part,* 74 FR 15449 (April 6, 2009) (unchanged in *Certain Tissue Paper Products from the People's Republic of China: Final Results and Partial Rescission of the 2007–2008 Antidumping Duty Administrative Review and Determination Not to Revoke in Part,* 74 FR 52176, 52177 (October 9, 2009); and *Certain Tissue Paper from the People's Republic of China: Preliminary Results of the 2008–2009 Administrative Review,* 75 FR 18812 (April 13, 2010) (unchanged in *Certain Tissue Paper Products from the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review,* 75 FR 63806, 63807 (October 18, 2010). Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense, resulting in an unusually high margin). Similarly, the Department does not apply a margin that has been discredited. *See D & L Supply Co.* v. *United States,* 113 F.3d 1220, 1221 (Fed. Cir. 1997) (finding that the Department cannot use a margin that has been judicially invalidated in its calculations). The AFA rate we are applying for the instant review was calculated based on export price information and production data from the petition, as well as the most appropriate surrogate value information available to the Department during the LTFV investigation. As there is no information on the record of this review that demonstrates this rate is not appropriate for use as AFA, we determine this rate has relevance.

Because the AFA rate, 112.64 percent, is both reliable and relevant, we determine that it has probative value. As a result, we determine that the 112.64 percent rate is corroborated to the extent practicable for the purposes of this administrative review, in accordance with section 776(c) of the Act, and may reasonably be applied as AFA to exports of tissue paper from MFVN for cash deposit purposes.

Preliminary Results of Review

As a result of our review, we preliminarily determine that exports of tissue paper from Vietnam produced by MFVN using Chinese-origin jumbo rolls and/or cut sheets constitute subject merchandise, and therefore the following cash deposit rate applies to MFVN:

CERTAIN TISSUE PAPER PRODUCTS FROM THE PRC

Producer/exporter	Margin (percent)
Max Fortune (Vietnam) Paper Products Company Limited (MFVN)	112.64

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of the administrative review for all shipments of certain tissue paper products from the PRC entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) A cash deposit rate of 112.64 percent will be required for tissue paper produced and/or exported by MFVN; (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) for all other PRC exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash deposit rate will be PRC-wide rate of 112.64 percent; and (4) for all non-PRC exporters of subject merchandise, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: March 31, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–8217 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA340

Endangered Species; File No. 14344

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that The University of California, Davis, Bodega Marine Laboratory, 2099 Westside Road, Bodega Bay, CA 94923 [Gary Cherr, Ph.D., Principal Investigator] has been issued a permit to take white abalone (*Haliotis sorenseni*) for purposes of scientific research and enhancement.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West

Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Colette Carins, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On August 27, 2009, notice was published in the **Federal Register** (74 FR 43679) that a request for a scientific research and enhancement permit to take white abalone had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes the captive maintenance, breeding and outplanting of white abalone, *Haliotis sorenseni.* The purpose of this research is to overcome key barriers to captive propagation of the endangered white abalone, to identify limitations to reproduction in wild animals, to further understand disease processes and how to mitigate them, and the most successful means of restoration. In addition, white abalone will be maintained at participating aquariums for education and reserve holding. No white abalone will be taken from the wild; animals will come from existing captive broodstock and their progeny. A permit is issued five years.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: March 31, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–8210 Filed 4–5–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: Per Diem, Travel and Transportation Allowance Committee, DoD.

ACTION: Notice of Revised Non-Foreign Overseas Per Diem Rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 275. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 275 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: *Effective Date:* April 1, 2011.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 274. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows: The changes in Civilian Bulletin 275 are updated rates for Alaska.

Dated: March 31, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ALASKA						
[OTHER]						
01/01 - 12/31	110		96		206	2/1/2011
ADAK						
01/01 - 12/31	120		79		199	7/1/2003
ANCHORAGE [INCL NAV RES]						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
BARROW						
01/01 - 12/31	159		95		254	10/1/2002
BETHEL						
01/01 - 12/31	139		108		247	1/1/2011
BETTLES						
01/01 - 12/31	135		62		197	10/1/2004
CLEAR AB						
01/01 - 12/31	90		82		172	10/1/2006
COLDFOOT						
01/01 - 12/31	165		70		235	10/1/2006
COPPER CENTER						
09/16 - 05/14	95		95		190	1/1/2011
05/15 - 09/15	139		99		238	1/1/2011
CORDOVA						
01/01 - 12/31	95		130		225	1/1/2011
CRAIG						
10/01 - 03/31	151		80		231	2/1/2011
04/01 - 09/30	236		89		325	2/1/2011
DELTA JUNCTION						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
DENALI NATIONAL PARK						
06/01 - 08/31	135		88		223	1/1/2011

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/01 - 05/31	90		84		174	1/1/2011
DILLINGHAM						
05/15 - 10/15	185		111		296	1/1/2011
10/16 - 05/14	169		109		278	1/1/2011
DUTCH HARBOR-UNALASKA						
01/01 - 12/31	121		99		220	2/1/2011
EARECKSON AIR STATION						
01/01 - 12/31	90		77		167	6/1/2007
EIELSON AFB						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
ELFIN COVE						
01/01 - 12/31	200		45		245	8/1/2010
ELMENDORF AFB						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
FAIRBANKS						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
FOOTLOOSE						
01/01 - 12/31	175		18		193	10/1/2002
FT. GREELY						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
FT. RICHARDSON						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
FT. WAINWRIGHT						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
GAMBELL						
01/01 - 12/31	105		39		144	1/1/2011
GLENNALLEN						
05/15 - 09/15	139		99		238	1/1/2011

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/16	- 05/14	95		95		190	1/1/2011
HAINES							
01/01	- 12/31	107		101		208	1/1/2011
HEALY							
06/01	- 08/31	135		88		223	1/1/2011
09/01	- 05/31	90		84		174	1/1/2011
HOMER							
05/15	- 09/15	167		117		284	1/1/2011
09/16	- 05/14	79		115		194	1/1/2011
JUNEAU							
05/01	- 09/30	149		127		276	1/1/2011
10/01	- 04/30	109		123		232	1/1/2011
KAKTOVIK							
01/01	- 12/31	165		86		251	10/1/2002
KAVIK CAMP							
01/01	- 12/31	150		69		219	10/1/2002
KENAI-SOLDOTNA							
05/15	- 09/15	179		117		296	4/1/2011
09/16	- 05/14	89		109		198	4/1/2011
KENNICOTT							
01/01	- 12/31	259		115		374	2/1/2011
KETCHIKAN							
05/01	- 09/30	140		90		230	2/1/2011
10/01	- 04/30	99		86		185	2/1/2011
KING SALMON							
05/01	- 10/01	225		91		316	10/1/2002
10/02	- 04/30	125		81		206	10/1/2002
KLAWOCK							
04/01	- 09/30	236		89		325	2/1/2011
10/01	- 03/31	151		80		231	2/1/2011
KODIAK							
05/01	- 09/30	141		120		261	2/1/2011
10/01	- 04/30	99		117		216	2/1/2011
KOTZEBUE							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01	- 12/31	189		114		303	2/1/2011
KULIS AGS							
05/01	- 09/15	181		104		285	2/1/2011
09/16	- 04/30	99		96		195	2/1/2011
MCCARTHY							
01/01	- 12/31	259		115		374	2/1/2011
MCGRATH							
01/01	- 12/31	165		69		234	10/1/2006
MURPHY DOME							
05/05	- 09/15	175		107		282	1/1/2011
09/16	- 05/04	75		98		173	1/1/2011
NOME							
01/01	- 12/31	150		126		276	2/1/2011
NUIQSUT							
01/01	- 12/31	180		53		233	10/1/2002
PETERSBURG							
01/01	- 12/31	110		96		206	2/1/2011
POINT HOPE							
01/01	- 12/31	200		49		249	1/1/2011
POINT LAY							
01/01	- 12/31	225		23		248	1/1/2011
PORT ALEXANDER							
01/01	- 12/31	150		43		193	8/1/2010
PORT ALSWORTH							
01/01	- 12/31	135		88		223	10/1/2002
PRUDHOE BAY							
01/01	- 12/31	170		68		238	1/1/2011
SELDOVIA							
09/16	- 05/14	79		115		194	1/1/2011
05/15	- 09/15	167		117		284	1/1/2011
SEWARD							
10/01	- 04/30	85		96		181	2/1/2011
05/01	- 09/30	172		106		278	2/1/2011
SITKA-MT. EDGECUMBE							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
05/01	- 09/30	119		114		233	2/1/2011
10/01	- 04/30	99		112		211	2/1/2011
SKAGWAY							
05/01	- 09/30	140		90		230	2/1/2011
10/01	- 04/30	99		86		185	2/1/2011
SLANA							
10/01	- 04/30	99		55		154	2/1/2005
05/01	- 09/30	139		55		194	2/1/2005
SPRUCE CAPE							
05/01	- 09/30	141		120		261	2/1/2011
10/01	- 04/30	99		117		216	2/1/2011
ST. GEORGE							
01/01	- 12/31	129		55		184	6/1/2004
TALKEETNA							
01/01	- 12/31	100		89		189	10/1/2002
TANANA							
01/01	- 12/31	150		126		276	2/1/2011
TOK							
05/01	- 09/30	89		129		218	2/1/2011
10/01	- 04/30	71		126		197	2/1/2011
UMIAT							
01/01	- 12/31	350		35		385	10/1/2006
VALDEZ							
09/16	- 04/30	119		111		230	2/1/2011
05/01	- 09/15	189		120		309	2/1/2011
WAINWRIGHT							
01/01	- 12/31	175		83		258	1/1/2011
WASILLA							
10/01	- 04/30	99		103		202	2/1/2011
05/01	- 09/30	153		108		261	2/1/2011
WRANGELL							
05/01	- 09/30	140		90		230	2/1/2011
10/01	- 04/30	99		86		185	2/1/2011
YAKUTAT							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
	01/01 - 12/31	105		94		199	1/1/2011
AMERICAN SAMOA							
AMERICAN SAMOA							
	01/01 - 12/31	139		122		261	12/1/2010
GUAM							
GUAM (INCL ALL MIL INSTAL)							
	01/01 - 12/31	159		94		253	7/1/2010
HAWAII							
[OTHER]							
	01/01 - 12/31	121		104		225	5/1/2010
CAMP H M SMITH							
	01/01 - 12/31	177		106		283	5/1/2008
EASTPAC NAVAL COMP TELE AREA							
	01/01 - 12/31	177		106		283	5/1/2008
FT. DERUSSEY							
	01/01 - 12/31	177		106		283	5/1/2008
FT. SHAFTER							
	01/01 - 12/31	177		106		283	5/1/2008
HICKAM AFB							
	01/01 - 12/31	177		106		283	5/1/2008
HONOLULU							
	01/01 - 12/31	177		106		283	5/1/2008
ISLE OF HAWAII: HILO							
	01/01 - 12/31	121		104		225	5/1/2010
ISLE OF HAWAII: OTHER							
	01/01 - 12/31	180		108		288	5/1/2009
ISLE OF KAUAI							
	01/01 - 12/31	198		115		313	5/1/2009
ISLE OF MAUI							
	01/01 - 12/31	169		104		273	5/1/2009
ISLE OF OAHU							
	01/01 - 12/31	177		106		283	5/1/2008
KEKAHA PACIFIC MISSILE RANGE FAC							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
	01/01 - 12/31	198		115		313	5/1/2009
KILAUEA MILITARY CAMP							
	01/01 - 12/31	121		104		225	5/1/2010
LANAI							
	01/01 - 12/31	229		124		353	5/1/2009
LUALUALEI NAVAL MAGAZINE							
	01/01 - 12/31	177		106		283	5/1/2008
MCB HAWAII							
	01/01 - 12/31	177		106		283	5/1/2008
MOLOKAI							
	01/01 - 12/31	135		91		226	5/1/2010
NAS BARBERS POINT							
	01/01 - 12/31	177		106		283	5/1/2008
PEARL HARBOR							
	01/01 - 12/31	177		106		283	5/1/2008
SCHOFIELD BARRACKS							
	01/01 - 12/31	177		106		283	5/1/2008
WHEELER ARMY AIRFIELD							
	01/01 - 12/31	177		106		283	5/1/2008
MIDWAY ISLANDS							
MIDWAY ISLANDS							
	01/01 - 12/31	125		49		174	5/1/2010
NORTHERN MARIANA ISLANDS							
[OTHER]							
	01/01 - 12/31	55		72		127	10/1/2002
ROTA							
	01/01 - 12/31	129		102		231	7/1/2010
SAIPAN							
	01/01 - 12/31	121		98		219	6/1/2007
TINIAN							
	01/01 - 12/31	85		71		156	7/1/2010
PUERTO RICO							
[OTHER]							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01	- 12/31	62		57		119	10/1/2002
AGUADILLA							
01/01	- 12/31	124		113		237	9/1/2010
BAYAMON							
01/01	- 12/31	195		128		323	9/1/2010
CAROLINA							
01/01	- 12/31	195		128		323	9/1/2010
CEIBA							
01/01	- 12/31	210		141		351	11/1/2010
FAJARDO [INCL ROOSEVELT RDS NAVSTAT]							
01/01	- 12/31	210		141		351	11/1/2010
FT. BUCHANAN [INCL GSA SVC CTR, GUAYNABO]							
01/01	- 12/31	195		128		323	9/1/2010
HUMACAO							
01/01	- 12/31	210		141		351	11/1/2010
LUIS MUNOZ MARIN IAP AGS							
01/01	- 12/31	195		128		323	9/1/2010
LUQUILLO							
01/01	- 12/31	210		141		351	11/1/2010
MAYAGUEZ							
01/01	- 12/31	109		112		221	9/1/2010
PONCE							
01/01	- 12/31	149		87		236	9/1/2010
SABANA SECA [INCL ALL MILITARY]							
01/01	- 12/31	195		128		323	9/1/2010
SAN JUAN & NAV RES STA							
01/01	- 12/31	195		128		323	9/1/2010
VIRGIN ISLANDS (U.S.)							
ST. CROIX							
04/15	- 12/14	135		92		227	5/1/2006
12/15	- 04/14	187		97		284	5/1/2006
ST. JOHN							
04/15	- 12/14	163		98		261	5/1/2006
12/15	- 04/14	220		104		324	5/1/2006

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ST. THOMAS							
04/15	- 12/14	240		105		345	5/1/2006
12/15	- 04/14	299		111		410	5/1/2006
WAKE ISLAND							
WAKE ISLAND							
01/01	- 12/31	152		16		168	5/1/2009

[FR Doc. 2011–8014 Filed 4–5–11; 8:45 am]

BILLING CODE 5001–06–C

DEPARTMENT OF EDUCATION

Applications for New Awards; Educational Opportunity Centers (EOC) Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

Overview Information: Educational Opportunity Centers (EOC) Program; notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.066A.

Dates:

Applications Available: April 6, 2011.

Deadline for Transmittal of Applications: May 23, 2011.

Deadline for Intergovernmental Review: July 20, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the EOC Program is to provide information regarding financial and academic assistance available for individuals who desire to pursue a program of postsecondary education; to provide assistance to these individuals in applying for admission to institutions at which a program of postsecondary education is offered, including assistance in preparing necessary applications for use by admissions and financial aid officers; and to improve the financial and economic literacy of participants.

Priorities: This notice includes one competitive preference priority and two invitational priorities. The competitive preference priority is from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Competitive Preference Priority: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i) we award up to an additional two points to an application, depending on how well the application meets this priority.

This priority is:

Projects that are designed to address the needs of military-connected students (as defined in this notice).

Note: For purposes of this notice, *military-connected student* means (a) a child participating in an early learning program, a student in preschool through grade 12, or a student enrolled in postsecondary education or training who has a parent or guardian on active duty in the uniformed services (as defined by 37 U.S.C. 101, in the Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, or the reserve component of any of the aforementioned services) or (b) a student who is a veteran of the uniformed services, who is on active duty, or who is the spouse of an active-duty service member.

Invitational Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets one or more of these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1: The Secretary encourages applicants to propose projects in which they would work with appropriate State agencies to use data from State longitudinal data systems or obtain data from reliable third-party sources when providing information on the implementation of their EOC projects and their participants' outcomes.

Invitational Priority 2: The Secretary encourages applicants to propose projects in which they would coordinate project services with school-level partners and other community resources in order to carry out projects that are cost-effective and best meet the needs of adult learners, including veterans.

Program Authority: 20 U.S.C. 1070a–11 and 20 U.S.C. 1070a–16.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75 (except for 75.215 through 75.221), 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99. (b) The regulations for this program in 34 CFR part 644, as revised by the notice of final regulations, published in the **Federal Register** on October 26, 2010, 75 FR 65712. (c) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $853.1 million for the Federal TRIO Programs for FY 2011, of which we intend to use an estimated $46,830,000 for the EOC Program competition. The actual level of funding, if any, depends on final Congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $230,000–$1,172,000.

Estimated Average Size of Awards: $377,661.

Maximum Award:

- For an applicant who is not currently receiving an EOC Program grant and proposes to serve a minimum of 1,000 eligible participants at a cost that does not exceed $230 per participant, the maximum award amount is $230,000.
- For an applicant who is currently receiving an EOC Program grant and proposes to serve a minimum of 1000 eligible participants at a cost that does not exceed $300 per participant, the maximum award amount is the greater of: (a) $230,000 or (b) an amount equal to 103 percent of the applicant's grant award amount for FY 2009 or FY 2010, whichever is greater.

For example, an applicant who is eligible for a $300,300 grant (103 percent of the applicant's current funding level) and is applying for the full $300,300 must propose to serve at least 1001 participants. The applicant would be proposing to serve at least 1001 participants at $300 per participant, which would equal $300,300 in grant funding. This applicant would meet the requirement to serve a minimum of 1000 participants and the requirement not to exceed $300 per participant.

Note: For an applicant who is currently receiving an EOC program grant that is serving more than 1000 participants, the applicant is encouraged to continue to serve its current number of participants. However, if the applicant proposes to reduce the number of participants to be served, the applicant must propose to serve at least 1000 participants at a cost that does not exceed $300 per participant.

For an applicant who is currently receiving an EOC program grant that is serving 1,000 participants, but at a cost per participant exceeding $300, the applicant must either: (1) Propose to continue to serve 1,000 participants, but at a reduced award amount that is based on a $300 cost per participant (i.e. $300,000); or (2) request an award amount equal to 103% of the applicant's grant award amount for FY 2009 or

2010, whichever is greater, but increase the number of participants proposed to be served, such that the per participant cost does not exceed $300.

The Department may choose to fund successful applicants who are currently receiving an EOC grant and serving more than 1000 participants at a level equal to the greater of the award amount for FY 2009 or FY 2010, instead of an amount equal to 103 percent of the greater of the award amount for FY 2009 or FY 2010. However, in that situation, the Department will adjust the number of participants that the applicant will be required to serve accordingly. For example, an applicant that is eligible to receive a $480,000 grant would be required to serve at least 1,600 participants.

Pursuant to 34 CFR 644.32(b), we will reject any application that proposes a budget exceeding the maximum amount described in this section for a single budget period of 12 months. We will also reject any application that proposes a budget to serve less than 1000 participants or proposes a budget that exceeds the maximum per participant cost of $300.

Estimated Number of Awards: 124.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education; public and private agencies and organizations, including community-based organizations with experience in serving disadvantaged youth; combinations of these institutions, agencies, and organizations; and secondary schools.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* An applicant may submit more than one application for an EOC grant as long as each application describes a project that serves a different target area (34 CFR 644.10(a)). The Secretary is not designating any additional populations for which an applicant may submit a separate application under this competition (34 CFR 644.10(b)).

IV. Application and Submission Information

1. *Address to Request Application Package:* Rachael Couch, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7600 or by e-mail: *TRIO@ed.gov*.

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

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The total page limit for the project narrative portion of the application for the FY 2011 EOC competition is 50 pages, including any discussion of how the application meets one or both of the invitational priorities. However, any application addressing the competitive preference priority may include up to five additional pages in a separate section of the application submission to discuss how the application meets the competitive preference priority. The five additional pages cannot be used for or transferred to the project narrative. Partial pages will count as a full page toward the page limit. Please use the following standards for the application narrative:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be within the 1″ margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, captions, and all text in charts, tables, figures and graphs.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the Application for Federal Assistance Face Sheet (SF 424); Part II, the budget information summary form (ED Form 524); the EOC Program Profile; the one-page Project Abstract narrative; and the assurances and certifications. The page limit also does not apply to a table of contents. If you include any attachments or appendices, these items will be counted as part of Part III, the application narrative, for purposes of the page-limit requirement. You must include your complete response to the selection criteria, which also includes the budget narrative, in Part III, the application narrative.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: April 6, 2011.

Deadline for Transmittal of Applications: May 23, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: July 20, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 644.31. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/GrantsgovRegistrationBrochure.pdf*).

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the EOC Program, CFDA number 84.066A, must be submitted electronically using the Governmentwide Grants.gov Apply site at www.Grants.gov. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the EOC Program at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.066, not 84.066A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem

affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Geraldine Smith, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. FAX: (202) 502–7857.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and three copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.066A)
LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.066A)
550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program competition are from 34 CFR 644.21 and are listed in the application package.

Note: With the changes made to the Higher Education Act of 1965, as amended, by the Higher Education Opportunity Act, the EOC Program objectives have been standardized. Please note that applicants are required to use these objectives to measure performance under the program. Specifically, under the "Objectives" section of the selection criterion, 34 CFR 644.21(b), which is worth eight points, applicants should address the standardized objectives related to secondary school diploma or equivalent, financial aid applications, college admission applications, and postsecondary enrollment.

2. *Review and Selection Process:* A panel of non-Federal readers will review each application in accordance with the selection criteria and the competitive preference priority, pursuant to 34 CFR 75.217. The individual scores of the readers will be added and the sum divided by the number of readers to determine the reader score received in the review process. In accordance with 34 CFR 644.22, the Secretary will evaluate the prior experience of applicants that received an EOC Program project grant for project years 2007–08, 2008–09 and 2009–10. Based on that evaluation, the Secretary may add prior experience points to the application's averaged reader score to determine the total score for each application. The Secretary makes new grants in rank order on the basis of the total scores of the reader scores and prior experience points awarded to each application. Pursuant to 34 CFR 644.20(c), if there are insufficient funds for all applications with the same total scores, the Secretary will choose among the tied applications so as to serve geographical areas that have been underserved by the EOC Program. The Secretary will not make a new grant to an applicant if the applicant's prior project involved the fraudulent use of program funds.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those

applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or, is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:*

We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The success of the EOC Program will be measured by the EOC Program participants' success in completing a secondary school diploma or its equivalent, completion of applications for student financial aid, submission of applications for postsecondary admission, and postsecondary enrollment. All EOC Program grantees will be required to submit an annual performance report.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Rachael Couch or Geraldine Smith, U.S. Department of Education, 1990 K Street, NW., room 7000, Washington, DC 20006–8510. Telephone: (202) 502–7600 or by e-mail: *TRIO@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to one of the program contact persons listed under *For Further Information Contact* in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF, you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.*

Dated: March 31, 2011.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2011–8202 Filed 4–5–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: Western Area Power Administration, Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: Western Area Power Administration (Western), an agency of the Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years without change, an information collection request with the Office of Management and Budget (OMB). Western's current OMB control number 1910–5136 for its Applicant Profile Data form (APD) expires on September 30, 2011. Comments are invited on: (1) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated electronic, mechanical or other collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before the end of the comment period that closes on June 6, 2011. Western must receive comments by the end of the comment period to ensure consideration.

ADDRESSES: Written comments may be sent to Mr. Ronald Klinefelter, Corporate Service Office, Western Area Power Administration, 12155 W. Alameda Parkway, Lakewood, CO 80228 or by e-mail at *PRAComments@wapa.gov.* Please refer to "Paperwork Reduction Act Information Collection" as the subject of your comments.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Klinefelter, Corporate Service Office, Western Area Power Administration, 12155 W. Alameda Parkway, Lakewood, CO 80228, telephone (720) 962–7010, or e-mail *PRAComments@wapa.gov.* Western's existing collection instrument, the Applicant Profile Data form (APD), can be viewed in the Invitation for Public Comments on Western's Web page *http://www.wapa.gov/documents/APDcomments.pdf.*

SUPPLEMENTARY INFORMATION: This information collection request relates to: (1) OMB No. 1910–5136; (2) Information Collection Request Title: Western Area Power Administration Applicant Profile Data; (3) Type of Review: Renewal; (4) Purpose: The proposed collection of information is necessary for the proper performance of Western's functions. Western markets a limited amount of Federal power. Western has discretion to determine who will receive an allocation of Federal power. Due to the high demand for Western's power and limited amount of available power under established marketing plans, Western needs to be able to collect information to evaluate who will receive an allocation of Federal power. As a result, the information Western collects is necessary and useful; (5) Annual Estimated Number of Respondents: 33.3; (6) Annual Estimated Number of Total Responses: 33.3; (7) Annual Estimated Number of Burden Hours: 266.7; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: 0.

I. Statutory Authority

Reclamation Laws are a series of laws arising from the Desert Land Act of 1872 and include but are not limited to: The Desert Land Act of 1872, Reclamation Act of 1902, Reclamation Project Act of 1939, and the Acts authorizing each individual project such as the Central Valley Project Authorizing Act of 1937.[1] The Reclamation Act of 1902 established the Federal reclamation program.[2] The basic principle of the Reclamation Act of 1902 was that the United States, through the Secretary of the Interior, would build and operate irrigation works from the proceeds of public land sales in the sixteen arid Western states (a seventeenth was later added). The Reclamation Project Act of 1939 expanded the purposes of the reclamation program and specified certain terms for contracts that the Secretary of the Interior enters into to furnish water and power.[3] Congress enacted the Reclamation Laws for purposes that include enhancing navigation, protection from floods, reclaiming the arid lands in the Western United States, and for fish and wildlife.[4] Congress intended the production of power would be a supplemental feature of the multi-purpose water projects authorized under the Reclamation Laws.[5] No contract entered into by the United States for power may impair the efficiency of the project for irrigation purposes.[6] Section 5 of the Flood Control Act of 1944 is read *in pari materia* with Reclamation Laws.[7] In 1977 the Department of Energy Organization Act transferred the power marketing functions of the Department of the Interior to Western.[8] Pursuant to this authority, Western markets Federal hydropower. As part of Western's marketing authority, Western needs to obtain information from interested entities who desire an allocation of Federal power. The Paperwork Reduction Act of 1995 requires Western to obtain a clearance from OMB before collecting this information.[9]

II. This Process Determines the Format of the APD and Is Not a Call for Applications

This public process and the associated **Federal Register** Notice only determine the information that Western will collect from an entity desiring to apply for a Federal power allocation. It is a legal requirement with which Western must comply before Western can request information from potential preference customers. This public process is not the process whereby interested parties request an allocation of Federal power. The actual allocation of power is outside the scope of this proceeding. Please do not submit a request for Federal power in this process. At a later time, through a separate process, Western will issue a call for applications, as part of its project-specific marketing plans. When Western issues a call for applications, the information Western proposes to collect is voluntary. Western will use the information collected, in conjunction with its project-specific marketing plans, to determine an entity's eligibility and ultimately who will receive an allocation of Federal power.

III. Purpose of Proposed Collection

Western proposes to continue to collect the information in its existing APD. Western's current OMB control number 1910–5136 for its APD will expire on September 30, 2011. There will be no changes in the content, format, and directions. There are some ministerial errors that have been corrected on the APD; however, such corrections have no impact on the content, format, directions or paperwork burden. The content, format, directions and paperwork burden for the existing APD are discussed in more detail in that **Federal Register** Notice.[10] This information also is included as part of the administrative record for this proceeding. In that process, Western identified what it believes is the minimum amount of collective information, as well as the need for collecting this information and the burden it creates. Western stated due to the variations that may be developed in each of Western's Regions, each Region through its project-specific marketing plans may determine that it does not need all of the information. Each Region will identify the subset of the data that it will require in its application through its call for applications. The APD, as well as administrative record for the proposal justifying its continued use, is available for inspection and copying at Western's Corporate Service Office and the ministerial changes as well as the invitation for comments may be viewed at *http://www.wapa.gov/documents/APDcomments.pdf.* As part of this process, Western has updated the annual cost burdens. From 2008 to 2011, Western has increased its estimate of the cost burden for preparing the APD from $100 to $104 per hour and for recordkeeping from $50 to $52 per hour.

IV. Invitation for Comments

Western invites public comment on its existing collection of information as set forth above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be

[1] *See,* Ch. 107, 19 stat. 377 (1872), Ch. 1093, 32 Stat. 388 (1902), Ch. 418, 53 Stat. 1187 (1939), ch. 832, 50 Stat. 844, 850 (1937), all as amended and supplemented.

[2] *See,* Ch. 1093, 32 Stat. 388, as amended and supplemented.

[3] *See,* Ch. 418, 53 Stat. 1187 (1939), as amended and supplemented.

[4] *See, e.g.,* ch. 832, 50 Stat. 844, 850 (1937), as amended and supplemented.

[5] *Id.*

[6] *See,* 43 U.S.C. 485h(c).

[7] *See* Act of December 22, 1944, ch. 665, 58 Stat. 887, as amended and supplemented.

[8] *See,* 42 U.S.C. 7152(a)(1)(E).

[9] *See,* 44 U.S.C. 3501, *et seq.*

[10] 73 FR 5555 (2008), 73 FR 31463 (2008).

collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated, electronic, mechanical or other collection techniques or other forms of information technology. As required under the Paperwork Reduction Act, after evaluating comments, Western will make a final determination on this information collection extension and publish a second notice in the **Federal Register**.

Dated: March 28, 2011.

Timothy J. Meeks,

Administrator.

[FR Doc. 2011–8159 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–209–C]

Application to Export Electric Energy; Cargill Power Markets, LLC

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: Cargill Power Markets, LLC (CPM) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or requests to intervene must be submitted to DOE and received on or before May 6, 2011.

ADDRESSES: Comments, protests, or requests to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Christopher.Lawrence@hq.doe.gov,* or by facsimile to 202–586–8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) 202–586–5260.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On June 24, 1999, the Department of Energy (DOE) issued Order No. EA–209, which authorized CPM to transmit electric energy from the United States to Canada as a power marketer for a two-year term using existing international transmission facilities. DOE renewed the CPM export authorization two additional times: On July 3, 2001 in Order No. EA–209–A and on May 31, 2006 in Order No. EA–209–B. Order No. EA–209–B will expire on May 31, 2011. On February 14, 2011, CPM filed an application with DOE for renewal of the export authority contained in Order No. EA–209–B for an additional five-year term.

The electric energy that CPM proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by CPM have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE and must be received on or before the date listed above.

Comments on the CPM application to export electric energy to Canada should be clearly marked with OE Docket No. 290–B. An additional copy is to be filed directly with Eugene J. Becker, Vice President, Cargill Power Markets, LLC, 9350 Excelsior Blvd., MS 150, Hopkins, MN 55343. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR Part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm,* or by e-mailing Odessa Hopkins at *Odessa.Hopkins@hq.doe.gov.*

Issued in Washington, DC, on March 30, 2011.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011–8178 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–029]

Petition for Waiver From DaikinAC (Americas) Inc. and Granting of the Interim Waiver From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedure

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

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from DaikinAC (Americas) Inc. (Daikin). The petition for waiver (hereafter "petition") requests a waiver from the U.S. Department of Energy (DOE) test procedure applicable to commercial package air-source central air conditioners and heat pumps. The petition is specific to the Daikin variable capacity VRV III–PB variable refrigerant flow (VRF) commercial multi-split heat pumps ("VRV III–PB multi-split heat pumps"). Through this document, DOE: solicits comments, data, and information with respect to the Daikin petition; and announces the grant of an interim waiver to Daikin from the existing DOE test procedure for the subject commercial multi-split heat pumps.

DATES: DOE will accept comments, data, and information with respect to the Daikin petition until, but no later than May 6, 2011.

ADDRESSES: You may submit comments, identified by case number "CAC–029," by any of the following methods:

- *Federal eRulemaking Portal:http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [CAC–029] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue, SW.,

Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except on Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *AS_Waiver_Requests@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. Telephone: (202) 287–6111. E-mail: *Jennifer.Tiedeman@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, part C of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title V, § 441(a), established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain industrial equipment, which includes the VRV III–PB variable refrigerant flow (VRF) commercial multi-split heat pumps ("VRV III–PB multi-split heat pumps") that are the focus of this notice.[1] Part C specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from manufacturers. 42 U.S.C. 6316. With respect to test procedures, part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

For commercial package air-conditioning and heating equipment, EPCA provides that "the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992." (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), the statute further directs the Secretary to amend the test procedure for a covered commercial product if the industry test procedure is amended, unless the Secretary determines, by rule and based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. For commercial air-source heat pumps, DOE adopted ARI Standard 340/360–2004. Table 1 to Title 10 of the Code of Federal Regulations (10 CFR) 431.96 directs manufacturers of commercial package air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. The cooling capacities of Daikin's VRV III–PB multi-split heat pumps at issue in the waiver petition filed by Daikin range from 72,000 Btu/h to 360,000 Btu/h. All of this equipment is covered by ARI Standard 340/360–2004, which includes units with capacities greater than 65,000 Btu/hour.

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect pursuant to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 431.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs first. It may be extended by DOE for an additional 180 days. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On November 22, 2010, Daikin filed a petition for waiver from the test procedure at 10 CFR 431.96 applicable to commercial package air source central air conditioners and heat pumps, as well as an application for interim waiver. The capacities of Daikin's VRV III–PB multi-split heat pumps range from 72,000 Btu/h to 360,000 Btu/h. The applicable test procedure for commercial air-source heat pumps is ARI 340/360–2004. Manufacturers are directed to use these test procedures pursuant to Table 1 of 10 CFR 431.96.

Daikin seeks a waiver from the applicable test procedure under 10 CFR 431.96 on the grounds that its VRV III–PB multi-split heat pumps contain design characteristics that prevent testing according to the current DOE test procedure. Specifically, Daikin asserts that the two primary factors that prevent testing of its multi-split variable speed products are the same factors stated in the waivers that DOE granted to Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi) and other manufacturers for similar lines of

[1] For editorial reasons, upon codification in the U.S. Code, part C was re-designated part A–1.

commercial multi-split air-conditioning systems:

- Testing laboratories cannot test products with so many indoor units; and
- There are too many possible combinations of indoor and outdoor units to test. 69 FR 52660 (August 27, 2004) (Mitsubishi waiver); 72 FR 17528 (April 9, 2007) (Mitsubishi waiver); 72 FR 71387 (Dec. 17, 2007) (Samsung waiver); 72 FR 71383 (Dec. 17, 2007) (Fujitsu waiver); 73 FR 39680 (July 10, 2008) Daikin waiver); 74 FR 15955 (April 8, 2009) (Daikin waiver); 74 FR 16193 (April 9, 2009) (Daikin waiver); 74 FR 16373 (April 10, 2009) (Daikin waiver).

The VRV III–PB multi-split heat pump systems have operational characteristics similar to the commercial multi-split products manufactured by Mitsubishi, Samsung, Fujitsu and Daikin. As indicated above, DOE has already granted waivers for this equipment. The VRV III–PB multi-split heat pump system consists of multiple indoor units connected to an air-cooled outdoor unit. The indoor units for this equipment are available in a very large number of potential configurations, including: 4–Way Cassette, Wall Mounted, Ceiling Suspended, Floor Standing, Ceiling Concealed, and Multi Position AHU. There are over one million combinations possible with the current Daikin VRV III–PB product offerings. It is impractical for testing laboratories to test this equipment because of the number of potential system configurations. Consequently, Daikin requested that DOE grant a waiver from the applicable test procedure for its VRV III–PB multi-split heat pump equipment designs until a suitable test method can be prescribed.

III. Application for Interim Waiver

On November 22, 2010, Daikin also submitted an application for an interim waiver. DOE has determined that Daikin's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Daikin might experience absent a favorable determination on its application for an interim waiver. DOE understands, however, that if it did not issue an interim waiver, Daikin's equipment would not be tested and rated for energy consumption on an equal basis with equivalent equipment for which DOE has previously granted waivers. This would place Daikin at a competitive disadvantage. Furthermore, DOE has determined that it appears likely that Daikin's petition for waiver will be granted and that it is desirable for public policy reasons to grant Daikin immediate relief pending a determination on the petition for waiver. DOE believes that it is likely Daikin's petition for waiver for the new VRV III–PB multi-split heat pump models will be granted because, as noted above, DOE has previously granted a number of waivers for similar product designs.[2] The two principal reasons supporting the grant of the previous waivers also apply to Daikin's VRV III–PB multi-split heat pump equipment: (1) Test laboratories cannot test equipment with so many indoor units; and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. In addition, DOE believes that similar equipment should be tested and rated for energy consumption on a comparable basis. For these same reasons, DOE also determined that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

Therefore, *it is ordered that:*

The application for interim waiver filed by Daikin is hereby granted for Daikin's VRV III–PB multi-split heat pumps, subject to the specifications and conditions below.

1. Daikin shall not be required to test or rate its VRV III–PB multi-split heat pump equipment on the basis of the existing test procedures under 10 CFR 431.96, which incorporates by reference ARI 340/360–2004.

2. Daikin shall be required to test and rate its VRV III–PB multi-split heat pump equipment according to the alternate test procedure as set forth in section IV(3), "Alternate test procedure."

The interim waiver applies to the following basic model groups:

VRV III–PB multi-split heat pump series outdoor units:

- *460V/3-phase/60 Hz Models:*
  - *Heat Pump models RXYQ72PBYD, RXYQ96PBYD, RXYQ120PBYD, RXYQ144PBYD, RXYQ168PBYD, RXYQ192PBYD, RXYQ216PBYD, RXYQ240PBYD, RXYQ264PBYD, RXYQ288PBYD, RXYQ312PBYD, RXYQ336PBYD, RXYQ360PBYD with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000, 264,000, 288,000, 312,000, 336,000 and 360,000 Btu/hr respectively.*
  - *Heat Recovery models REYQ72PBYD, REYQ96PBYD, REYQ120PBYD, REYQ144PBYD (2x REMQ72PBYD), REYQ168PBYD (1x REMQ96PBYD + 1x REMQ72PBYD), REYQ192PBYD (2x REMQ96PBYD), REYQ216PBYD (1x REMQ120PBYD + 1x REMQ96PBYD), REYQ240PBYD (2x REMQ120PBYD), REYQ264PBYD (1x REMQ72PBYD + 2x REMQ96PBYD), REYQ288PBYD (1x REMQ120PBYD + 1x REMQ96PBYD + 1x REMQ72PBYD), REYQ312PBYD (2x REMQ96PBYD + 1x REMQ120PBYD), REYQ336PBYD (2x REMQ120PBYD + 1x REMQ96PBYD), with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000 264,000, 288,000, 312,000 and 336,000 Btu/hr respectively.*
- *208–230V/3-phase/60 Hz Models:*
  - *Heat Pump models RXYQ72PBTJ, RXYQ96PBTJ, RXYQ120PBTJ, RXYQ144PBTJ, RXYQ168PBTJ, RXYQ192PBTJ, RXYQ216PBTJ, RXYQ240PBTJ, RXYQ264PBTJ, RXYQ288PBTJ, RXYQ312PBTJ, RXYQ336PBTJ, RXYQ360PBTJ with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000, 264,000, 288,000, 312,000, 336,000 and 360,000 Btu/hr respectively.*
  - *Heat Recovery models REYQ72PBTJ, REYQ96PBTJ, REYQ120PBTJ, REYQ144PBTJ, REYQ168PBTJ (1x REMQ96PBTJ + 1x REMQ72PBTJ), REYQ192PBTJ (2x REMQ96PBTJ), REYQ216PBTJ (1x REMQ120PBTJ + 1x REMQ96PBTJ), REYQ240PBTJ (2x REMQ120PBTJ), REYQ264PBTJ (1x REMQ72PBTJ + 2x REMQ96PBTJ), REYQ288PBTJ (1x REMQ120PBTJ + 1x REMQ96PBTJ + 1x REMQ72PBTJ), REYQ312PBTJ (2x REMQ96PBTJ + 1x REMQ120PBTJ), REYQ336PBTJ (2x REMQ120PBTJ + 1x REMQ96PBTJ), with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000 264,000, 288,000, 312,000 and 336,000 Btu/hr respectively.*
- *Compatible indoor units for above listed outdoor units:*
  - *FXAQ Series all mounted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000 and 24,000 Btu/hr.*
  - *FXLQ Series floor mounted indoor units with nominal capacities of 12,000, 18,000 and 24,000 Btu/hr.*
  - *FXNQ Series concealed floor mounted indoor units with nominal capacities of 12,000, 18,000 and 24,000 Btu/hr.*
  - *FXDQ Series low static ducted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000 and 24,000 Btu/hr.*

[2] DOE notes that it has also previously granted interim waivers to Fujitsu (70 FR 5980 (Feb. 4, 2005)), Samsung (70 FR 9629 (Feb. 28, 2005)), Mitsubishi (72 FR 17533 (April 9, 2007)), and Daikin (72 FR 35986 (July 2, 2007)), for comparable commercial multi-split air conditioners and heat pumps.

○ *FXSQ Series medium static ducted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000, 24,000, 30,000, 36,000 and 48,000 Btu/hr.*

○ *FXMQ Series medium/high static ducted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000, 24,000, 30,000, 36,000, 48,000, 72,000 and 96,000 Btu/hr.*

○ *FXZQ Series recessed cassette indoor units with nominal capacities of 7,500, 9,500, 12,000 and 18,000 Btu/hr.*

○ *FXFQ Series recessed cassette indoor units with nominal capacities of 9,500, 12,000, 18,000, 24,000, 30,000, 36,000 and 48,000 Btu/hr.*

○ *FXHQ Series ceiling suspended indoor units with nominal capacities of 12,000, 24,000 and 36,000 Btu/hr.*

○ *FXTQ Series ceiling suspended indoor units with nominal capacities of 12,000, 18,000, 24,000, 30,000, 36,000, 42,000, 48,000 and 54,000 Btu/hr.*

○ *FXMQ–MF Series concealed ducted indoor units with nominal capacities of 48,000, 72,000, and 96,000 Btu/hr.*

This interim waiver is issued on the condition that the statements, representations, and documents provided by the petitioner are valid. DOE may revoke or modify this interim waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

IV. Alternate Test Procedure

In responses to two petitions for waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis upon which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI equipment, as well as for its R22 multi-split equipment. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. *See* 72 FR 17528 and 72 FR 17533. For reasons similar to those published in these prior notices, DOE believes that an alternate test procedure is appropriate in this instance.

DOE understands that existing testing facilities have limited ability to test multiple indoor units simultaneously. This limitation makes it impractical for manufacturers to test the large number of possible combinations of indoor and outdoor units for some variable refrigerant flow zoned systems. We further note that after DOE granted a waiver for Mitsubishi's R22 multi-split products, ARI formed a committee to discuss testing issues and to develop a testing protocol for variable refrigerant flow systems. The committee has developed a test procedure which has been adopted by the American National Standards Institute (AHRI)—"American National Standards Institute (ANSI)/ AHRI 1230–2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment." This test procedure has been incorporated into ASHRAE 90.1—2010. Daikin's petition proposes that DOE apply ANSI/AHRI Standard 1230–2010 as the alternate test procedure to apply to itsVRV III–PB multi-split heat pump equipment as a condition of its requested waiver and interim waiver. The commercial multi-split waivers that DOE has granted to Mitsubishi and several other manufacturers do not conflict with ANSI/AHRI 1230–2010 because DOE has taken the ANSI/AHRI standard into account in developing its multi-split alternate test procedure. Essentially, the waivers use a definition of "tested combination" that is not in ARI 340/360–2004, but is substantially the same as the definition in ANSI/ AHRI 1230–2010.

The definition in AHRI 1230–2010 reads:

3.25 *Tested Combination.* A sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. The tested combination shall have the following features:

a. The basic model of a variable refrigerant flow system ("VRF system") used as a tested combination shall consist of an outdoor unit (an outdoor unit can include multiple outdoor units that have been manifolded into a single refrigeration system, with a specific model number) that is matched with between 2 and 5 indoor units (for systems with nominal cooling capacities greater than 150,000 Btu/h [43,846 W], the number of indoor units may be as high as 8 to be able to test non-ducted indoor unit combinations)

b. The indoor units shall:

b.1 Represent the highest sales model family as determined by type of indoor unit, *e.g.* ceiling cassette, wall-mounted, ceiling concealed, *etc.* If 5 are insufficient to reach capacity, another model family can be used for testing.

b.2 Together, have a nominal cooling capacity between 95% and 105% of the nominal cooling capacity of the outdoor unit.

b.3 Not, individually, have a nominal cooling capacity greater than 50% of the nominal cooling capacity of the outdoor unit, unless the nominal cooling capacity of the outdoor unit is 24,000 Btu/h [7016 W] or less.

b.4 Have a fan speed that is consistent with the manufacturer's specifications.

b.5 All be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR part 430, subpart B, Appendix M.

This is the alternate test procedure language used in the recent DOE waivers:

(B) *Tested combination.* The term "tested combination" means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(i) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between two and five indoor units. (For systems with nominal cooling capacities greater than 150,000 Btu/h, as many as eight indoor units may be used, so as to be able to test non-ducted indoor unit combinations.) For multi-split systems, each of these indoor units shall be designed for individual operation.

(ii) The indoor units shall:

(a) Represent the highest sales model family, or another indoor model family if the highest sales model family does not provide sufficient capacity (*see* (b) below);

(b) Together, have a nominal cooling capacity that is between 95 percent and 105 percent of the nominal cooling capacity of the outdoor unit;

(c) Not, individually, have a nominal cooling capacity greater than 50 percent of the nominal cooling capacity of the outdoor unit;

(d) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(e) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR part 430, subpart B, Appendix M.

If the alternate test procedure approved today were confined to using the definition of "tested combination" in ANSI/AHRI 1230–2010, there would be no significant change from the multi-split waivers already granted. But Daikin has asked to use ANSI/AHRI 1230–2010 as the entire alternate test procedure, which could introduce some additional changes from the previously granted waivers, which are based on ARI 340/360–2004 and the above "tested combination" definition. According to 42 U.S.C. 6314(a)(4)(B), if an industry

test procedure reference in AS/HRAE 90.1 is amended, the Secretary shall amend the test procedure for the product as necessary to be consistent with the amended industry test procedure. It is therefore likely that in the future, ANSI/ASHRAE 1230–2010 will be the approved test procedure for this equipment, and DOE is considering prescribing it in the subsequent decision and order as the alternate test procedure for this Daikin waiver. For the interim waiver, DOE will continue to require the use of the alternate test procedure prescribed in the past multi-split waivers.

Therefore, as a condition for granting this interim waiver to Daikin, DOE is including an alternate test procedure similar to those granted to Mitsubishi for its R22 and R410A units. This alternate test procedure will allow Daikin to test and make energy efficiency representations for its VRV III–PB multi-split heat pump equipment. DOE has applied a similar alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps manufactured by Mitsubishi (72 FR 17528, April 9, 2007); Samsung (72 FR 71387, Dec. 17, 2007); Fujitsu (72 FR 71383, Dec. 17, 2007); Daikin (73 FR 39680, July 10, 2008); Daikin (74 FR 15955, April 8, 2009); Daikin (74 FR 16193, April 9, 2009); Daikin (74 FR 16373, April 10, 2009); Mitsubishi (74 FR 66315, December 15, 2009) and LG (74 FR 66330, December 15, 2009).

The alternate test procedure developed in conjunction with the Mitsubishi waiver permits Daikin to designate a "tested combination" for each model of outdoor unit. The indoor units designated as part of the tested combination must meet specific requirements. For example, the tested combination must have between two and eight indoor units so that it can be tested in available test facilities. (The "tested combination" was originally defined to consist of one outdoor unit matched with between two and five indoor units. The maximum number of indoor units in a tested combination is increased in this instance from five to eight to account for the fact that the larger-capacity equipment can accommodate a greater number of indoor units.) The tested combination must be tested according to the applicable DOE test procedure, as modified by the provisions of the alternate test procedure as set forth below. The alternate test procedure also allows manufacturers of such products to make valid and consistent representations of energy efficiency for their central air-conditioning and heat pump products.

DOE is including the following waiver language in the interim waiver for Daikin's VRV III–PB multi-split heat pump models:

(1) The petition for interim waiver filed by DaikinAC (Americas) Inc. is hereby granted as set forth in the paragraphs below.

(2) Daikin shall not be required to use existing test procedures to test or rate its VRV III–PB multi-split heat pump equipment listed above in section III, but shall be required to test and rate such equipment according to the alternate test procedure as set forth in paragraph (3).

(3) *Alternate test procedure.*

(A) Daikin shall be required to test the equipment listed in section III above according to the test procedures for central air conditioners and heat pumps prescribed by DOE at 10 CFR 431.96, except that Daikin shall test a tested combination selected in accordance with the provisions of subparagraph (B) of this paragraph. For every other system combination using the same outdoor unit as the tested combination, Daikin shall make representations concerning the VRV III–PB multi-split heat pump equipment covered in this waiver according to the provisions of subparagraph (C) below.

(B) Tested combination. The term tested combination means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between two and five indoor units. (For systems with nominal cooling capacities greater than 150,000 Btu/h, as many as eight indoor units may be used, so as to be able to test non-ducted indoor unit combinations). For multi-split systems, each of these indoor units shall be designed for individual operation.

(2) The indoor units shall—

(i) Represent the highest sales model family or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR part 430, subpart B, appendix M.

(C) *Representations.* In making representations about the energy efficiency of its VRV III–PB multi-split heat pump equipment for compliance, marketing, or other purposes, Daikin must fairly disclose the results of testing under the DOE test procedure in a manner consistent with the provisions outlined below:

(1) For VRV III–PB multi-split heat pump combinations tested in accordance with this alternate test procedure, Daikin may make representations based on these test results.

(2) For VRV III–PB multi-split heat pump combinations that are not tested, Daikin may make representations of non-tested combinations at the same energy efficiency level as the tested combination. The outdoor unit must be the one used in the tested combination. The representations must be based on the test results for the tested combination. The representations may also be determined by an Alternative Rating Method approved by DOE.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the Daikin petition for waiver from the test procedure applicable to Daikin's VRV III–PB multi-split heat pump equipment. For the reasons articulated above, DOE also grants Daikin an interim waiver from that procedure. As part of this notice, DOE is publishing Daikin's petition for waiver in its entirety. The petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that Daikin is required to follow as a condition of its interim waiver. In this alternate test procedure, DOE is defining a tested combination that Daikin could use in lieu of testing all retail combinations of its VRV III–PB multi-split heat pumps.

DOE is considering including ANSI/AHRI 1230–2010 as the alternate test procedure in its subsequent decision and order.

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR

431.401(d). The contact information for the petitioner is: Chris Bellshaw, Director of Product and Engineering, Daikin AC (Americas) Inc., 1645 Wallace Drive, Suite 110, Carrollton, Texas 75006. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on March 30, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

November 22, 2010

Ms. Catherine Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy
1000 Independence Ave, SW
Washington, DC 20585–0121

Re: Petition for Waiver of Test Procedure

Dear Assistant Secretary Zoi:

Daikin AC (Americas) Inc. (DACA) respectfully petitions the Department of Energy (DOE) pursuant to 10 CFR § 431.401(a)(1) (2010) for a waiver of the test procedures applicable to commercial air conditioners and heat pumps, as established in 10 CFR § 431.96 (2010) and ARI Standard 340/360–20043, for the Daikin VRV III–PB system. The specific models for which DACA requests this waiver in the Daikin VRV III–PB product class are listed below in this Petition. DACA seeks a waiver from the existing central air conditioner and central air conditioning heat pump test procedure for the listed Daikin VRV III–PB systems because the basic models contain design criteria that prevent testing of the basic models according to the prescribed test procedures. We are simultaneously requesting an interim waiver for the same systems pursuant to 10 CFR § 431.401(a)(2) (2010). Daikin is simultaneously proposing that DOE establish AHRIStandard 1230 (2010) as the alternate test method for the Daikin VRV III–PB product class in association with the requested interim waiver and waiver.

Background

DACA is a leading manufacturer of variable speed and Variable Refrigerant Volume (VRV) zoning systems that DACA offers for sale in the North American market. These products combine advanced technologies such as high efficiency variable speed compressors and fan motors with electronic expansion valves and other devices to ensure peak operating performance of the overall system and to optimize energy efficiency. DACA has designed the VRV III–PB systems to operate in commercial applications, and this product class employs zoning to provide users with peak utility of the system and with significant energy savings compared to competing technologies.

General Characteristics of DACA's Air Cooled VRV III–PB Products

DACA's VRV III–PB system has the following characteristics and applications:

- DACA's VRV III–PB products are an air conditioning system that includes numerous individually controllable discrete indoor units.
- The VRV III–PB system consists of multi-split, multi-zone units utilizing one or multiple outdoor units that serve up to sixty indoor units.
- The VRV III–PB system employs variable speed technology that matches system capacity to the current load thereby utilizing the minimum amount of energy required for optimal system operation.
- Due to its multi-zone applications, each VRV III indoor unit can be independently controlled with a local controller allowing the occupant to alter their environmental condition to meet their needs. Individually controlled system functions include temperature, fan speed and mode of operation.
- The VRV III–PB system can efficiently operate the compressor at loads as small as 7% of the rated capacity of the system, resulting in significant energy savings.
- The VRV III–PB system employs variable speed indoor and outdoor high efficiency fan motors to precisely control operating pressures and airflow rates.
- The VRV III–PB system uses electronically controlled expansion valves to precisely control refrigerant flow, superheat, sub-cooling, pump down functions and even oil flow throughout the system.

Particular Basic Models for Which a Waiver Is Requested

DACA requests a waiver from the test procedures for the following VRV III–PB basic model groups:

- VRV III–PB Series Outdoor Units:
- 460V/3-phase/60Hz Models:
  - Heat Pump models RXYQ72PBYD, RXYQ96PBYD, RXYQ120PBYD, RXYQ144PBYD, RXYQ168PBYD, RXYQ192PBYD, RXYQ216PBYD, RXYQ240PBYD, RXYQ264PBYD, RXYQ288PBYD, RXYQ312PBYD, RXYQ336PBYD, RXYQ360PBYD with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000, 264,000, 288,000, 312,000, 336,000 and 360,000 Btu/hr respectively.
  - Heat Recovery models REYQ72PBYD, REYQ96PBYD, REYQ120PBYD, REYQ144PBYD (2x REMQ72PBYD), REYQ168PBYD (1x REMQ96PBYD + 1x REMQ72PBYD), REYQ192PBYD (2x REMQ96PBYD), REYQ216PBYD (1x REMQ120PBYD + 1x REMQ96PBYD), REYQ240PBYD (2x REMQ120PBYD), REYQ264PBYD (1x REMQ72PBYD + 2x REMQ96PBYD), REYQ288PBYD (1x REMQ120PBYD + 1x REMQ96PBYD + 1x REMQ72PBYD), REYQ312PBYD (2x REMQ96PBYD + 1x REMQ120PBYD), REYQ336PBYD (2x REMQ120PBYD + 1x REMQ96PBYD), with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000 264,000, 288,000, 312,000 and 336,000 Btu/hr respectively.
- 208–230V/3-phase/60Hz Models:
  - Heat Pump models RXYQ72PBTJ, RXYQ96PBTJ, RXYQ120PBTJ, RXYQ144PBTJ, RXYQ168PBTJ, RXYQ192PBTJ, RXYQ216PBTJ, RXYQ240PBTJ, RXYQ264PBTJ, RXYQ288PBTJ, RXYQ312PBTJ, RXYQ336PBTJ, RXYQ360PBTJ with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000, 264,000, 288,000, 312,000, 336,000 and 360,000 Btu/hr respectively.
  - Heat Recovery models REYQ72PBTJ, REYQ96PBTJ, REYQ120PBTJ, REYQ144PBTJ, REYQ168PBTJ (1x REMQ96PBTJ + 1x REMQ72PBTJ), REYQ192PBTJ (2x REMQ96PBTJ), REYQ216PBTJ (1x REMQ120PBTJ + 1x REMQ96PBTJ), REYQ240PBTJ (2x REMQ120PBTJ), REYQ264PBTJ (1x REMQ72PBTJ + 2x REMQ96PBTJ), REYQ288PBTJ (1x REMQ120PBTJ + 1x REMQ96PBTJ + 1x REMQ72PBTJ), REYQ312PBTJ (2x REMQ96PBTJ + 1x REMQ120PBTJ), REYQ336PBTJ (2x REMQ120PBTJ + 1x REMQ96PBTJ), with nominal cooling capacities of 72,000, 96,000, 120,000, 144,000, 168,000, 192,000, 216,000, 240,000 264,000, 288,000, 312,000 and 336,000 Btu/hr respectively.
- Compatible Indoor Units for Above Listed Outdoor Units:
- FXAQ Series all mounted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000 and 24,000 Btu/hr.
- FXLQ Series floor mounted indoor units with nominal capacities of 12,000, 18,000 and 24,000Btu/hr.
- FXNQ Series concealed floor mounted indoor units with nominal capacities of 12,000, 18,000 and 24,000 Btu/hr.

FXDQ Series low static ducted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000 and 24,000 Btu/hr.

- FXSQ Series medium static ducted indoor units with nominal capacities of 7,500, 9,500, 12,000, 18,000, 24,000, 30,000, 36,000, 48,000 Btu/hr.
- FXMQ Series medium/high static ducted indoor units with nominal capacities of

[3] The AHRI has updated this standard from version ARI 340/360–2004 to version AHRI 340–360–2007. However, DOE has not yet updated the reference to the standard in 10 CFR Part 431.

7,500, 9,500, 12,000, 18,000, 24,000, 30,000, 36,000, 48,000, 72,000 and 96,000 Btu/hr.

- FXZQ Series recessed cassette indoor units with nominal capacities of 7,500, 9,500, 12,000 and 18,000 Btu/hr.
- FXFQ Series recessed cassette indoor units with nominal capacities of 9,500, 12,000, 18,000, 24,000, 30,000, 36,000 & 48,000 Btu/hr.
- FXHQ Series ceiling suspended indoor units with nominal capacities of 12,000, 24,000 and 36,000 Btu/hr.
- FXTQ Series ceiling suspended indoor units with nominal capacities of 12,000, 18,000, 24,000, 30,000, 36,000, 42,000, 48,000 and 54,000 Btu/hr.
- FXMQ–MF Series concealed ducted indoor units with nominal capacities of 48,000, 72,000, and 96,000 Btu/hr.

Design Characteristics Constituting the Grounds for DACA's Petition

DACA's VRV III–PB Series product offering consists of multiple indoor units being connected to an air-cooled outdoor unit. The indoor units for these products are available in a very large number of potential configurations, including but not limited to the following: 4-Way Cassette, Wall Mounted, Ceiling Suspended, Floor Standing, Ceiling Concealed, and Multi Position AHU. DACA is currently developing additional indoor unit models for future market introduction. There are over one million combinations possible with the current DACA VRV III product offering. It is completely impractical for testing laboratories to test a product such as the VRV III–PB Series with multiple indoor units because of the astronomical number of potential system configurations.

DACA's VRV III–PB products share many of the design characteristics and features of DACA's VRV–III, VRV–S, VRV III–C and VRV W–III product lines, and of Mitsubishi Electric and Electronics USA, Inc.'s (MEUS) CITY MULTI product class, for all of which DOE has previously granted waivers.[2] Like the VRV–III products for which DOE granted a waiver, the VRV III–PB products use air to reject heat. The same testing constraints and limitations apply to all of these products.

DOE stated the following in the notice granting DACA a waiver for VRV–III:

DOE believes that the VRV–III Daikin equipment and equipment for which waivers have previously been granted are alike with respect to the factors that make them eligible for test procedure waivers. DOE is therefore granting to Daikin a VRV–III product waiver similar to the previous MEUS multi-split waivers.

74 Fed. Reg. at 15,957.

Manufacturers of Other Basic Models Incorporating Similar Design Characteristics

The DACA VRV III–PB Series system operates in similar configurations as the VRV–III system. The reasons and rationale that DOE has already articulated to support previous DACA, MEUS, Sanyo, LG, Samsung and Fujitsu waivers for multi-split, multi-zoned air conditioners (including the DACA VRV–III system) also apply to the DACA VRV III–PB Series products. Therefore, DOE should conclude that the design characteristics of DACA's VRV III–PB product class prevent testing of the basic VRV III–PB model according to the prescribed test procedures.

Specific Testing Requirements Sought To Be Waived

The test procedures from which DACA is requesting a waiver are ARI Standard 340/360–2004 These standards, which are applicable to large commercial and industrial unitary air conditioning and heat pump equipment, are referenced in Table 1 to 10 CFR § 431.96, and are made applicable to Daikin's large commercial air cooled VRV III–PB products in 10 CFR § 431.96(a).

Detailed Discussion of Need for Requested Waiver

Although the capacity of Daikin's VRV III–PB product class are within the scope of ARI 340/360–2004, the design characteristics of the VRV III–PB product class prevent testing of the basic model according to the prescribed test procedures. The testing procedures outlined in these standards do not provide for:

- The testing of multi-split products when all connected indoor units physically cannot be located in a single room.
- The operation of indoor units at several different static pressure ratings during a single test.
- The precise number of part load tests that ARI Standard 340/360–2004 requires for fully or infinitely variable speed products.

DACA especially requires the requested waiver because ARI Standard 340/360–2004 provide no direction or guidance about how to test systems with millions of combinations of indoor units configurable to a single outdoor unit.

A further reason that DACA needs the requested waiver is that ARI Standard 340/360–2004 does not provide a test method to measure part load performance of a system operating in simultaneous cooling and heating modes (i.e., performing both heating and cooling functions at the same time).

Yet another problem that prevents testing of the VRV III–PB Series product class under these two standards, and another major reason why DACA requires the requested waiver, is the wide variety of indoor unit static pressure ratings available with these and other multi-split products. Testing facilities cannot effectively control multiple indoor static pressures as would be required to test many of the indoor unit combinations available. To accomplish such testing, a testing lab would be required to use a large number of test rooms simultaneously, and each test room would have to be networked into the data recording instrumentation. Also, extensive piping configurations would need to be routed throughout the various test rooms. This process would be extraordinarily expensive, and the logistical challenges presented by the testing might be insurmountable.

Alternate Test Procedure

DACA proposes that DOE apply AHRI Standard 1230–2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment, as the alternate test procedure for DOE to apply to the covered VRV III–PB products as a condition of the requested waiver and interim waiver. The Air-Conditioning, Heating & Refrigeration Institute (AHRI) has recently adopted this standard. AHRI developed AHRI Standard 1230–2010 to apply to multi-split air conditioning and heat pump equipment like the VRV III–PB, and AHRI intends to eventually submit its Standard 1230–2010 to DOE for inclusion in 10 CFR Part 431 as the proposed test method for the product category that includes DACA's VRV III–PB class.

ASHRAE Standard 90.1 will incorporate AHRI Standard 1230–2010 by reference effective January 1, 2011. Also, EPA has recognized Standard 1230–2010 in the eligibility requirements (*see: http://www.energystar.gov/index.cfm?c=lchvac.pr_crit_lchvac*) for the Light Commercial EnergyStar category. Because DACA believes that AHRI Standard 1230–2010 will eventually become the applicable test standard for VRV III–PB products under

[2] DOE granted DACA a waiver for its VRV and VRV–S product lines on July 10, 2008. 73 Fed. Reg. 39,680. DOE granted MEUS a waiver for its CITY MULTI VRFZ class of products.69 Fed. Reg. 52,660 (August 27, 2004). DOE granted DACA a waiver for its VRV–WII product lines on January 7, 2008. 73 Fed. Reg. 1,213. DOE granted DACA a waiver for its VRV–III–C product line on December 15, 2009. 74 Fed. Reg. 66,324. DOE also granted DACA a waiver for its VRV–WIII products on January 29, 2010. 75 Fed. Reg. 4,975. DOE granted DACA a waiver for its VRV–III systems on April 8, 2009. 74 Fed. Reg. 15,955.

10 CFR Part 431, and because AHRI Standard 1230–2010 will adequately address all of the conditions that are causing DACA to request this testing waiver, DACA requests that DOE make AHRI Standard 1230–2010 immediately applicable to VRV III–PB as a term of a waiver and interim waiver.

DOE can obtain a copy of AHRI Standard 1230–10 from the following web site:
http://www.ahrinet.org/Content/FindaStandard_218.aspx?Listing_PK=1120

Application for Interim Waiver

DACA also hereby applies pursuant to 10 CFR § 431.401(a)(2) for an interim waiver of the applicable test procedure requirements for the VRV III–PB product class models listed above. The basis for DACA's Application for Interim Waiver follows.

DACA is likely to succeed in its Petition for Waiver because there is no reasonable argument that ARI Standard 340/360 can be properly applied to DACA's VRV III–PB product class. As explained above in the DACA's Petition for Waiver, the design characteristics of the VRV III–PB product class clearly prevent testing of the basic model according to the prescribed test procedures. The likelihood of DOE approving DACA's Petition for Waiver is buttressed by the DOE's history of approving previous waiver requests from DACA and from several other manufacturers for other products that are similar to the VRV III–PB product class, based on the same rationale put forth by DACA in this Petition for Waiver. See preceding discussion of waivers granted by DOE to MEUS, Fujitsu General, Sanyo Fisher (USA) Corp, LG Electronics, Inc., and Quietside Corporation (Samsung Air Conditioning).

Additionally, DACA is likely to suffer economic hardship and competitive disadvantage if DOE does not grant its interim waiver request. DACA is now preparing to introduce its VRV III–PB product class in a matter of months. If we must wait for completion of the normal waiver consideration and issuance process, DACA will be forced to delay the opportunity to begin recouping through product sales its research, development and production costs associated with the VRV III–PB product class. In addition to these economic hardship costs, DACA will lose market share to MEUS, especially if DOE grants MEUS' pending interim waiver application for its CITY MULTI R2 and Y product classes, which will compete directly with DACA's VRV III–PB product class.

DOE approval of DACA's interim waiver application is also supported by sound public policy reasons. As DOE stated in its August 14, 2006 approval of DACA's interim waiver for the VRV and VRV–S product classes:

[I]n those instances where the likely success of the Petition for Waiver has been demonstrated, based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

The VRV III–PB product class will provide superior comfort to the end user, will allow for independent zoning of facilities, and will incorporate state of the art technology such as variable speed compressors utilizing neodymium magnets to increase efficiency and electronic control of compressor speed, fan speed and even metering device opening positions. The VRV III–PB product class includes technologies that will increase system efficiency and reduce national energy consumption, and that will also offer a new level of comfort and control to end users.

DACA requests that DOE approve our Application for Interim Waiver so we can bring the new highly energy efficient technology represented by the VRV III–PB product class to the market as soon as possible, thereby allowing the U.S. consumer to benefit from our high technology and high efficiency product, and from competition for other manufacturers who may have already received waivers.

Confidential Information

DACA makes no request to DOE for confidential treatment of any information contained in this Petition for Waiver and Application for Interim Waiver.

Conclusion

Daikin AC (Americas) Inc. respectfully requests that DOE approve its Petition for Waiver of the applicable test procedure to DACA for the VRV III–PB product design, and to approve an approval for its Application for Interim Waiver. DOE's failure to issue an interim waiver from test standards would cause significant economic hardship to DACA by preventing DACA from marketing these products even though DOE has previously granted a waiver to other products currently being offered in the market with similar design characteristics.

We would be pleased to respond to any questions you may have regarding this Petition for Waiver and Application for Interim Waiver. Please contact Chris Bellshaw, Director of Product and Engineering at 972–245–1510 or by e-mail at *chris.bellshaw@daikinac.com* if you have any questions.

Sincerely,

Akinori Atarashi

President

Daikin AC (Americas) Inc.

1645 Wallace Drive

Suite 110

Carrollton, Texas 75006

(Submitted in triplicate)

I certify that DACA has sent copies of this Petition for Waiver from Testing Requirements to the following known manufacturers of domestically marked units of the same product type:

Fujitsu General America, Inc.:

Arturo Thur De Koos

Engineering & Technical Support

Fujitsu General America, Inc.

353 Route 46 West

Fairfield, NJ 07004

LG Electronics USA, Inc.:

John I. Taylor

Vice President

Government Relations and Communications

LG Electronics USA, Inc.

1776 K Street, NW

Washington, DC 20006

Mitsubishi Electric & Electronics USA, Inc.:

William Rau

Senior Vice President and General Manager

Mitsubishi Electric & Electronics USA, Inc.

4300 Lawrenceville-Suwanee Road

Suwanee, GA 30024

Samsung Air Conditioning:

John Miles

Vice President Sales & Engineering

Quietside Corporation

Samsung Air Conditioning

8750 Pioneer Boulevard

Santa Fe Springs, CA 90670

Sanyo Fisher (USA) Corp.:

Gary Nettinger

Vice President, Technical and Service

Sanyo Fisher (USA) Corp.

1690 Roberts Blvd., Suite 110

Kennesaw, GA 30144

[FR Doc. 2011–8220 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–017]

Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Electrolux From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedures

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

ACTION: Decision and Order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of the decision and order (Case No. RF–017) that grants to Electrolux Home Products, Inc. (Electrolux) a waiver from the DOE electric refrigerator and refrigerator-freezer test procedures for certain basic models containing relative humidity sensors and adaptive control anti-sweat heaters. Under today's decision and order, Electrolux shall be required to test and rate its refrigerator-freezers with relative humidity sensors and adaptive control anti-sweat heaters using an alternate test procedure that takes this technology into account when measuring energy consumption.

DATES: This Decision and Order is effective April 6, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611, E-mail: *Michael.Raymond@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0103, (202) 287–6111, E-mail: *Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(l)), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants Electrolux a waiver from the applicable residential refrigerator and refrigerator-freezer test procedures found in 10 CFR part 430, subpart B, appendix A1 for certain basic models of refrigerator-freezers with relative humidity sensors and adaptive control anti-sweat heaters, provided that Electrolux tests and rates such products using the alternate test procedure described in this notice. Today's decision prohibits Electrolux from making representations concerning the energy efficiency of these products unless the product has been tested consistent with the provisions and restrictions in the alternate test procedure set forth in the decision and order below, and the representations fairly disclose the test results.

Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

Issued in Washington, DC, on March 30, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: Electrolux Home Products, Inc. (Case No. RF–017)

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential electric refrigerators and refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential electric refrigerators and refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A1.

DOE's regulations for covered products contain provisions allowing a person to seek a waiver for a particular basic model from the test procedure requirements for covered consumer products when (1) the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

Any interested person who has submitted a petition for waiver may also file an application for interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g).

II. Electrolux's Petition for Waiver: Assertions and Determinations

On September 15, 2010, Electrolux filed a petition for waiver from the test procedures applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR Part 430, subpart B, appendix A1. The products covered by the petition employ relative humidity sensors and adaptive control anti-sweat heaters, which detect and respond to temperature and humidity conditions, and then activate adaptive heaters as needed to evaporate excess moisture. Electrolux's petition was published in the **Federal Register** on December 10, 2010. 75 FR 76962. In its petition, Electrolux sought a waiver from the existing DOE test procedure because it takes neither ambient humidity nor adaptive technology into account. DOE did not receive any comments on the Electrolux petition.

Electrolux requested that it be permitted to use the same alternate test procedure DOE prescribed for GE, Whirlpool, and other companies manufacturing refrigerators and refrigerator-freezers equipped with a similar technology. Specifically, DOE granted GE, Whirlpool, Electrolux (3 waivers), LG, Samsung (2 waivers), and Haier waivers on February 27, 2008 (73

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

FR 10425); May 5, 2009 (74 FR 20695); December 15, 2009 (74 FR 66338), March 11, 2010 (75 FR 11530), April 29, 2010 (75 FR 22584); August 19, 2010 (75 FR 51264); March 18, 2010 (75 FR 13120), August 3, 2010 (75 FR 45623); and June 7, 2010 (75 FR 32175), respectively. The approved alternate test procedure simulates the energy used by the adaptive heaters in a typical consumer household, as explained in the respective decisions and orders referenced above. As DOE has stated in the past, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Since the publication of the December notice, DOE issued an interim final rule that prescribes a particular procedure to address the type of system employed by the Electrolux products at issue. See 75 FR 78810 (December 16, 2010). This procedure would apply to those products manufactured starting in 2014.

III. Consultations With Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Electrolux petition for waiver. The FTC staff did not have any objections to granting a waiver to Electrolux.

IV. Conclusion

After careful consideration of all the material that was submitted by Electrolux and consultation with the FTC staff, *it is ordered* that:

(1) The petition for waiver submitted by the Electrolux Home Products, Inc. (Case No. RF–017) is hereby granted as set forth in the paragraphs below.

(2) Electrolux shall not be required to test or rate the following Electrolux models: EI27BS**** FGUN26**** CFD26***on the basis of the current test procedures contained in 10 CFR part 430, subpart B, appendix A1. Instead, it shall be required to test and rate such products according to the alternate test procedure as set forth in paragraph (3) below:

(3) Electrolux shall be required to test the products listed in paragraph (2) above according to the test procedures for electric refrigerator-freezers prescribed by DOE at 10 CFR part 430, appendix A1, except that, for the Electrolux products listed in paragraph (2) only:

(A) The following definition is added at the end of Section 1:

1.13 Variable anti-sweat heater control means an anti-sweat heater where power supplied to the device is determined by an operating condition variable(s) and/or ambient condition variable(s).

(B) Section 2.2 is revised to read as follows:

2.2 Operational conditions. The electric refrigerator or electric refrigerator-freezer shall be installed and its operating conditions maintained in accordance with HRF–1–1979, section 7.2 through section 7.4.3.3, except that the vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. Unless shields or baffles obstruct the area, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height 1 foot (30.5 cm) above the unit under test. Defrost controls are to be operative. The anti-sweat heater switch is to be off during one test and on during the second test. In the case of an electric refrigerator-freezer equipped with variable anti-sweat heater control, the result of the second test will be derived by performing the calculation described in 6.2.3. Other exceptions are noted in 2.3, 2.4, and 5.1 below.

(C) New section 6.2.3 is inserted after section 6.2.2.2.

6.2.3 Variable anti-sweat heater control test. The standard cycle energy consumption of an electric refrigerator-freezer with a variable anti-sweat heater control in the on position (E_{on}), expressed in kilowatt-hours per day, shall be calculated equivalent to:

E_{ON} = E + (Correction Factor)

where E is determined by sections 6.2.1.1, 6.2.1.2, 6.2.2.1, or 6.2.2.2, whichever is appropriate, with the anti-sweat heater switch in the off position.

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) × (1 kW/1000 W)

Where:

Anti-sweat Heater Power = A1 * (Heater Watts at 5%RH)
+ A2 * (Heater Watts at 15%RH)
+ A3 * (Heater Watts at 25%RH)
+ A4 * (Heater Watts at 35%RH)
+ A5 * (Heater Watts at 45%RH)
+ A6 * (Heater Watts at 55%RH)
+ A7 * (Heater Watts at 65%RH)
+ A8 * (Heater Watts at 75%RH)
+ A9 * (Heater Watts at 85%RH)
+ A10 * (Heater Watts at 95%RH)

where A1–A10 are defined in the following table:

A1 = 0.034	A6 = 0.119
A2 = 0.211	A7 = 0.069
A3 = 0.204	A8 = 0.047
A4 = 0.166	A9 = 0.008
A5 = 0.126	A10 = 0.016

Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72°F ambient, and DOE reference temperatures of fresh food (FF) average temperature of 45 °F and freezer (FZ) average temperature of 5 °F.

System-loss Factor = 1.3

(4) Representations. Electrolux may make representations about the energy use of its adaptive control anti-sweat heater refrigerator-freezer products for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such representations fairly disclose the results of such testing.

(5) This waiver shall remain in effect consistent with the provisions of 10 CFR 430.27(m).

(6) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

(7) Grant of this waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

Issued in Washington, DC, on March 30, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–030]

Energy Conservation Program for Certain Industrial Equipment: Publication of the Petition for Waiver From Mitsubishi Electric and Electronics USA, Inc. and Granting of the Interim Waiver From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures

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

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from Mitsubishi Electric and Electronics USA, Inc. (Mitsubishi). The petition for waiver (hereafter "petition") requests a waiver from the U.S. Department of Energy (DOE) test procedure applicable to commercial package air-source central air conditioners and heat pumps. The petition is specific to additional indoor units of the Mitsubishi variable

capacity WR2, WY and S&L Class (commercial) multi-split heat pumps. Through this document, DOE: Solicits comments, data, and information with respect to the Mitsubishi petition; and announces the grant of an interim waiver to Mitsubishi from the existing DOE test procedure for the subject commercial multi-split air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the Mitsubishi petition until, but no later than May 6, 2011.

ADDRESSES: You may submit comments, identified by case number "CAC–030," by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [CAC–030] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., (Resource Room of the Building Technologies Program), Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except on Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings and waivers regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *AS_Waiver_Requests@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. E-mail: *mailto:Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency, including Part B of Title III, which establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles." (42 U.S.C. 6291–6309) Part C of Title III provides for a similar energy efficiency program titled "Certain Industrial Equipment," which includes commercial air conditioning equipment, package boilers, water heaters, and other types of commercial equipment.[1] (42 U.S.C. 6311–6317)

Today's notice involves commercial equipment under Part C. Part C specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, Part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

For commercial package air-conditioning and heating equipment, EPCA provides that "the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992." (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), the statute further directs the Secretary to amend the test procedure for a covered commercial product if the industry test procedure is amended, unless the Secretary determines, by rule and based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. Table 1 to Title 10 of the Code of Federal Regulations (10 CFR) 431.96 directs manufacturers of commercial package air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. The test procedures applicable to small commercial packaged air conditioning and heating water-source heat pumps, with capacities less than 135,000 Btu/h, are those included in ISO Standard 13256–1 (1998). The capacities of Mitsubishi's WR2 and WY CITY MULTI water-source products covered by this petition fall in that range. For commercial package air-source equipment with capacities between 65,000 and 760,000 Btu/h, ARI Standard 340/360–2004 is the applicable test procedure under 10 CFR 431.96. The capacities of Mitsubishi's S&L Class CITY MULTI commercial products fall in that range.

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect pursuant to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a

[1] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

determination on the petition for waiver. 10 CFR 431.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs first. It may be extended by DOE for an additional 180 days. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On February 18, 2011, Mitsubishi filed an application for interim waiver and a petition for waiver from the test procedures under 10 CFR 431.96 that apply to commercial package air and water-source air conditioners and heat pumps. Mitsubishi's petition requests a waiver from the applicable test procedures for its additional indoor models to be used with the WR2 and WY Series and S&L Class CITY MULTI products.

On December 15, 2009, DOE granted Mitsubishi waivers from the DOE commercial air conditioner and heat pump test procedures for Mitsubishi's WR2 and WY Series products and the S&L Class products. 74 FR 66311, 66315. Mitsubishi's February 18, 2011 petition lists additional models of indoor units for these multi-split systems. These include models in existing model families that have capacities not previously offered, as well as new indoor model families to be used with these systems. These additional indoor models face the same testing challenges as the models already covered by the WR2 and WY Series Waiver and the S&L Class Waiver.

Mitsubishi seeks a waiver from the applicable test procedures under 10 CFR 431.96 on the grounds that its WR2, WY and S&L Class multi-split heat pumps contain design characteristics that prevent testing according to the current DOE test procedures. DOE granted the WR2 and WY Series products a waiver because the basic model of these products contains one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. DOE made the same finding with respect to the S&L Class products, stating that the existing testing facilities have limited ability to test multiple indoor units at one time, and that the number of possible combinations of indoor and outdoor units is impractical to test, and thus granted Mitsubishi's requested waiver. The additional indoor models that are the subject of this petition would be used just as the products covered by the WR2 and WY Series Waiver and the S&L Class Waiver, and thus present exactly the same testing challenges.

As DOE found in its grant of the WR2 and WY Series Waiver and the S&L Class Waiver, indoor models are not the primary efficiency drivers for these systems—the primary efficiency drivers are the outdoor units. Mitsubishi is not proposing to add new outdoor units to the WR2 and WY Series Waiver and S&L Class Waiver. The indoor units described above will be combined with the same outdoor unit models covered by the prior waivers to create multi-split systems.

III. Application for Interim Waiver

On February 18, 2011, Mitsubishi also submitted an application for an interim waiver from the test procedures at 10 CFR 431.96 for its specified WR2, WY, and S&L equipment. DOE determined that Mitsubishi's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Mitsubishi might experience absent a favorable determination on its application for an interim waiver. DOE understands, however, that if it did not issue an interim waiver, Mitsubishi's products would not be tested and rated for energy consumption in the same manner as similar products for which DOE previously granted waivers. Furthermore, DOE has determined that it appears likely that Mitsubishi's petition for waiver will be granted and that is desirable for public policy reasons to grant Mitsubishi immediate relief pending a determination on the petition for waiver. DOE believes that it is likely Mitsubishi's petition for waiver for the new WR2, WY and S&L Class multi-split models will be granted because DOE has previously granted a number of waivers for similar product designs. The two principal reasons supporting the grant of the previous waivers also apply to Mitsubishi's WR2, WY and S&L Class products: (1) Test laboratories cannot test products with so many indoor units; and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. In addition, DOE believes that similar products should be tested and rated for energy consumption on a comparable basis. For these same reasons, DOE also determined that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

Therefore, *it is ordered that:*

The application for interim waiver filed by Mitsubishi is hereby granted for Mitsubishi's WR2, WY and S&L Class multi-split heat pumps, subject to the specifications and conditions below.

1. Mitsubishi shall not be required to test or rate its WR2, WY and S&L Class commercial multi-split products on the basis of the existing test procedures under 10 CFR 431.96, which incorporates by reference ARI 340/360–2004 (S&L Class) and ISO Standard 13256–1 (1998) (WR2 and WY classes).

2. Mitsubishi shall be required to test and rate its WR2, WY and S&L Class commercial multi-split products according to the alternate test procedure as set forth in section IV(3), "Alternate test procedure."

The interim waiver applies to the following indoor units:

- PCFY—Series—Ceiling Suspended—with a capacity of 15 MBtu/h
- PEFY Series—Ceiling Concealed Ducted (Low Profile)—with a capacity of 15 MBtu/h
- PKFY Series—Wall Mounted—with a capacity of 15 MBtu/h
- PLFY Series—4-Way Airflow Ceiling Cassette—with a capacity of 15 MBtu/h
- The PEFY–AF Series—100% outdoor air ventilation systems (Concealed ducted)—PEFY–AF1200CFM/CFMR**—with a maximum outside air ventilation capability of 1200 CFM
- The PVFY Series-Vertical air handler (Concealed ducted)—with capacities of 12/18/24/30/36/42/48/54 MBtu/h
- PWFY Series—Commercial Hot Water Heat Pump Indoor Units—with capacities of 36/72 MBtu/h and 36 MBtu/h with booster unit.
- PEFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h
- PLFY Series—2′-by-2′ frame 4-Way Airflow Ceiling Cassette—with capacities of 8/12/15 MBtu/h

This interim waiver is issued on the condition that the statements, representations, and documents provided by the petitioner are valid. DOE may revoke or modify this interim waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. MEUS may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of commercial package air conditioners and heat pumps for which it seeks a waiver from the DOE test procedure. In

addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR Part 431, Subpart T.

IV. Alternate Test Procedure

In responses to petitions for waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis from which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI products, as well as for its R22 multi-split products. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. See 72 FR 17528 and 72 FR 17533. The same alternate test procedure was specified in the December 15, 2009 waivers. For reasons similar to those published in these prior notices, DOE believes that an alternate test procedure is appropriate in this instance.

We further note that after DOE granted a waiver for Mitsubishi's multi-split products, ARI formed a committee to discuss testing issues and to develop a testing protocol for variable refrigerant flow systems. The committee has developed a test procedure which has been adopted by AHRI—"ANSI/AHRI 1230—2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment" and incorporated into ASHRAE 90.1—2010. The commercial multisplit waivers that DOE has granted to Mitsubishi and several other manufacturers and the alternate test procedure set forth in those waivers are consistent with AHRI 1230–2010. The waivers use a definition of "tested combination" that is substantially the same as the definition in AHRI 1230–2010. As a result, DOE is considering prescribing ANSI/AHRI 1230–2010 in the subsequent decision and order as the alternate test procedure for this Mitsubishi waiver. For the interim waiver, however, DOE will continue to require the use of the alternate test procedure prescribed in the past multisplit waivers.

Therefore, as a condition for granting this interim waiver to Mitsubishi, DOE is including an alternate test procedure similar to those granted to Mitsubishi in its previous waivers and identical to the ones granted on December 15, 2009. This alternate test procedure will allow Mitsubishi to test and make energy efficiency representations for its WR2, WY and S&L Class products. DOE has applied a similar alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps manufactured by Mitsubishi (72 FR 17528, April 9, 2007); Samsung (72 FR 71387, Dec. 17, 2007); Fujitsu (72 FR 71383, Dec. 17, 2007); Daikin (73 FR 39680, July 10, 2008); Daikin (74 FR 15955, April 8, 2009); Daikin (74 FR 16193, April 9, 2009); Daikin (74 FR 16373, April 10, 2009); Mitsubishi (74 FR 66311, 66315, December 15, 2009) and LG (74 FR 66330, December 15, 2009).

The alternate test procedure developed in conjunction with the Mitsubishi waiver permits Mitsubishi to designate a "tested combination" for each model of outdoor unit. The indoor units designated as part of the tested combination must meet specific requirements. For example, the tested combination must have from two to eight indoor units so that it can be tested in available test facilities. (The "tested combination" was originally defined to consist of one outdoor unit matched with between 2 and 5 indoor units. The maximum number of indoor units in a tested combination is increased in this instance from 5 to 8 to account for the fact that these larger-capacity products can accommodate a greater number of indoor units.) The tested combination must be tested according to the applicable DOE test procedure, as modified by the provisions of the alternate test procedure as set forth below. The alternate test procedure also allows manufacturers of such products to make valid and consistent representations of energy efficiency for their air-conditioning and heat pump products.

DOE plans to consider inclusion of the following waiver language in the decision and order for Mitsubishi's WR2, WY and S&L Class commercial multi-split water-source heat pump models:

Mitsubishi shall not be required to test or rate its WR2, WY and S&L Class commercial multi-split heat pumps according to the existing test procedures under Table 1 of 10 CFR 431.96, which incorporates by reference the Air-Conditioning and Refrigeration Institute (ARI) Standard 340/360–2004 for the air-source S&L Class products, and ISO Standard 13256–1998 for the water-source WR2 and WY Series products. Mitsubishi will be required, however, to test and rate its WR2, WY and S&L Class commercial multi-split heat pumps covered in this waiver according to the alternate test procedure as set forth below:

(A) Mitsubishi shall be required to test the basic models of WR2, WY and S&L Class water and air-source outdoor units and compatible indoor units listed in its petition for waiver dated February 18, 2011, according to the test procedures for commercial central air conditioners and heat pumps prescribed under 10 CFR 431.96, except that Mitsubishi shall test a "tested combination" selected in accordance with the provisions of subparagraph (B). For every other system combination using the same outdoor unit as the tested combination, Mitsubishi shall make representations concerning the WR2, WY and S&L Class equipment covered in this interim waiver according to the provisions of subparagraph (C).

(B) Tested combination. The term tested combination means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between two and five indoor units. (For systems with nominal cooling capacities greater than 150,000 Btu/h, as many as eight indoor units may be used, so that non-ducted indoor unit combinations can also be tested.) For multi-split systems, each of these indoor units shall be designed for individual operation.

(2) The indoor units shall—

(i) Represent the highest sales model family or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR part 430, subpart B, appendix M.

(C) *Representations.* In making representations about the energy efficiency of its WR2, WY and S&L Class variable capacity multi-split heat pump products for compliance, marketing, or other purposes, Mitsubishi must fairly disclose the results of testing under the DOE test procedure in a manner consistent with the provisions outlined below:

(1) For WR2, WY and S&L Class combinations tested in accordance with this alternate test procedure, Mitsubishi may make representations based on these test results.

(2) For WR2, WY and S&L Class combinations that are not tested, Mitsubishi may make representations of non-tested combinations at the same energy efficiency level as the tested combination. The outdoor unit must be the one used in the tested combination. The representations must be based on the test results for the tested combination. The representations may also be determined by an Alternative Rating Method approved by DOE.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the Mitsubishi petition for waiver from the test procedures applicable to Mitsubishi's WR2, WY and S&L Class commercial multi-split heat pump products. For the reasons articulated above, DOE also grants Mitsubishi an interim waiver from those procedures. As part of this notice, DOE is publishing Mitsubishi's petition for waiver in its entirety. The petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that Mitsubishi is required to follow as a condition of its interim waiver. In this alternate test procedure, DOE is defining a tested combination that Mitsubishi could use in lieu of testing all retail combinations of its WR2, WY and S&L Class multi-split heat pump products.

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: William Rau, Senior Vice President and General Manager, HVAC Advanced Products Division, Mitsubishi Electric & Electronics USA, Inc., 4300 Lawrenceville-Suwanee Road, Suwanee, GA 30024. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on March 30, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

February 18, 2011

The Honorable Cathy Zoi, Assistant Secretary for Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585–0121

Re: *Update to Previously-Granted Test Procedure Waivers for CITY MULTI VRFZ WR2 and WY Series and S&L Class Air Conditioners and Heat Pumps*

Dear Assistant Secretary Zoi:

On December 15, 2009, the Department of Energy (DOE) granted Mitsubishi Electric & Electronics USA, Inc. (MEUS) a waiver from the DOE commercial air conditioner and heat pump test procedures for MEUS's WR2 and WY Series products [1] and the S&L Class products.[2] These products are part of MEUS's CITY MULTI Variable Refrigerant Flow Zoning (VRFZ) line of multi-split central air conditioners and heat pumps. As explained in MEUS's petitions for waiver for the WR2 and WY Series and the S&L Class products, these systems cannot be tested according to the prescribed test procedures for commercial products. Pursuant to DOE's grant of the waivers, MEUS is not required to test or rate the products listed in the waivers based on the currently applicable test procedure. Instead, MEUS is required to test and rate these products according to the alternate test procedure set forth in the waivers.

MEUS has now developed additional models of indoor units for these multi-split systems. These include both models in certain existing model families that have capacities not previously offered, as well as new indoor model families to be used with these systems. These additional indoor models face the same testing challenges as the models already covered by the WR2 and WY Series Waiver and the S&L Class Waiver. Specifically, they contain one or more design characteristic that prevents testing according to the test procedures. Therefore, MEUS respectfully requests that DOE update the list of models covered by the applicable test procedure waivers to cover these additional indoor models.[3] MEUS simultaneously requests an interim waiver covering systems using these additional indoor models.

MEUS frames this request to update the list of models covered by two already-granted waivers pursuant to the requirements for granting new test procedure waivers.[4] Given that this request simply addresses the addition of certain new indoor models for MEUS's WR2 and WY Series and the S&L Class products, and that DOE previously has granted waivers for the outdoor units and other indoor units for these systems, if DOE would prefer to utilize a procedurally simpler approach for updating the covered list of models, MEUS would welcome such an approach.

Background

On October 30, 2006, MEUS submitted a Petition for Waiver from the test procedures applicable to the water-source WR2 and WY Series of its CITY MULTI VRFZ line of commercial package heat pump equipment. Mitsubishi sought a waiver from the applicable test procedures because the design characteristics of these models prevented testing according to the currently prescribed test procedures. Specifically, these models can connect an outdoor unit to many more indoor units than the test laboratories can physically test at one time, and it is not practical to test all of the potentially available combinations. DOE granted the requested waiver because "the basic model [of these products] contains one or more design characteristics which * * * prevent testing of the basic model according to the prescribed test procedures." [5] The waiver included an alternate test procedure pursuant to which MEUS must test and rate the products covered by the waiver.

On March 28, 2008, MEUS submitted a Petition for Waiver from the test procedures applicable to the S&L Class models from MEUS's CITY MULTI VRFZ line of commercial package heat pump equipment. MEUS based its request on the fact that the testing laboratories cannot test systems with so many indoor units, and that there are

[1] Energy Conservation Program for Certain Industrial Equipment: Decision and Order Granting a Waiver to Mitsubishi Electric and Electronics USA, Inc. From the Department of Energy Commercial Package Water-Source Heat Pump Test Procedure, 74 Fed. Reg. 66311 (Dec. 15, 2009) ("WR2 and WY Series Waiver").

[2] Energy Conservation Program for Certain Industrial Equipment: Decision and Order Granting a Waiver to Mitsubishi Electric & Electronics USA, Inc. From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures, 74 Fed. Reg. 66315 (Dec. 15, 2009) ("S&L Class Waiver").

[3] The existing WR2 and WY Series Waiver and S&L Class Waiver would remain in effect until DOE modifies those waivers in accordance with this request.

[4] See 10 CFR § 431.401.

[5] WR2 and WY Series Waiver at 66313.

too many possible combinations of indoor units with a single outdoor unit to test. DOE agreed with MEUS that the existing testing facilities have limited ability to test multiple indoor units at one time, and that the number of possible combinations of indoor and outdoor units is impractical to test, and thus granted MEUS's requested waiver.[6] DOE approved an alternate test procedure pursuant to which MEUS must test and rate the models covered by the waiver.

New Indoor Models

Both the WR2 and WY Series Waiver and the S&L Class Waiver covered the following indoor model families: (1) PCFY Series—Ceiling Suspended; (2) PEFY Series—Ceiling Concealed Ducted (Low Profile); (3) PKFY Series—Wall Mounted; and (4) PLFY Series—4-Way Airflow Ceiling Cassette. For each of these indoor model families, MEUS has developed an additional model with a capacity of 15 MBtu/h. At the time MEUS initially filed its petitions for waiver for the WR2 and WY Series and S&L Class products, this capacity product was not available. MEUS has developed this additional capacity product to meet customer demands for specialized applications.

When MEUS originally applied for a waiver for its WR2 and WY Series and its S&L Class products, it only included those indoor units that were being produced at that time. MEUS has now developed new indoor model types to expand its CITY MULTI product line to offer consumers a greater variety of available indoor units to suit consumers' specific needs. MEUS plans to add five new types of indoor unit families to the line-up of indoor units that can be matched with the CITY MULTI outdoor units. The new indoor model families will be: (1) PEFY–AF; (2) PVFY; (3) PWFY; (4) PLFY Series—2′-by-2′ frame 4-Way Airflow Ceiling Cassette; and (5) PEFY Series—Ceiling Concealed Ducted. The difference between these new indoor models and the models previously covered by the waivers relates to their application. All of the new models have been developed for specialized applications to meet consumers' unique demands.

MEUS requests that the WR2 and WY Series Waiver and the S&L Class Waiver be updated to cover the following additional indoor units:

- PCFY-Series-Ceiling Suspended—with a capacity of 15 MBtu/h
- PEFY Series-Ceiling Concealed Ducted (Low Profile)—with a capacity of 15 MBtu/h
- PKFY Series-Wall Mounted—with a capacity of 15 MBtu/h
- PLFY Series-4-Way Airflow Ceiling Cassette—with a capacity of 15 MBtu/h
- The PEFY–AF Series—100% outdoor air ventilation systems (Concealed ducted)—PEFY–AF1200CFM/CFMR**—with a maximum outside air ventilation capability of 1200 CFM
- The PVFY Series—Vertical air handler (Concealed ducted)—with capacities of 12/18/24/30/36/42/48/54 MBtu/h
- PWFY Series—Commercial Hot Water Heat Pump Indoor Units—with capacities of 36/72 MBtu/h and 36 MBtu/h with booster unit.
- PEFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h
- PLFY Series—2′-by-2′ frame 4-Way Airflow Ceiling Cassette—with capacities of 8/12/15 MBtu/h

For DOE's convenience, MEUS is attaching comprehensive lists of all of the models for the WR2 and WY Series and S&L Class systems that include the outdoor and indoor models covered by previously granted waivers in the WR2 and WY Series Waiver and the S&L Class Waiver, plus the additional indoor models that are the subject of this petition. MEUS respectfully requests that DOE replace, in its entirety, the lists of models included in the WR2 and WY Series Waiver and the S&L Class Waiver with the lists included as Attachment A and Attachment B to this petition upon grant of this waiver petition. Having an updated comprehensive list will assist DOE and market participants in easily keeping track of all of the WR2 and WY Series and S&L Class models that are subject to a DOE-granted waiver.

Test Procedures From Which Waiver Is Requested

MEUS's petition requests waiver from the applicable test procedures for its additional indoor models to be used with the WR2 and WY Series and S&L Class CITY MULTI products.

For the water source products, DOE's regulations provide the test procedures for small and large commercial package air conditioning and heating equipment.[7] Pursuant to 10 CFR § 431.96, the test procedures applicable to small commercial packaged air conditioning and heating water-source heat pumps, with capacities less than 135,000 Btu/h, are those included in ISO Standard 13256–1 (1998).[8] The capacities of MEUS's WR2 and WY CITY MULTI water-source products covered by this petition fall in that range. Therefore, MEUS requests waiver from ISO Standard 13256–1 (1998), as incorporated by reference in DOE's regulations for its WR2 and WY Series products.

MEUS's petition also requests waiver from the commercial test procedures for its S&L Class products. For commercial package air conditioning equipment with capacities between 65,000 and 760,000 Btu/h, ARI Standard 340/360–2004 is the applicable test procedure under 10 CFR § 431.96. The capacities of MEUS's S&L Class CITY MULTI products sold for commercial use fall in that range. Therefore, MEUS requests waiver from ARI Standard 340/360–2004 as incorporated by reference in DOE's regulations for MEUS's S&L Class products.

MEUS proposes to test and rate a tested combination for each individual outdoor unit of the WR2 and WY Series products and the S&L Class products pursuant to the applicable alternate test procedure already specified in the WR2 and WY Series Waiver and the S&L Class Waiver, as discussed below.

Need for Waiver of Test Procedures

The Department's regulations contain provisions allowing a person to seek a waiver from the test procedure requirements for commercial equipment. These provisions are set forth in 10 CFR § 431.401. The waiver provisions allow DOE to temporarily waive test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data.[9]

As explained above, DOE granted the WR2 and WY Series products a waiver because "the basic model [of these products] contains one or more design characteristics which * * * prevent testing of the basic model according to the prescribed test procedures."[10] DOE made the same finding with respect to the S&L Class products, stating that the existing testing facilities have limited ability to test multiple indoor units at one time, and that the number of possible combinations of indoor and outdoor units is impractical to test, and thus granted MEUS's requested

[6] S&L Class Waiver at 66317.

[7] 10 CFR § 431.96.

[8] 10 CFR § 431.96, Table 1.

[9] 10 CFR § 431.401(a)(1).

[10] WR2 and WY Series Waiver at 66313.

waiver.[11] The additional indoor models that are the subject of this petition would be used just as the products covered by the WR2 and WY Series Waiver and the S&L Class Waiver, and thus present exactly the same testing challenges. Thus, DOE should grant the requested waiver.

As DOE found in its grant of the WR2 and WY Series Waiver and the S&L Class Waiver, indoor models are not the primary efficiency drivers for these systems—the primary efficiency drivers are the outdoor units.[12] MEUS is not proposing to add new outdoor units to the WR2 and WY Series Waiver and S&L Class Waiver. The indoor units described above will be combined with the same outdoor unit models covered by the prior waivers to create VRFZ systems.

It should be noted that these CITY MULTI products employ advanced technologies and their marketing will advance the goals of the Energy Policy and Conservation Act (EPCA) to promote energy efficiency. Testing procedures should not inhibit the commercial success of these products in the United States. Without a waiver of the test procedures, MEUS will be at a competitive disadvantage in the market. Consumers have come to expect the availability of the CITY MULTI products in the U.S. marketplace, and a significant number of engineers and contractors are currently requesting these WR2 and WY and S&L Class products for their projects because of the great advantages they offer. Thus, MEUS respectfully requests that DOE grant a waiver from the applicable test procedures.

Alternative Test Procedures

Both the WR2 and WY Series Waiver and the S&L Class Waiver include alternate test procedures pursuant to which MEUS tests and rates its water source and S&L class products.[13] No changes to those alternate test procedures are needed to cover the additional indoor units that are the subject of this petition. Therefore, MEUS requests that the products listed herein be subject to the same alternate test procedures as in the WR2 and WY Series Waiver and the S&L Class Waiver, as applicable.

For DOE's convenience, MEUS is reproducing the alternate test procedures included in the WR2 and WY Series Waiver and the S&L Class Waiver as Attachment C and Attachment D to this petition.

Similar Products

To the best of our knowledge, water-source VRFZ products or products similar to MEUS's S&L Class products are also offered in the United States by Daikin AC (Americas), LG Electronics U.S.A., Inc., Fujitsu Gen America Inc, Samsung Electronics Company, LTD., and Sanyo Fisher (USA) Corp.

Application for Interim Waiver

Pursuant to 10 CFR § 431.401(a)(2), MEUS also submits an application for interim waiver of the applicable test procedures for the WR2 and WY CITY MULTI indoor models and the S&L Class indoor models listed above. DOE's regulations contain provisions allowing DOE to grant an interim waiver from the test procedure requirements to manufacturers that have petitioned the Department for a waiver of such prescribed test procedures.[14] As DOE has stated, "an Interim Waiver will be granted if it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination for the Petition for Waiver."[15] MEUS will experience economic hardship if the application for interim waiver is denied. Additionally, precedent indicates that DOE will likely grant MEUS's petition for waiver. Finally, it is in the public interest to grant an interim waiver. Therefore, MEUS respectfully requests DOE to grant the application for interim waiver.

MEUS plans to introduce the additional WR2 and WY Series and the S&L Class indoor models into the U.S. market soon. The procedure for granting a waiver is a time-consuming process—DOE must publish the request in the **Federal Register,** allow time for public comment, and then consider any comments before it makes a decision. Thus, the process typically takes a number of months. If an interim waiver is not granted, MEUS will suffer economic hardship because MEUS will be required to delay its introduction of these products to U.S. customers.

In addition, DOE will likely grant MEUS's request to update the previously-granted waivers to include the products covered by this request. As described above, DOE has already granted a waiver for the WR2 and WY Series and S&L Class products. The indoor models that are the subject of this request include the same design characteristics that prevented testing of the basic model of the products listed in the WR2 and WY Series Waiver and the S&L Class Waiver. The best evidence that DOE is likely to grant this request is the fact that it previously granted similar waivers to MEUS and other manufacturers.[16]

[11] S&L Class Waiver at 66317.

[12] "DOE believes that allowing MEUS to make energy efficiency representations for non-tested combinations by adopting this alternative test procedure as described above is reasonable because the outdoor unit is the principal efficiency driver." S&L Class Waiver at 66317. *See also* WR2 and WY Series Waiver at 66313.

[13] WR2 and WY Series Waiver at 66313; S&L Class Waiver at 66317.

[14] 10 CFR § 431.401(a)(2).

[15] *Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Granting of the Application for Interim Waiver of Samsung Air Conditioning From the DOE Residential and Commercial Package Air Conditioner and Heat Pump Test Procedures (Case No. CAC–009),* 70 Fed. Reg. 9629 at 9630 (Feb. 28, 2005). *See* 10 CFR § 431.201(e)(3) (2005).

[16] *See* WR2 and WY Series Waiver and the S&L Class Waiver. *See also, Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver From the DOE Commercial Package Air Conditioner and Heat Pump Test Procedure to Mitsubishi Electric (Case No. CAC–008),* 69 Fed. Reg. 52660 (Aug. 27, 2004); *Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver From the Department of Energy (DOE) Residential and Commercial Package Air Conditioner and Heat Pump Test Procedures to Mitsubishi Electric, and Modification of a 2004 Waiver Granted to Mitsubishi Electric From the Same DOE Test Procedures (Case No. CAC–012),* 72 Fed. Reg. 17528 (Apr. 9, 2007); *Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Fujitsu General From the Department of Energy Residential Central Air Conditioner and Heat Pump Test Procedure [Case No. CAC–010],* 72 Fed. Reg. 71383 (Dec. 17, 2007); *Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Samsung Air Conditioning From the Department of Energy Residential and Commercial Package Air Conditioner and Heat Pump Test Procedures [Case No. CAC–009],* 72 FR 71387 (Dec. 17, 2007); *Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Daikin U.S. Corporation From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures and Denying a Waiver From the Residential Central Air Conditioner and Heat Pump Test Procedures,* 73 Fed. Reg. 39680 (July 10, 2008); *Energy Conservation Program for Commercial Equipment: Decision and Order Granting a Waiver to Daikin AC (Americas), Inc. From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures,* 74 Fed. Reg. 15955 (Apr. 8, 2009); *Energy Conservation Program for Commercial Equipment: Decision and Order Granting a Waiver to Sanyo Fisher Company From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedure and Denying a Waiver From the Residential Central Air Conditioner and Heat Pump Test Procedure,* 74 Fed. Reg. 16193 (Apr. 9, 2009); *Energy Conservation Program for Certain Industrial Equipment: Decision and Order Granting a Waiver to Daikin AC (Americas), Inc. From the Department of Energy Commercial Package Water-Source Air Conditioner and Heat Pump Test Procedure,* 74 FR 16373 (Apr. 10, 2009); *Energy Conservation Program for Commercial Equipment: Decision and Order Granting a Waiver to Daikin AC (Americas), Inc. (Daikin) From the Department of Energy Commercial Package Air*

Finally, DOE's regulations state that the Assistant Secretary may grant an interim waiver if he determines that it would be desirable for public policy reasons to grant immediate relief pending a determination for the Petition for Waiver. In response to MEUS's Application for Interim Waiver for its WR2 and WY products, DOE stated that "in those instances where the likely success of the Petition for Waiver has been demonstrated, based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis." [17] The same conclusion should be reached with respect to the additional indoor models listed in this petition. These products will suffer the same testing obstacles as the products covered by the earlier waivers. Therefore, since it is in the public interest to have similar products tested and rated on a comparable basis, DOE should grant MEUS's Application for Interim Waiver.

Conclusion

MEUS respectfully requests that DOE update the list of models covered by WR2 and WY Series Waiver and the S&L Class Waiver to cover the additional indoor models listed in this request. DOE should grant this request because the list of covered products, as updated, "contain[] one or more design characteristics which * * * prevent testing of the basic model according to the prescribed test procedures." [18] MEUS further requests DOE to grant its request for an interim waiver while this request is pending.

If you have any questions or would like to discuss this request, please contact Paul Doppel, at (678) 376–2923, or Douglas Smith at (202) 298–1902. We greatly appreciate your attention to this matter.

Sincerely,

William Rau, Senior Vice President and General Manager, HVAC Advanced Products Division, Mitsubishi Electric & Electronics USA, Inc., 4300 Lawrenceville-Suwanee Road, Suwanee, GA 30024.

Attachments

CERTIFICATE

I hereby certify that I have this day served the foregoing Petition for Waiver and Application for Interim Waiver upon the following companies known to Mitsubishi Electric & Electronics USA, Inc. to currently market systems in the United States that appear to be similar to the WR2 and WY Series or the S&L CITY MULTI VRFZ system design. I have notified these manufacturers that the Assistant Secretary for Energy Efficiency and Renewable Energy will receive and consider timely written comments on the Application for Interim Waiver.

Daikin AC (Americas), Inc., 1645 Wallace Drive, Suite 110, Carrollton, TX 75006, Attn: Mike Bregenzer, VP and GM.

LG Electronics U.S.A., Inc., 1000 Sylvan Ave, Englewood Cliffs, NJ 07632, Attn: Johnson Christopher, Environmental Manager.

Samsung Air Conditioning, Samsung Electronics Company, LTD., 3001 Northern Star Blvd, Ft Worth TX 76137, Attn: Matt Wall.

Sanyo Commercial Solutions, HVAC Solutions, 1690 Roberts Blvd Nw, Suite 110, Kennesaw, GA 301, Attn: Gary Nettinger, Vice President, Technical Solutions.

Fujitsu General America, 353 US Highway 46, Fairfield, NJ 07004–2437, Attn: Rozylowicz Tedd, President & COO.

Dated this 18th day of February, 2011.

William Rau, Senior Vice President and General Manager, HVAC Advanced Products Division, Mitsubishi Electric & Electronics USA, Inc., 3400 Lawrenceville-Suwanee Road, Suwanee, GA 30024.

Attachment A

Complete List of Models for the WR2 and WY Series (As updated in February 2011)

CITY MULTI Variable Refrigerant Flow Zoning System Outdoor Equipment:

- WY-Series (PQHY) 208/230–3–60 and 460–3–60 split-system, water-sourced, variable-speed heat pumps with individual model nominal cooling capacities of 72,000, 96,000, 108,000 and 120,000 Btu/h.
- WR2-Series (PQRY) 208/230–3–60 and 460–3–60 split-system, water-sourced, variable-speed heat pumps with heat recovery and with individual model nominal cooling capacities of 72,000, 96,000, 108,000 and 120,000 Btu/h.

*CITY MULTI Variable Refrigerant Flow Zoning System Indoor Equipment: P*FY indoor models, ranging from 6,000 to 48,000 Btu/h, 208/230–1–60 and from 72,000 to 120,000 Btu/h, 208/230–3–60 for use in split system variable-capacity air conditioner or heat pump systems:*

- PCFY Series—Ceiling Suspended—with capacities of 12/15/18/24/30/36 MBtu/h.
- PDFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted (Low Profile)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted (Alternate High Static Option)—with capacities of 15/18/24/27/30/36/48/54/72/96 MBtu/h.
- PEFY–F Series—Ceiling Concealed Ducted (100% OA Option)—with capacities of 30/54/72/96/120 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h.
- The PEFY–AF Series—100% outdoor air ventilation systems (Concealed ducted)—PEFY–AF1200CFM/CFMR**—with a maximum outside air ventilation capability of 1200 CFM.
- PFFY Series—Floor Standing (Concealed)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PFFY Series—Floor Standing (Exposed)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PKFY Series—Wall-Mounted—with capacities of 06/08/12/15/18/24/30 MBtu/h.
- PLFY Series—4-Way Airflow Ceiling Cassette—with capacities of 12/15/18/24/30/36 MBtu/h.
- PLFY Series—2′-by-2′ frame 4-Way Airflow Ceiling Cassette —with capacities of 8/12/15 MBtu/h.
- PMFY Series—1–Way Airflow Ceiling Cassette—with capacities of 06/08/12/15 MBtu/h.
- PVFY Series—Vertical air handler (Concealed ducted)—with capacities of 12/18/24/30/36/42/48/54 MBtu/h
- PWFY Series—Commercial Hot Water Heat Pump Indoor Units—with capacities of 36/72 MBtu/h and 36 MBtu/h with booster unit.

Attachment B

Complete List of Models for the S&L Class Systems (As Updated in February 2011)

CITY MULTI Variable Refrigerant Flow Zoning System Outdoor Equipment:

- Y–Series (PUHY) 208/230–3–60 and 460–3–60 split-system variable-speed heat pumps with individual model nominal capacities ranging from 65,000 to 144,000 Btu/h, and combined model nominal capacities ranging from 130,000 to 480,000 Btu/h.
- H2I–Series (PUHY–HP) 208/230–3–60 and 460–3–60 split-system variable speed heat pumps with hyper-heat technology, with individual model nominal capacities ranging from 65,000 to 120,000 Btu/h, and combined model nominal capacities ranging from 130,000 to 300,000 Btu/h.
- R2–Series (PURY) 208/230–3–60 and 460–3–60 split-system variable speed heat pumps with heat recovery and with individual model nominal capacities ranging from 65,000 to 144,000 Btu/h, and combined model nominal capacities ranging from 130,000 to 300,000 Btu/h.

Conditioner and Heat Pump Test Procedures, 75 Fed. Reg. 22581 (Apr. 29, 2010); and *Energy Conservation Program for Certain Commercial and Industrial Equipment: Decision and Order Granting a Waiver to Sanyo North America Corporation From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedures,* 75 Fed. Reg. 41845 (July 19, 2010);

[17] *Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Granting of the Application for Interim Waiver of Mitsubishi Electric From the DOE Commercial Water Source Heat Pump Test Procedure [Case No. CAC–015],* 72 Fed. Reg. 17533 at 17535 (Apr. 9, 2007).

[18] 10 CFR § 431.201(a)(1) (2005).

CITY MULTI Variable Refrigerant Flow Zoning System Indoor Equipment:

*P*FY indoor models, ranging from 6,000 to 48,000 Btu/h, 208/230–1–60 and from 72,000 to 120,000 Btu/h, 208/230–3–60 for use in split system variable-capacity air conditioner or heat pump systems:*

- PCFY Series—Ceiling Suspended—with capacities of 12/15/18/24/30/36 MBtu/h.
- PDFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted (Low Profile)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted (Alternate High Static Option)—with capacities of 15/18/24/27/30/36/48/54/72/96 MBtu/h.
- PEFY–F Series—Ceiling Concealed Ducted (100% OA Option)—with capacities of 30/54/72/96/120 MBtu/h.
- PEFY Series—Ceiling Concealed Ducted—with capacities of 06/08/12/15/18/24/27/30/36/48 MBtu/h.
- The PEFY–AF Series—100% outdoor air ventilation systems (Concealed ducted)—PEFY–AF1200CFM/CFMR**—with a maximum outside air ventilation capability of 1200 CFM.
- PFFY Series—Floor Standing (Concealed)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PFFY Series—Floor Standing (Exposed)—with capacities of 06/08/12/15/18/24 MBtu/h.
- PKFY Series—Wall-Mounted—with capacities of 06/08/12/15/18/24/30 MBtu/h.
- PLFY Series—4–Way Airflow Ceiling Cassette—with capacities of 12/15/18/24/30/36 MBtu/h.
- PLFY Series—2′-by-2′ frame 4-Way Airflow Ceiling Cassette—with capacities of 8/12/15 MBtu/h.
- PMFY Series—1-Way Airflow Ceiling Cassette—with capacities of 06/08/12/15 MBtu/h.
- PVFY Series—Vertical air handler (Concealed ducted)—with capacities of 12/18/24/30/36/42/48/54 MBtu/h
- PWFY Series—Commercial Hot Water Heat Pump Indoor Units—with capacities of 36/72 MBtu/h and 36 MBtu/h with booster unit.

Attachment C

Alternate Test Procedure for the WR2 and WY Series (Established in the WR2 and WY Waiver, Dec. 15, 2009)

(A) Mitsubishi shall be required to test its water-source WR2 and WY series models of its CITY MULTI VRFZ equipment according to those test procedures for commercial package air conditioners and heat pumps prescribed at 10 CFR Part 431.96, except that:

(i) Mitsubishi shall test a "tested combination" selected in accordance with the provisions of subparagraph (B) of this paragraph. For every other system combination using the same outdoor unit as the tested combination, Mitsubishi shall make representations concerning the WR2 and WY CITY MULTI equipment covered in this waiver according to the provisions of subparagraph (C) below.

(B) Tested combination. The term "tested combination" means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of an outdoor unit that is matched with between two and five indoor units.

(2) The indoor units shall—

(i) Represent the highest sales model family, or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity between 95 percent and 105 percent of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50 percent of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) All be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR Part 430, Subpart B, Appendix M.

(C) Representations. In making representations about the energy efficiency of its WR2 and WY CITY MULTI VRFZ equipment, for compliance, marketing, or other purposes, Mitsubishi must fairly disclose the results of testing under the DOE test procedure, doing so in a manner consistent with the provisions outlined below:

(i) For WR2 and WY CITY MULTI VRFZ combinations tested in accordance with this alternate test procedure, Mitsubishi may make representations based on these test results.

(ii) For WR2 and WY CITY MULTI VRFZ combinations that are not tested, Mitsubishi may make representations based on the testing results for the tested combination and which are consistent with either of the two following methods:

(a) Representation of non-tested combinations according to an Alternative Rating Method (ARM) approved by DOE; or

(b) Representation of non-tested combinations at the same energy efficiency level as the tested combination with the same outdoor unit.

(5) This waiver shall remain in effect from the date of issuance of this Decision and Order consistent with the provisions of 10 CFR 431.401(g).

(6) This waiver is conditioned upon the presumed validity of statements, representations, and documentary materials provided by the petitioner. This waiver may be revoked or modified at any time upon a determination that the factual basis underlying the petition is incorrect, or DOE determines that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

Attachment D—Alternate Test Procedure for S&L Class Products (Established in S&L Class Waiver, Dec. 15, 2009)

(A) MEUS shall be required to test the products listed in paragraph (2) above according to the test procedure for central air conditioners and heat pumps prescribed by DOE at 10 CFR Part 431 (ARI 340/360–2004, incorporated by reference in 10 CFR 431.95(b)(2)), except that MEUS shall test a "tested combination" selected in accordance with the provisions of subparagraph (B) of this paragraph. For every other system combination using the same outdoor unit as the tested combination, MEUS shall make representations concerning the S&L Class products covered in this waiver according to the provisions of subparagraph (C) below.

(B) Tested combination. The term "tested combination" means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this waiver, the tested combination shall have the following features:

(i) The basic model of a variable refrigerant flow system used as a tested combination shall consist an outdoor unit (an outdoor unit can include multiple outdoor units that have been manifolded into a single refrigeration system, with a specific model number) that is matched with between 2 and 8 indoor units in total; for multi-split systems, each of these indoor units shall be designed for individual operation.

(ii) The indoor units shall—

(a) Represent the highest sales model family, or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(b) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(c) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(d) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(e) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR Part 430, Subpart B, Appendix M.

(C) Representations. In making representations about the energy efficiency of its S&L Class variable speed and variable refrigerant volume air-cooled multi-split heat pump and heat recovery system products, for compliance, marketing, or other purposes, Mitsubishi must fairly disclose the results of testing under the DOE test procedure, doing so in a manner consistent with the provisions outlined below:

(i) For S&L Class combinations using a single outdoor unit tested in accordance with this alternate test procedure, Mitsubishi may make representations based on these test results.

(ii) For S&L Class combinations using a single outdoor unit that have not been tested, Mitsubishi may make representations based

on the testing results for the tested combination and which are consistent with either of the two following methods:

(a) Representation of non-tested combinations according to an Alternative Rating Method (ARM) approved by DOE; or

(b) Representation of non-tested combinations at the same energy efficiency level as the tested combination with the same outdoor unit.

(iii) For S&L Class combinations utilizing multiple outdoor units that have been tested in accordance with this alternate test procedure, MEUS may make representations based on those test results.

(iv) For S&L Class combinations utilizing multiple outdoor units that have not been tested, MEUS may make representations which are consistent with any of the three following methods:

(a) Representation of non-tested combinations according to an Alternative Rating Method ("ARM") approved by DOE.

(b) Representation of non-tested combinations at the same energy efficiency level as the tested combination with the same combination of outdoor units.

(c) Representation of non-tested combinations based on the capacity weighted average of the efficiency ratings for the tested combinations for each of the individual outdoor units used in the system, as determined in accordance with the provisions of this alternate test procedure.

(4) This waiver shall remain in effect from the date of issuance of this Order consistent with the provisions of 10 CFR 431.401(g).

(5) This waiver is conditioned upon the presumed validity of statements, representations, and documentary materials provided by the petitioner. This waiver may be revoked or modified at any time upon a determination that the factual basis underlying the Petition for Waiver is incorrect, or DOE determines that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

[FR Doc. 2011–8145 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CD–006]

Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Notice of Granting the Application for Interim Waiver of BSH Home Appliances Corporation From the Department of Energy Residential Clothes Dryer Test Procedure

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

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for public comments.

SUMMARY: This notice announces receipt of and publishes the BSH Home Appliances Corporation (BSH) petition for waiver (hereafter, "petition") from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of residential clothes dryers. The waiver request pertains to BSH's specified models of condensing residential clothes dryers. The existing test procedure does not apply to condensing clothes dryers. In addition, today's notice grants BSH an interim waiver from the DOE test procedure applicable to residential clothes dryers. DOE solicits comments, data, and information concerning BSH's petition.

DATES: DOE will accept comments, data, and information with respect to BSH's Petition until May 6, 2011.

ADDRESSES: You may submit comments, identified by case number CD–006, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. CD–005] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Petition for Waiver Case No. CD–005, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings regarding similar clothes dryers. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *Michael.Raymond@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. Telephone: (202) 287–6111. E-mail: *Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential clothes dryers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)). The test procedure for clothes dryers is contained in 10 CFR part 430, subpart B, appendix D.

DOE's regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner evaluate the basic model in a manner representative of its energy consumption. 10 CFR

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

430.27(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(a)(2); 430.27(g). An interim waiver remains in effect for a period of 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary. 10 CFR 430.27(h).

II. Petition for Waiver of Test Procedure

On December 28, 2009, BSH filed a petition for waiver and an application for interim waiver from the test procedure applicable to residential clothes dryers set forth in 10 CFR Part 430, Subpart B, Appendix D. BSH seeks a waiver from the applicable test procedure for its Bosch WTC82100US and Bosch WTE86300US product models because, BSH asserts, design characteristics of these models prevent testing according to the currently prescribed test procedure, as described in greater detail in the following paragraph. DOE previously granted Miele Appliance, Inc. (Miele) a waiver from test procedures for two similar condenser clothes dryer models (T1565CA and T1570C). 60 FR 9330 (Feb. 17, 1995). DOE granted Miele an interim waiver for similar additional products on February 1, 2011. (76 FR 5567). DOE also granted waivers for the same type of clothes dryer to LG Electronics (73 FR 66641, Nov. 10, 2008), Whirlpool Corporation (74 FR 66334, Dec. 15, 2009) and General Electric (75 FR 13122, Mar. 18, 2010). BSH claims that its condenser clothes dryers cannot be tested pursuant to the DOE procedure and requests that the same waiver granted to other manufacturers be granted for BSH's Bosch WTC82100US and Bosch WTE86300US models.

In support of its petition, BSH claims that the current clothes dryer test procedure applies only to vented clothes dryers because the test procedure requires the use of an exhaust restrictor on the exhaust port of the clothes dryer during testing. Because condenser clothes dryers operate by blowing air through the wet clothes, condensing the water vapor in the airstream, and pumping the collected water into either a drain line or an in-unit container, these products do not use an exhaust port like a vented dryer does. BSH plans to market a condensing clothes dryer for situations in which a conventional vented clothes dryer cannot be used, such as high-rise apartments and condominiums; the construction of these types of buildings does not permit the use of external venting.

The BSH Petition requests that DOE grant a waiver from the existing test procedure to allow the sale of two models (Bosch WTC82100US and Bosch WTE86300US) until DOE prescribes final test procedures and minimum energy conservation standards appropriate to condenser clothes dryers. Similar to the other manufacturers, BSH did not include an alternate test procedure in its petition.

III. Application for Interim Waiver

BSH also requests an interim waiver from the existing DOE test procedure for immediate relief. Under 10 CFR 430.27(b)(2) each application for interim waiver "shall demonstrate likely success of the Petition for Waiver and shall address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver." An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.27(g).

DOE has determined that BSH's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship BSH might experience absent a favorable determination on its application for interim waiver. DOE understands, however, that the BSH condensing clothes dryers have a feature that prevents testing them according to the existing DOE test procedure. In addition, as stated in the previous section, DOE has previously granted waivers to Miele, LG, Whirlpool and GE for similar products. It is in the public interest to have similar products tested and rated for energy consumption on a comparable basis, where possible. Further, DOE has determined that BSH is likely to succeed on the merits of its petition for waiver and that it is desirable for policy reasons to grant immediate relief.

For the reasons stated above, DOE grants BSH's application for interim waiver from testing of its condensing clothes dryer product line. Therefore, *it is ordered that:*

The application for interim waiver filed by BSH is hereby granted for BSH's Bosch WTC82100US and Bosch WTE86300US condensing clothes dryers. BSH shall not be required to test its Bosch WTC82100US and Bosch WTE86300US condensing clothes dryers on the basis of the test procedure under 10 CFR part 430 subpart B, appendix D.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may or may not be manufactured by the petitioner. BSH may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of clothes dryers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

IV. Summary and Request for Comments

Through today's notice, DOE grants BSH an interim waiver from the specified portions of the test procedure applicable to BSH's Bosch WTC82100US and Bosch WTE86300US condensing clothes dryers and announces receipt of BSH's petition for waiver from those same portions of the test procedure. DOE publishes BSH's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Dr. Uwe Mette, Director, Engineering Laundry Products, BSH Home Appliances Corporation, 5551 McFadden Avenue, Huntington Beach, CA 92649. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC on March 30, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

December 28, 2009
Catherine Zoi
Energy Efficiency and Renewable Energy
Department of Energy
1000 Independence Avenue, SW., Washington, DC 20585.

Re: *Petition of Waiver and Application for Interim Waiver, BSH Condenser Clothes Dryers*

Dear Assistant Secretary: BSH Home Appliances Corporation ("BSH") hereby submits this Petition for Waiver and Application for Interim Waiver, pursuant to 10 CFR 430.27, for its condenser clothes dryers. A waiver was granted to Miele Appliance, Inc. for the same type of product. 60 FR 9330 (Feb. 17, 1995).

BSH is the manufacturer of household appliances bearing the brand names of Bosch, Thermador, and Gaggenau. Its appliances include washing machines, clothes dryers, refrigerator-freezers, ovens, microwave ovens, dishwashers, and vacuum cleaners, and are sold worldwide, including in the United States. BSH's United States operations are headquartered in Huntington Beach, California. BSH's residential clothes dryers are produced in the United States and Poland.

BSH markets highly efficient, advanced-design condenser (non-vented) clothes dryers. The current BSH model numbers of these products are Bosch WTC82100US and Bosch WTE86300US. This product does not vent exhaust air to the outside as a conventional dryer does, but rather uses ambient air to cool the hot, humid air inside the appliance thereby condensing out the moisture. There is no exhaust air, only a wastewater stream that can be drained into a water container. This type of product is suited for installation conditions where exhaust venting is not practical or is cost prohibitive. It thus benefits those dwellers of high-rise apartments and others who in many cases have no way to vent to the outside or at least not without considerable remodeling/construction expense. The advantageous no-exhaust design characteristic produces a more complex drying process than the regular vented dryer.

Condenser clothes dryers offer additional utility to the consumer that affects energy consumption, and the characteristics of the product are not reflected by the test procedure. The condenser clothes dryer does not have an outside vent exhaust, and extracting the moisture from the warm moist air in the drum requires more energy to dry clothes than simply exhausting the warm moist air to the outdoors.[1]

DOE's existing test procedure for clothes dryers requires the use of an exhaust restrictor to simulate the backpressure effects of a vent tube in an installed condition. And the test procedure does not provide any definition or mention of condenser clothes dryers. Since BSH's condenser clothes dryers do not have an exhaust vent and the DOE test procedure does not provide any definition or mention of condenser clothes dryers, the products cannot be tested in accordance with the test procedure. Thus, the test procedure does not apply to them. Consequently, the DOE energy conservation standard for clothes dryers does not apply to BSH condenser dryers since the DOE standard must be "determined in accordance with test procedures prescribed under section 6293 of this title." 42 U.S.C. 6291(6).

These circumstances clearly warrant a waiver. 10 CFR 430.27 provides for waiver of DOE test procedures on the grounds that a basic model contains design characteristics that either prevent testing according to the prescribed test procedure or produce data so unrepresentative of a covered product's true energy consumption characteristics as to provide materially inaccurate comparative data. As discussed above, the BSH condenser clothes dryer contains a design characteristic—lack of an exhaust—that prevents testing according to the DOE test procedure. Further, the test procedure does not provide any definition or mention of condenser clothes dryers. A waiver should therefore be granted that provides that BSH is not required to test its condenser clothes dryers. The existing minimum energy conservation standard for clothes dryers also should not apply to these BSH condenser clothes dryers. The waiver should remain in effect until DOE prescribes final test procedures and minimum energy conservation standards appropriate to BSH's condenser clothes dryers.

That a waiver is warranted is borne out by the fact that DOE has granted a waiver to Miele for the same type of product. 60 FR 9330 (Feb. 17, 1995). DOE stated: "The Department agrees with Miele and AHAM that the condenser clothes dryer offers the consumer additional utility, and is justified to consum[e] more energy (lower energy factor) versus non-condenser clothes dryers. Furthermore, the Department believes that the existing clothes dryer test procedure is not applicable to the Miele condenser clothes dryers. This assertion is based on the fact that the existing test procedure requires the use of an exhaust restrictor and does not provide any definition or mention of condenser clothes dryers. The Department agrees with Miele that the current clothes dryer minimum energy conservation standard does not apply to Miele's condenser clothes dryers. Today's Decision and Order exempts Miele from testing its condenser clothes dryer and determining an Energy Factor. The Department is not publishing an amended test procedure for Miele at this time because there is not any reason to. The existing minimum energy conservation standard for clothes dryers is not applicable to the Miele condenser

[1] However, while the condensing dryer inherently uses more energy to dry a load of clothes than a conventional dryer, the condensing dryer could save substantially more household energy than a conventional dryer if the effects on space heating and cooling requirements are considered. The air lost from dryer exhaust vent can impose a significant load on the space-conditioning unit as cool or hot outdoor air is drawn inside the room or home to replace the exhausted air.

clothes dryer. Furthermore, the FTC does not have a labeling program for clothes dryers, therefore, Miele is not required to test its condenser clothes dryers."

BSH urges that the same waiver be granted to BSH as was granted to Miele for its comparable product.

Manufacturers of all other basic models marketed in the United States and known to BSH to incorporate similar design characteristics as the BSH condenser clothes dryer include Miele (models T1565CA and T1570C), Whirlpool (model WCD7500VW), LG (model DLEC733W), and GE (models DCVH480E* and DCVH485E*).

BSH is not aware of any alternative test procedure to evaluate in a manner representative of the energy consumption characteristics of the BSH condenser clothes dryers. BSH notes that DOE's February 17, 1995 decision on Miele's application indicated that Miele proposed that DOE consider adding a class for condenser clothes dryers in the then current clothes dryer rulemaking for minimum efficiency standards, along with an appropriate test procedure. DOE's decision indicated that DOE would consider adding a new product class for condenser clothes dryers in that rulemaking and would initiate a clothes dryers test procedure rulemaking to add the capability of testing condenser clothes dryers to the existing test procedure for any potential future use. To the best of BSH's knowledge, DOE has not done so.

BSH also requests immediate relief by grant of an interim waiver. Grant of an interim waiver is fully justified:

The petition for waiver is likely to be granted, as evidenced not only by its merits but also because DOE has already granted a similar waiver to Miele.

Lack of relief will impose economic hardship on BSH. BSH would be placed in an untenable situation: The product would be subject to a set of regulations that DOE already acknowledges is not applicable to such a product and cannot be complied with, while at the same time another manufacturer is allowed to operate under a waiver from such regulations.

Significant investment has already been made in BSH condensing clothes dryers. Lack of relief would not allow BSH to recoup this investment and would deny BSH anticipated sales revenue. This does not take into account significant losses in goodwill and brand acceptance.

Beyond that, since the BSH condensing clothes dryer is intended to be sold as a pair with BSH washing machines an inability to sell the clothes dryer will harm sales of the washing machine as well.

The basic purpose of the Energy Policy and Conservation Act, as amended by the National Appliance Energy Conservation Act, is to foster purchase of energy-efficient appliances, not hinder such purchases. The BSH condenser clothes dryer makes a dryer available to households where for physical, structural reasons a vented dryer could otherwise not be installed. BSH condenser clothes dryers thus offer benefits in the public interest. To encourage and foster the availability of these products is in the public interest. Standards programs should not be used as a means to block innovative, improved designs.[2] DOE's rules thus should accommodate and encourage—not act to block—such a product.

Granting the interim waiver and waiver would also eliminate a non-tariff trade barrier. In addition, grant of relief would help enhance economic development and employment, including not only BSH's operations in North Carolina, and Tennessee, but also at major national retailers and regional dealers that carry BSH products. Furthermore, continued employment creation and ongoing investments in its marketing, sales and servicing activities will be fostered by approval of the interim waiver. Conversely, denial of the requested relief would harm the company and would be anticompetitive.

We would be pleased to discuss this request with DOE and provide further information as needed.

BSH will notify all clothes dryer manufacturers of domestically marketed units known to BSH of this petition and application by letter.

Sincerely,

Dr. Uwe Mette

Director Engineering Laundry Products

[FR Doc. 2011–8143 Filed 4–5–11; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2010–1016 ; FRL–9290–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; National Refrigerant Recycling and Emissions Reduction Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before May 6, 2011.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2010–1016 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-docket@epa.gov* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Cynthia Newberg; Stratospheric Protection Division, Office of Air and Radiation, Office of Atmospheric Programs; Mail Code 6205J; Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9870; fax number: (202) 343–9729 e-mail address: *newberg.cindy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On December 14, 2010 (75 FR 77864), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ –2010–1016, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Office of Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

[2] See FTC Advisory Opinion No. 457, TRRP 1718.20 (1971 Transfer Binder); 49 FR 32213 (Aug. 13, 1984); 52 FR 49141, 49147–48 (Dec. 30, 1987).

number for the Reading Room is 202–566–1744, and the telephone number for the Office of Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: National Refrigerant Recycling and Emissions Reduction Program (Renewal)

ICR numbers: EPA ICR No. 1626.11, OMB Control No. 2060–0256.

ICR Status: This ICR is scheduled to expire on April 30, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the Federal Register when approved, are listed in 40 CFR part 9, are displayed either by publication in the Federal Register or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: EPA has developed regulations under the Clean Air Act Amendments of 1990 (the Act) establishing standards and requirements regarding the use and disposal of class I and class II ozone-depleting substances used as refrigerants during the service, maintenance, repair, or disposal of refrigeration and air-conditioning equipment. Section 608(c) of the Act states that effective July 1, 1992 it is unlawful for any person in the course of maintaining, servicing, repairing, or disposing of refrigeration or air-conditioning equipment to knowingly vent or otherwise knowingly release or dispose of any class I or class II substance used as a refrigerant in the equipment in a manner which permits the substance to enter the environment.

In 1993, EPA promulgated regulations under section 608 of the Act for the recycling of ozone-depleting refrigerants recovered during the servicing and disposal of air-conditioning and refrigeration equipment. These regulations were published on May 14, 1993 (58 FR 28660) and codified in 40 CFR part 82, subpart F (§ 82.150 *et seq.*).

The regulations require persons servicing refrigeration and air-conditioning equipment to observe certain service practices that reduce emissions of ozone depleting refrigerants. The regulations also establish certification programs for technicians, recycling and recovery equipment, and off-site refrigerant reclaimers. In addition, EPA requires that ozone depleting refrigerants contained "in bulk" in appliances be removed prior to disposal of the appliances and that all refrigeration and air-conditioning equipment, except for small appliances and room air conditioners, be provided with a servicing aperture that facilitates recovery of the refrigerant. Moreover, the Agency requires that substantial refrigerant leaks in equipment be repaired when they are discovered. These regulations significantly reduce emissions of ozone depleting refrigerants, and therefore aid U.S. and global efforts to minimize damage to the ozone layer and the environment as a whole.

To facilitate compliance with and enforcement of section 608 requirements, EPA requires reporting and record keeping requirements of technicians; technician certification programs; equipment testing organizations; refrigerant wholesalers and purchasers; refrigerant reclaimers; refrigeration and air-conditioning equipment owners; and other establishments that perform refrigerant removal, service, or disposal. The recordkeeping requirements and periodic submission of reports to EPA's Office of Air and Radiation, Office of Atmospheric Programs, occur on an annual, biannual, one-time or occasional basis depending on the nature of the reporting entity and the length of time that the entity has been in service. Specific reporting and recordkeeping requirements were published in 58 FR 28660 and codified under 40 CFR part 82, subpart F (*i.e.,* § 82.166). These reporting and recordkeeping requirements also allow EPA to evaluate the effectiveness of the refrigerant regulations, and help the Agency determine if we are meeting the obligations of the Unites States, under the 1987 Montreal Protocol, to reduce use and emissions of ozone-depleting substances to the lowest achievable level.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected are those that recover, recycle, reclaim, sell or distribute in interstate commerce ozone-depleting refrigerants that contain chlorofluorocarbons (CFCs) or hydrochlorofluorocarbons (HCFCs); and those that service, maintain, repair, or dispose of appliances containing CFC or HCFC refrigerants. In addition, the owners or operators of appliances containing more than 50 pounds of CFC or HCFC refrigerants are regulated.

Estimated Number of Respondents: 663,669.

Frequency of Response: Primarily annually, with the exception of technician testing organizations that are required to report biannually.

Estimated Total Annual Hour Burden: 2,404,913.

Estimated Total Annual Cost: $96,364,851, which includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is no increase of hours in the total estimated individual respondent burden compared with that identified in the ICR currently approved by OMB. This is due to the fact that there have been no changes in any program requirement, no changes in EPA's estimates of the time required to submit reports and maintain records, and no changes in EPA's estimates of the overall number of respondents. However, due to a correction of miscalculated estimates in the ICR currently approved by OMB, there is a change in the estimated number of

respondents from that identified in the ICR currently approved by OMB. There is also an increase in the estimated total annual cost as a result of changes in EPA's estimates of labor rates.

Dated: March 31, 2011.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2011–8161 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0303; FRL–8868–5]

Diflubenzuron; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Wyoming Department of Agriculture to use the pesticide diflubenzuron (CAS No. 35367–38–5) to treat up to 26,000 acres of alfalfa to control grasshoppers and Mormon crickets.

The applicant proposes a use which is supported by the Interregional (IR)–4 program and has been requested in 5 or more previous years, and a petition for tolerance has not yet been submitted to the Agency. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before April 21, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0303, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2011–0303 EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Andrea Conrath, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–9356; *fax number:* (703) 605–0781; *e-mail address: conrath.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for preparing your comments. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What action is the agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Wyoming Department of Agriculture has requested the Administrator to issue a specific exemption for the use of diflubenzuron on alfalfa to control grasshoppers and Mormon crickets. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserts that projected population levels for these damaging insect pests are higher than normal for the 2011 season. The applicant claims that registered alternatives will not provide adequate control to avert significant economic losses from occurring.

The Applicant proposes to make no more than two applications of diflubenzuron, at a rate of 0.032 lbs. active ingredient (a.i.) (equivalent to 2 fl. oz. of product containing 2 lbs. a.i. per gallon). Application could be made on up to 26,000 acres of alfalfa, from the date of approval, if granted, until October 31, 2011, in the state of Wyoming. If the ABC maximum proposed acreage were treated at the maximum rate, a total of 814 lbs. active ingredient (407 gallons formulated product) could be applied.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a specific exemption proposing a use which is supported by the IR–4 program and has been requested in 5 or more previous years, and a petition for tolerance has not yet been submitted to the Agency. The notice provides an opportunity for public comment on the application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Wyoming Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: March 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–7771 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0277; FRL–8868–2]

Fipronil; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Oregon Department of Agriculture to use the pesticide fipronil (CAS Reg. No. 120068–37–3) to treat up to 600 acres of turnips and rutabagas to control the cabbage maggot. The applicant proposes a use which is supported by the Interregional (IR)–4 program and has been requested in 5 or more previous years, and a petition for tolerance has not yet been submitted to the Agency. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before April 21, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0277, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2011–0277. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available

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

FOR FURTHER INFORMATION CONTACT: Andrea Conrath, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–9356; *fax number:* (703) 605–0781; *e-mail address: conrath.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What action is the agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Oregon Department of Agriculture has requested the Administrator to issue a specific exemption for the use of fipronil on turnips and rutabagas to control the cabbage maggot. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserts that an emergency situation exists based upon three factors: (1) A severe increase in cabbage maggot populations; (2) apparent increasing resistance of the maggot to the registered alternative; and (3) phytotoxicity of the registered alternative to emerging seedlings. The applicant states that significant economic losses will be suffered without adequate control of the cabbage maggot in turnip and rutabaga production.

The Applicant proposes to make no more than one application at 4.16 fluid oz. of product per acre, to a maximum of 600 acres of rutabagas and turnips, for use of up to a potential maximum of 19.5 gallons of product. Applications would potentially be made from April 1 through September 30, 2011, in the Oregon counties of Clackimas, Marion, Multnomah, and Umatilla.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a specific exemption proposing a use which is supported by the IR–4 program and has been requested in 5 or more previous years, and a petition for tolerance has not yet been submitted to the Agency. The notice provides an opportunity for public comment on the application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Oregon Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: March 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–7772 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9290–8]

Meeting of the Mobile Sources Technical Review Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Mobile Sources Technical Review Subcommittee (MSTRS) will meet in May 2011. The MSTRS is a subcommittee under the Clean Air Act Advisory Committee. This is an open meeting. The meeting will include discussion of current topics and presentations about activities being conducted by EPA's Office of Transportation and Air Quality. The preliminary agenda for the meeting and any notices about change in venue will be posted on the Subcommittee's Web site: *http://www.epa.gov/air/caaac/mobile_sources.html.* MSTRS listserver subscribers will receive notification when the agenda is available on the Subcommittee Web site. To subscribe to the MSTRS listserver, send a blank e-mail to *lists-mstrs@lists.epa.gov*.

DATES: Tuesday May 10, 2011 from 9 a.m. to 4 p.m. Registration begins at 8:30 a.m.

ADDRESSES: The meeting is currently scheduled to be held at the Washington Hilton, 1919 Connecticut Ave., NW., Washington, DC, 20009. However, this date and location are subject to change and interested parties should monitor the Subcommittee Web site (above) for the latest logistical information. The hotel is located four blocks from the Dupont Circle Metro station using the Connecticut Ave. & Q St., NW. exit from the Metro.

FOR FURTHER INFORMATION CONTACT: *For technical information:* Elizabeth Etchells, Designated Federal Officer, Transportation and Climate Division, Mailcode 6401A, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Ph: 202–564–1372; e-mail: *etchells.elizabeth@epa.gov. For logistical and administrative information:* Ms. Cheryl Jackson, U.S. EPA, Transportation and Regional Programs Division, Mailcode 6405J, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; 202–343–9653; e-mail: *jackson.cheryl@epa.gov.*

Background on the work of the Subcommittee is available at: *http://www.epa.gov/air/caaac/mobile_sources.html.* Individuals or organizations wishing to provide comments to the Subcommittee should submit them to Ms. Etchells at the address above by April 26, 2011. The Subcommittee expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

SUPPLEMENTARY INFORMATION: During the meeting, the Subcommittee may also hear progress reports from some of its workgroups as well as updates and announcements on activities of general interest to attendees.

For Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Ms. Etchells or Ms. Jackson (see above). To request accommodation of a disability, please contact Ms. Etchells or Ms. Jackson, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: March 31, 2011.

Margo Tsirigotis Oge,

Director, Office of Transportation and Air Quality.

[FR Doc. 2011–8175 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0342; FRL- 8870–1]

Pesticide Program Dialogue Committee; Notice of Public Meetings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, EPA gives notice that a public meeting of the Pesticide Program Dialogue Committee (PPDC) is scheduled for April 20–21, 2011. A draft agenda is under development that will include Integrated Pest Management, Pollinator Protection, Children/Worker Risk Policy, Endangered Species Act issues; and reports from and discussions about current issues from the following PPDC work groups: 21st Century Toxicology/New Integrated Testing Strategies; Pesticide Registration Improvement Act (PRIA) Process Improvements; Comparative Safety Statements for Pesticide Product Labeling; and Public Health Work Group. Updates will also cover spray drift, inerts disclosure, water quality issues, and the regulatory improvement initiative. PPDC work group meetings are also being scheduled and are open to the public. The PPDC PRIA Process Work Group will meet on April 19, 2011, from 1 p.m. to 4 p.m., and the PPDC Public Health Workgroup will meet on April 19, 2011, from 1 p.m. to 5 p.m.

DATES: The PPDC meeting will be held on Wednesday, April 20, 2011, from 9 a.m. to 5:30 p.m., and Thursday, April 21, 2011, from 9 a.m. to noon.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held in the Conference Center on the lobby level at EPA's location at 1 Potomac Yard South, 2777 S. Crystal Drive, Arlington, VA. This location is approximately one mile from the Crystal City Metro Station.

FOR FURTHER INFORMATION CONTACT: Margie Fehrenbach, Office of Pesticide Programs (7501P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–4775; *fax number:* (703) 308–4776; *e-mail address: fehrenbach.margie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of particular interest to persons who work in agricultural settings or persons who are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act (FFDCA); and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA) of 1996; and the Pesticide Registration Improvement Act. Potentially affected entities may include, but are not limited to: Agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farmworker groups; animal welfare organizations; pesticide users and growers; pest consultants; State, local and Tribal governments; academia; public health organizations; food processors; and the public. If you have questions regarding the applicability of

this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2011–0342. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr.*

A draft agenda is being developed and will be posted by April 1, 2011, on EPA's Web site at: *http://www.epa.gov/pesticides/ppdc/*.

II. Background

EPA's Office of Pesticide Programs (OPP) is entrusted with the responsibility to help ensure the safety of the American food supply, the education and protection from unreasonable risk of those who apply or are exposed to pesticides occupationally or through use of products, and general protection of the environment and special ecosystems from potential risks posed by pesticides.

The Charter for the Environmental Protection Agency's Pesticide Program Dialogue Committee (PPDC) was established under the Federal Advisory Committee Act (FACA), Public Law 92–463, in September 1995, and has been renewed every 2 years since that time. PPDC's Charter was renewed October 30, 2009, for another 2-year period. The purpose of PPDC is to provide advice and recommendations to the EPA Administrator on issues associated with pesticide regulatory development and reform initiatives, evolving public policy and program implementation issues, and science issues associated with evaluating and reducing risks from use of pesticides. It is determined that PPDC is in the public interest in connection with the performance of duties imposed on the Agency by law. The following sectors are represented on the PPDC: Pesticide industry and trade associations; environmental/public interest, consumer, and animal rights groups; farm worker organizations; pesticide user, grower, and commodity groups; Federal and State/local/Tribal governments; the general public; academia; and public health organizations.

Copies of the PPDC Charter are filed with appropriate committees of Congress and the Library of Congress and are available upon request.

III. How can I request to participate in this meeting?

PPDC meetings are open to the public and seating is available on a first-come basis. Persons interested in attending do not need to register in advance of the meeting. Comments may be made during the public comment session of each meeting or in writing to the address listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Agricultural workers, Agriculture, Chemicals, Endangered species, Foods, Integrated Pest Management, Pesticide labels, Pesticides and pests, Pollinator protection, Public health.

Dated: March 28, 2011.

Martha Monell,

Acting, Director, Office of Pesticide Programs.

[FR Doc. 2011–7901 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket# EPA–RO4–SFUND–2011–0278, FRL–9290–7]

National Starch and Chemical Company, Salisbury, Rowan County, North Carolina; Notice of Correction

AGENCY: Environmental Protection Agency.

ACTION: Notice of correction concerning location of Site.

SUMMARY: In the **Federal Register** published March 18, 2011, FR9284, EPA posted a Notice of Settlement for past cost under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), concerning the National Starch and Chemical Company Site located in Salisbury, Rowan County, North Carolina. In the published notice the location of the Site is indicated in error as Mobile, Mobile County, Alabama. The Site is located in Salisbury, Rowan County, North Carolina.

DATES: The Agency will consider public comments on the settlement until April 18, 2011. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from Ms. Paula V. Painter. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2011–0278 or Site name National Starch and Chemical Company Superfund Site by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *http://www.epa.gov/region4/waste/sf/enforce.htm*
- E-mail: *Painter.Paula@epa.gov*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: March 25, 2011.

Anita L. Davis,

Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. 2011–8177 Filed 4–5–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)-523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011928–006.

Title: Maersk Line/HLAG Slot Charter Agreement.

Parties: A.P. Moller-Maersk A/S and Hapag-Lloyd AG.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment reflects changes in the space allocations.

Agreement No.: 012063–003.

Title: Grand Alliance/Zim Transpacific Vessel Sharing Agreement.

Parties: Hapag-Lloyd Aktiengesellschaft; Nippon Yusen

Kaisha; Orient Overseas Container Line Limited; and Zim Integrated Shipping Services Limited.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment would increase the number of vessels to be deployed under the Agreement, revise the initial duration of the Agreement, revise provisions relating to the partners' SCE service, and restate the Agreement.

Agreement No.: 012122.

Title: Grand Alliance/Zim/HMM Transpacific Vessel Sharing Agreement.

Parties: Hapag-Lloyd Aktiengesellschaft; Hyundai Merchant Marine Co., Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line Limited; and Zim Integrated Shipping Services Limited (ZIM).

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The agreement authorizes the parties to share vessel space in the trade between ports on the U.S. East Coast and ports in China, (including Hong Kong), Taiwan, Panama, and Jamaica.

Agreement No.: 012123.

Title: NYK/Liberty Global Space Charter Agreement.

Parties: Liberty Global Logistics LLC and Nippon Yusen Kaisha.

Filing Party: Patricia M. O'Neill, Esq.; Corporate Counsel; NYK Line (North America) Inc.; 300 Lighting Way, 5th Floor; Secaucus, NJ 07094.

Synopsis: The agreement authorizes the parties to cross charter space on each other's vessels in the trade from ports on the U.S. Atlantic and Gulf coasts to ports on the Red Sea and Persian Gulf.

Agreement No.: 012124.

Title: CSAV/"K" Line-Baltimore/Livorno Space Charter Agreement.

Parties: Compana Sud Americana de Vapores S.A. and Kawasaki Kaisan Kaisha, Ltd.

Filing Party: John P. Meade, Esq.; Vice-President; K- Line America, Inc.; 6009 Bethlehem Road; Preston, MD 21655.

Synopsis: The agreement authorizes the parties to charter space in the trade from ports on the U.S. East coast to Livorno, Italy.

Agreement No.: 201162–007.

Title: NYSA–ILA Assessment Agreement.

Parties: International Longshoremen's Association and New York Shipping Association.

Filing Parties: Donato Caruso, Esq.; The Lambos Firm; 29 Broadway, 9th Floor; New York, NY 10006 and Andre Mazzola, Esq.; Marrinan & Mazzola Mardon, P.C.; 26 Broadway, 17th Floor; New York, NY 10004.

Synopsis: The amendment reduces the assessment rate per house container.

By Order of the Federal Maritime Commission.

Dated: April 1, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2011–8203 Filed 4–5–11; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by e-mail at *OTI@fmc.gov.*

Agility Logistics Corp. (OFF), 240 Commerce, Irvine, CA 92602, Officers: Michael G. Gargaro, Vice President, Ocean Products (Qualifying Individual), Michael K. Bible, President/CEO/Director, Application Type: QI Change.

Air Sea Containers, Inc. (NVO), 1850 NW 94th Avenue, Doral, FL 33172, Officers: Alan H. Bond, President (Qualifying Individual), Rosario C. Bond, Vice President, Application Type: New NVO License.

Ali Ismailzada, Medhi Ismailzada and Gary Sachs dba Ali Baba Global Shipping (NVO), 1260 57th Avenue, Oakland, CA 94621, Officers: Gary Sachs, Partner/Logistics Manager (Qualifying Individual), Ali Ismailzada, Partner/CFO, Application Type: New NVO License.

Alpha-Raleigh USA, Limited Liability Company dba ARL–USA (NVO & OFF), 81 Doremus Avenue, Newark, NJ 07083, Officer: Hakeem K. Bisiolu, Member/Manager (Qualifying Individual), Application Type: New NVO & OFF License.

BBC Freight Line Inc. dba ABC Depot Logistics (NVO), 7400 E. Slauson Avenue, ES 5A, Commerce, CA 90040, Officers: Douglas E. Garcia, Secretary (Qualifying Individual), Fred Chen, President, Application Type: Trade Name Change.

Base Ventures International, Inc dba Base Ventures Shipping (NVO & OFF), 1405 Silver Lake Road, NW., #201, New Brighton, MN 55112, Officers: Oluwaseyi E. Olawore, President/CEO (Qualifying Individual), Novella E. Olawore, Vice President/Secretary, Application Type: Business Structure Change.

Beagle Shipping Inc (NVO & OFF), 2801 NW 74th Avenue, Miami, FL 33122, Officers: Paola Rebellon, Operations Manager/Secretary (Qualifying Individual), Ricardo J. Tovar, President, Application Type: New NVO & OFF License.

Blue Horizon Shipping Inc. (NVO), 229 NE 26th Terrace, Miami, FL 33137, Officers: David V. Rico, President (Qualifying Individual), Eleven Rico, Secretary, Application Type: New NVO License.

Business Solutions Partner, Inc. (NVO), 12493 Cliff Edge Drive, Herndon, VA 20170, Officers: Marina K. Komova, President/Treasurer/Secretary (Qualifying Individual), Ernesto Hernandez, Vice President, Application Type: New NVO License.

Dennis Shipping Int'l, Inc. (NVO), 3695–3697 NW 15th Street, Lauderdale, FL 33311, Officers: Dennis Hawthorne, President/CEO/CFO (Qualifying Individual), Jennifer Campbell, Secretary, Application Type: New NVO.

E-Cargoway Logistics USA, Inc. (NVO & OFF), 550 E. Carson Plaza Drive, #232, Carson, CA 90746, Officers: Susan W. Lee, CFO (Qualifying Individual), Myeong H. Kim, CEO/Secretary, Application Type: New NVO & OFF License.

Eurosur Logistics, LLC (NVO & OFF), 1519 NW 82nd Avenue, Doral, FL 33126, Officer: Gilberto A. Altuve, MGRM (Qualifying Individual), Application Type: New NVO & OFF License.

Fortune Seasons Corporation dba Amerasia Shipping Line (NVO), 4933 Durfee Avenue, Pico Rivera, CA 90660, Officer: Kevin Yang, Secretary (Qualifying Individual), Nadia H. Chang, Director, Application Type: QI Change.

G & F West Indies Shipping, Inc. (NVO), 1416 Blue Hill Avenue, Boston, MA 02126, Officers: Duncan B. Greenwood, President/Secretary (Qualifying Individual), Kirk D.

Greenwood, Treasurer, Application Type: New NVO License.

G & G Auto Sales, LLC dba W8 Shipping (OFF), 14004 Roosevelt Blvd., Clearwater, FL 33762, Officers: Darius Ziulpa, Member Manager (Qualifying Individual), Gediminas Garmus, Member Manager, Application Type: New OFF License.

Gator Source and Supply Company Inc. dba Danmax Shipping (OFF), 12978 SW 132nd Avenue, Miami, FL 33186, Officer: Victor Rickards, President/Secretary (Qualifying Individual), Application Type: License Transfer.

Green Line Shipping & Logistics Services Inc. (NVO), 16230 Lake View Lane, Apple Valley, CA 92307, Officer: Monwar Hussain, President (Qualifying Individual), Application Type: Name Change.

Gruden USA Inc. dba Lybra Overseas Shipping (NVO & OFF), 51 Newark Street, Suite 302, Hoboken, NJ 07030, Officers: Carmen T. Rodriguez, Secretary (Qualifying Individual), Luca D. Pieri, President/Director, Application Type: QI Change.

H & Y International Cargo Services, Inc. (NVO), 12385 SW 193 Street, Miami, FL 33177, Officers: Hismel Garcia, President (Qualifying Individual), Jacqueline Tejera, Secretary, Application Type: New NVO.

Landstar Global Logistics, Inc. (NVO & OFF), 13410 Sutton Park Drive South, Jacksonville, FL 32224, Officers: Thomas A. Ming, Vice President International Operations (Qualifying Individual), Patrick J. O'Malley, President, Application Type: QI Change.

Legend International Transport, LLC (NVO), 3310 Mandeville Canyon Road, Los Angeles, CA 90049, Officers: Jacqueline Benabe, Chief Financial Officer (Qualifying Individual), Daniel Lerner, Manager, Application Type: New NVO License.

Lynx Global Corp. (NVO & OFF), 2000 NW 62nd Avenue, Building 711, Miami, FL 33122, Officers: George T. Ackler, President (Qualifying Individual), Alfonso Rey, Owner, Application Type: New NVO & OFF License.

Marcel Ogouliguende and Kevin Essone dba Export USA (OFF), 10055 Belknap Road, #119, Sugar Land, TX 77498, Officers: Marcel Ogouliguende, Partner/CFO (Qualifying Individual), Kevin Essone, Partner/CEO, Application Type: New NVO License.

MBA Logistics, LLC (OFF), 11455 Narin Drive, Brighton, MI 48114, Officers: Martin J. Stapleton, Member (Qualifying Individual), Seiko Stapleton, Member, Application Type: New OFF License.

Morgan USA Logistics Inc. (NVO), 145–40 157th Street, Suite F1, Jamaica, NY 11434, Officers: Kit Hui, President/Vice President/Secretary/Treasurer (Qualifying Individual), Application Type: New NVO License.

Mota Import Export LLC dba MTI Mota Import Export Cargo Express (NVO), 175 Smith Street, Perth Amboy, NJ 08861, Officers: Mercedes Nunez, Manager (Qualifying Individual), Angel M. Ramirez, Chief Executive Manager, Application Type: New NVO License.

Pegasus International, Inc. (NVO & OFF), 1100 Jorie Blvd., Suite 240, Oak Brook, IL 60523, Officers: Yu Cai, President/Treasurer (Qualifying Individual), Weimin Huang, Secretary, Application Type: Add OFF Service.

Pioneer Shipping Logistics, Corp. (NVO), 145–119 Guy R. Brewer Blvd., Jamaica, NY 11434, Officer: Xiao Zhi Lou, President/Vice President/Secretary/Treasurer (Qualifying Individual), Application Type: New NVO License.

Shahi Logistics LLC (OFF), 8394 Elder Creek Road, Sacramento, CA 95828, Officers: Lisa L. Germen, Vice President-Operations (Qualifying Individual), Sayed Z. Alashahi, President/Managing Member, Application Type: New OFF License.

Silver Lake Auto Inc. dba AGA Worldwide (NVO & OFF), 3807 Stinson Blvd., NE, St. Anthony, MN 55421, Officer: Bilal Haidri, President/Secretary/Treasurer (Qualifying Individual), Application Type: New NVO & OFF License.

South Cargo LLC (OFF), 8337 NW 66th Street, Miami, FL 33166, Officers: Jenny R. Contreras, Manager (Qualifying Individual), Jesus Aznar, Manager, Application Type: New OFF License.

Super Trans Lines Inc (NVO & OFF), 510 Plaza Drive, #2728, College Park, GA 30349, Officer: Wai Kwan Tang, President/Secretary/Treasurer (Qualifying Individual), Application Type: New NVO & OFF License.

Transatlantic North America Inc. (NVO & OFF), 745 Birginal Drive, Suite B, Bensenville, IL 60106, Officers: Peter G. Weinberger, President/Secretary/Treasurer (Qualifying Individual), Lynne E. Weinberger, Director, Application Type: New NVO & OFF License.

Translink International, Inc. (NVO), 2591 Highway 17, Suite #203, Richmond Hill, GA 31324, Officers: Sean D. Register, President (Qualifying Individual), Thomas Black, Treasurer, Application Type: New NVO License.

Ziad H. Hajahmed dba Cargo Marine (NVO & OFF), 3925 Galveston Road, #B, Houston, TX 77017, Officers: Ziad H. Hajahmed, Sole Proprietor (Qualifying Individual), Application Type: Add NVO Service.

Dated: April 1, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2011–8201 Filed 4–5–11; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/Address	Date Reissued
019288N	Kairos Logistics LLC, 1447 West 178th Street, Suite 305 Gardena, CA 90248	February 15, 2011.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2011–8199 Filed 4–5–11; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 21, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Ralph C. Stayer, Naples, Florida, individually, and Ralph C. Stayer together with Shelly A. Stayer, Naples, Florida, the RFS 2010 Irrevocable Trust F/B/O Ralph C. Stayer, the Shelly A. Stayer 2010 Childrens Trust, Michael G. Kuechler and Mary A. Kuechler, Fond du Lac, Wisconsin, Michael G. Kuechler and Ralph C. Stayer as trustees of the RFS 2010 Irrevocable Trust F/B/O Ralph C. Stayer, and Michael G. Kuechler and Mary A. Kuechler as trustees of the Shelly A. Stayer 2010 Childrens Trust, as a group acting in concert,* to acquire 10 percent or more of the voting shares of Hometown Bancorp, Ltd., Fond du Lac, Wisconsin, and thereby indirectly acquire control of Hometown Bank, Fond du Lac, Wisconsin.

Board of Governors of the Federal Reserve System, April 1, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–8137 Filed 4–5–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Child and Family Services Plan (CFSP), Annual Progress and Servicers Review (ASPR), and Annual Budget Expenses Request and Estimated Expenditures (CFS–101).

OMB No.: 0980–0047.

Description: Under title IV–B, subparts 1 and 2, of the Social Security Act (the Act), States, Territories, and Tribes are required to submit a Child and Family Services Plan (CFSP). The CFSP lays the groundwork for a system of coordinated, integrated, and culturally relevant family services for the subsequent five years (45 CFR 1357.15(a)(1)). The CFSP outlines initiatives and activities the State, Tribe or territory will carry out in administering programs and services to promote the safety, permanency, and well-being of children and families. By June 30 of each year, States, Territories, and Tribes are also required to submit an Annual Progress and Services Report (APSR) and a financial report called the CFS–101. The APSR is a Yearly report that discusses progress made by a State, Territory or Tribe in accomplishing the goals and objectives cited in its CFSP (45 CFR 1357.16(a)). The APSR contains new and updated information about service needs and organizational capacities throughout the five-year plan period. The CFS–101 has three parts. Part I is an annual budget request for the upcoming fiscal year. Part II includes a summary of planned expenditures by program area for the upcoming fiscal year, the estimated number of individuals or families to be served, and the geographical service area. Part III includes actual expenditures by program area, numbers of families and individuals served by program area, and the geographic areas served for the last complete fiscal year.

The Child and Family Services Improvement Act of 2006 amended Title IV–B, subparts 1 and 2, adding a number of requirements that affect reporting through the APSR and the CFS–101. Of particular note, the law added a provision requiring States (including Puerto Rico and the District of Columbia) to report data on caseworker visits (section 424(e) of the Act). States must provide annual data on (1) the percentage of children in foster care under the responsibility of the State who were visited on a monthly basis by the caseworker handling the case of the child; and (2) the percentage of the visits that occurred in the residence of the child. In addition, by June 30, 2008, States must set target percentages and establish strategies to meet the goal that; by October 1, 2011; at least 90 percent of the children in foster care are visited by their caseworkers on a monthly basis and that the majority of these visits occur in the residence of the child (section 424(e)(2)(A) of the Act).

Respondents: States, Territories, and Tribes must complete the CFSP, APSR, and CFS–101. Tribes and territories are exempted from the monthly caseworker visits reporting requirement of the APSR. There are approximately 180 Tribal entities that are eligible for IV–B funding. There are 52 States (including Puerto Rico and the District of Columbia) that must complete the CFSP, APSR, and CFS–101. There are a total of 232 possible respondents.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ASPR	232	1	76.58	17,766.56
CFSP	232	1	120.25	27,898
CFS–101, Parts I, II, and III	232	1	4.38	1,016.16
Caseworker Visits	52	1	99.33	5,165.16

Estimated Total Annual Burden Hours: 51,845.88.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, E-mail: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–8164 Filed 4–5–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0450]

Maria Carmen Palazzo: Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) permanently debarring Maria Carmen Palazzo, M.D. from providing services in any capacity to a person that has an approved or pending drug product application. We base this order on a finding that Dr. Palazzo was convicted of felonies under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product or otherwise relating to the regulation of any drug product under the FD&C Act. Dr. Palazzo was given notice of the proposed permanent debarment and an opportunity to request a hearing within the timeframe prescribed by regulation. Dr. Palazzo failed to respond. Dr. Palazzo's failure to respond constitutes a waiver of her right to a hearing concerning this action.

DATES: This order is effective April 6, 2011.

ADDRESSES: Submit applications for special termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kenny Shade, Office of Regulatory Affairs (HFC–230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–4640.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(A) and (B) of the FD&C Act (21 U.S.C. 335a(a)(2)(A) and (B)) require debarment of an individual if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product or otherwise relating to the regulation of any drug product under the FD&C Act.

On August 19, 2010, the United States District Court for the Eastern District of Louisiana accepted Dr. Palazzo's plea of guilty, and entered judgment against her for 15 counts of failure to prepare and maintain records with intent to defraud or mislead in violation of 21 U.S.C. 331(e), 333(a)(2), and 18 U.S.C. 2.

FDA's finding that debarment is appropriate is based on the felony convictions referenced herein for conduct relating to the development or approval, including the process for development or approval, of any drug product and otherwise relating to the regulation of any drug product under the FD&C Act. The factual basis for those convictions is as follows: Dr. Palazzo was a licensed medical doctor with offices located in New Orleans, Louisiana. SmithKline Beecham, Corporation, d.b.a. GlaxoSmithKline (SKB) was a pharmaceutical company engaged in developing, testing, and marketing pharmaceutical products including Paroxetine, also known as "Paxil." Under the FD&C Act and its implementing regulations, SKB had to apply to FDA for approval to market Paxil. SKB was required to demonstrate, through clinical investigations in which Paxil was given to human subjects, the safety and effectiveness of the drug in order to receive approval from FDA.

SKB hired Dr. Palazzo to be a clinical investigator for the Paxil study. As a participating investigator, Dr. Palazzo signed, on multiple occasions, an FDA Form 1572 committing to conduct the study in accordance with the study protocol, to personally conduct or supervise the investigation, and to comply with FDA regulations. Dr. Palazzo agreed to conduct the study in strict compliance with the criteria set forth in the study protocol, to personally review all Case Report Forms, and, in return, SKB agreed to pay for each subject who completed the study.

FDA regulations require that a clinical investigator on a drug study prepare and maintain adequate and accurate case histories that record all observations and other data pertinent to the investigation on each study subject and provide that information to the drug sponsor. From on or about October 23, 2000, through May 24, 2001, Dr. Palazzo, with intent to defraud and mislead, failed to prepare and maintain records required under 21 U.S.C. 355(i) and 21 CFR 312.62(b), all in violation of 21 U.S.C. 331(e), 333(a)(2), and 18 U.S.C. 2.

As a result of her convictions, on January 11, 2011, FDA sent Dr. Palazzo a notice by certified mail proposing to permanently debar her from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(A) and (B) of the FD&C Act, that Dr. Palazzo was convicted of felonies under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product and otherwise relating to the regulation of any drug product under the FD&C Act. The proposal also offered Dr. Palazzo an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Dr. Palazzo failed to respond within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and waived any contentions concerning her debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(a)(2)(A) and(B) of the FD&C Act, under authority delegated to the Acting Director (Staff Manual Guide 1410.35), finds that Maria Carmen Palazzo has been convicted of felonies under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product and otherwise relating to the regulation of any drug product under the FD&C Act.

As a result of the foregoing finding, Dr. Palazzo is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under sections 505, 512, or 802 of the FD&C

Act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective, (see DATES) (see sections 306(c)(1)(B), (c)(2)(A)(ii), and 201(dd) of the FD&C Act (21 U.S.C. 335a(c)(1)(B), (c)(2)(A)(ii), and 321(dd))). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Dr. Palazzo, in any capacity during Dr. Palazzo's debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Dr. Palazzo provides services in any capacity to a person with an approved or pending drug product application during her period of debarment she will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Dr. Palazzo during her period of debarment (section 306(c)(1)(B) of the FD&C Act.

Any application by Dr. Palazzo for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2010–N–0450 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: March 28, 2011.

Howard Sklamberg,

Director, Office of Enforcement, Office of Regulatory Affairs.

[FR Doc. 2011–8152 Filed 4–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for a Nonvoting Industry Representative and Request for Nominations for a Nonvoting Industry Representative on an FDA Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of a nonvoting industry representative to serve on its Allergenic Products Advisory Committee notify FDA in writing. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nomination will be accepted for current vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating the interest to FDA by May 6, 2011 for vacancies listed in the notice. Concurrently, nomination material for prospective candidates should be sent to FDA by May 6, 2011.

ADDRESSES: All letters of interest and nominations should be submitted in writing to Gail Dapolito (*see* **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Gail Dapolito, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–1289, FAX: 301–827–0294, e-mail: *gail.dapolito@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Agency requests nominations for a nonvoting industry representative on the Allergenic Products Advisory Committee. The Allergenic Products Advisory Committee advises the Commissioner or designee in discharging responsibilities as they relate to the regulation of allergenic products. This Committee has nine voting members. Members are asked to provide their expert scientific and technical advice to FDA to help make sound decisions on the safety, effectiveness, appropriate use, and labeling of allergenic biological products.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (*see* **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document. Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations, and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the Allergenic Products Advisory Committee.

The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner of Food and Drugs will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. A current curriculum vitae and the name of the committee of interest should be sent to the FDA contact person within the 30 days following nomination. FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA has a special interest in ensuring that women, minority groups, individuals with physical disabilities, and small businesses are adequately represented on its advisory committees and, therefore, encourages nominations for appropriately qualified candidates from these groups. Specifically, in this document, nominations for nonvoting representatives of industry interests are encouraged from the allergenic product manufacturing industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: March 31, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–8125 Filed 4–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council on Blood Stem Cell Transplantation; 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: Advisory Council on Blood Stem Cell Transplantation.

Date and Times: May 11, 2011, 8 a.m. to 4:30 p.m.

Place: Georgetown University Hotel and Conference Center, 3800 Reservoir Road, NW., Washington, DC 20057.

Status: The meeting will be open to the public.

Purpose: Pursuant to Public Law 109–129, 42 U.S.C. 274k (section 379 of the Public Health Service Act, as amended), the Advisory Council on Blood Stem Cell Transplantation (ACBSCT) advises the Secretary of HHS and the Administrator, HRSA, on matters related to the activities of the C.W. Bill Young Cell Transplantation Program (Program) and the National Cord Blood Inventory (NCBI) Program.

Agenda: The Council will hear reports from five ACBSCT Work Groups: Cord Blood Bank Collections, Realizing the Potential of Cord Blood, Scientific Factors Necessary to Define a Cord Blood Unit as High Quality, Cord Blood Thawing and Washing, and Access to Transplantation. The Council also will hear presentations and discussions on the following topics: Current State of Knowledge-Cord Blood Transplantation; National Marrow Donor Program (NMDP) Analysis of National Cord Blood Inventory (NCBI) and Non-NCBI Cord Blood Units; Adverse Event Reporting; Cord Blood Studies at the National Institutes of Health; and Report on NMDP Cord Blood Financial Summit. Agenda items are subject to change as priorities indicate.

After the presentations and Council discussions, members of the public will have an opportunity to provide comments. Because of the Council's full agenda and the timeframe in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACBSCT meeting. Meeting summary notes will be made available on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html.*

Those planning to attend are requested to register in advance and those wishing to make oral comments should so indicate. The draft meeting agenda and a registration form are available on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html.*

Registration also can be completed electronically at *http://www.acbsct.com* or submitted by facsimile to Lux Consulting Group, Inc., the logistical support contractor for the meeting, at fax number (301) 585–7741 ATTN: Deborah Jones. Individuals without access to the Internet who wish to register may call Deborah Jones at (301) 585–1261.

FOR FURTHER INFORMATION CONTACT: Patricia Stroup, Executive Secretary, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 12C–06, Rockville, Maryland 20857; telephone (301) 443–1127.

Dated: March 29, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–8146 Filed 4–5–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Short Follow-Up Questionnaire for the National Institutes of Health (NIH)–AARP Diet and Health Study (NCI)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on February 4, 2011 (76 FR 6485) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: Short Follow-Up Questionnaire for the National Institutes of Health (NIH)-AARP Diet and Health Study (NCI). *Type of Information Collection Request:* Extension. *Need and Use of Information Collection:* The purpose of this short 2-page questionnaire is to obtain information on 18 different medical conditions, several medical procedures, and lifestyle characteristics from 485,909 participants of the NIH–AARP Diet and Health Study. The questionnaire will support the ongoing examination between cancer and nutritional exposures. A pilot mailing to 1,600 randomly selected NIH–AARP Diet and Health study participants confirmed the feasibility of the methodology and willingness of respondents to participate in this data collection effort. This questionnaire adheres to The Public Health Service Act, Section 412 (42 U.S.C. 285a–1) and Section 413 (42 U.S.C. 285a–2), which authorizes the Division of Cancer Epidemiology and Genetics of the National Cancer Institute (NCI) to establish and support programs for the detection, diagnosis, prevention and treatment of cancer; and to collect, identify, analyze and disseminate information on cancer research, diagnosis, prevention and treatment. *Frequency of Response:* Once. *Affected Public:* Individuals. *Type of Respondents:* U.S. adults (persons aged 50–85). The annual reporting burden is displayed in the table below. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Type of respondents	Number of respondents	Frequency of response	Average Time per response (minutes/hour)	Annual hour burden
Senior Adults	485,909	1	4/60 (0.067)	32,394

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the

validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: 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 Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Yikyung Park, Staff Scientist, Nutritional Epidemiology Branch, Division of Cancer Epidemiology and Genetics, National Cancer Institute, NIH, DHHS, Executive Plaza South, Room 3040, 6120 Executive Blvd., EPS–MSC 7242, Bethesda, MD 20892–7335 or call non-toll-free number 301–594–6394 or e-mail your request, including your address to: *parkyik@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: March 31, 2011.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2011–8184 Filed 4–5–11; 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; AIDS Related Technology Applications.

Date: April 13, 2011.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Robert Freund, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, 301–435–1050, *freundr@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; Collaborative: Cardiovascular Disease Epidemiology.

Date: April 14, 2011.

Time: 11 a.m. to 12 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: Denise Wiesch, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7770, Bethesda, MD 20892, (301) 435–0684, *wieschd@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.

(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 30, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8156 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Sleep Disorders Research Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., for discussion of personal qualifications and performances, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Sleep Disorders Research Advisory Board.

Date: April 29, 2011.

Time: 8:30 a.m. to 12 p.m.

Agenda: To discuss and provide updates on sleep and circadian research developments and the NIH sleep research plan.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892,

Closed: 12 p.m. to 12:30 p.m.

Agenda: To review and evaluate to discuss personal qualifications and performance of individual Board members for election of chair position.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Open: 1 p.m. to 4 p.m.

Agenda: To discuss and provide updates on sleep and circadian research developments and the NIH sleep research plan.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact: Michael J. Twery, PhD, Director, National Center on Sleep Disorders Research, Division of Lung Diseases, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Suite 10038, Bethesda, MD 20892–7952, 301–435–0199, *twerym@nhlbi.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's/Center's home page: *http://www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and

Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8157 Filed 4–5–11; 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; Technologies for Healthy Independent Living (R01) Par–11–020, Par–11–021.

Date: May 9, 2011.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: John Firrell, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, 301–435–2598, *firrellj@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.

Date: May 10–11, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Boris P Sokolov, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biology and Diseases of the Posterior Eye.

Date: May 10, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

Contact Person: Noni Byrnes, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5130, MSC 7840, Bethesda, MD 20892, (301)–435–1023, *byrnesn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Methodology and Measurement in the Behavioral and Social Sciences.

Date: May 16, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.

Contact Person: Tomas Drgon, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, 301–435–1017, *tdrgon@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Bioengineering, Technology and Surgical Sciences Study Section.

Date: May 16–17, 2011.

*Time:*8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Khalid Masood, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, 301–435–2392, *masoodk@csr.nih.gov.*

Name of Committee: Oncology 1–Basic Translational Integrated Review Group; Cancer Etiology Study Section.

Date: May 16, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Elaine Sierra-Rivera, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Support Opportunity for Addiction Research.

Date: May 18–19, 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: Edwin C Clayton, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5180, MSC 7844, Bethesda, MD 20892, 301–408–9041, *claytone@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8162 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences Special Emphasis Panel; 2011 NIH Director's Pioneer Awards.

Date: May 2–4, 2011.

Time: 7:45 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Vernon Anderson, PhD, Program Director, Division of Pharmacology, Physiology, and Biological Chemistry, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 2As.43J, Bethesda, MD 20892, 301–594–3827, *andersonve@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8188 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences Special Emphasis Panel; NIGMS Legacy Community-Wide Scientific Resources.

Date: April 12, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3An12A, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Brian R. Pike, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@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. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8187 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Pathobiology of Alzheimer's Disease.

Date: May 3, 2011.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alexander Parsadanian, PhD, Scientific Review Officer, National Institute on Aging, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *PARSADANIANA@NIA.NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program No. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8186 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Loan Repayment.

Date: May 2, 2011.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bita Nakhai, PhD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8185 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections/ 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Prevention, Control and Population Sciences.

Date: May 23–25, 2011.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Wlodek Lopaczynski, MD, PhD, Scientific Review Officer, Research

Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8131, Bethesda, MD 20892, 301–594–1402, *lopacw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; T32 and K99 Grant Applications Review.

Date: June 28, 2011.

Time: 5 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Sergei Radaev, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8117, Bethesda, MD 20892, 301–435–5655, *sradaev@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8165 Filed 4–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Sickle Cell Disease Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Sickle Cell Disease Advisory Committee.

Date: April 26, 2011.

Time: 8:30 a.m. to 4 p.m.

Agenda: Discussion of Programs and Issues.

Place: National Institutes of Health, 6701 Rockledge Drive, Conference Room 9091, Bethesda, MD 20892.

Contact Person: W. Keith Hoots, MD, Director, Division of Blood Diseases and Resources, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Suite 9030, Bethesda, MD 20892, 301–435–0080, *hootswk@nhlbi.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 31, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–8163 Filed 4–5–11; 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: Survey of Evidence-Based Practices for Mental Health and Substance Use Disorders in State Medicaid Plans: Coverage Structures, Access and Challenges—NEW

The Substance Abuse and Mental Health Services Administration (SAMHSA) is conducting a survey to gather information about current and planned State Medicaid activities and policies related to eight mental health/substance abuse evidence-based practices (EBPs). This survey is part of a five-year project to increase attention to and understanding of Medicaid mental health and substance abuse service issues among State Medicaid and Mental Health/Substance Abuse Directors, as well as improve the effectiveness of State Medicaid mental health services.

The purpose of the survey is to determine the overall management and delivery of mental health and substance abuse services within Medicaid and the use of eight specific evidence-based practices. The information provided through the survey will be vital to increasing awareness and understanding of Medicaid mental health/substance abuse evidence-based practice activities. This information will also be used to develop numerous products to help State Medicaid and Mental Health/Substance Abuse Directors adopt, deliver, and refine existing policies about mental health and substance abuse EBPs.

A survey will be sent to the director of each State Medicaid office in the 50 States and the District of Columbia, with responses expected over a four-week period. The survey contains a total of 114 questions on the overall management and delivery of mental health and substance abuse services within Medicaid and on the implementation of eight EBPs within the state Medicaid program. However, respondents will complete part or all of the survey, depending on how many of the eight EBPs are being implemented in their state. The survey will be sent electronically to State Medicaid Directors, and they may respond by email or facsimile. To reduce burden, prior to administering the survey several survey questions will be pre-completed based on existing information, as available.

Below is the table of the estimated total burden hours:

Respondent	Number of respondents	Number of responses per respondent	Average burden hour	Total burden hours
State Medicaid Directors	51	1	1	51

Written comments and recommendations concerning the proposed information collection should be sent by May 6, 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 30, 2011.

Elaine Parry,

Director, Office of Management, Technology and Operations.

[FR Doc. 2011–8134 Filed 4–5–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0017]

Privacy Act of 1974; Department of Homeland Security Federal Emergency Management Agency—011 Training and Exercise Program Records System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new Department of Homeland Security system of records titled, "Department of Homeland Security Federal Emergency Management Agency—011 Training and Exercise Program Records System of Records." This system of records will allow the Department of Homeland Security/Federal Emergency Management Agency to collect and maintain records on its training and exercise programs. This system of records will include the personally identifiable information of current and former Federal Emergency Management Agency employees and contractors, current and former members of the first responder and emergency management communities, and others who have applied or registered to participate in or who have assisted with Federal Emergency Management Agency's training and exercise programs. The Department of Homeland Security is issuing a Notice of Proposed Rulemaking, to exempt this system of records from certain provisions of the Privacy Act, elsewhere in the **Federal Register**. In addition, in accordance with the Privacy Act of 1974 the Department of Homeland Security is giving notice that it proposes to consolidate the Privacy Act system of records notice titled, Department of Homeland Security/Federal Emergency Management Agency/National Emergency Training Center—017 Student Application and Registration Records system of records (October 5, 2004, 69 FR 192) into this system of records. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before May 6, 2011. This new system will be effective May 6, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0017 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Thomas R. McQuillan (202–646–3323), Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC 20478. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) proposes to establish a new DHS system of records titled, "DHS/FEMA–011 Training and Exercise Program Records System of Records."

In support of its mission, components within FEMA such as the Protection and National Preparedness Bureau, the National Processing Service Centers (NPSCs), the United States Fire Administration (USFA), and the FEMA Emergency Management Institute (FEMA/EMI) sponsor a wide range of training and exercise programs for FEMA's employees and contractors and its partners in the first responder and emergency management communities.

Through its training and exercise programs, FEMA brings together partners from state, local, tribal, regional, international, and nongovernmental/volunteer organizations, as well as the private sector, including firefighters, emergency medical services, emergency management agencies, law enforcement, and public officials. These programs provide FEMA's employees, contractors and partners with the opportunity to develop the situational awareness and skills necessary to quickly prevent, respond to, or mitigate all hazards affecting the people of the United States.

This system of records notice is being published because FEMA collects and maintains personally identifiable information (PII) about the individuals who register or apply for its training and exercise programs and the organization employing or sponsoring these individuals, as well as information used to grant access to IT systems that support these programs. FEMA's training and exercise programs also maintain information about the trainings and exercise events, such as rosters and reports, which may be shared among participants. The type and amount of PII FEMA collects from individuals to facilitate their participation may vary among programs.

The purpose of this system is to facilitate registration for, participation in, and the completion and documentation of, training and exercise programs sponsored by FEMA in support of its mission.

FEMA collects, uses, and maintains the records within this system under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act; the Federal Fire Prevention and Control Act of 1974, as amended; 44 U.S.C. 3101; 6 U.S.C. 748; Homeland Security Presidential Directives, and several Executive Orders, as described in this notice. This updated system of records strengthens privacy protections and provides greater transparency regarding FEMA's training and exercise records by encompassing the full range of the agency's training and exercise programs into a single system of records. To further safeguard individuals' privacy, FEMA limits access to the information in this system by verifying the status and "need to know" of individuals registering for and participating in the agency's training and exercise programs.

The proposed routine uses are compatible with the purpose of the original collection as they ensure that the information within this system is

shared in association with individuals' registration and participation in FEMA's training and exercise programs, and otherwise ensure that the sharing of information in this system is consistent with that of other DHS systems.

FEMA collects, uses, and maintains information about the individuals who register or apply for its training and exercise programs, including DHS employees and contractors, other Federal employees, volunteers and members of the first responder and emergency management communities, to foster the development of mission critical skills among them through participation in these training and exercise programs. FEMA's training and exercise programs may share information with state, local, tribal, international, nongovernmental/volunteer organizations, and private sector organizations. FEMA shares this information to facilitate the development of training and exercise programs, coordinate, facilitate, and track participation in training and exercise programs, and for statistical purposes. FEMA's sharing of information with education institutions for transcript purposes will only take place upon the request of the student. In accordance with the Privacy Act of 1974 the Department of Homeland Security is giving notice that it proposes to consolidate the Privacy Act system of records notice titled, Department of Homeland Security/Federal Emergency Management Agency/National Emergency Training Center—017 Student Application and Registration Records system of records (October 5, 2004, 69 FR 192) into the this system of records.

Additionally, DHS is issuing a Notice of Proposed Rulemaking elsewhere in the Federal Register to exempt this system of records from certain provisions of the Privacy Act in order to preserve the objectivity and fairness of testing and examination material, elsewhere in the **Federal Register**. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/FEMA–011 Training and Exercise Program Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM OF RECORDS

DHS/FEMA–011

SYSTEM NAME:

DHS/FEMA–011 Training and Exercise Program Records.

SECURITY CLASSIFICATION:

Sensitive But Unclassified.

SYSTEM LOCATION:

Records are maintained at the FEMA Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual who has applied for, participated in, or assisted with a training or exercise program recommended, sponsored, or operated by FEMA including current and former employees of DHS, any other federal employee, volunteers and contractors, and private individuals such as state, local, tribal, international, and non-profit/nongovernmental personnel; and other participants in FEMA training and exercise programs such as instructors, developers, observers, and interpreters.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Individual's name (First, Middle, Last, Suffix);
- Date of birth;
- Social Security Number;
- Alternate unique number assigned in lieu of an SSN;
- Sex;
- Race and ethnicity;
- U.S. Citizenship;
- City and country of birth (collected for non-U.S. citizens);
- Information related to disabilities requiring special assistance;
- Phone numbers;
- Email addresses;
- Addresses;
- Military Rank/Prefix;
- Unique user ID (for IT system registration);
- Individual's password (for IT system access; only accessible by the individual; disclosed as part of the authentication process);
- Individual's security questions and answers (for IT system access);
- Individual's employer or organization being represented;
- Individual's employment status;
- Individual's position title;
- Individual's professional certifications;
- Category of position;
- Years of experience;
- Type of experience;
- Primary responsibility;
- Reason for applying/registering for training/exercise;
- Reference point of contact name;
- Reference point of contact phone number;
- Reference point of contact addresses;
- Relationship of individual to the reference point of contact;
- Time Zone;
- Organization type/Jurisdiction (e.g. federal agency, state or local government, etc.);
- Organization identification number;
- Number of staff in the organization;
- Size of population served by the organization;
- Nomination forms;
- Registration/Application forms;
- Training/Exercise rosters and sign-in sheets;
- Training instructor and Exercise role lists;
- Training/exercise schedules, including location and venue, type, target capabilities, and mission;
- Financial information, such as bank routing and account number;
- Payment records, including financial, travel and related expenditures;
- Examination and testing materials;
- Grades and student evaluations;
- Course and instructor critiques; and
- Reports pertaining to and resulting from training and exercises.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- Pub. L. 93–288, Robert T. Stafford Disaster Relief and Emergency Assistance Act as amended; Pub. L. 93–498, Federal Fire Prevention and Control Act of 1974, as amended; Pub. L. 93–579, 44 U.S.C. 3101–3106; 6 U.S.C. 748; Homeland Security Presidential Directive 8; Homeland Security Presidential Directive 5; the Homeland Security Act of 2002; the E-Government Act of 2002; the Reorganization Plan No.3 of 1978, 5 U.S.C. 301; 31 U.S.C. 3716, Administrative offset; 31 U.S.C. 321, General authority of the Secretary;

Executive Order 13111; Executive Order 12148; Executive Order 12127; Executive Order 9397; Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973; Presidential Memorandum, "Electronic Government's Role in Implementing the President's Management Agenda," July 10, 2002, 15 U.S.C. 2206, 44 U.S.C. 3101; 50 U.S.C. App. 2253 and 2281; CFO Bulletin, Financial and Acquisition Management Division, Number 117, June 23, 2003. Subject: Invitational Travel. Executive Order 9397 authorizes the collection of the social security number.

PURPOSE(S):

The purpose of this system is to facilitate registration for, participation in, and the completion and documentation of training and exercise programs sponsored by FEMA in support of its mission. Records in this system will be used to: determine eligibility for, and the effectiveness of, FEMA training and exercise programs; facilitate housing for and reimbursements to students of FEMA Training Programs/Conferences; promote a collaborative environment for participants in FEMA's training and exercise programs; and facilitate the compilation of statistical information about FEMA's training and exercise programs. FEMA uses the Social Security Number to ensure the accuracy of academic records, for stipend reimbursement of funds to registered students, and to distinguish the identity of individuals with identical names and birth dates.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including U.S. Attorney Offices, or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or other federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To a federal, State, territorial, tribal, local, international, or foreign agency or entity for the purpose of consulting with that agency or entity (a) to assist in making a determination regarding access to or amendment of information, or (b) for the purpose of verifying the identity of an individual or the accuracy of information submitted by an individual who has requested access to or amendment of information.

I. To a Federal, State, local, tribal, territorial, foreign, or international agency, if necessary to obtain information relevant to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit.

J. To a Federal, State, local, tribal, territorial, foreign, or international agency, in response to its request, in connection with the hiring of a prospective employee or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, the issuance of a license, grant, or other benefit by the requesting agency, or for general inquiries by a state agency or state entity in connection with monitoring status and activities of its employees, to the extent that the information is relevant and necessary to the requesting agency's role and authority on such decisions and matters.

K. To a physician(s) in order to provide information from the application for students who become ill or are injured during courses and are unable to provide the information.

L. To members of the NFA and EMI Boards of Visitors Federal advisory committees for the purpose of evaluating NFA's and EMI's programmatic statistics.

M. To sponsoring States, local officials, or state agencies to update/evaluate statistics on participation in FEMA-sponsored educational programs.

N. To the Department of Treasury for the processing and issuance of stipend payments to reimburse training/exercise/conference related expenses.

O. To Federal, State, local and tribal educational institutions for the maintenance/updating of student academic records such as transcripts.

P. To the news media and the public, with the approval of the Chief Privacy

Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by an individual's name, social security number, or unique user ID.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

FEMA's training and exercise records retention is generally covered under General Records Schedule (GRS) 1A–29a, 1–29a(2), and 1–29b; NARA Authority N1–311–08–2 1a, and NARA Authority N1–311–88–2 2. Under GRS 1, records are maintained for up to five years after the cutoff date and then destroyed. Under NARA Authority N1–311–08–2 1a, records are retired to the Federal Records Center (FRC) five years after the cutoff and destroyed after forty years. Under NARA Authority N1–311–88–2 2, records are maintained for six years and three months after the cutoff and then destroyed.

SYSTEM MANAGER AND ADDRESS:

Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC 20478.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the FEMA FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under "contacts." If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See "Notification Procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification Procedure" above.

RECORD SOURCE CATEGORIES:

Records are obtained from all individuals who have registered for, applied for, participated in, or assisted with FEMA's training or exercise programs including FEMA employees and contractors, volunteers, other Federal employees and other participants such as instructors, course developers, observers, and interpreters.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(6).

Dated: March 3, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–8089 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–17–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Published Privacy Impact Assessments on the Web

AGENCY: Privacy Office, Department of Homeland Security (DHS).

ACTION: Notice of Publication of Privacy Impact Assessments (PIAs).

SUMMARY: The Privacy Office of the DHS has made available forty PIAs on various programs and systems in the Department. The assessments were approved and published on the Privacy Office's Web site between May 3, 2010 and January 7, 2011.

DATES: The Privacy Impact Assessments are available on the DHS Web site until June 6, 2011, after which they are obtained by contacting the DHS Privacy Office (contact information below).

FOR FURTHER INFORMATION CONTACT: Mary Ellen Callahan, Chief Privacy Officer, DHS, Washington, DC 20528, or e-mail: *pia@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Between May 3, 2010 and January 7, 2011, the Chief Privacy Officer of the DHS approved and published forty Privacy Impact Assessments (PIAs) on the DHS Privacy Office Web site, *http://www.dhs.gov/privacy,* under the link for

"Privacy Impact Assessments." Below is a short summary of the programs, indicating the DHS component responsible for the system, and the date on which the PIA was approved. Additional information can be found on the Web site or by contacting the Privacy Office.

System: E-Verify Program: Use of Commercial Data for Employer Verification.

Component: United States Citizenship and Immigration Services (USCIS).

Date of approval: May 4, 2010.

The Verification Division of USCIS operates the E-Verify Program, which provides verification of employment authorization for employers participating in the E-Verify program. The E-Verify Program collects additional employer business information from both registering employers and a commercial data provider, Dun and Bradstreet (D&B), to enhance the employer registration process, manage customer relationships, improve reporting capabilities and operational effectiveness. This expanded information collection pertains to registered employers participating in the E-Verify Program.

System: CRCL Matters.

Component: Civil Rights and Civil Liberties (CRCL).

Date of approval: May 6, 2010.

CRCL has established the CRCL Matters database. CRCL Matters is a database developed to respond to allegations of abuses of civil rights, civil liberties, and religious, racial, and ethnic profiling by department employees and officials. The PIA is being conducted because CRCL collects personally identifiable information (PII).

System: Exodus Accountability Referral System (EARS).

Component: Immigration and Customs Enforcement (ICE).

Date of approval: May 6, 2010.

In order to enforce U.S. federal export control laws, ICE and U.S. Customs and Border Protection (CBP) require information from federal regulatory agencies that grant export licenses on controlled items; specifically whether a license is required and whether a license has been granted. The ICE Exodus Command Center operates the EARS database that initiates, tracks, and manages requests to regulatory agencies for this information. The purpose of the PIA is to document the system's collection and use of PII.

System: Hiring Information Tracking System (HITS).

Component: ICE.

Date of approval: May 13, 2010.

HITS is an information system used by ICE to track current and prior hiring actions. HITS maintains information about individuals who are selected for vacant positions at ICE. ICE has conducted the PIA because HITS collect PII about individuals who are offered employment with ICE.

System: First Responder Technologies (R-Tech) Program.

Component: Science and Technology (S&T).

Date of approval: May 13, 2010.

The DHS S&T First Responder Technologies (R-Tech) program requires the collection of personal information and video recordings of first responder research volunteers in support of operational testing, evaluation, demonstration, and outreach activities. The PIA discusses the risks associated with the use of volunteers to test first responder technologies that are not privacy sensitive.

System: Equal Employment Opportunities (EEO) Eagle Compliant Enterprise System.

Component: CRCL.

Date of approval: June 3, 2010.

The CRCL EEO Program operates the EEO Eagle Complaint Enterprise System. EEO Eagle is an electronic records system used to track complaints and supporting documentation related to individual and class complaints of employment discrimination and retaliation prohibited by the DHS civil rights statutes. CRCL EEO has conducted this PIA because EEO Eagle collects and stores PII.

System: Security and Safety Computer Network.

Component: United States Coast Guard (USCG).

Date of approval: June 16, 2010.

The USCG operates the Coast Guard Headquarters (CGHQ) Support Command Security and Safety Computer Network (CSS LAN). The CSS LAN is a stand-alone system that encompasses multiple applications that support: physical access control to the CGHQ facility, identity verification, security camera monitoring, and key security and tracking for master keys that are used throughout CGHQ. USCG conducted this PIA because the applications that comprise the CSS LAN collect PII.

System: Digital Mail Pilot Program.

Component: DHS Wide.

Date of approval: June 18, 2010.

The DHS Office of the Chief Administrative Officer (OCAO) has implemented a Digital Mail Pilot Program for DHS Headquarters (HQ) and Components within the National Capital Region. The Digital Mail Pilot Program provides users the opportunity to receive mail via email thereby improving DHS business processes and increasing security. The purpose of this PIA is to demonstrate that the Digital Mail Pilot Program has considered and incorporated privacy protections of PII that may be collected, used, disseminated, and maintained throughout the entire lifecycle of the program.

System: Accessibility Compliance Management System (ACMS).

Component: DHS Wide.

Date of approval: June 22, 2010.

The DHS Office of Accessible Systems & Technology (OAST) operates the Accessibility Compliance Management System (ACMS). ACMS is intended to bring together a web-based DHS-wide single point-of-entry reporting system. ACMS allows documenting and reporting of all Section 508 compliance and accessibility activities it consistently tracks current status and progress towards meeting Section 508 compliance requirements for OAST and Component Accessible Systems and Technology Programs (ASTP). The PIA is being conducted to determine any privacy issues with customer information.

System: Publicly Available Social Media Monitoring and Situational Awareness Initiative.

Component: Office of Operations Coordination and Planning (OPS).

Date of approval: June 22, 2010.

The OPS, National Operations Center (NOC), has launched and lead the Publicly Available Social Media Monitoring and Situational Awareness (Initiative) to assist DHS and its components involved in fulfilling OPS statutory responsibility (Section 515 of the Homeland Security Act (6 U.S.C. 321d(b)(1)) to provide situational awareness and establish a common operating picture for the federal government, and for those state, local, and tribal governments, as appropriate. While this Initiative is not designed to actively collect PII, OPS conducted this PIA because the Initiative could potentially involve PII or other information received in an identifiable form. In the event PII comes into the Department's possession under this Initiative, the NOC will redact all PII prior to further dissemination of any collected information. In the event of an *in extremis* situation involving potential life and death, OPS will share certain PII with the responding authority in order for them to take the necessary actions to save a life, such as name and location of a person calling for help buried under rubble, or hiding in a hotel room when the hotel is under attack by terrorists.

System: MyTSA.

Component: Transportation Security Administration (TSA).

Date of approval: July 1, 2010.

TSA's MyTSA consists of a mobile and an iTunes application that provides the traveling public access to relevant TSA travel information via any mobile phone with internet access. MyTSA allows individuals to access such information as the types of items that may be carried through TSA security checkpoints, basic information regarding TSA checkpoint policy, estimated wait times at TSA checkpoints, and current travel conditions. The MyTSA application does not collect or use personally identifiable information. The PIA addresses the privacy impact of TSA's use of mobile media for delivering information to the public.

System: iComplaints.

Component: CRCL.

Date of approval: July 8, 2010.

CRCL EEO Program operates the iComplaints Complaint Enterprise System. IComplaints is an electronic records system used to track complaints and supporting documentation relating to individual and class complaints of employment discrimination and retaliation prohibited by DHS civil rights statutes. IComplaints will replace EEO Eagle as EEO Eagle is being decommissioned. CRCL EEO has conducted this PIA because iComplaints collects and stores PII.

System: Operations Center Incident Management System (OCIMS) Update.

Component: TSA.

Date of approval: July 12, 2010.

Under the Aviation and Transportation Security Act (ATSA), TSA has "responsibility for security in all modes of transportation." TSA uses an operations center incident management system called WebEOC to perform incident management, coordination, and situation awareness functions for all modes of transportation. The system stores information that it receives about the following categories of individuals: (1) Individuals who violate, or are suspected of violating transportation security laws, regulations, policies or procedures; (2) individuals whose behavior or suspicious activity resulted in referrals by Ticket Document Checkers to Behavior Detection Officer or Law Enforcement Officer interview (primarily at airports); or (3) individuals whose identity must be verified, or checked against federal watch lists. Individuals whose identity must be verified includes both those individuals who fail to show acceptable identification documents to compare to boarding documents and law enforcement officials seeking to fly armed. The system collects and compiles reports from federal, state, local, tribal, or private sector security officials related to incidents that may pose a threat to transportation or national security. TSA republished this PIA to clarify that the TSA Operations Center will record telephonic communications. The PIA previously disclosed in section 1.4 that telephone calls were a source of information but did not explicitly state that telephone calls would be recorded. Daily reports will be provided to executives at TSA and DHS to assist in incident and operational response management.

System: Targeted Violence Information Sharing System (TAVISS).

Component: United States Secret Service (USSS).

Date of approval: July 13, 2010.

USSS has created the Targeted Violence Information Sharing System (TAVISS). TAVISS is used to conduct name checks and determine whether a subject is of protective interest to any agency within the TAVISS network. The Secret Service is conducting this PIA because TAVISS contains personally identifiable information (PII) regarding subjects of protective interest to the Secret Service and agencies participating in the network.

System: Watchlist Service.

Component: DHS Wide.

Date of approval: July 14, 2010.

DHS currently uses the Terrorist Screening Database (TSDB), a consolidated database maintained by the Department of Justice Federal Bureau of Investigation Terrorist Screening Center (TSC) of identifying information about those known or reasonably suspected of being involved in terrorist activity in order to facilitate DHS mission-related functions, such counterterrorism, law enforcement, border security, and inspection activities. DHS and TSC are improving the current method of transmitting TSDB data from TSC to DHS. Through a new service called the "DHS Watchlist Service" (WLS), TSC and DHS will automate and simplify the current manual process. TSC remains the authoritative source of watchlist data and will provide DHS with near real-time synchronization of the TSDB. DHS will ensure that each DHS component system receives only those TSDB records which they are authorized to use under the WLS Memorandum of Understanding and authorized under existing regulations and privacy compliance documentation between TSC and DHS (WLS MOU) and any amendments or modifications thereto. DHS conducted this privacy impact assessment (PIA) because the WLS will maintain a synchronized copy of the TSDB, which contains PII, and disseminate it to authorized DHS components.

System: Significant Event Notification (SEN) System.

Component: ICE.

Date of approval: July 26, 2010.

The Significant Event Notification system (SEN) is a reporting and law enforcement intelligence transmission capability developed for DHS and ICE. The ICE Office of Homeland Security Investigations initiated the reporting capability to create reports for ICE field and headquarters managers to provide timely information about critical incidents, activities, and events that involve or impact ICE field staff. The system also handles law enforcement intelligence communication from ICE Office of Enforcement and Removal Operations field offices to field and headquarters managers and the ERO Intelligence Operations Unit. The PIA is being completed to provide notice of the existence of SEN and to publicly document the privacy protections in place.

System: Enforcement Integrated Database (EID) Update.

Component: ICE.

Date of approval: July 28, 2010.

The Enforcement Integrated Database (EID) is a DHS shared common database repository for several DHS law enforcement and homeland security applications. EID captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and criminal law enforcement investigations and operations conducted by ICE and CBP, both components within DHS. The PIA for EID was published in January 2010. The information entered into EID and the scope of external information sharing is being expanded, thus necessitating an update to the EID PIA.

System: Iris and Face Technology Demonstration and Evaluation (IFTDE).

Component: Science and Technology (S&T).

Date of approval: August 12, 2010.

As part of its Multi-Modal Biometrics Projects, S&T Directorate and the National Institute of Standards and Technology (NIST) are investigating iris recognition as a promising biometric modality that may become suitable to support DHS operations in the near future. As iris recognition technologies mature, it is important to understand

the capabilities and limitations of the technologies in operational settings, as well as what additional technology development is necessary to reduce technical risk in potential future acquisitions by DHS operational components. The purpose of this evaluation of iris recognition technologies is to conduct field trials/studies of iris camera prototypes under conditions and environments of relevance (*e.g.,* humidity levels, amount of sunlight, etc.) to DHS operational users to assess the viability of the technology and its potential operational effectiveness in support of DHS operations. S&T is conducting a PIA because biometric information is being collected from individuals detained in an operational setting.

System: Freedom of Information Act (FOIA) and Privacy Act (PA) Records Program.

Component: DHS Wide.

Date of approval: August 18, 2010.

DHS and its components have established a Departmental Freedom of Information Act (FOIA) and Privacy Act (PA) Program to maintain records created by the Department's FOIA and PA staff, as well as manage a multitude of FOIA and PA systems. While DHS has established the Department's FOIA and PA program, some components have established information technology as well as paper-based systems designed to handle component-specific FOIA and PA processing. The purpose of the various systems within the FOIA and PA program is to process record requests and administrative appeals under the FOIA and PA, as well as access, notification, and amendment requests and appeals under the PA. These systems also maintain records used in litigation arising from such requests and appeals, and in assisting DHS in carrying out any other responsibilities under the FOIA and PA. The DHS Privacy Office has conducted PIA to assess the risks presented by the use of PII in the various FOIA and PA processes and systems employed by DHS' FOIA and PA program.

System: Entellitrack.

Component: CRCL.

Date of approval: August 23, 2010.

CRCL and TSA have established a new database called Entellitrak which is an enterprise tracking system that has been configured to track, search, and report on complaints data. It is a database developed to respond to allegations of abuses of civil rights, civil liberties, and religious, racial, and ethnic profiling by department employees and officials. Entellitrak will replace the legacy system CRCL Matters with all CRCL Matters data migrating onto Entellitrak in the transition. The PIA is being conducted because Entellitrak collects and stores PII.

System: Watchlist Service Update.

Component: DHS Wide.

Date of approval: September 7, 2010.

DHS currently uses the Terrorist Screening Database (TSDB), a consolidated database maintained by the Department of Justice Federal Bureau of Investigation Terrorist Screening Center (TSC) that contains identifying information about those known or reasonably suspected of being involved in terrorist activity in order to facilitate DHS mission-related functions, such counterterrorism, law enforcement, border security, and inspection activities. In July 2010, DHS launched an improved method of transmitting TSDB data from TSC to DHS through a new service called the "DHS Watchlist Service" (WLS). At that time, DHS published a PIA to describe and analyze privacy risks associated with this new service. The WLS maintains a synchronized copy of the TSDB, which contains PII, and disseminates it to authorized DHS components. DHS is issuing this privacy impact assessment update to identify two additional authorized DHS recipients of TSDB data via the WLS in the form of a computer readable extract: the DHS Office of Intelligence and Analysis and the ICE.

System: Citizenship and Immigration Data Repository (CIDR).

Component: USCIS.

Date of approval: September 8, 2010.

DHS and USCIS developed the Citizenship Immigration Data Repository (CIDR), hosted on DHS classified networks, in order to make information from multiple USCIS benefits administration systems available for querying by authorized USCIS personnel for the following three purposes: (1) Vetting USCIS application information for indications of possible immigration fraud and national security concerns; (2) detecting possible fraud and misuse of immigration information or position by USCIS employees, for personal gain or by coercion; and (3) responding to requests for information (RFIs) from the DHS Office of Intelligence and Analysis (I&A) and/or the federal intelligence and law enforcement community members that are based on classified criteria. In conjunction with this PIA, DHS is issuing a new Privacy Act system of records notice to cover the search parameters and the results of the searches.

System: Access to Sensitive Security Information and Contract Solicitation.

Component: TSA.

Date of approval: September 9, 2010.

TSA is responsible for the acquisition of services and supplies related to protecting the nation's transportation system. If determined necessary for the proposal preparation process, TSA may permit offerors to have access to Sensitive Security Information (SSI) necessary to prepare a proposal. SSI is a form of unclassified information that if publicly released would be detrimental to transportation security. The standards governing SSI are promulgated under 49 U.S.C. 114(r) in 49 CFR part 1520. In order to determine if a potential offer or may be granted access to SSI in the pre-contract award acquisition process, TSA will conduct a security threat assessment (STA) of the individuals and company. The STA may include a verification of site facility clearance in the National Industrial Security Program, contractor suitability determination or other federal background investigation, individual security clearance(s), and if required, a criminal history records check and/or a check against terrorism databases. Because this program entails a new collection of information about members of the public in identifiable form, the E-Government Act of 2002 and the Homeland Security Act of 2002 requires that TSA conduct a PIA.

System: Eversity Enterprise System.

Component: CRCL.

Date of approval: September 14, 2010.

The CRCL EEO Program operates the Eversity Enterprise System. Eversity is an electronic records system used in workforce analysis, tracking, management, and reporting required under Equal Employment Opportunity Commission (EEOC) Management Directive (MD) 715. CRCL EEO has conducted this PIA because Eversity collects and stores PII.

System: Social Networking Interactions and Applications (Communications/Outreach/Public Dialogue).

Component: DHS Wide.

Date of approval: September 16, 2010.

Social networking interactions and applications includes a sphere of non-government Web sites and web-based tools that focuses on connecting users, inside and outside of the DHS, to engage in dialogue, share information and media, and collaborate. Third parties control and operate these non-governmental websites; however, the Department may use them as alternative channels to provide robust information and engage with the public. The Department may also use these websites to make information and services

widely available, while promoting transparency and accountability, as a service for those seeking information about or services from the Department. This PIA analyzes the Department's use of social networking and how these interactions and applications could result in the Department receiving PII. This PIA describes the information the Department may have access to, how it will use the information, what information is retained and shared, and how individuals can gain access to and correct their information.

System: Alien Criminal Response Information Management System (ACRIMe) & Enforcement Integrated Database (EID) Update.

Component: ICE.

Date of approval: September 29, 2010.

ACRIMe is an information system used by ICE to receive and respond to immigration status inquiries made by other agencies about individuals arrested, subject to background checks, or otherwise encountered by those agencies. EID is an ICE case management system that captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and criminal law enforcement investigations and operations conducted by ICE and U.S. Customs and Border Protection. ICE is combining ACRIMe and EID data via the ICE Integrated Decision Support System, a reporting sub system of EID, to enable and enhance comprehensive reporting about criminal aliens throughout the alien identification, apprehension, and removal process. To effectuate this reporting, ICE is modifying ACRIMe to expand its user base within the agency, implementing new user functionality in ACRIMe and EID, and updating IIDS to support enhanced reporting of ACRIMe and EID data. ICE is further expanding ACRIMe support for the Secure Communities initiative. ICE is conducting this PIA update to address these modifications and enhancements.

System: National File Tracking System (NFTS).

Component: USCIS.

Date of approval: October 5, 2010.

USCIS has prepared this PIA for the National File Tracking System (NFTS). NFTS is an automated file-tracking system used to maintain an accurate file inventory and track the physical location of files. The system facilitates USCIS's ability to efficiently manage and streamline access to the millions of immigration files under its control. USCIS is conducting this PIA to document, analyze and assess the current practices with respect to the PII, NFTS collects, uses and shares.

System: Standoff Technology Integration and Demonstration Program Update.

Component: S&T.

Date of approval: October 14, 2010.

S&T has updated the Standoff Explosives Detection Technology Demonstration Program (now referred to as the Standoff Technology Integration and Demonstration Program, or STIDP) PIA issued July 21, 2008 to reflect updates to the program involving live crowd testing.

The program is adding new technologies, expanding the use of the test center, enhancing object tracking technologies and beginning to distribute crowd video data to vendors. The PIA update identifies and addresses the privacy issues associated with public test and evaluation activities on technologies that will be acquired, matured, and integrated by STIDP between now and the end of the program, currently slated for 2014. Based on the privacy issues identified, three sets of privacy protective requirements were developed and implemented at all stages of the program. The Live Testing Requirements and Law Enforcement Operations Requirements apply to conducting and operating a test in a public environment and the Data Protection Requirements address the collection and protection of PII. These requirements, when systematically applied to test and evaluation plans and their implementation, ensure that privacy concerns are appropriately addressed for broad classes of technologies tested in a range of venues with and without law enforcement operations. This update assists STIDP's mission of developing an integrated countermeasure architecture to prevent person-borne improvised explosive device attacks.

System: Electronic Surveillance System (ELSUR).

Component: ICE.

Date of approval: November 2, 2010.

The Electronic Surveillance System (ELSUR) is owned by ICE. ELSUR allows ICE to track and search for ICE applications for court orders that authorize ICE to intercept oral, wire, or electronic communications during the course of a criminal investigation. ICE conducted this PIA because ELSUR contains PII and to publicly document the privacy protections that are in place.

System: Immigration Benefits Background Check Systems (IBBCS).

Component: USCIS.

Date of approval: November 5, 2010.

As part of its benefits adjudication process and as required by law, USCIS conducts background checks on petitioners and applicants who seek certain immigration benefits. These background checks consist of four separate checks against systems within Department of Justice (DOJ), Federal Bureau of Investigation (FBI), and DHS. In order to facilitate the collection and transmission of information necessary to complete background check processes, USCIS maintains five information technology electronic systems: The Fingerprint Masthead Notification System (FMNS), the Customer Identity Capture System (CICS), the FD–258 Tracking System—Mainframe (FD–258 MF), the Benefits Biometrics Support System (BBSS), and the Interagency Border Inspection System (IBIS) Manifest. USCIS is conducting this PIA because FMNS, CICS, FD–258 MF, BBSS, and IBIS Manifest collect, use, and share PII. The PIA replaces the previously published USCIS PIA for the "Background Check Service (BCS)" which describes planned background check-related systems that were never implemented. Upon publication of this PIA, the BCS PIA will be retired.

System: Quality Assurance Recording System (QARS).

Component: Federal Emergency Management Agency (FEMA).

Date of approval: November 10, 2010.

FEMA, Response and Recovery Bureau operates the QARS. The proposed system of telephone call and computer screen capture recording is for internal employee and contractor performance evaluation, training and quality assurance purposes to improve customer service to disaster assistance applicants requesting assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. FEMA is conducting the PIA because QARS call recordings and screen captures information about the FEMA employees and/or contractors as they provide customer service to disaster assistance applicants. The system will maintain information about disaster assistance applicants, but the focus of this system is on employee and contractor quality assurance.

System: Protective Research Information System Management (PRISM–ID).

Component: USSS.

Date of approval: November 12, 2010.

USSS has created and used the PRISM–ID system to record information that in accordance with Secret Service criteria is required to assist the agency in meeting its protective mission that includes the protection of the President, Vice President, their immediate families, former Presidents and First

Ladies, major candidates for the presidency and vice presidency, foreign heads of state visiting the United States, and other individuals authorized to receive Secret Service protection. The PIA is being conducted because PRISM–ID collects PII.

System: Department of Homeland Security Information Sharing Environment Suspicious Activity Reporting Initiative (ISE–SAR).

Component: DHS Wide.

Date of approval: November 17, 2010.

The Office and Intelligence and Analysis, primarily through the State and Local Program Office in coordination with the Office of Operations Coordination Planning, is leading the DHS effort to implement the Nationwide Suspicious Activity Reporting Initiative (NSI). The NSI is a key aspect of the federal Information Sharing Environment (ISE) that Congress created in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRPTA). The NSI is overseen by DOJ and is designed to support the sharing of information through the ISE about suspicious activities which are defined as "official documentation of observed behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity [related to terrorism]." The Office of Intelligence and Analysis and the Office of Operations and Coordination Planning have been jointly coordinating activities throughout DHS to develop a department-level interface with the NSI that will enable DHS to share Suspicious Activity Reporting (SAR) that meet the ISE–SAR Functional Standard Version 1.5 (hereinafter referred to as ISE–SAR). Throughout this PIA, the term "SAR" refers to suspicious activity reporting, which may include activities that do not have a nexus to terrorism, and the term "ISE–SAR" refers to a subset of SAR that meet the ISE–SAR Functional Standard. The ISE–SAR Functional Standard Version 1.5 defines an ISE–SAR as official documentation of observed behavior reasonably indicative of: Pre-operational planning related to terrorism or other criminal activity associated with terrorism. DHS conducted the PIA because ISE–SAR may contain PII. The PIA describes the coordinated activities of the DHS ISE–SAR Initiative, including the process for DHS component level review, identification, and submission of ISE–SAR to the NSI Shared Space as well as the technology that DHS developed to support DHS' participation in the NSI.

System: Research Project Involving Volunteers.

Component: S&T.

Date of approval: November 23, 2010.

An integral part of the S&T mission is to conduct research, development, testing, and evaluation (RDT&E) on technologies or topics related to improving homeland security and combating terrorism. Some S&T RDT&E activities use volunteers to test, evaluate, provide feedback, or otherwise collect data on certain research topics, technologies, equipment, and capabilities related to S&T's mission. Volunteer RDT&E activities require the collection of a range of information from volunteers including work experience, biographic data and images. RDT&E activities will vary in the types and breadth of data elements and information collected from volunteers. S&T is conducting this PIA to establish protections for all volunteer S&T RTD&E activities. Volunteer RDT&E activities that are covered by the PIA are listed in the appendix, updated periodically.

System: NOC Patriot Report Database.

Component: OPS.

Date of approval: December 7, 2010.

The NOC in OPS operates the NOC Patriot Report Database. The NOC Patriot Report Database is a repository for reports generated to record and track suspicious activity that may implicate terrorism-related or criminal activity. OPS has conducted this PIA because the NOC Patriot Report Database may contain PII.

System: Electronic Discovery Software System (EDSS).

Component: ICE.

Date of approval: December 10, 2010.

The Electronic Discovery Software System (EDSS) is owned by the Office of the Principal Legal Advisor (OPLA) within ICE. EDSS supports the collection and organization of paper and electronic documents for analysis, review, redaction, and production to meet litigation discovery requirements. ICE may also use the system to process agency records in response to FOIA or PA requests. ICE conducted this PIA because EDSS collects, analyzes, and stores PII.

System: TECS System: CBP Primary and Secondary Processing.

Component: CBP.

Date of approval: December 23, 2010.

The TECS (not an acronym) System is the updated and modified version of the former Treasury Enforcement Communications System. TECS is owned and managed by CBP. TECS is both an information-sharing platform, which allows users to access different databases that may be maintained on the platform or accessed through the platform, and the name of a system of records that include temporary and permanent enforcement, inspection, and operational records relevant to the antiterrorism and law enforcement mission of CBP and numerous other federal agencies that it supports. TECS not only provides a platform for interaction between these systems and defined TECS users, but also serves as a data repository to support law enforcement "lookouts," border screening, and reporting for CBP's primary and secondary inspection processes, which are generally referenced as TECS Records or Subject Records. In order to provide more transparency as it relates to the functions and data in TECS, CBP published separate PIAs and Privacy Act System of Records Notices (SORNs) for the CBP sub-systems based on the purpose and use of the information. CBP also maintains other federal agency data on TECS to stage the information for use by CBP at the time an individual presents himself/herself to CBP. This allows TECS to work more efficiently and reduces the performance impact on the originating systems. The PIA focuses on CBP's use and modernization of TECS as it relates to the primary and secondary inspection processes (including information collected in advance of arrival, during inspections at the United States (U.S.) port of entry (POE), and retention of information and reports following interactions during U.S. border crossing activities) to ensure compliance with the numerous laws enforced by CBP, including determining the admissibility of persons attempting to enter the U.S. CBP will issue a separate PIA to address the information access and system linkages facilitated for CBP, DHS, and other federal agency systems that link to TECS and share data within the TECS user community.

System: ELBC System: Exit Line Breach Control System.

Component: TSA.

Date of approval: December 28, 2010.

TSA has conducted an assessment of ELBC systems for use in airports. The assessment will evaluate the ELBC systems' capability to monitor traffic flow at the exit lanes from the sterile areas of the airport and initiate an automated response if it appears that an individual is entering the sterile area through the exit lane. TSA will make results of the assessment available to airports seeking to implement such systems. This PIA is being conducted to provide transparency into TSA testing affecting the public and the collection of images as part of the assessment. If TSA decides to implement such systems for

its own use, a new PIA will be conducted.

System: NICC SARS: National Infrastructure Coordinating Center Suspicious Activity Reporting Initiative (NICC).

Component: National Protection and Programs Directorate (NPPD).

Date of approval: December 29, 2010.

NPPD Office of Infrastructure Protection (IP) National Infrastructure Coordinating Center (NICC) has published this PIA to reflect activities under its Suspicious Activity Reporting (SAR) Initiative. The NICC SAR Initiative serves as a mechanism by which a report involving suspicious behavior related to an observed encounter or reported activity is received and evaluated to determine its potential nexus to terrorism. NICC is conducting this PIA because SAR occasionally contain PII and NICC will be collecting and contributing SAR data for reporting and evaluation proceedings.

System: Publicly Available Social Media Monitoring and Situational Awareness Initiative Update.

Component: OPS.

Date of approval: January 7, 2011.

OPS, NOC, leads the Publicly Available Social Media Monitoring and Situational Awareness (Initiative) to assist the DHS and its components involved in fulfilling OPS statutory responsibility (Section 515 of the Homeland Security Act (6 U.S.C. 321d(b)(1)) to provide situational awareness and establish a common operating picture for the federal government, and for those state, local, and tribal governments, as appropriate. The NOC and participating components may also share this de-identified information with international partners and the private sector where necessary and appropriate for coordination. While this Initiative is not designed to actively collect PII, OPS is conducting this update to the PIA because the initiative may now collect and disseminate PII for certain narrowly tailored categories. For example, in the event of an in extremis situation involving potential life and death, OPS will share certain PII with the responding authority in order for them to take the necessary actions to save a life, such as name and location of a person calling for help buried under rubble, or hiding in a hotel room when the hotel is under attack by terrorists. In the event PII comes into the Department's possession under circumstances other than those itemized herein, the NOC will redact all PII prior to further dissemination of any collected information. After conducting the Second Privacy Compliance Review, it was determined that the PIA should be updated to allow for collection and dissemination of PII in a limited number of situations in order to respond to the evolving operational needs of the NOC. The PIA will be reviewed every six months to ensure compliance. The review will be done in conjunction with a Privacy Office-led Privacy Compliance Review (PCR) of the Initiative and of OPS social media monitoring Internet-based platforms and information technology infrastructure.

Dated: March 17, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–8086 Filed 4–5–11; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1960–DR; Docket ID FEMA–2011–0001]

Illinois; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Illinois (FEMA–1960–DR), dated March 17, 2011, and related determinations.

DATES: *Effective Date:* March 17, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 17, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Illinois resulting from a severe winter storm and snowstorm during the period of January 31 to February 3, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Illinois.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. You are further authorized to provide emergency protective measures, including snow assistance, under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period. You may extend the period of assistance, as warranted. This assistance excludes regular time costs for the sub-grantees' regular employees. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Gregory W. Eaton, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Illinois have been designated as adversely affected by this major disaster:

Adams, Bond, Boone, Brown, Bureau, Calhoun, Carroll, Cass, Christian, Clark, Clay, Coles, Cook, Crawford, Cumberland, DeKalb, Douglas, DuPage, Edgar, Effingham, Fayette, Ford, Fulton, Hancock, Henderson, Henry, Jasper, Jo Daviess, Kane, Knox, Lake, LaSalle, Lee, Logan, Marion, Marshall, Mason, McDonough, McHenry, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Pike, Putnam, Richland, Rock Island, Schuyler, Scott, Shelby, Stark, Tazewell, Warren, Washington, Whiteside, Will, Winnebago, and Woodford Counties for Public Assistance.

Bureau, Calhoun, Carroll, Cass, Cook, DeKalb, DuPage, Fulton, Hancock, Henry, Jo Daviess, Kane, Lake, LaSalle, Lee, Logan, Marshall, Mason, McDonough, Mercer, Morgan, Ogle, Peoria, Pike, Putnam, Rock Island, Schuyler, Stark, Tazewell, Warren, Whiteside, Will, Winnebago, and Woodford Counties for emergency protective measures (Category B), including snow assistance, under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period. This emergency assistance will be provided for a period of 72 hours for the counties of Adams, Boone, Brown, Ford, Henderson, Knox, McHenry, Menard, and Scott.

All counties within the State of Illinois are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034,

Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–8110 Filed 4–5–11; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1961–DR; Docket ID FEMA–2011–0001]

Missouri; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1961–DR), dated March 23, 2011, and related determinations.

DATES: *Effective Date:* March 23, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 23, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Missouri resulting from a severe winter storm and snowstorm during the period of January 31 to February 5, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Missouri.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. You are further authorized to provide emergency protective measures, including snow assistance, under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period. You may extend the period of assistance, as warranted. This assistance excludes regular time costs for the sub-grantees' regular employees. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Elizabeth Turner, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Missouri have been designated as adversely affected by this major disaster:

Adair, Andrew, Audrain, Barton, Bates, Benton, Boone, Caldwell, Callaway, Carroll, Cass, Cedar, Chariton, Clark, Clinton, Cole, Cooper, Dade, Dallas, DeKalb, Grundy, Henry, Hickory, Howard, Johnson, Knox, Laclede, Lafayette, Lewis, Linn, Livingston, Macon, Madison, Maries, Marion, McDonald, Miller, Moniteau, Monroe, Montgomery, Morgan, Newton, Osage, Pettis, Platte, Polk, Pulaski, Putnam, Ralls, Randolph, Ray, Saline, Schuyler, Scotland, Shelby, St. Clair, Sullivan, Vernon, and Worth Counties for Public Assistance.

Adair, Andrew, Audrain, Barton, Bates, Benton, Boone, Caldwell, Callaway, Carroll, Cass, Cedar, Chariton, Clark, Clinton, Cole, Dade, DeKalb, Grundy, Henry, Hickory, Howard, Johnson, Knox, Laclede, Lafayette, Lewis, Livingston, Maries, Marion, McDonald, Miller, Monroe, Montgomery, Morgan, Newton, Osage, Pettis, Platte, Polk, Pulaski, Putnam, Randolph, Ray, Saline, Schuyler, Scotland, St. Clair, Sullivan and Vernon Counties for emergency protective measures (Category B), including snow assistance, under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period. The assistance for Cooper, Dallas, Linn, Macon, Moniteau, Ralls, and Shelby Counties will be provided for a period of 72 hours.

All counties within the State of Missouri are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–8109 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1963–DR; Docket ID FEMA–2011–0001]

Washington; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Washington (FEMA–1963–DR), dated March 25, 2011, and related determinations.

DATES: *Effective Date:* March 25, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 25, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Washington resulting from a severe winter storm, flooding, landslides, and mudslides during the period of January 11–21, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Washington.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and

Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Douglas G. Mayne, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Washington have been designated as adversely affected by this major disaster:

King, Kittitas, Klickitat, Lewis, Skagit, Skamania, and Wahkiakum Counties for Public Assistance.

All counties within the State of Washington are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–8108 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1964–DR; Docket ID FEMA–2011–0001]

Oregon; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oregon (FEMA–1964–DR), dated March 25, 2011, and related determinations.

DATES: *Effective Date:* March 25, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 25, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Oregon resulting from a tsunami wave surge on March 11, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Oregon.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated area and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Dolph A. Diemont, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following area of the State of Oregon has been designated as adversely affected by this major disaster:

Curry County for Public Assistance.

All counties within the State of Oregon are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–8107 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1962–DR; Docket ID FEMA–2011–0001]

New Mexico; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New Mexico (FEMA–1962–DR), dated March 24, 2011, and related determinations.

DATES: *Effective Date:* March 24, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 24, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of New Mexico resulting from a severe winter storm and extreme cold temperatures during the period of February 1–5, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of New Mexico.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for

Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Thomas J. McCool, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of New Mexico have been designated as adversely affected by this major disaster:

Lincoln, Otero, Rio Arriba, Sierra, Socorro, and Taos Counties and the Tribal jurisdictions of the Mescalero Apache Tribe, Santa Ana Pueblo, Taos Pueblo, and the portions of Santa Clara Pueblo that lie entirely within Rio Arriba County for Public Assistance.

All counties and Indian Tribes within the State of New Mexico are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–8106 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. CUSTOMS AND BORDER PROTECTION

Agency Information Collection Activities: Certificate of Origin

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0016.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Certificate of Origin (CBP Form 3229). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before June 6, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Certificate of Origin.

OMB Number: 1651–0016.

Form Number: CBP Form 3229.

Abstract: CBP Form 3229, Certificate of Origin, is used by shippers to declare that goods being imported into the United States are produced or manufactured in a U.S. insular possession from materials grown, produced or manufactured in such possession, and to list the foreign materials included in the goods, including their description and value. CBP Form 3229 is used as documentation for goods entitled to enter the U.S. free of duty. This form is authorized by General Note 3(a)(iv) of The Harmonized Tariff Schedule of the Untied States (19 U.S.C. 1202) and is provided for by 19 CFR 7.3 CBP Form 3229 is accessible at *http://forms.cbp.gov/pdf/CBP_Form_3229.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with a change to the burden hours based on revised estimates by CBP of the number of forms filed annually. There is no change to the information being collected.

Type of Review: Extension (with change)

Affected Public: Businesses.

Estimated Number of Respondents: 113.

Estimated Number of Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 2,260.

Estimated Time per Response: 22 minutes.

Estimated Total Annual Burden Hours: 814.

Dated: March 31, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–8144 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Report of Diversion

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information: 1651–0025.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Report of Diversion (CBP Form 26). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before June 6, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW,, 5th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Report of Diversion.

OMB Number: 1651–0025.

Form Number: CBP Form 26.

Abstract: CBP Form 26, *Report of Diversion,* is used to track vessels traveling coastwise from U.S. ports to other U.S. ports when a change occurs in scheduled itineraries. This form is initiated by the vessel owner or agent to notify and request approval by CBP for a vessel to divert while traveling coastwise from one U.S. port to another U.S. port, or a vessel cleared to a foreign port or place having to divert to another U.S. port when a change occurs in the vessel itinerary. CBP Form 26 collects information such as the name and nationality of the vessel, the expected port and date of arrival, and information about any related penalty cases, if applicable. This information collection is authorized by the Jones Act (46 U.S.C. App. 883) and is provided for 19 CFR 4.91. CBP Form 26 is accessible at *http://forms.cbp.gov/pdf/CBP_Form_26.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 1,400.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Responses: 2,800.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 233.

Dated: April 1, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–8147 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Drawback Process Regulations

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0075.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Drawback Process Regulations (CBP Forms 7551, 7552 and 7553). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before June 6, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Drawback Process Regulations.

OMB Number: 1651–0075.

Form Number: CBP Forms 7551, 7552 and 7553.

Abstract: The collections of information related to the drawback process are required to implement provisions of 19 CFR, Part 191, which provides for a refund of duty for certain merchandise that is imported into the United States and subsequently exported. If the requirements set forth in Part 191 are met, claimants may file for a refund of duties using CBP Form 7551, *Drawback Entry.* CBP Form 7552, *Delivery Certificate for Purposes of Drawback,* is used to record a transfer of merchandise from a company other than the importer of record and is also used each time a change to the imported merchandise occurs as a result of a manufacturing operation. CBP Form 7553, *Notice of Intent to Export, Destroy or Return Merchandise for Purposes of Drawback,* is used to notify CBP if an exportation, destruction, or return of the imported merchandise will take place. The information collected on these forms is authorized by 19 U.S.C. 1313(l). The drawback forms are accessible at *http://www.cbp.gov/xp/cgov/toolbox/forms/.*

Current Action: This submission is being made to extend the expiration date of this information collection with no change to the burden hours or to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

CBP Form 7551, Drawback Entry

Estimated Number of Respondents: 6,000.

Estimated Number of Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 120,000.

Estimated Time per Response: 35 minutes.

Estimated Total Annual Burden Hours: 70,000.

CBP Form 7552, Delivery Certificate for Drawback

Estimated Number of Respondents: 2,000.

Estimated Number of Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 40,000.

Estimated Time per Response: 33 minutes.

Estimated Total Annual Burden Hours: 22,000.

CBP Form 7553, Notice of Intent To Export, Destroy or Return Merchandise for Purposes of Drawback

Estimated Number of Respondents: 150.

Estimated Number of Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 3,000.

Estimated Time per Response: 33 minutes.

Estimated Total Annual Burden Hours: 1,650.

Dated: April 1, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–8148 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Automated Clearinghouse

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing collection of information: 1651–0078.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Automated Clearinghouse (CBP Form 400). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before June 6, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Automated Clearinghouse.

OMB Number: 1651–0078.

Form Number: CBP Form 400.

Abstract: The Automated Clearinghouse (ACH) allows participants in the Automated Broker Interface (ABI) to transmit daily statements, deferred tax, and bill payments electronically through a financial institution directly to a CBP account. ACH debit allows the payer to exercise more control over the payment process. In order to participate in ACH debit, companies must complete CBP Form 400, *ACH Application.* Participants also use this form to notify CBP of changes to bank information or contact information. The ACH procedure is authorized by 19 U.S.C. 1202, and provided for by 19 CFR 24.24 (b). CBP Form 400 is accessible at *http://www.cbp.gov/xp/cgov/toolbox/forms/.*

Current Actions: This submission is being made to extend the expiration date of this information collection with a change to the burden hours due to updated estimates by CBP. There is no change to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 1,443.

Estimated Number of Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 2,886.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 240.

Dated: March 31, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–8150 Filed 4–5–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–32]

Notice of Submission of Proposed Information Collection to OMB Multifamily Project Applications and Construction Prior to Initial Endorsement

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information from sponsors and general contractors, and submitted by a HUD-approved mortgagee, is needed to determine project feasibility, mortgagor/

contractor acceptability, and construction cost. Documentation from operators/managers of health care facilities is also required as part of the application for firm commitment for mortgage insurance. Project owners/sponsors may apply for permission to commence construction prior to initial endorsement.

DATES: *Comments Due Date: May 6, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0029) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail OIRA–Submission@omb.eop.gov fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Multifamily Project Applications and Construction Prior to Initial Endorsement.

OMB Approval Number: 2502–0029.

Form Numbers: HUD–92466 R3, HUD–92408M, HUD–92264 R1, HUD–92466 R2, HUD–92466 R4, HUD–92466M, HUD–92452, HUD–1006, HUD–2880, HUD–91708, HUD–92013, HUD–92013–SUPP, HUD–92013–E, HUD–92264, HUD–92264–A, HUD–92273, HUD–92274, HUD 92329, HUD 92331, HUD 92447, HUD 92326, HUD 92485, HUD 92415, HUD–92010.

Description of the Need for the Information and its Proposed Use:

The information from sponsors and general contractors, and submitted by a HUD-approved mortgagee, is needed to determine project feasibility, mortgagor/contractor acceptability, and construction cost. Documentation from operators/managers of health care facilities is also required as part of the application for firm commitment for mortgage insurance. Project owners/sponsors may apply for permission to commence construction prior to initial endorsement.

Frequency of Submission: On occasion, Other Required with each project application.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	28,612	12.250		0.0097		3,432

Total Estimated Burden Hours: 3,432.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 30,2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–8099 Filed 4–5–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

Record of Decision (ROD) for Authorizing the Use of Outer Continental Shelf (OCS) Sand Resources in National Aeronautics and Space Administration's Wallops Flight Facility Shoreline Restoration and Infrastructure Protection Program

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Notice of Availability (NOA) of the Record of Decision.

SUMMARY: BOEMRE has issued a ROD to authorize the use of OCS sand resources in National Aeronautics and Space Administration's (NASA's) Wallops Flight Facility (WFF) Shoreline Restoration and Infrastructure Protection Program (SRIPP). The ROD documents the Bureau's decision in selecting the Preferred Alternative described in NASA's Final Programmatic Environmental Impact Statement (PEIS) for the WFF SRIPP (October 2010). BOEMRE will enter into a negotiated agreement with NASA for the purpose of making sand available from a shoal on the OCS for placement on the beach in support of the WFF SRIPP's initial beach fill, following the mandated 30-day wait period from the date of the issuance of the ROD. BOEMRE is announcing the availability of this ROD, in accordance with the regulations implementing the National Environmental Policy Act (NEPA). The Associate Director for Offshore Energy and Minerals Management in BOEMRE signed the ROD on March 2, 2011.

Authority: This NOA of the ROD is published pursuant to the regulations (40 CFR 1506.6) implementing the provisions of the NEPA of 1969 (42 U.S.C. 4321 *et seq.*).

SUPPLEMENTARY INFORMATION:

Description of NASA's WFF SRIPP and BOEMRE's Connected Action

NASA has proposed the SRIPP to reduce the potential for damage to, or loss of, NASA, U.S. Navy, and Commonwealth of Virginia assets on Wallops Island from storm-induced

wave impacts and coastal erosion. Under the SRIPP, NASA will extend an existing seawall and implement an initial beach fill in late 2011 with re-nourishment projects about every 5 years. The goal of SRIPP is to provide long-term protection of essential assets, including facilities and infrastructure on the WFF (such as rocket launch pads, runways, and launch control centers) valued at over $1 billion. The purpose of BOEMRE's connected action is to respond to a request for use of OCS sand in the initial beach fill, under the authority granted to the Department of the Interior by the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. 1337(k)(2)). Under OCSLA, BOEMRE can convey, on a noncompetitive basis, the rights to use OCS sand, gravel, or shell resources for use in a program for shoreline protection or beach restoration undertaken by a Federal, State, or local government agency (43 U.S.C. 1337(k)(2)). The Proposed Action is necessary because BOEMRE has a directive to authorize the use of OCS sand resources for the purpose of shore protection and beach restoration. The Secretary of the Interior delegated the authority granted in the OCSLA to BOEMRE.

Record of Decision

BOEMRE's decision is supported by the comprehensive analysis presented in NASA's Final PEIS, which was published in October 2010. NASA published their ROD in December 2010. BOEMRE and the U.S. Army Corps of Engineers (USACE) served as cooperating agencies in preparing the PEIS. Due to the specialized expertise of the USACE, USACE is acting as a technical partner for NASA.

The PEIS assessed the physical, biological, and social/human impacts of the proposed project and considered a wide range of structural and non-structural alternatives, including a no-action alternative, as well as impacts from proposed mitigation. The PEIS was developed cooperatively to fulfill all three Federal agencies' obligations under NEPA and the environmental impacts of their connected actions were encompassed in the analysis. As NASA is the lead agency and BOEMRE is a cooperating agency for the proposed action, BOEMRE independently reviewed and adopted the PEIS prepared by NASA (43 CFR 46.120).

The ROD summarizes the alternatives considered by BOEMRE, the decision BOEMRE made, the basis for the decision, the environmentally preferred alternative, required mitigation measures, and the process NASA, as the lead Federal agency, and the USACE and BOEMRE as cooperating agencies, undertook to involve the public and other Federal and State agencies. The decision identifies and adopts mitigation measures and monitoring requirements enforceable by BOEMRE and deemed practicable to avoid or minimize the environmental harm that could result from the project. In NASA's ROD, NASA and USACE committed to implement the mitigation measures and monitoring requirements also identified in BOEMRE's ROD. This action is taken with the understanding that any proposed use of OCS sand in future beach re-nourishment activities by NASA will require a new negotiated agreement and an updated environmental analysis.

Availability of the ROD

To obtain a printed copy of the ROD, you may contact BOEMRE, Environmental Division (MS 4042), 381 Elden Street, Herndon, Virginia 20170. An electronic copy of the ROD is available at BOEMRE's Web site at: [*http://www.boemre.gov/sandandgravel/MarineMineralProjects.htm*].

FOR FURTHER INFORMATION CONTACT: James F. Bennett, Bureau of Ocean Energy Management, Regulation and Enforcement, Environmental Division, 381 Elden Street, MS 4042, Herndon, Virginia 20170, (703) 787–1660, *jfbennett@boemre.gov.*

Dated: March 10, 2011.

Robert P. LaBelle,

Acting Associate Director for Offshore, Energy and Minerals Management.

[FR Doc. 2011–8151 Filed 4–5–11; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[Billing Code: 2011–GX11GG009950000]

National Earthquake Prediction Evaluation Council (NEPEC)

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 96–472, the National Earthquake Prediction Evaluation Council (NEPEC) will hold a 1-day meeting on April 16, 2011. The meeting will be held at the Crowne Plaza Memphis Downtown, 300 North Second Street, Memphis, Tennessee 38105. The Council is comprised of members from academia and the Federal Government. The Council shall advise the Director of the U.S. Geological Survey on proposed earthquake predictions, on the completeness and scientific validity of the available data related to earthquake predictions, and on related matters as assigned by the Director. Additional information about the Council may be found at: *http://earthquake.usgs.gov/aboutus/nepec/.*

At the meeting, the Council will receive a report from the Independent Expert Panel on New Madrid Seismic Zone Earthquake Hazards, a subcommittee charged with commenting on the level of hazard posed by future large earthquakes in the region and on priorities for future research to better constrain that hazard. The Council may also receive briefings on other topics relating to earthquakes in the Central U.S., on earthquake swarms recently active in Arkansas, on communication of seismic hazard in the Pacific Northwest, on the project intended to deliver an updated Uniform California Earthquake Rupture Forecast (UCERF3) in summer 2012, on the recent earthquake and tsunami in Japan, and on other topics.

Workshops and meetings of the NEPEC are open to the public. A draft workshop agenda is available on request (contact information below). In order to ensure sufficient seating and hand-outs, it is requested that visitors pre-register by April 13. Members of the public wishing to make a statement to the Council should provide notice of that intention by April 13 so that time may be allotted in the agenda.

DATES: April 16, 2011, commencing at 8:30 a.m. and adjourning at 5:30 p.m. Times are approximate; guests are encouraged to contact the Executive Secretary for a copy of the agenda.

FOR FURTHER INFORMATION CONTACT: Dr. Michael Blanpied, Executive Secretary, National Earthquake Prediction Evaluation Council U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive, Reston, Virginia 20192, (703) 648–6696, E-mail: *mblanpied@usgs.gov.*

Dated: March 30, 2011.

David J. Newman,

USGS Federal Register Liaison.

[FR Doc. 2011–7995 Filed 4–5–11; 8:45 am]

BILLING CODE 4311–AM–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

United States Section, Notice of Availability of a Draft Supplemental Environmental Assessment and Finding of No Significant Impact for Improvements to the Mission Levee Protective System in Hidalgo County, Texas

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico (USIBWC).

ACTION: Notice of Availability of Draft Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI).

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, the Council on Environmental Quality Final Regulations (40 CFR parts 1500 through 1508), and the United States Section's Operational Procedures for Implementing Section 102 of NEPA, published in the **Federal Register** September 2, 1981 (46 FR 44083); the USIBWC hereby gives notice of availability of the Draft Supplemental Environmental Assessment and FONSI for Improvements to the Mission Levee Protective System located in Hidalgo County, Texas. An environmental impact statement will not be prepared unless additional information which may affect this decision is brought to our attention within 30-days from the date of this notice.

FOR FURTHER INFORMATION CONTACT: Daniel Borunda, Natural Resources Specialist, Environmental Management Division, United States Section, International Boundary and Water Commission; 4171 N. Mesa, C–100; El Paso, Texas 79902. Telephone: (915) 832–4767; e-mail: *Daniel.Borunda@ibwc.gov.*

DATES: Comments on the Draft SEA and Draft FONSI will be accepted through May 6, 2011.

Availability: Single hard copies of the Draft Supplemental Environmental Assessment and Finding of No Significant Impact are available by request at the above address. Electronic copies are available from the USIBWC homepage at *http://www.ibwc.gov/Organization/Environmental/EIS_EA_Public_Comment.html.*

Dated: March 31, 2011.

Pamela Barber,

Attorney/Advisor.

[FR Doc. 2011–8132 Filed 4–5–11; 8:45 am]

BILLING CODE 7010–01–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1185 (Preliminary)]

Certain Steel Nails From the United Arab Emirates

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping investigation and scheduling of a preliminary phase investigation.

SUMMARY: The Commission hereby gives notice of the institution of an investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1185 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from The United Arab Emirates of certain steel nails, provided for in subheadings 7317.00.55, 7317.00.65 and 7317.00.75 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by May 16, 2011. The Commission's views are due at Commerce within five business days thereafter, or by May 23, 2011.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* March 31, 2011.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187, *fred.ruggles@usitc.gov*), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on March 31, 2011, by Mid Continent Nail Corporation, Poplar Bluff, Missouri.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigation under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with this investigation for 8:45 a.m. on April 21, 2011, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact in writing the Secretary to the Commission not later than April 19, 2011, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within

which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before April 26, 2011, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 31, 2011.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–8155 Filed 4–5–11; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–477 and 731–TA–1180–1181 (Preliminary)]

Bottom Mount Combination Refrigerator-Freezers From Korea and Mexico

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty Investigation Nos. 701–TA–477 and 731–TA–1180–1181 (Preliminary) under sections 703(a) and 733(a) of the Tariff Act of 1930 (the Act) (19 U.S.C. 1671b(a) and 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of bottom mount combination refrigerator-freezers from Korea and Mexico, provided for in subheadings 8418.10.00, 8418.21.00, 8418.99.40, and 8418.99.80 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of Korea. Unless the Department of Commerce extends the time for initiation pursuant to sections 702(c)(1)(B) or 732(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B) or 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by May 16, 2011. The Commission's views are due at Commerce within five business days thereafter, or by May 23, 2011.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: EFFECTIVE DATE: March 30, 2011.

FOR FURTHER INFORMATION CONTACT: Christopher Cassise (202–708–5408), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on March 30, 2011, by Whirlpool Corporation, Benton Harbor, MI.

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register.** Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 1 p.m. on April 20, 2011, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Requests to appear at the conference should be filed in writing with the Secretary to the Commission on or before April 18, 2011. Parties in support of the imposition of antidumping and countervailing duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before April 25, 2011, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 Fed. Reg. 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II(C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 31, 2011.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–8084 Filed 4–5–11; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Polyimide Films, Products Containing Same, and Related Methods,* DN 2798; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of Kaneka Corporation, on April 1, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain polyimide films, products containing same, and related methods. The complaint names as respondent SKC Kolon PI, Inc., of South Korea and SKC Corporation of Covington, GA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2798") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: April 1, 2011.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–8154 Filed 4–5–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on March 31, 2011, a proposed Consent Decree (the "Consent Decree") in *United State*s v. *City of Vineland, New Jersey,* Civil Action No. 1:11–cv–1826 was lodged with the United States District Court for the District of New Jersey.

In this action, the United States sought civil penalties and injunctive relief for Defendant City of Vineland, New Jersey's ("the City") violations of the Clean Air Act, 42 U.S.C. 7401 *et seq.,* at the Vineland Municipal Electric Utility's oil- and coal-fired electric generating station ("Facility"). The Consent Decree requires the City to pay a civil penalty of $850,000 to the United States, and to implement remedial measures at the Facility, including permanently retiring two of the Facility's electric generating units, installing pollution controls on or permanently retiring a third unit, and constructing and operating a new natural gas-fired turbine at an estimated cost of approximately $60 million.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, United States Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *City of Vineland, New Jersey,* D.J. Ref. 90–5–2–1–09529.

During the public comment period, the Consent Decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, United States Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax No. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $8.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ronald G. Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–8060 Filed 4–5–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on March 31, 2011, a proposed Settlement Agreement in *In re Exide Technologies et al.,* No. 02–11125(KJC) (Bankr. D. Del.), was lodged with the United States Bankruptcy Court for the District of Delaware. In this bankruptcy matter the United States, on behalf of the Environmental Protection Agency, sought reimbursement of response costs incurred pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in connection with 21 Superfund sites, and on behalf of the National Oceanic and Atmospheric Administration the United States sought natural resource damages under CERCLA for two sites. The Settlement Agreement between the United States and the Debtor, Exide Technologies, and certain of its Debtor affiliates, including Exide Illinois, Inc., Exide Delaware, LLC, RBD Liquidation, LLC, Dixie Metals Company, and Refined Metals Corporation, resolves Exide's liability to the United States' for response costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), and Exide's liability under Section 6973 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6973, for the following 21 sites: (1) Hamburg Lead Superfund Site, Hamburg, PA (03BH); (2) Hamburg Rail Cut Superfund Site, Hamburg, PA (A3H6); (3) Hamburg Port Clinton Avenue Superfund Site, Hamburg, PA (A3J4); (4) (5) Hamburg Peach Alley Parking Lot Superfund Site, Hamburg, PA (A3V1); (6) Kaercher Creek Superfund Site, Hamburg and Windsor Township, PA (A3H8); (7) Hamburg Mill Creek Superfund Site, Hamburg, PA (A3H7); (8) Hamburg Pleasant Hills Trailer Park Superfund Site, Hamburg, PA (A3H2); (9) Hamburg Ambulance Garage Superfund Site, Hamburg, PA (A3H5); Hamburg South Canal Superfund Site, Hamburg, PA (A3J2); (10) Non-Debtor-Owned Portions of the Price Battery Superfund Site, Hamburg, PA (A3E2); (11) Brown's Battery Superfund Site, Tilden Township, PA (03–84); (12) ESB Superfund Site, Atlanta, GA (A4AB); (13) Raleigh Street Dump Superfund Site, Tampa, FL (A4J7); (14) Ross Metals Superfund Site, Rossville, Fayette County, TN (O4RO); (15) Still Meadow Battery Superfund Site, Valrico, FL (O4A2); (16) Magic Marker/Gould Battery Superfund Site, Trenton, NJ; (17) Bowers Battery Superfund Site, New Philadelphia, OH (B5S9); (18) Puente Valley Operable Unit of the San Gabriel Valley Superfund Sites, Area 4,Industry, CA (O98V); (19) Operating Industries Superfund Site, Monterey Park, CA (O958); (20) Hamburg Old Gas Station Superfund Site, Hamburg, PA (A3ER); (21) Hamburg Schappelle Road Superfund Site, Hamburg, PA (A3EG).

The Settlement Agreement also resolves the claims of the United States on behalf of NOAA for natural resource damages under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for the following two sites: NL Industries, Inc. Superfund Site, Pedricktown, Salem County, NJ; and Custom Distribution Services Site in Perth Amboy, Middlesex County, NJ.

Under the Settlement Agreement, the Debtors have agreed to an allowed, general unsecured claim in the total amount of $67,599,678 to resolve their liability under Sections 106 and 107 of CERCLA and Section 7003 of RCRA at the 21 Liquidated and 2 NRD Sites. The Settlement Agreement also contains provisions pertaining to the treatment of three other categories of sites: Debtor-Owned Sites, Additional Sites, and sites subject to Work Orders and Work Consent Decrees.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Acting Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to In re Exide, D.J. Ref. 90–11–2–07802. Persons may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The Settlement Agreement may be examined at the United States Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20004. During the public comment period, the Settlement Agreement may also be examined on the following Department of Justice Web site, to *http://*

www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $10.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–8149 Filed 4–5–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Stipulation of Judgment Pursuant to Safe Drinking Water Act

Notice is hereby given that on March 28, 2011, a proposed Stipulation of Judgment in *United States of America* v. *Territory of the Virgin Islands, et al.,* Civil Action No. 3:09–cv–00156, was lodged with the United States District Court for the District of the Virgin Islands.

The proposed Stipulation of Judgment will settle claims of the United States (on behalf of the Environmental Protection Agency), for violations of the Safe Drinking Water Act and the implementing regulations, 42 U.S.C. 300h, *et seq.,* and the implementing Underground Injection Control ("UIC") regulations promulgated thereunder, at 40 CFR part 144, *et seq.* (the "SDWA"), against the government of the Territory of the Virgin Islands and the Virgin Islands Department of Health relating to past unauthorized discharges to an underground injection well which occurred in 2008 and 2009. The discharges have ceased. Pursuant to the proposed Stipulation, the Defendants will pay $175,000 in civil penalties.

The Department of Justice will receive for a period of 30 days from the date of this publication comments relating to the proposed Stipulation. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States of America* v. *Territory of the Virgin Islands, et al.,* Civil Action No. 3:09–cv–00156, D.J. Ref. 90–5–1–1–09680.

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *Territory of the Virgin Islands, et al.,* Civil Action No. 3:09–cv–00156, D.J. Ref. 90–5–1–1–09608.

During the public comment period, the Stipulation of Judgment may also be examined on the following Department of Justice Web site to: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Stipulation may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $2.75 (25 cents per page reproduction costs of Stipulation) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–8064 Filed 4–5–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1546]

Extension of Time for Comments on NIJ Draft Vehicular Digital Multimedia Evidence Recording System Certification Program Requirements for Law Enforcement; Correction Regarding NIJ Draft Law Enforcement Vehicular Digital Multimedia Evidence Recording System Selection and Application Guide

AGENCY: National Institute of Justice, DOJ.

ACTION: Notice and Request for Comments.

SUMMARY: The U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (NIJ) published a notice in the **Federal Register** of March 11, 2011, announcing a call for comments on two draft documents:

- "Vehicular Digital Multimedia Evidence Recording System Certification Program Requirements for Law Enforcement"
- "Law Enforcement Vehicular Digital Multimedia Evidence Recording System Selection and Application Guide"

Due to a clerical error, only one document, "Vehicular Digital Multimedia Evidence Recording System Certification Program Requirements for Law Enforcement," is currently posted on the JustNet Web site (*http://www.justnet.org*) at this time. NIJ will extend the deadline for those who wish to submit comments regarding this document from April 25, 2011, to the date specified below.

NIJ's "Law Enforcement Vehicular Digital Multimedia Evidence Recording System Selection and Application Guide" is not available for public comment at this time. NIJ anticipates that this document will be available at a future date, and plans to publish a separate notice announcing its availability and soliciting comments on it at that time.

DATES: The comment period for NIJ's "Vehicular Digital Multimedia Evidence Recording System Certification Program Requirements for Law Enforcement" will be open until May 23, 2011.

FOR FURTHER INFORMATION CONTACT: Casandra Robinson, by telephone at 202–305–2596 [**Note:** this is not a toll-free telephone number], or by e-mail at *casandra.robinson@usdoj.gov.*

John H. Laub,

Director, National Institute of Justice.

[FR Doc. 2011–8208 Filed 4–5–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0033]

Agency Information Collection Activities; Announcement of the Office of Management and Budget's (OMB) Assignment of a Control Number Under the Paperwork Reduction Act

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice; announcement of OMB approval of information collection requirements.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is announcing that OMB approved the information collection requirements

contained in the Baseline Safety and Health Practices Survey under the Paperwork Reduction Act of 1995. This document announces the OMB approval number and expiration date.

DATES: The collections of information contained in the Baseline Safety and Health Practices become effective on April 6, 2011.

FOR FURTHER INFORMATION CONTACT: Todd Owen or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 12, 2010 (75 FR 48992), the Agency announced its request to OMB for approval of the collections of information contained in the OSHA Baseline Safety and Health Practices Survey. This survey will collect information about the safety and health practices of private sector establishments in agriculture (with 10 or more workers) and nonagriculture industries, as well as public sector establishments in those states with OSHA-approved safety and health programs (State Plan States).

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OMB approved the collections of information contained in the Baseline Safety Practices Survey, and assigned these collections of information OMB control number 1218–0263. This approval expires on March 31, 2014. In accordance with 5 CFR 1320.5(b), an Agency may not conduct or sponsor, and a person need not respond to, a collection of information unless the collection displays a valid OMB control number.

Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and the Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on March 31, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–8121 Filed 4–5–11; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0057]

Excavations (Design of Cave-in Protection Systems); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Standard on Excavations (Design of Cave-in Protection Systems) (29 CFR part 1926, subpart P).

DATES: Comments must be submitted (postmarked, sent, or received) by June 6, 2011.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2011–0057, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2011–0057). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Michael Buchet at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Michael Buchet, Directorate of Construction, OSHA, U.S. Department of Labor, Room N–3468, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2020.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Paragraphs (b) and (c) of § 1926.652 ("Requirements for Protective Systems"; the "Standard") contain paperwork requirements that impose burden hours or costs on employers. These paragraphs require employers to use protective systems to prevent cave-ins during excavation work; these systems include sloping the side of the trench, benching the soil away from the excavation, or

using a support system or shield (such as a trench box). The Standard specifies allowable configurations and slopes for excavations, and provides appendices to assist employers in designing protective systems. However, paragraphs (b)(3) and (b)(4) of the Standard permit employers to design sloping or benching systems based on tabulated data (Option 1), or to use a design approved by a registered professional engineer (Option 2).

Under Option 1, employers must provide the tabulated data in a written form that also identifies the registered professional engineer who approved the data and the parameters used to select the sloping or benching system drawn from the data, as well as the limitations of the data (including the magnitude and configuration of slopes determined to be safe); the document must also provide any explanatory information necessary to select the correct benching system based on the data. Option 2 requires employers to develop a written design approved by a registered professional engineer. The design information must include the magnitude and configuration of the slopes determined to be safe, and the identity of the registered professional engineer who approved the design.

Paragraphs (c)(2), (c)(3), and (c)(4) allow employers to design support systems, shield systems, and other protective systems based on tabulated data provided by a system manufacturer (Option 3) or obtained from other sources and approved by a registered professional engineer (Option 4); they can also use a design approved by a registered professional engineer (Option 5). If they select Option 3, employers must complete a written form that provides the manufacturer's specifications, recommendations, and limitations, as well as any deviations approved by the manufacturer. The paperwork requirements of Option 4 are the same as for Option 1. Option 5 requires a written form that provides a plan indicating the sizes, types, and configurations of the materials used in the protective system and the identity of the registered professional engineer who approved the design.

Each of these provisions requires employers to maintain a copy of the documents described in these options at the jobsite during construction. After construction is complete, employers may store the documents off-site provided they make them available to an OSHA compliance officer on request. These documents provide both the employer and the compliance officer with information needed to determine if the selection and design of a protective system are appropriate to the excavation work, thereby assuring employees of maximum protection against cave-ins.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting that OMB extend its approval of the information collection requirements contained in the Standard on Excavations (Design of Cave-in Protection Systems). OSHA is requesting a decrease in burden hours from 20,022 to 11,822 (a total decrease of 8,200). This decrease is a result of a decline in the number of residential starts from 1.4 million to 706,000 annually. The Agency is also requesting a decrease in cost from $815,400 to $578,672 (a total decrease of $236,728) as a result of the decline. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of a currently approved collection.

Title: Excavations (Design of Cave-in Protection Systems) (29 CFR part 1926, subpart P).

OMB Number: 1218–0137.

Affected Public: Business or other for-profits.

Number of Respondents: 11,800.

Frequency of Response: On occasion.

Total Responses: 11,800.

Average Time per Response: Two hours to obtain information on the design of cave-in protection systems.

Estimated Total Burden Hours: 11,822 hours.

Estimated Cost (Operation and Maintenance): $578,672.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0057). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on March 31, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2011–8120 Filed 4–5–11; 8:45 am]

BILLING CODE 4510–26–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 11–03]

Notice of Quarterly Report (October 1, 2010–December 31, 2010)

AGENCY: Millennium Challenge Corporation.

SUMMARY: The Millennium Challenge Corporation (MCC) is reporting for the quarter October 1, 2010 through December 31, 2010, on assistance provided under section 605 of the Millennium Challenge Act of 2003 (22 U.S.C. 7701 *et seq.*), as amended (the Act), and on transfers or allocations of funds to other federal agencies under section 619(b) of the Act. The following report will be made available to the public by publication in the **Federal Register** and on the Internet Web site of the MCC (*http://www.mcc.gov*) in accordance with section 612(b) of the Act.

Dated: March 29, 2011.

T. Charles Cooper,

Vice President, Congressional and Public Affairs, Millennium Challenge Corporation.

ASSISTANCE PROVIDED UNDER SECTION 605

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Madagascar Year: 2011 Quarter 1 Total obligation: $87,998,166 Entity to which the assistance is provided: MCA Madagascar Total Quarterly Expenditures[1]: $12,976				
Land Tenure Project	$30,123,098	Increase Land Titling and Security.	$29,304,770	Area secured with land certificates or titles in the Zones. Legal and regulatory reforms adopted. Number of land documents inventoried in the Zones and Antananarivo. Number of land documents restored in the Zones and Antananarivo. Number of land documents digitized in the Zones and Antananarivo. Average time for Land Services Offices to issue a duplicate copy of a title. Average cost to a user to obtain a duplicate copy of a title from the Land Services Offices. Number of land certificates delivered in the Zones during the period. Number of new guichets fonciers operating in the Zones. The 256 Plan Local d'Occupation Foncier—Local Plan of Land Occupation (PLOFs) are completed.
Financial Sector Reform Project.	$25,705,099	Increase Competition in the Financial Sector.	$23,535,781	Volume of funds processed annually by the national payment system. Number of accountants and financial experts registered to become CPA. Number of Central Bank branches capable of accepting auction tenders. Outstanding value of savings accounts from CEM in the Zones. Number of MFIs participating in the Refinancing and Guarantee funds. Maximum check clearing delay. Network equipment and integrator. Real time gross settlement system (RTGS). Telecommunication facilities. Retail payment clearing system. Number of CEM branches built in the Zones. Number of savings accounts from CEM in the Zones. Percent of Micro-Finance Institution (MFI) loans recorded in the Central Bank database.

ASSISTANCE PROVIDED UNDER SECTION 605—Continued

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Agricultural Business Investment Project.	$13,687,987	Improve Agricultural Projection Technologies and Market Capacity in Rural Areas.	$13,582,534	Number of farmers receiving technical assistance. Number of marketing contracts of ABC clients. Number of farmers employing technical assistance. Value of refinancing loans and guarantees issued to participating MFIs (as a measure of value of agricultural and rural loans). Number of Mnistère de l'Agriculture, de l'Elevage et de la Pêche- Ministry of Agriculture, Livestock, and Fishing (MAEP) agents trained in marketing and investment promotion. Number of people receiving information from Agricultural Business Center (ABCs) on business opportunities.
Program Administration [2] and Control, Monitoring and Evaluation.	$18,481,991		$17,802,882	
Pending subsequent reports [3].			$1,368,813	

FY2010 Madagascar post-compact disbursement related to final payment of audit expenses.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Honduras Year: 2011 Quarter 1 Total obligation: $205,000,000 Entity to which the assistance is provided: MCA Honduras Total Quarterly Expeditures[1]: $7,025,275				
Rural Development Project.	$68,273,380	Increase the productivity and business skills of farmers who operate small and medium-size farms and their employees.	$68,197,673	Number of program farmers harvesting high-value horticulture crops. Number of hectares harvesting high-value horticulture crops. Number of business plans prepared by program farmers with assistance from the implementing entity. Total value of net sales. Total number of recruited farmers receiving technical assistance. Value of loans disbursed to farmers, agribusiness, and other producers and vendors in the horticulture industry, including Program Farmers, cumulative to date, Trust Fund Resources. Number of loans disbursed (disaggregated by trust fund, leveraged from trust fund, and institutions receiving technical assistance from ACDI–VOCA). Number of hectares under irrigation. Number of farmers connected to the community irrigation system.
Transportation Project ...	$120,591,240	Reduce transportation costs between targeted production centers and national, regional and global markets.	$121,211,917	Freight shipment cost from Tegucigalpa to Puerto Cortes. Average annual daily traffic volume—CA–5. International roughness index (IRI)—CA–5. Kilometers of road upgraded—CA–5. Percent of contracted road works disbursed—CA–5. Average annual daily traffic volume—secondary roads. International roughness index (IRI)—secondary roads Kilometers of road upgraded—secondary roads. Average annual daily traffic volume—rural roads. Average speed—Cost per journey (rural roads) Kilometers of road upgraded—rural roads. Percent disbursed for contracted studies. Value of signed contracts for feasibility, design, supervision and program mgmt contracts. Kilometers (km) of roads under design.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Number of Construction works and supervision contracts signed. Kilometers (km) of roads under works contracts.
Program Administration,[2] and Control, Monitoring and Evaluation.	$16,135,380		$15,081,707	
Pending subsequent reports[3].			$0	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Cape Verde Year: 2011 Quarter 1 Total obligation: $110,078,488 Entity to which the assistance is provided: MCA Cape Verde Total Quarterly Expenditures[1]: $2,055,100				
Watershed and Agricultural Support Project.	$12,031,549	Increase agricultural production in three targeted watershed areas on three islands.	$11,264,926	Productivity: Horticulture, Paul watershed. Productivity: Horticulture, Faja watershed. Productivity: Horticulture, Mosteiros watershed. Number of farmers adopting drip irrigation: All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Area irrigated with drip irrigation: All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Irrigation Works: Percent contracted works disbursed. All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Number of reservoirs constructed in all intervention watersheds (Paul, Faja and Mosteiros) (incremental). Number of farmers that have completed training in at least 3 of 5 core agricultural disciplines: All intervention watersheds (Paul, Faja and Mosteiros) (incremental).
Infrastructure Improvement Project.	$82,630,208	Increase integration of the internal market and reduce transportation costs.	$78,967,304	Travel time ratio: percentage of beneficiary population further than 30 minutes from nearest market. Kilometers of roads rehabilitated. Percent of contracted Santiago Roads works disbursed (cumulative). Percent of contracted Santo Antao Bridge works disbursed (cumulative). Port of Praia: percent of contracted port works disbursed (cumulative). Cargo village: percent of contracted works disbursed (cumulative). Quay 2 improvements: percent of contracted works disbursed (cumulative). Access road: percent of contracted works disbursed (cumulative).
Private Sector Development Project.	$1,931,223	Spur private sector development on all islands through increased investment in the priority sectors and through financial sector reform.	$1,595,002	MFI portfolio at risk, adjusted (level).
Program Administration,[2] and Control, Monitoring and Evaluation.	$13,485,508		$12,509,672	
Pending subsequent reports[3].			$516,776	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Nicaragua Year: 2011 Quarter 1 Total obligation: $113,478,345 Entity to which the assistance is provided: MCA Nicaragua Total Quarterly Expenditures[1]: $ 1,561,680				
Property Regularization Project.	$7,180,454	Increase Investment by strengthening property rights.	$6,289,228	Automated database of registry and cadastre installed in the 10 municipalities of Leon. Value of land, urban. Value of land, rural. Time to conduct a land transaction. Number of additional parcels with a registered title, urban. Number of additional parcels with a registered title, rural. Area covered by cadastral mapping. Cost to conduct a land transaction.
Transportation Project ...	$58,000,000	Reduce transportation costs between Leon and Chinandega and national, regional and global markets.	$54,867,252	Annual Average daily traffic volume: N1 Section R1. Annual Average daily traffic volume: N1 Section R2. Annual Average daily traffic volume: Port Sandino (S13). Annual Average daily traffic volume: Villanueva—Guasaule Annual. Average daily traffic volume: Somotillo-Cinco Pinos (S1). Annual average daily traffic volume: León-Poneloya-Las Peñitas. International Roughness Index: N–I Section R1. International Roughness Index: N–I Section R2. International Roughness Index: Port Sandino (S13). International roughness index: Villanueva—Guasaule. International roughness index: Somotillo-Cinco Pinos. International roughness index: León-Poneloya-Las Peñitas. Kilometers of NI upgraded: R1 and R2 and S13. Kilometers of NI upgraded: Villanueva—Guasaule. Kilometers of S1 road upgraded. Kilometers of S9 road upgraded.
Rural Development Project.	$32,875,845	Increase the value added of farms and enterprises in the region.	$30,603,852	Number of beneficiaries with business plans. Numbers of *manzanas (1 Manzana = 1.7 hectares),* by sector, harvesting higher-value crops. Number of beneficiaries with business plans prepared with assistance of Rural Business Development Project. Number of beneficiaries implementing Forestry business plans under Improvement of Water Supplies Activity. Number of Manzanas reforested. Number of Manzanas with trees planted.
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$15,422,046		$14,172,209	
Pending subsequent reports[3].			$1,496,404	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Georgia Year: 2011 Quarter 1 Total obligation: $395,300,000 Entity to which the assistance is provided: MCA Georgia Total Quarterly Expenditures[1]: $20,153,289				
Regional Infrastructure Rehabilitation Project.	$313,250,000	Key Regional Infrastructure Rehabilitated.	$266,179,261	Household savings from Infrastructure Rehabilitation Activities. Savings in vehicle operating costs (VOC). International roughness index (IRI). Annual average daily traffic (AADT). Travel Time. Road paved/completed. Construction Works completed (Contract 1). Construction Works completed (Contract 2). Signed contracts for feasibility and/or design studies. Percent of contracted studies disbursed. Kilometers of roads under design. Signed contracts for road works. Kilometers of roads under works contracts. Sites rehabilitated (phases I, II, III)—pipeline. Construction works completed (phase II)—pipeline. Savings in household expenditures for all RID subprojects. Population Served by all RID subprojects. RID Subprojects completed. Value of RID Grant Agreements signed. Value of project works and goods contracts Signed. RID subprojects with works initiated.
Regional Enterprise Development Project.	$52,530,800	Enterprises in Regions Developed.	$45,474,493	Jobs Created by Agribusiness Development Activity (ADA) and by Georgia Regional Development Fund (GRDF). Household net income—ADA and GRDF. Jobs created—ADA. Firm income—ADA. Household net income—ADA. Beneficiaries (direct and indirect)—ADA. Grant agreements signed—ADA. Increase in gross revenues of portfolio companies (PC). Increase in portfolio company employees. Increase in wages paid to the portfolio company employees. Portfolio companies (PC). Funds disbursed to the portfolio companies.
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$29,519,200		$22,483,134	
Pending subsequent reports[3].			$7,304,772	

November 2008, MCC and the Georgian Government signed a Compact amendment making up to $100 million of additional funds available to the Millennium Challenge Georgia Fund. These funds will be used to complete works in the Roads, Regional Infrastructure Development, and Energy Rehabilitation Projects contemplated by the original Compact. The amendment was ratified by the Georgian parliament and entered into force on January 30, 2009.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Vanuatu Year: 2011 Quarter 1 Total obligation: $65,690,000 Entity to which the assistance is provided: MCA Vanuatu Total Quarterly Expenditures[1]: $1,209,129				
Transportation Infrastructure Project.	$60,090,228	Facilitate transportation to increase tourism and business development.	$59,601,565	Traffic volume (average annual daily traffic)—Efate: Ring Road. Traffic Volume (average annual daily traffic)—Santo: East Coast Road. Kilometers of road upgraded—Efate: Ring Road. Kilometers of roads upgraded—Santo: East Coast Road. Percent of contracted roads works disbursed (USD disbursed): Total (Cumulative).

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$5,599,772		$4,416,275	
Pending subsequent reports [3].			$19,948	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Armenia Year: 2011 Quarter 1 Total obligation: $235,650,000 Entity to which the assistance is provided: MCA Armenia Total Quarterly Expenditures[1]: $17,769,018				
Irrigated Agriculture Project (Agriculture and Water).	$152,709,208	Increase agricultural productivity Improve and Quality of Irrigation.	$94,721,567	Training/technical assistance provided for On-Farm Water Management. Training/technical assistance provided for Post-Harvest Processing. Loans Provided. Percent of contracted works disbursed. Value of signed contracts for irrigation works. Number of farmers using better on-farm water management. Number of enterprises using improved techniques. Value of irrigation feasibility and/or detailed design contracts signed. Additional Land irrigated under project. Percent of contracted irrigation feasibility and/or design studies disbursed.
Rural Road Rehabilitation Project.	$67,100,000	Better access to economic and social infrastructure.	$7,870,944	Average annual daily traffic on Pilot Roads. International roughness index for Pilot Roads. Road Sections Rehabilitated—Pilot Roads. Pilot Roads: Percent of Works Completed.
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$15,840,792		$10,516,317	
Pending subsequent reports [3].			$79	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Benin Year: 2011 Quarter 1 Total obligation: $307,298,040 Entity to which the assistance is provided: MCA Benin Total Quarterly Expenditures[1]: $37,758,677				
Access to Financial Services Project.	$19,650,000	Expand Access to Financial Services.	$6,227,768	Volume of credits granted by the Micro-Finance Institutions (MFI). Volume of saving collected by the Micro-Finance Institutions. Average portfolio at risk >90 days of micro-finance institutions at the national level. Operational self-sufficiency of MFIs at the national level. Number of institutions receiving grants through the Facility. Number of MFIs *inspected by CSSFD*.
Access to Justice Project.	$34,250,521	Improved Ability of Justice System to Enforce Contracts and Reconcile Claims.	$6,654,143	Average time to enforce a contract. Percent of firms reporting confidence in the judicial system. Passage of new legal codes. Average time required for Tribunaux de premiere instance—arbitration centers and courts of first instance (TPI) to reach a final decision on a case. Average time required for Court of Appeals to reach a final decision on a case. Percent of cases resolved in TPI per year. Percent of cases resolved in Court of Appeals per year. Number of Courthouses completed. Average time required to register a business (*société*).

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Access to Land Project	$35,645,826	Strengthen property rights and increase investment in rural and urban land.	$18,760,887	Average time required to register a business (sole proprietorship). Total value of investment in targeted urban land parcels. Total value of investment in targeted rural land parcels. Average cost required to convert occupancy permit to land title through systematic process. Share of respondents perceiving land security in the PH–TF or PFR areas. Number of preparatory studies completed. Number of Legal and Regulatory Reforms Adopted. Amount of Equipment Purchased. Number of new land titles obtained by transformation of occupancy permit. Number of land certificates issued within MCA—Benin implementation. Number of PFRs established with MCA Benin implementation. Number of permanent stations installed. Number of stakeholders Trained. Number of communes with new cadastres. Number of operational land market information systems.
Access to Markets Project.	$171,059,550	Improve Access to Markets through Improvements to the Port of Cotonou.	$96,786,669	Volume of merchandise traffic through the Port Autonome de Cotonou. Bulk ship carriers waiting times at the port. Port design-build contract awarded. Port crime levels (number of thefts). Average time to clear customs. Port meets—international port security standards (ISPS).
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$46,692,143		$29,028,322	
Pending subsequent reports[3].			$283,061	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Ghana Year: 2011 Quarter 1 Total obligation: $547,009,000 Entity to which the assistance is provided: MCA Ghana Total Quarterly Expenditures[1]: $53,662,034				
Agriculture Project	$212,597,378	Enhance Profitability of cultivation, services to agriculture and product handling in support of the expansion of commercial agriculture among groups of smallholder farms.	$118,885,684	Number of farmers trained in Commercial Agriculture. Number of agribusinesses assisted. Number of preparatory land studies completed. Legal and Regulatory land reforms adopted. Number of landholders reached by public outreach efforts. Number of hectares under production. Number of personnel trained. Number of buildings rehabilitated/constructed. Value of equipment purchased. Feeder Roads International Roughness Index. Feeder Roads Annualized Average Daily Traffic. Value of signed contracts for feasibility and/or design studies of Feeder Roads. Percent of contracted design/feasibility studies completed for Feeder Roads. Value of signed works contracts for Feeder Roads. Percent of contracted Feeder Road works disbursed. Value of loans disbursed to clients from agriculture loan fund. Value of signed contracts for feasibility and/or design studies (irrigation). Percent of contracted (design/feasibility) studies complete (irrigation).

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Value of signed contracts for irrigation works (irrigation). Rural hectares mapped. Percent of contracted irrigation works disbursed. Percent of people aware of their land rights in Pilot Land Registration Areas. Total number of parcels surveyed in the Pilot Land Registration Areas (PLRAs). Volume of products passing through post-harvest treatment.
Rural Development Project.	$73,390,556	Strengthen the rural institutions that provide services complementary to, and supportive of, agricultural and agriculture business development.	$46,142,299	Number of students enrolled in schools affected by Education Facilities Sub-Activity. Number of schools rehabilitated. Number of basic school blocks constructed to Ministry of Education (MOE) construction standards. Distance to collect water. Time to collect water. Incidence of guinea worm. Average number of days lost due to guinea worm. Number of people affected by Water and Sanitation Facilities Sub-Activity. Number of stand-alone boreholes/wells/non-conventional water systems constructed/rehabilitated. Number of small-town water systems designed and due diligence completed for construction. Number of pipe extension projects designed and due diligence completed for construction. Number of agricultural processing plants in target districts with electricity due to Rural Electrification Sub-Activity.
Transportation Project ...	$216,235,347	Reduce the transportation costs affecting agriculture commerce at sub-regional levels.	$93,326,799	Trunk Roads International roughness index. N1 International Roughness Index. N1 Annualized Average Daily Traffic. N1 Kilometers of road upgraded. Value of signed contracts for feasibility and/or design studies of the N1. Percent of contracted design/feasibility studies completed of the N1. Value of signed contracts for road works N1, Lot 1. Value of signed contracts for road works N1, Lot 2. Trunk Roads Annualized Average Daily Traffic. Trunk Roads Kilometers of roads completed. Percent of contracted design/feasibility studies completed of Trunk Roads. Percent of contracted Trunk Road works disbursed. Ferry Activity: annualized average daily traffic vehicles. Ferry Activity: annual average daily traffic (passengers). Landing stages rehabilitated. Ferry terminal upgraded. Rehabilitation of Akosombo Floating Dock completed. Rehabilitation of landing stages completed. Percent of contracted road works disbursed: N1, Lot 2. Percent of contracted road works disbursed: N1, Lot 2. Percent of contracted work disbursed: ferry and floating dock. Percent of contracted work disbursed: landings and terminals. Value of signed contracts for feasibility and/or design studies of Trunk Roads. Value of signed contracts for Trunk Roads.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Program Administration,[2] Due Diligence, Monitoring and Evaluation.	$44,785,719		$29,624,036	
Pending subsequent reports[3].			$341,182	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: El Salvador Year: 2011 Quarter 1 Total obligation: $460,940,000 Entity to which the assistance is provided: MCA El Salvador Total Quarterly Expenditures[1]: $27,896,592				
Human Development Project.	$101,753,001	Increase human and physical capital of residents of the Northern Zone to take advantage of employment and business opportunities.	$39,303,357	Employment rate of graduates of middle technical schools. Graduation rates of middle technical schools. Middle technical schools remodeled and equipped. Scholarships granted to students of middle technical schools. Students of non-formal training. Cost of water. Time collecting water. Households benefiting with water solutions built. Potable water and basic sanitation systems with construction contracts signed. Cost of electricity. Households benefiting with a connection to the electricity network. Household benefiting with the installation of isolated solar systems. Kilometers of new electrical lines with construction contracts signed. Population benefiting from strategic infrastructure. Number of hectares under production with MCC support. Number of beneficiaries of technical assistance and training—Agriculture. Number of beneficiaries of technical assistance and training—Agribusiness. Value of Agricultural Loans to Farmers/Agribusiness.
Connectivity Project	$248,822,000	Reduce travel cost and time within the Northern Zone, with the rest of the country, and within the region.	$99,760,888	Average annual daily traffic. International roughness index. Kilometers of roads rehabilitated. Kilometers of roads with Construction Initiated.
Productive Development Project.	$71,824,000		$36,985,024	
Program Administration[2] and Control, Monitoring and Evaluation.	$38,540,999		$17,241,351	
Pending Subsequent Report[3].			$0	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Mali Year: 2011 Quarter 1 Total obligation: $460,811,164 Entity to which the assistance is provided: MCA Mali Total Quarterly Expenditures[1]: $27,024,327				
Bamako Senou Airport Improvement Project.	$181,254,263		$35,384,813	Employment at airport. Signature of design contract. Average number of weekly flights (arrivals). Passenger traffic (annual average). Percent works complete. Time required for passenger processing at departures and arrivals. Percent works complete. Percent of airport management and maintenance plan implemented.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Alatona Irrigation Project	$234,884,675	Increase the agricultural production and productivity in the Alatona zone of the ON.	$113,956,663	Airport meets Federal Aviation Administration (FAA) and International Civil Aviation Organization (ICAO) security standards. Technical assistance delivered to project. Main season rice yields. International roughness index (IRI) on the Niono-Goma Coura Route. Average daily vehicle count. Percentage works completed on Niono-Goma Coura road. Number of hectares of land irrigated in the Alatona Canal. Irrigation system efficiency on Alatona Canal during the rainy season and the dry season. Completion rate of work on the construction of the main system (B03). Percentage of contracted irrigation construction works disbursed. Number of titles registered in the land registration office of the Alatona zone. Number market gardens allocated in Alatona zones (for PAPs) (market garden parcels allotted to PAP women). Decree transferring legal control of the project impact area is passed. Contractor implementing the "Mapping of Agricultural and Communal Land Parcels" contract is mobilized. Net school enrollment rate (in Alatona zone). Percent of Alatona population with access to drinking water. Number of schools available in Alatona. Number of health centers available in the Alatona. Number of affected people who have been compensate. Resettlement Census verified. Adoption of Rate of Extension Techniques. Area planted with rice during the rainy season. Area planted with shallots during dry season. Number of farmers trained. Water management system design and capacity building strategy implemented. Amount of credit extended to Alatona farmers. Number of farmers accessing grant assistance for first loan from financial institutions. Financial institution partners identified (report on assessment of the financial institutions in the Office du Niger—Office of Niger zone (ON zone). Loan Portfolio quality of Alatona MFIs: portfolio at risk.
Industrial Park Project ...	$2,643,432	Terminated	$2,637,472	
Program Administration [2] and Control, Monitoring and Evaluation.	$42,028,793		$23,009,671	
Pending Subsequent Report [3].			$595,909	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Mongolia Year: 2011 Quarter 1 Total obligation: $284,911,363 Entity to which the assistance is provided: MCA Mongolia Total Quarterly Expenditures[1]: $8,665,430				
Property Rights Project	$27,201,061	Increase security and capitalization of land assets held by lower-income Mongolians, and increased peri-urban herder productivity and incomes.	$4,359,517	Number of studies completed. Legal and regulatory reforms adopted. Number of landholders reached by public outreach efforts.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Training to Leaseholders—Intensive and Semi-Intensive Farming. Number of Buildings rehabilitated/constructed. Value of equipment purchased. Rural hectares Mapped. Urban Parcels Mapped. Leaseholds Awarded. Hashaa Plots Directly Registered by the Property Rights Project.
Vocational Education Project.	$47,355,638	Increase employment and income among unemployed and underemployed Mongolians.	$3,874,128	Rate of employment of TVET Graduates. Students completing newly designed long-term programs. Percent of active teachers receiving certification training. Technical and vocational education and training (TVET) legislation passed.
Health Project	$38,974,817	Increase the adoption of behaviors that reduce non-communicable diseases (NCDIs) among target populations and improved medical treatment and control of NCDIs.	$8,133,305	Diabetes and hypertension controlled. Percentage of cancer cases diagnosed in early stages. Road and traffic safety activity finalized and key interventions developed.
Roads Project	$79,750,000	TBD	$8,434,083	TBD.
Energy and Environmental Project.	$46,966,205	TBD	$1,541,021	TBD.
Rail Project	$369,560	Terminated	$369,560	Terminated.
Program Administration [2] and Control, Monitoring and Evaluation.	$44,294,082		$11,896,484	
Pending subsequent reports [3].			$357,801	

In late 2009, the MCC's Board of Directors approved the allocation of a portion of the funds originally designated for the rail project to the expansion of the health, vocational education and property right projects from the rail project, and the remaining portion to the addition of a road project.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Mozambique Year: 2011 Quarter 1 Total obligation: $506,924,053 Entity to which the assistance is provided: MCA Mozambique Total Quarterly Expenditures[1]: $4,595,841				
Water Supply and Sanitation Project.	$203,585,393	Increase access to reliable and quality water and sanitation facilities.	$6,922,726	Percent of urban population with improved water sources. Time to get to non-private water source. Percent of urban population with improved sanitation facilities. Percent of rural population with access to improved water sources. Number of private household water connections in urban areas. Number of Rural water points constructed. Number of standpipes in urban areas. Final detailed design for 5 towns submitted. Final detailed design for 3 cities submitted.
Road Rehabilitation Project.	$176,307,480	Increase access to productive resources and markets.	$3,497,298	Kilometers of road rehabilitated. Percent of Namialo—Rio Lúrio Road—Metoro feasibility, design, and supervision contract disbursed. Percent of Rio Ligonha-Nampula feasibility, design, and supervision contract disbursed. Percent of Chimuara-Nicoadala feasibility, design, and supervision contract disbursed. Percent of Namialo—Rio Lúrio Road construction contract disbursed. Percent of Rio Lúrio—Metoro Road construction contract disbursed.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Percent of Rio Ligonha—Nampula Road construction contract disbursed. Percent of Chimuara-Nicoadala Road construction contract disbursed. Average annual daily traffic volume. Average annual daily traffic volume. Average annual daily traffic volume. Average annual daily traffic volume. Change in International Roughness Index (IRI)—Namialo—Rio Lurio Road. Change in International Roughness Index (IRI)—on Rio Ligonha-Nampula Road. Change in International Roughness Index (IRI)—on Rio Lurio-Metoro Road. Change in International Roughness Index (IRI)—on Chimuara-Nicoadala Road.
Land Tenure Project	$39,068,307	Establish efficient, secure land access for households and investors.	$8,874,069	Total number of officials and residents reached with land strategy and policy awareness and outreach messages. Time to get land usage rights (DUAT), urban. Time to get land usage rights (DUAT), rural. Number of buildings rehabilitated or built. Total value of procured equipment and materials. Number of people trained. Rural hectares mapped in Site Specific Activity. Rural hectares mapped in Community Land Fund Initiative. Urban parcels mapped. Rural hectares formalized through Site Specific Activity. Rural hectares formalized through Community Land Fund Initiative. Urban parcels formalized. Number of communities delimited. Number of households having land formalized, rural. Number of households having land formalized, urban.
Farmer Income Support Project.	$18,400,117	Improve coconut productivity and diversification into cash crop.	$4,818,852	Number of diseased or dead palm trees cleared. Number of coconut seedlings planted Hectares under production. Number of farmers trained in pest and disease control. Number of farmers trained in crop diversification technologies. Income from coconuts and coconut products (estates). Income from coconuts and coconuts products (households).
Program Administration [2] and Control, Monitoring and Evaluation.	$69,562,756		$14,971,583	
Pending Subsequent Report [3].			$641,587	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Lesotho Year: 2011 Quarter 1 Total Obligation: $362,551,000 Entity to which the assistance is provided: MCA Lesotho Total Quarterly Expenditures[1]: $20,235,490				
Water Project	$164,027,999	Improve the water supply for industrial and domestic needs, and enhance rural livelihoods through improved watershed management.	$20,665,287	School days lost due to water borne diseases. Diarrhea notification at health centers. Time saved due to access to water source. Rural household (HH) provided with access to improved water supply.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Rural HH provided with access to improved ventilated latrines. Rural population with knowledge of good hygiene principles. Urban HH with access to potable water supply. Number of enterprises connected to water network. Households connected to improved water network. Cubic meters of treated water from metolong dam delivered through a conveyance system to Water and Sewerage Authority (WASA). Hydrological flows variability. Reclaimed area.
Health Project	$122,398,000	Increase access to life-extending ART and essential health services by providing a sustainable delivery platform.	$20,391,636	People with HIV still alive 12 months after initiation of treatment. TB notification (per 100,000 pop.). Percentage of PLWA receiving ARV treatment (by age & sex). Deliveries conducted in the health centers. Immunization coverage rate.
Private Sector Development Project.	$36,470,318	Stimulate investment by improving access to credit, reducing transaction costs and increasing the participation of women in the economy.	$7,219,420	Average time (days) required to enforce a contract. Value of commercial cases. Cases referred to ADR that are successfully completed. Portfolio of loans. Loan processing time. Performing loans. Electronic payments—salaries. Electronic payments—pensions. Debit/smart cards issued. Mortgage bonds registered. Value of registered mortgage bonds. Clearing time—Country. Clearing time—Maseru. Time to complete transfer of land rights. Land transactions recorded. Land parcels regularized and registered. People trained on gender equality and economic rights. ID cards issued. Monetary cost of a lease transaction.
Program Administration [2] and Control, Monitoring and Evaluation.	$39,654,682		$16,807,335	
Pending Subsequent Report [3].			$7,597	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Morocco Year: 2011 Quarter 1 Total obligation: $697,500,000 Entity to which the assistance is provided: MCA Morocco Total Quarterly Expenditures[1]: $16,235,188				
Fruit Tree Productivity Project.	$300,896,445	Reduce volatility of agricultural production and increase volume of fruit agricultural production.	$54,073,820	Number of farmers trained. Number of agribusinesses assisted. Number of hectares under production. Value of agricultural production.
Small Scale Fisheries Project.	$116,168,027	Improve quality of fish moving through domestic channels and assure the sustainable use of fishing resources.	$7,628,045	Landing sites and ports rehabilitated. Mobile fish vendors using new equipments. Fishing boats using new landing sites. Average price of fish at auction markets. Average price of fish at wholesale. Average price of fish at ports.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Artisan and Fez Medina Project.	$111,873,858	Increase value added to tourism and artisan sectors.	$5,083,742	Average revenue of SME pottery workshops. Construction and rehabilitation of Fez Medina Sites. Tourist receipts in Fez. Training of potters.
Enterprise Support Project.	$33,850,000	Improved survival rate of new SMEs and INDH-funded income generating activities; increased revenue for new SMEs and INDH-funded income generating activities.	$5,957,147	Number of enterprises in pilot project receiving coaching. Value added per enterprise. Survival rate after two years.
Financial Services Project.	$46,200,000	TBD	$19,458,039	TBD.
Program Administration [2] and Control, Monitoring and Evaluation.	$88,511,670		$22,819,549	
Pending Subsequent Report [3].			$50,964	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Tanzania Year: 2011 Quarter 1 Total obligation: $698,136,001 Entity to which the assistance is provided: MCA Tanzania Total Quarterly Expenditures[1]: $50,430,174				
Energy Sector Project ...	$206,042,428	Increase value added to businesses.	$38,537,389	New power customers: Kigoma. New power customers: Morogoro. New power customers: Tanga. New power customers: Mbeya. New power customers: Iringa. New power customers: Dodoma. New power customers: Mwanza. New power customers: Zanzibar. Energy generation—Kigoma. Transmission capacity: Kigoma. Transmission capacity: Morogoro. Transmission capacity: Tanga. Transmission capacity: Mbeya. Transmission capacity: Iringa. Transmission capacity: Dodoma. Transmission capacity: Mwanza. Transmission capacity: Zanzibar. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted: Distribution Rehabilitation and extension activity. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted; Zanzibar Interconnector activity. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted; Malagarasi hydropower and Kigoma distribution activity.
Transport Sector Project	$368,847,429	Increase cash crop revenue and aggregate visitor spending.	$70,094,338	International roughness index: Tunduma Sumbawanga. International roughness index: Tanga Horohoro. International roughness index: Namtumbo Songea. International roughness index: Peramiho Mbinga. Annual average daily traffic: Tunduma Sumbawanga. Annual average daily traffic: Tanga Horohoro. Annual average daily traffic: Namtumbo Songea. Annual average daily traffic: Peramiho Mbinga. Kilometers upgraded/completed: Tunduma Sumbawanga.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
				Kilometers upgraded/completed: Tanga Horohoro. Kilometers upgraded/completed: Namtumbo Songea. Kilometers upgraded/completed: Peramiho Mbinga. Percent disbursed on construction works: Tunduma Sumbawanga. Percent disbursed on construction works: Tanga Horohoro. Percent disbursed on construction works: Namtumbo Songea. Percent disbursed on construction works: Peramiho Mbinga. Percent disbursed for feasibility and/or design studies: Tunduma Sumbawanga. Percent disbursed for feasibility and/or design studies: Tanga Horohoro. Percent disbursed for feasibility and/or design studies: Namtumbo Songea. Percent disbursed for feasibility and/or design studies: Peramiho Mbinga. International roughness index: Pemba. Average annual daily traffic: Pemba. Kilometers upgraded/completed: Pemba. Percent disbursed on construction works: Pemba. Signed contracts for construction works (Zanzibar Rural Roads). Percent disbursed on signed contracts for feasibility and/or design studies: Pemba. Passenger arrivals: Mafia Island. Percentage of upgrade complete: Mafia Island. Percent disbursed on construction works: Mafia Island.
Water Sector Project	$65,692,144	Increase investment in human and physical capital and to reduce the prevalence of water-related disease.	$3,284,750	Number of households using improved source for drinking water (Dar es Salaam). Number of households using improved source for drinking water (Morogoro). Number of businesses using improved water source (Dar es Salaam). Number of businesses using improved water source (Morogoro). Volume of water produced (Lower Ruvu). Volume of water produced (Morogoro). Percent disbursed on Feasibility Design Update contract Lower Ruvu Plant Expansion.
Program Administration [2] and Control, Monitoring and Evaluation.	$57,554,000		$15,382,170	
Pending Subsequent Report [3].			$206,197	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Burkina Faso Year: 2011 Quarter 1 Total obligation: $480,943,569 Entity to which the assistance is provided: MCA Burkina Faso Total Quarterly Expenditures[1]: $4,817,464				
Roads Project	$194,130,681	Enhance access to markets through investments in the road network.	$3,055,661	To Be Determined (TBD).
Rural Land Governance Project.	$59,934,615	Increase investment in land and rural productivity through improved land tenure security and land management.	$6,348,245	TBD.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Agriculture Development Project.	$141,910,059	Expand the productive use of land in order to increase the volume and value of agricultural production in project zones.	$6,518,953	TBD.
Bright II Schools Project	$28,829,669	Increase primary school completion rates.	$14,756,395	TBD.
Program Administration [2] and Control, Monitoring and Evaluation.	$56,138,545		$16,054,831	
Pending Subsequent Report [3].			$12,034,926	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Namibia Year: 2011 Quarter 1 Total obligation: $304,477,816 Entity to which the assistance is provided: MCA Namibia Total Quarterly Expenditures[1]: $7,083,896				
Education Project	$144,976,557	Improve the education sector's effectiveness, efficiency and quality.	$8,875,295	TBD.
Tourism Project	$66,959,292	Increase incomes and create employment opportunities by improving the marketing, management and infrastructure of Etosha National Park.	$4,718,437	TBD.
Agriculture Project	$47,550,008	Sustainably improve the economic performance and profitability of the livestock sector and increase the volume of the indigenous natural products for export.	$4,834,237	TBD.
Program Administration [2] and Control, Monitoring and Evaluation.	$44,991,959		$8,477,524	
Pending Subsequent Report [3].			$3,189,460	

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Moldova Year: 2011 Quarter 1 Total obligation: $262,000,000 Entity to which the assistance is provided: MCA Moldova Total Quarterly Expenditures[1]: −$55,865				
Road Rehabilitation Project.	$132,840,000		$94,350	To Be Determined (TBD).
Transition to High Value Agriculture Project.	$101,773,402		$0	TBD.
Program Administration [2] and Monitoring and Evaluation.	$27,386,598		$0	TBD.

The negative quarterly expenditure for Moldova is related to expense accruals. The accruals will be reversed in 2011 and applied to various projects and activities.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Country: Senegal Year: 2011 Quarter 1 Total obligation: $540,000,000 Entity to which the assistance is provided: MCA Moldova Total Quarterly Expenditures[1]: $446,752				
Road Rehabilitation Project.	$324,712,499		$0	To Be Determined (TBD).
Transition to High Value Agriculture Project.	$170,008,860		$0	TBD.
Program Administration [2] and Monitoring and Evaluation.	$45,278,641		$1,353,733	TBD.

Projects	Obligated	Objectives	Cumulative expenditures	Measures
Pending Subsequent Report [3].			$46,835	

[1] Expenditures are the sum of cash outlays and quarterly accruals for work completed but not yet paid or invoiced.
[2] Program administration funds are used to pay items such as salaries, rent, and the cost of office equipment.
[3] These amounts represent disbursements made that will be allocated to individual projects in the subsequent quarter(s) and reported as such in subsequent quarterly report(s).

619(b) Transfer or Allocation of Funds		
U.S. Agency to which funds were transferred or allocated	Amount	Description of program or project
USAID	$0	Threshold Program.

[FR Doc. 2011–8104 Filed 4–5–11; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–030)]

Aerospace Safety Advisory Panel; Meeting.

AGENCY: National Aeronautics and Space Administration (NASA).

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 announce a forthcoming meeting of the Aerospace Safety Advisory Panel.

DATES: Friday, April 29, 2011, from 11 p.m. to 1 p.m.

ADDRESSES: Kennedy Space Center Visitor Complex, Astronaut Encounter Theatre, SR 405, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Dakon, Aerospace Safety Advisory Panel Executive Director, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–0732.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel will hold its 2nd Quarterly Meeting for 2011. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The agenda will include Kennedy Space Center Overview; Updates on Safety Mission Assurance; Safety Metrics and Commercial Space. The meeting will be open to the public up to the seating capacity of the room. Seating will be on a first-come basis. Visitors will be requested to sign a visitor's register.

Photographs will only be permitted during the first 10 minutes of the meeting. During the first 30 minutes of the meeting, members of the public may make a 5-minute verbal presentation to the Panel on the subject of safety in NASA. To do so, please contact Ms. Susan Burch at *susan.burch@nasa.gov* at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel at the time of the meeting. Verbal presentations and written comments should be limited to the subject of safety in NASA.

March 30, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–8059 Filed 4–5–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Electronic Records Archives (ACERA)

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting change.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the National Archives and Records Administration (NARA) announces an agenda change for the Advisory Committee on the Electronic Records Archives (ACERA). The meeting has been consolidated into one day. This meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Electronic Records Archives Program at *era.program@nara.gov*. This meeting will be recorded for transcription purposes.

DATES: This meeting will be held on April 6, 2011, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: 700 Pennsylvania Avenue, NW., Washington, DC 20408–0001.

FOR FURTHER INFORMATION CONTACT: Charles Piercy, Acting Assistant Archivist for the Office of Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740, (301) 837–1583.

SUPPLEMENTARY INFORMATION:

Agenda

(1) Opening Remarks
(2) ERA Status Updates
(3) Subcommittee Breakouts
(4) Adjournment

Dated: March 31, 2011.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. 2011–8215 Filed 4–5–11; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: LIGO Laboratory Annual Review at Livingston Observatory for Physics.

Date and Time: Monday, April 25, 2011; 8 a.m.–6:30 p.m.; Tuesday, April 26, 2011; 8 a.m.–5:30 p.m.; Wednesday, April 27, 2011; 8:15 a.m.–11 a.m.

Place: LIGO site at Livingston, Louisiana.

Type of Meeting: Partially Closed.

Contact Person: Thomas Carruthers, Program Director, Division of Physics, National Science Foundation, (703) 292–7373.

Purpose of Meeting: To provide an evaluation of the project construction

for implementation of the AdvLIGO project to the National Science Foundation.

Agenda

Monday, April 25, 2011

8 a.m.–8:30 a.m. Closed—Executive Session
8:40 a.m.–10:35 a.m. Open—Welcome, Charge to Panel, AdvLIGO status,
10:45 p.m.–11:40 a.m. Open—AdvLIGO Technical status (1)
11:45 Lunch
12:30 p.m.–1:30 p.m. Open—AdvLIGO technical status (2), Installation status
1:30 p.m.–2:15 p.m. Open—Integration planning
3 p.m.–4:15 p.m. Open—AdvLIGO Project Performance & Mgmt Report
4:15 Open—Breakout sessions
5:55 p.m.–6:30 p.m. Closed—Executive Session

Tuesday, April 26, 2011

8 a.m.–11:45 a.m. Open—Break out sessions
11:45 a.m. Lunch
12:15 p.m.–3:45 p.m. Open—Tour
3:45 p.m.–4 p.m. Open—Breakout sessions
4:00 p.m.–5:30 p.m. Closed—Executive Session

Wednesday, April 27, 2011

8 a.m.–10:30 a.m. Closed—Executive Session report writing
10:30 a.m.–11 a.m. Closed—Executive Session—closing address

Reason for Closing: The proposal contains proprietary or confidential material, including technical information on personnel. These matters are exempt under 5 U.S.C. 552b(c)(2)(4) and (6) of the Government in the Sunshine Act.

Dated: April 1, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–8126 Filed 4–5–11; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–272, 50–311, 50–354; NRC–2009–0390 and NRC–2009–0391]

PSEG Nuclear, LLC, Hope Creek Generating Station and Salem Nuclear Generating Station, Units 1 and 2; Notice of Availability of the Final Supplement 45 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) has published a final plant-specific supplement to the *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (GEIS), NUREG–1437, regarding the renewal of operating licenses NPF–57, DPR–70, and DPR–75 for an additional 20 years of operation for the Hope Creek Generating Station (HCGS) and Salem Nuclear Generating Station, Units 1 and 2 (Salem). Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

As discussed in Section 9.4 of the final supplement, the staff determined that the adverse environmental impacts of license renewal for HCGS and Salem are not so great that preserving the option of license renewal for energy planning decision makers would be unreasonable. This recommendation is based on: (1) The analysis and findings in the GEIS; (2) information provided in the environmental report (ER) submitted by PSEG Nuclear, LLC; (3) consultation with Federal, State, and local agencies; (4) a review of pertinent documents and reports; and (5) consideration of public comments received during scoping and on the draft SEIS.

The final Supplement 45 to the GEIS is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://www.nrc.gov/reading-rm/adams.html*. The accession number for the final Supplement 45 to the GEIS is ML11089A021. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR reference staff by telephone at (800) 397–4209 or (301) 415–4737, or by e-mail at *pdr@nrc.gov*. In addition, the Salem Free Library, 112 West Broadway, Salem, NJ 08079, has agreed to make the final supplement available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Leslie Perkins, Project Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Mail Stop O–11F1, Washington, DC 20555–0001. Ms. Perkins may be contacted by telephone at (800) 368–5642, extension 2375, or via e-mail at *leslie.perkins@nrc.gov*.

Dated at Rockville, Maryland, this 30th day of March 2011.

For the Nuclear Regulatory Commission.

Bo Pham,

Chief, Project Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–8190 Filed 4–5–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–271; License No. DPR–28; NRC–2011–0074]

Entergy Nuclear Operations, Inc., Entergy Nuclear Vermont Yankee, LLC, Vermont Yankee Nuclear Power Station, Receipt of Request for Action

Notice is hereby given that by petition dated January 14, 2011, Mr. Thomas Saporito has requested that pursuant to Title 10 of the Code of Federal Regulations (10 CFR), Section 2.206, "Requests for Action under this Subpart," the U.S. Nuclear Regulatory Commission (NRC) take action with regard to the Vermont Yankee Nuclear Power Station (VY).

Mr. Saporito requested in his petition that the NRC (1) Issue a confirmatory order requiring the licensee to immediately bring the reactor in question to a cold shutdown mode of operation; (2) issue a civil penalty against the licensee; (3) remove the licensee's employees responsible for this matter from NRC-licensed activities for a period of no less than 5 years; and (4) perform an immediate NRC investigation and inspection of VY to ensure that all nuclear safety-related systems are properly operational in accordance with the licensee's technical specification and NRC license.

The Petition Review Board (PRB) met on January 24, 2011, to discuss the petition and denied the request for immediate action to bring VY to a cold shutdown mode of operation and to perform an immediate NRC investigation and inspection of VY because the PRB did not identify any urgent public health and safety concerns that would warrant an immediate shutdown and NRC investigation and inspection.

On January 24, 2011, Mr. Saporito was informed of the PRB's decision on the immediate action, and he requested an opportunity to address the PRB before its initial meeting to provide supplemental information for the Board's consideration. By teleconference on January 26, 2011, Mr. Saporito provided information to the PRB as further explanation and support for the petition. A copy of the transcript is available in the NRC's Agencywide

Documents Access and Management System (ADAMS) under Accession No. ML110330256.

The PRB met on February 2, 2011, to discuss the petition and made an initial recommendation to accept the petition in part concerning the failure of relief valve because this issue met the criteria for review.

On February 8, 2011, Mr. Saporito was informed of the PRB's initial recommendation to accept the petition in part, and Mr. Saporito requested another opportunity to address the PRB to provide comments to the PRB's initial recommendation and additional information in support of the petition. By teleconference on February 14, 2011, Mr. Saporito provided information to the PRB in support of his request for an immediate shutdown and an immediate NRC investigation and inspection of VY. A copy of the transcript is available in ADAMS under Accession No. ML110330256.

The PRB confirmed its initial recommendation because the additional information provided on February 14, 2011, did not change the PRB's decision to deny the request for immediate action.

The requests are being treated pursuant to 10 CFR 2.206 of the Commission's regulations. The requests have been referred to the Director of the Office of Nuclear Reactor Regulation. As provided by 10 CFR 2.206, appropriate action will be taken on this consolidated petition within a reasonable time.

A copy of the petition is available to the public from the NRC's Agencywide Documents Access and Management System (ADAMS) in the public Electronic Reading Room on the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession No. ML110190233, and is available for inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

Dated at Rockville, Maryland, this 28th day of March 2011.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–8189 Filed 4–5–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. A2011–12; Order No. 707]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Wesleyville Post Office in Wesleyville, Pennsylvania has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioner, and others to take appropriate action.

DATES: *Administrative record due (from Postal Service):* April 12, 2011; *deadline for notices to intervene:* April 25, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on March 28, 2011, the Commission received a petition for review of the Postal Service's determination to close the Wesleyville, Pennsylvania post office. The petition was filed online by William A. Wittenberg (Petitioner), and was posted on the Commission's Web site on March 28, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–12 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than May 2, 2011.

Categories of issues apparently raised. The categories of issues raised include: Failure to follow the post office closure requirements (*see* 39 U.S.C. 404(d)(1)); and failure to consider effect on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the two set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the administrative record with the Commission is April 12, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this Notice is April 12, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents also are available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Those, other than the Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before April 25, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has

been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the administrative record regarding this appeal no later than April 12, 2011.

2. Any responsive pleading by the Postal Service to this Notice is due no later than April 12, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Cassandra L. Hicks is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this Notice and Order in the **Federal Register.**

PROCEDURAL SCHEDULE

March 28, 2011	Filing of Appeal.
April 12, 2011	Deadline for the Postal Service to file the administrative record in this appeal.
April 12, 2011	Deadline for the Postal Service to file any responsive pleading.
April 25, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
May 2, 2011	Deadline for Petitioner's Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
May 23, 2011	Deadline for answering brief in support of Postal Service (*see* 39 CFR 3001.115(c)).
June 7, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
June 14, 2011	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
July 26, 2011	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–8102 Filed 4–5–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–29621; File No. 812–13841]

Jackson National Life Insurance Company, et al.

March 31, 2011.

AGENCY: The Securities and Exchange Commission ("Commission")

ACTION: Notice of application for an order under Section 6(c) of the Investment Company Act of 1940 (the "Act") granting exemptions from the provisions of Sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder to permit the recapture of contract enhancement endorsement credits applied to purchase payments made under certain deferred variable annuity contracts.

APPLICANTS: Jackson National Life Insurance Company ("Jackson"), Jackson National Separate Account—I (the "JNL Separate Account"), Jackson National Life Insurance Company of New York ("JNLNY") and collectively with Jackson, the "Insurance Companies," and individually as made appropriate by the context, an "Insurance Company"), JNLNY Separate Account I (the "JNLNY Separate Account," collectively with the JNL Separate Account, the "Separate Accounts," and individually as made appropriate by the context, a "Separate Account") and Jackson National Life Distributors LLC ("Distributor," and collectively with the Insurance Companies and the Separate Accounts, "Applicants").

SUMMARY OF APPLICATION: Applicants seek an order under Section 6(c) of the Act to exempt certain transactions from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder, to the extent necessary to permit the recapture, under specified circumstances, of certain credits under the 6% Contract Enhancements Endorsement (the "6% Contract Enhancement") when those credits have been applied to purchase payments made (a) Under the deferred variable annuity contracts more particularly described in this notice that Jackson has issued through the JNL Separate Account (the "Perspective Contracts"); (b) under other contracts that Jackson has issued through the JNL Separate Account (the "JNL Contracts"); (c) under the contracts that JNLNY has issued through the JNLNY Separate Account (the "JNLNY Contracts"); (d) under the Perspective Contracts as they may be subsequently updated; and (e) under other contracts that the Insurance Companies may issue in the future with the 6% Contract Enhancement ("Future Contracts," and together with the other contracts referred to in this paragraph, the "Contracts"), either through their existing separate accounts or future separate accounts ("Other Accounts"). Applicants also request that the order being sought extend to any other Financial Industry Regulatory Authority ("FINRA") member broker-dealer controlling or controlled by, or under common control with, Jackson, whether existing or created in the future, that serves as distributor or principal underwriter for the Contracts ("Affiliated Broker-Dealers") and any successors in interest to the Applicants.

FILING DATE: The application was filed on November 8, 2010, and amended on March 29, 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 should be received by the Commission by 5:30 p.m. on April 22, 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 writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing 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 Jackson National Life Insurance Company, 1 Corporate Way, Lansing, Michigan 48951, Attn: Frank J. Julian, Esq.

FOR FURTHER INFORMATION CONTACT: Ellen J. Sazzman, Senior Counsel, at

(202) 551–6762, or Harry Eisenstein, Senior Special Counsel, at (202) 551–6795, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the Application. The complete Application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Jackson is a stock life insurance company organized under the laws of the state of Michigan. Jackson is admitted to conduct life insurance and annuity business in the District of Columbia and all states except New York. Jackson is ultimately a wholly owned subsidiary of Prudential plc (London, England).

2. JNLNY is a stock life insurance company organized under the laws of the state of New York. JNLNY is admitted to conduct life insurance and annuity business in Delaware, Michigan, and New York. JNLNY is ultimately a wholly-owned subsidiary of Prudential plc (London, England).

3. The JNL Separate Account was established by Jackson pursuant to the provisions of Michigan law and the authority granted under a resolution of Jackson's Board of Directors. The JNLNY Separate Account was established by JNLNY pursuant to the provisions of New York law and the authority granted under a resolution of JNLNY's Board of Directors. Jackson and JNLNY are the depositors of their respective Separate Accounts. Each of the Separate Accounts meets the definition of a "separate account" under the federal securities laws and each is registered with the Commission as a unit investment trust under the Act (File Nos. 811–8664 and 811–8401, respectively). JNL Separate Account and JNLNY Separate Account will fund, respectively, the variable benefits available under the JNL Contracts and the JNLNY Contracts.

4. The assets of each Separate Account legally belong to the Insurance Company of which it is a segregated asset account and the obligations under the Contracts are obligations of that Insurance Company. However the Contract assets in the Separate Accounts are not chargeable with liabilities arising out of any other business the Insurance Companies may conduct. All of the income, gains, and losses resulting from these assets are credited to or charged against the Contracts and not against any other contracts the Insurance Companies may issue. The registration statements relating to the offering of the Perspective Contracts were filed under the Securities Act of 1933 (the "1933 Act") (File No. 333–70472 ("Perspective II Contracts") and File No. 333–119656 ("Perspective L Contracts")).

5. The Distributor is a wholly owned subsidiary of Jackson and serves as the distributor of the Contracts. The Distributor is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act") and is a member of FINRA. The Distributor enters into selling group agreements with affiliated and unaffiliated broker-dealers. The Contracts are sold by licensed insurance agents, where the Contracts may be lawfully sold, who are registered representatives of broker-dealers that are registered under the 1934 Act and are members of FINRA.

6. The Perspective Contracts (Perspective II Contracts and Perspective L Contracts) are the only Contracts that will rely immediately on the relief requested. However, Applicants represent that the JNL Contracts, the JNLNY Contracts, the Perspective Contracts as they may be subsequently updated, and the Future Contracts (the "Contracts") are or will be substantially similar in all material respects to the Perspective Contracts.

7. The Perspective Contracts require a minimum initial premium payment of $5,000 or $10,000 under most circumstances depending on the contract ($2,000 for a qualified plan contract). Subsequent payments may be made at any time during the accumulation phase. Each subsequent payment must be at least $500 ($50 under an automatic payment plan). Prior approval of the Insurance Company is required for aggregate premium payments of over $1,000,000.

8. The Perspective Contracts permit owners to accumulate contract values on a fixed basis through allocations to one of six fixed accounts (the "Fixed Accounts"). Fixed Account allocation and transfer restrictions initially will be imposed in connection with the subject 6% Contract Enhancement during the first seven contract years. In addition, if the optional Jackson Select Guaranteed Minimum Withdrawal Benefit ("GMWB") or the optional Jackson Select with Joint Option Guaranteed Minimum Withdrawal Benefit ("GMWB") is elected in the JNL Contracts, automatic transfers of an owner's contract value may be allocated to a fixed account designated for these guaranteed minimum withdrawal benefits ("GMWB Fixed Account").

9. The Perspective Contracts also permit owners to accumulate contract values on a variable basis, through allocations to one or more of the sub-accounts, also referred to as investment divisions, of the Separate Accounts (the "Investment Divisions," collectively with the Fixed Account and the GMWB Fixed Account, the "Allocation Options"). Under the Perspective Contracts, ninety-nine Investment Divisions currently are expected to be offered but additional Investment Divisions may be offered in the future and some could be eliminated or combined with other Investment Divisions in the future. Similarly, future Perspective Contracts may offer additional or different Investment Divisions. Each Investment Division will invest in shares of a corresponding series ("Series") of JNL Series Trust ("Trust") or JNL Variable Fund LLC ("Fund") (collectively the "Trust and Fund"). The Trust and Fund are open-end management investment companies registered under the Act and their shares are registered under the 1933 Act.

10. Transfers among the Investment Divisions are permitted. Certain transfers to, from and among the Fixed Account Options are also permitted during the Perspective Contracts' accumulation phase, but are subject to certain adjustments and limitations.

11. If the owner dies during the accumulation phase of the Perspective Contracts, the beneficiary named by the owner is paid a death benefit by the Insurance Company. The Perspective Contracts' base death benefit, which applies unless an optional death benefit has been elected, is a payment to the beneficiary of the greater of: (i) Contract value on the date the Insurance Company receives proof of death and completed claim forms from the beneficiary or (ii) the total premiums paid under the Perspective Contract minus any prior withdrawals (including any withdrawal charges, recapture charges or other charges or adjustments applicable to such withdrawals).

12. The owner may be offered optional death benefit endorsements that can change the death benefit paid to the beneficiary. The optional death benefit endorsements, in general, provide that withdrawals (including any withdrawal charges, recapture charges and other charges or adjustments to such withdrawal) will reduce the benefit base that determines the amount of the death benefit. The Perspective Contracts may also offer various GMWB optional endorsements.

13. The Perspective Contracts offer fixed and variable versions of the

following four types of annuity payment or "income payment": life income, joint and survivor, life annuity with at least 120 or 240 monthly payments guaranteed to be paid (although not guaranteed as to amount if variable), and income for a specified period of 5 to 30 years. The Insurance Companies may also offer other income payment options.

14. Perspective Contracts currently offer contract enhancement endorsements ("Contract Enhancement(s)"), all of which are optional although Future Contracts may have Contract Enhancements which are not optional. The Contract Enhancements provide for Jackson to add from its general account assets an additional amount to the owner's contract value upon receipt of the initial premium payment, and for each subsequent premium payment received within the first seven contract years (five for the 2% Contract Enhancement). The Contract Enhancements that may be elected at issue currently vary in amount between 2% and 5%. The Contract Enhancement percentages that are credited in each case also vary, depending upon the applicable percentage and contract year in which the premium payment is received. The Contract Enhancements offered under the Perspective Contracts may vary depending upon the design of the contract, the date of issue of a contract or the distribution channel. The 6% Contract Enhancement would not be available if the 20% Additional Free Withdrawal endorsement is elected and vice versa. Also if a Contract Enhancement is elected, allocations and transfers to the Fixed Account Options currently will be restricted, as fully described in the prospectus. The restrictions apply during the first seven contract years (five contract years for the 2% Contract Enhancement). These restrictions will also apply to the 6% Contract Enhancement.

15. Following is the table for the existing 5% Contract Enhancement that shows the variation in the percentages based upon the year of receipt of the applicable premium payment. This table shows how existing 5% Contract Enhancements are structured and how the 6% Contract Enhancement will be structured.

5% CONTRACT ENHANCEMENT

[In percent]

	Contract year premium is received							
	0–1	1–2	2–3	3–4	4–5	5–6	6–7	7+
Contract Enhancement Percentage of the Premium Payment	5.00	4.50	3.75	3.00	2.25	1.75	1.00	0

16. Applicants are proposing to add a 6% Contract Enhancement to the Perspective Contracts that is modeled on the above 5% structure, as follows:

6% CONTRACT ENHANCEMENT

[In percent]

	Contract year premium is received							
	0–1	1–2	2–3	3–4	4–5	5–6	6–7	7+
Contract Enhancement Percentage of the Premium Payment	6.00	5.50	4.75	4.00	3.25	2.50	1.25	0

17. Jackson will allocate the 6% Contract Enhancement to the Fixed Accounts and/or Investment Divisions in the same proportion as the premium payment allocation. The 6% Contract Enhancement is available only to owners 87 years old and younger. There is an asset-based charge for the 6% Contract Enhancement. The asset-based charges for the 6% Contract Enhancement applies only for the first seven contract years, as opposed to seven years from the date of the premium payment, and is 0.832%, based on the average daily net asset value of the allocations to the Investment Divisions. A charge equal to the asset-based charge will also be assessed against any amounts contract owners have allocated to the Fixed Accounts, through a reduction in the annual credited rate of interest resulting in a lower annual credited interest rate that would apply to the Fixed Account if the Contract Enhancement had not been elected.

18. Jackson will recapture all or a declining portion of the 6% Contract Enhancement by imposing a recapture charge whenever an owner: (i) Makes a total withdrawal within the recapture charge period up to seven years after a premium payment, or a partial withdrawal of corresponding premiums within the recapture charge period in excess of those permitted under the Perspective Contracts' free withdrawal provisions, unless the withdrawal is made for certain health-related emergencies specified in the Perspective Contracts; (ii) elects to receive payments under an income payment option within the recapture charge period; or (iii) returns the Perspective Contract during the free-look period.

19. The amount of the 6% Contract Enhancement recapture charge varies depending on the corresponding declining amount of the Contract Enhancement based on the contract year when the premium payment being withdrawn was received and when the charge is imposed based on the Completed Years since the receipt of the related premium, as follows:

6% CONTRACT ENHANCEMENT RECAPTURE CHARGE

[In percent]

Completed years since receipt of premium	Contract year premium is received							
	0–1	1–2	2–3	3–4	4–5	5–6	6–7	7+
0–1	5.00	4.75	4.00	3.75	2.50	2.00	0.75	0.00
1–2	4.75	4.25	3.60	3.00	2.25	1.25	0.00	0.00
2–3	4.00	3.75	3.00	2.25	1.25	0.00	0.00	0.00
3–4	3.75	3.00	2.25	1.25	0.00	0.00	0.00	0.00
4–5	3.00	2.00	1.25	0.00	0.00	0.00	0.00	0.00
5–6	2.25	1.25	0.00	0.00	0.00	0.00	0.00	0.00
6–7	1.25	0.00	0.00	0.00	0.00	0.00	0.00	0.00
7+	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

20. A "Completed Year" is the succeeding twelve months from the date on which the Insurance Companies receive a premium payment. Completed Years specifies the years from the date of receipt of the premium and does not refer to contract years. If the premium receipt date is on the issue date of the Contract, then Completed Year 0–1 does not include the first contract anniversary. The first contract anniversary begins Completed Year 1–2 and each successive Completed Year begins with the contract anniversary of the preceding contract year and ends the day before the next contract anniversary. If the premium receipt date is other than the issue date or a subsequent contract anniversary, there is no correlation of the contract anniversary date and Completed Years. For example, if the issue date is January 15, 2010 and a premium payment is received on February 28, 2010 then, although the first contract anniversary is January 15, 2011, the end of Completed Year 0–1 for that premium payment would be February 27, 2011, and February 28, 2011 begins Completed Year 1–2. The first contract year (contract year 0–1) starts on the issue date and extends to, but does not include, the first contract anniversary. Subsequent contract years start on an anniversary date and extend to, but do not include, the next anniversary date.

21. The recapture charge percentage will be applied to the corresponding premium reflected in the amount withdrawn or the amount applied to income payments that remain subject to a recapture charge. Earnings are withdrawn first without charge and the oldest purchase payments are withdrawn first. The amount recaptured will be taken from the Investment Divisions and the Fixed Account in the proportion their respective values bear to the contract value. The dollar amount recaptured will never exceed the dollar amount of the 6% Contract Enhancement added to the Perspective Contract. Recapture charges will be applied upon electing to commence income payments, even in a situation where the withdrawal charge is waived.

22. Jackson does not assess the recapture charge on any payments paid out as: Death benefits; withdrawals of earnings; withdrawals taken under the free withdrawal provision, which allows for free withdrawals (where a withdrawal is taken that exceeds the free withdrawal amount, the recapture charge is imposed only on the excess amount above the free withdrawal amount); withdrawals necessary to satisfy the required minimum distribution of the Internal Revenue Code (if the withdrawal requested exceeds the required minimum distribution, the recapture charge will not be waived on the required minimum distribution); if permitted by the owner's state, withdrawals of up to $250,000 from the JNL Separate Account, the Fixed Account or the GMWB Fixed Account in connection with the owner's terminal illness or if the owner needs extended hospital or nursing home care as provided in the Perspective Contract; or if permitted by the owner's state, withdrawals of up to 25% (12.5% for each of two joint owners) of contract value from the JNL Separate Account, the Fixed Account or the GMWB Fixed Account in connection with certain serious medical conditions specified in the Perspective Contract.

23. The contract value will reflect any gains or losses attributable to the 6% Contract Enhancement described above. The 6% Contract Enhancement and any gains or losses attributable to the 6% Contract Enhancement will be considered earnings under the Perspective Contracts for tax purposes and for purposes of calculating the free withdrawal amounts and the Earnings Protection Benefit.

24. The Perspective Contracts have a "free-look" period of ten days after the owner receives the Perspective Contract (or any longer period required by state law). Contract value (or premiums paid, as may be required by state law), less the full amount of any Contract Enhancement(s) is returned upon exercise of free look rights by an owner. Therefore, 100% of the 6% Contract Enhancement will be recaptured under all circumstances if an owner returns the Perspective Contract during the free-look period, but any gain or loss on investments of the 6% Contract Enhancement would be retained by the owner. The dollar amount recaptured will never exceed the dollar amount of the 6% Contract Enhancement added to the Perspective Contract. A withdrawal charge will not be assessed upon exercise of free look rights.

25. In addition to the 6% Contract Enhancement charge and 6% Contract Enhancement recapture charge, the Perspective Contracts may have a mortality and expense risk charge, an administration charge, a contract maintenance charge, a charge for the Earnings Protection Benefit, an optional GMWB charge, a fee for the five-year withdrawal charge period, an optional death benefit charge, a transfer fee for transfers in excess of 15 in a contract year, a commutation fee that applies only upon withdrawals from income payments for a fixed period, and a withdrawal charge that applies to total withdrawals, partial withdrawals in excess of amounts permitted to be withdrawn under the Perspective Contract's free withdrawal provision and on the income date (the date income payments commence) if the income date is within a year of the date the Perspective Contract was issued.

26. The withdrawal charges shown in the table below apply to Perspective II

Contracts with and without the five-year withdrawal charge option and the Perspective L Contracts. The amount of the withdrawal charge depends upon when the charge is imposed based on the Completed Years since the receipt of the related premium, as follows:

Withdrawal Charge (as a percentage of premium payments). Completed Years Since Receipt of Premium	0–1	1–2	2–3	3–4	4–5	5–6	6–7	7+
Withdrawal Charge (Base Withdrawal Charge Schedule for Offerings Under File No. 333–70472) (Perspective II)	8.5%	7.5%	6.5%	5.5%	5%	4%	2%	0%
Withdrawal Charge if Five-Year Period is elected (Optional Five-Year Withdrawal Charge Schedule for Offerings Under File No. 333–70472) (Perspective II)	8%	7%	6%	4%	2%	0%	0%	0%
Withdrawal Charge (Base Withdrawal Charge Schedule for Offerings Under File No. 333–119656) (Perspective L Series)	8%	7.5%	6.5%	5.5%	0%	0%	0%	0%

27. Jackson does not assess the withdrawal charge on any payments paid out as: Death benefits; election to begin income payments after the first contract year under JNL Contracts; cancellation of the Contract upon exercise of free look rights by an owner; withdrawals of earnings; withdrawals taken under the free withdrawal provision, which allows for free withdrawals up to 10% of remaining premium, less earnings (where a withdrawal is taken that exceeds the free withdrawal amount, the withdrawal charge is imposed only on the excess amount above the free withdrawal amount); withdrawals necessary to satisfy the required minimum distribution of the Internal Revenue Code (if the withdrawal requested exceeds the required minimum distribution, the withdrawal charge will not be waived on the required minimum distribution); if permitted by the owner's state, withdrawals of up to $250,000 from the Investment Divisions, Fixed Account or GMWB Fixed Account available under the Perspective Contracts in connection with the terminal illness of the owner of a Contract, or in connection with extended hospital or nursing home care for the owner (this withdrawal charge waiver is not available under JNLNY Contracts); and if permitted by the owner's state, withdrawals of up to 25% (12.5% each for two joint owners) of contract value from the Investment Divisions, Fixed Account or GMWB Fixed Account available under the Perspective Contracts in connection with certain serious medical conditions specified in the Contract.

Applicants' Legal Analysis

1. Applicants state that Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request that the Commission, pursuant to Section 6(c) of the Act, grant the exemptions requested below with respect to the Contracts and any Future Contracts funded by the Separate Accounts or Other Accounts that are issued by the Insurance Companies and underwritten or distributed by the Distributor or Affiliated Broker-Dealers. Applicants undertake that the Contracts will be substantially similar in all material respects to the Perspective Contracts described in the Application. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Applicants state that Section 27 of the Act regulates and imposes certain restrictions on the sales of periodic payment plan certificates issued by any registered investment company. Subsection (i) of Section 27 of the Act provides that Section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless such contract is a redeemable security. Section 2(a)(32) defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

3. Applicants submit that the recapture of the 6% Contract Enhancement in the circumstances set forth in the Application would not deprive an owner of his or her proportionate share of the issuer's current net assets. A Contract owner's interest in the amount of the 6% Contract Enhancement allocated to his or her contract value upon the Insurance Companies' receipt of a premium payment is not fully vested until seven complete years following a premium payment. Until or unless the amount of any 6% Contract Enhancement is vested, the Insurance Companies retain the right and interest in the 6% Contract Enhancement amount, although not in the earnings attributable to that amount. Applicants urge that when one of the Insurance Companies recaptures the 6% Contract Enhancement, it is simply retrieving its own assets, and because a Contract owner's interest in the Contract Enhancement is not vested, the Contract owner has not been deprived of a proportionate share of the Separate Account's assets, *i.e.,* a share of the Separate Account's assets proportionate to the Contract owner's contract value.

4. In addition, Applicants represent that it would be particularly unfair to allow a Contract owner exercising the free-look privilege to retain the 6% Contract Enhancement amount under a Contract that has been returned for a refund after a period of only a few days. If the Insurance Companies could not recapture the Contract Enhancement, individuals could purchase a Contract with no intention of retaining it and simply return it for a quick profit. Furthermore, Applicants state that the recapture of the 6% Contract Enhancement relating to withdrawals and to income payments within the first seven contract years is designed to protect the Insurance Companies against Contract owners not holding the Contract for a sufficient time period. This recapture of the Contract Enhancement within the first seven contract years provides the Insurance Companies with sufficient time to recover the cost of the Contract Enhancement and to avoid the financial detriment that would result from a shorter recapture period.

5. Applicants represent that it is not administratively feasible to track the Contract Enhancement amount in the

Separate Accounts after the 6% Contract Enhancement is applied. Accordingly, the asset-based charges applicable to the Separate Accounts will be assessed against the entire amounts held in the Separate Accounts, including any 6% Contract Enhancement amounts. As a result, the aggregate asset-based charges assessed will be higher than those that would be charged if the Contract owner's contract value did not include any Contract Enhancement.

6. Applicants submit that the provisions for recapture of any Contract Enhancement under the Contracts do not violate Sections 2(a)(32) and 27(i)(2)(A) of the Act. Sections 26(e) and 27(i) were added to the Act to implement the purposes of the National Securities Markets Improvement Act of 1996 and Congressional intent. The application of a 6% Contract Enhancement to premium payments made under the Contracts should not raise any questions as to compliance by the Insurance Companies with the provisions of Section 27(i). However, to avoid any uncertainty as to full compliance with the Act, Applicants request an order granting an exemption from Sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of the 6% Contract Enhancement under the circumstances described in the Application, without the loss of relief from Section 27 provided by Section 27(i).

7. Applicants state that Section 22(c) of the Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes as contemplated by Section 22(a). Rule 22c–1 under the Act prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

8. Applicants state that it is possible that someone might view the Insurance Companies' recapture of the 6% Contract Enhancement as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Separate Accounts. Applicants contend, however, that the recapture of the 6% Contract Enhancement does not violate Rule 22c–1. The recapture of some or all of the 6% Contract Enhancement does not involve either of the evils that Section 22(c) and Rule 22c–1 were intended to eliminate or reduce as far as reasonably practicable, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of a 6% Contract Enhancement, the Insurance Companies will redeem interests in a Contract owner's contract value at a price determined on the basis of the current net asset value of the Separate Accounts. The amount recaptured will be less than or equal to the amount of the Contract Enhancement that the Insurance Companies paid out of their general account assets. Although Contract owners will be entitled to retain any investment gains attributable to the 6% Contract Enhancement and to bear any investment losses attributable to the 6% Contract Enhancement, the amount of such gains or losses will be determined on the basis of the current net asset values of the Separate Accounts. Thus, no dilution will occur upon the recapture of the Contract Enhancement. Applicants also submit that the second harm that Rule 22c–1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the 6% Contract Enhancement. Because neither of the harms that Rule 22c–1 was meant to address is found in the recapture of the Contract Enhancement, Applicants assert that Rule 22c–1 should not apply to the 6% Contract Enhancement. However, to avoid any uncertainty as to full compliance with Rule 22c–1, Applicants request an order granting an exemption from the provisions of Rule 22c–1 to the extent deemed necessary to permit them to recapture the Contract Enhancement under the Contracts.

9. Applicants also submit that extending the requested relief to encompass Future Contracts and Other Accounts is appropriate in the public interest because it promotes competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications prior to introducing new variable annuity contracts. Applicants assert that investors would receive no benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issues under the Act not already addressed in the Application.

10. Applicants submit, for the reasons stated herein, that their exemptive request meets the standards set out in Section 6(c) of the Act, namely, that the exemptions requested are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8081 Filed 4–5–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64166; File No. SR–FINRA–2010–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes

April 1, 2011.

I. Introduction

On July 12, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Discovery Guide, which includes Document Production Lists, and to make conforming changes to Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code"). The proposed rule change was published for comment in the **Federal Register** on August 3, 2010.[3] The Commission received 55 comment letters on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 62584 (July 28, 2010), 75 FR 45685 (August 3, 2010).

proposed rule change.[4] On February 8, 2011, the Commission received from FINRA a Response to Comments and Partial Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice and order to solicit comment on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of Proposed Rule Change and Summary of Comments

As described in Exchange Act Release No. 62584,[6] FINRA is proposing to amend the Discovery Guide, which includes Document Production Lists, and to make conforming changes to Rules 12506 and 12508 of the Customer Code. Of the 55 comments received on the initial proposal, 15 supported it with modifications,[7] 36 opposed it,[8] and 4 addressed particular aspects of the proposal without expressing a position on whether the Commission should approve the proposed rule change.[9]

In its Response Letter, FINRA stated that the initial proposed rule change reflected several years of close consultation with FINRA's constituents, including investor and industry representatives, arbitrators, and attorneys that handle investor claims at securities arbitration clinics. FINRA also stated that, because the Discovery Guide, as amended by the initial proposed rule change, was comprised of language that was discussed at length with these constituents and crafted to balance the parties' discovery needs with the goal of keeping FINRA arbitration efficient and cost effective, FINRA was, for the most part, making only limited further revisions to the proposed rule change to provide additional clarification and guidance.[10]

In addition, FINRA stated that, if the Commission approves the proposed rule change as amended, it would establish a Discovery Task Force under the auspices of FINRA's National Arbitration and Mediation Committee to review substantive issues relating to the Discovery Guide on an ongoing basis, for the purpose of keeping the Discovery Guide current as products change and new discovery issues arise.[11] FINRA stated that it would convene the Discovery Task Force approximately six months after implementing the revised Discovery Guide to allow practitioners time to gauge the efficacy of the new Discovery Guide.[12]

FINRA's responses to comments and changes to the proposed rule change made by Amendment No. 1 are described below.

A. Guide Introduction

1. Arbitrator Discretion

Commenters expressed concerns that arbitrators may adhere strictly to the Discovery Guide's two lists of documents (the first itemizing categories of documents to be produced by firms and their associated persons, and the second itemizing categories of documents to be produced by customers—together, "Lists") when making discovery decisions and may not use the flexibility the Discovery Guide provides to them.[13] FINRA responded that it wants arbitrators to be aware of the flexibility they have when

[4] *See* comment letters submitted by Richard A. Stephens, Esq., dated August 6, 2010 ("Stephens comment"); Seth E. Lipner, Esq., Baruch College, Member, Deutsch & Lipner, dated August 15, 2010 ("Lipner comment"); Leonard Steiner, Esq., dated August 16, 2010 ("Steiner comment"); Robert C. Port, Esq., Cohen Goldstein Port Gottlieb, LLP, dated August 19, 2010 ("Port comment"); Steven M. McCauley, Esq., dated August 19, 2010 ("McCauley comment"); Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated August 20, 2010 ("Caruso comment"); Diane Nygaard, Esq., dated August 20, 2010 ("Nygaard comment"); Ryan K. Bakhtiari, Esq., Aidikoff, Uhl and Bakhtiari, dated August 20, 2010 ("Bakhtiari comment"); Thomas R. Cox, Esq., Miller, Canfield, Paddock and Stone, P.L.C., dated August 20, 2010 ("Cox comment"); Steven J. Gard, Esq., dated August 22, 2010 ("Gard comment"); John W. Shaw, Esq., Berkowitz, Oliver, Williams, Shaw and Eisenbrandt, dated August 23, 2010 ("Shaw comment"); Stephen Krosschell, Esq., Goodman & Nekvasil, P.A., dated August 23, 2010 ("Krosschell comment"); David P. Neuman, Esq., Stoltmann Law Offices, P.C., dated August 23, 2010 ("Neuman comment"); Theodore A. Krebsbach, Esq., Krebsbach and Snyder, P.C., dated August 23, 2010 ("Krebsbach comment"); Eric G. Wallis, Esq., Reed Smith LLP, dated August 23, 2010 ("Wallis comment"); Herb Pounds, Jr., Esq., dated August 23, 2010 ("Pounds comment"); Alan S. Brodherson, Esq., dated August 24, 2010 ("Brodherson comment"); Joseph Terry, dated August 24, 2010 ("Terry comment"); Mark James, dated August 24, 2010 ("James comment"); Jonathan W. Evans, Esq., and Michael S. Edmiston, Esq., Law Offices of Jonathan W. Evans & Associates, dated August 24, 2010 ("Evans and Edmiston comment"); G. Kirk Ellis, Esq., dated August 24, 2010 ("Ellis comment"); Jason R. Doss, Esq., The Doss Firm, LLC, dated August 24, 2010 ("Doss comment"); Jenice L. Malecki, Esq., Malecki Law, dated August 24, 2010 ("Malecki comment"); Frances Ruby, dated August 24, 2010 ("Ruby comment"); Carrie L. Chelko, Esq., Deputy General Counsel, Janney Montgomery Scott LLC, dated August 24, 2010 ("Janney comment"); Raymond W. Henney, Esq., Honigman Miller Schwartz and Cohn LLP, dated August 24, 2010 ("Henney comment"); Jonathan Kord Lagemann, Esq., dated August 24, 2010 ("Lagemann comment"); Brian N. Smiley, Esq., Smiley Bishop & Porter, LLP, dated August 24, 2010 ("Smiley comment"); Stanley Yorsz, Esq., Buchanan Ingersoll & Rooney PC, dated August 24, 2010 ("Yorsz comment"); Dominick F. Evangelista, Esq., Bressler, Amery & Ross, P.C., dated August 24, 2010 ("Evangelista comment"); Michael N. Ungar, Esq., Kenneth A. Bravo, Esq., Joseph S. Simms, Esq., and Jill Y. Coen, Esq., Ulmer & Berne LLP, dated August 24, 2010 ("Ulmer & Berne comment"); Barry D. Estell, Esq., dated August 24, 2010 ("Estell comment"); Richard A. Lewins, Esq., dated August 24, 2010 ("Lewins comment"); Robert M. Rudnicki, Esq., Vice President and Director of Litigation, Raymond James & Associates, Inc., on behalf of Raymond James Financial, Inc. and Raymond James & Associates, Inc., dated August 24, 2010 ("Raymond James comment"); Lee H. Schillinger, dated August 24, 2010 ("Schillinger comment"); Paula D. Shaffner, Esq., Stradley Ronon Stevens & Young, LLP, dated August 24, 2010 ("Shaffner comment"); Kelly J. Moynihan, Esq., Keesal, Young & Logan, dated August 24, 2010 ("Moynihan comment"); Richard L. Martens, Esq., Jason S. Haselkorn, Esq., Patricia M. Christiansen, Esq., Charles L. Pickett, Esq., Casey Ciklin Lubitz Martens & O'Connell, dated August 24, 2010 ("Casey Ciklin comment"); Peter J. Mougey, Esq., Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A., dated August 24, 2010 ("Mougey comment"); Rob Bleecher, Esq., dated August 24, 2010 ("Bleecher comment"); Scott R. Shewan, Esq., President, Public Investors Arbitration Bar Association, dated August 24, 2010 ("PIABA comment"); Bradford D. Kaufman, Esq., Greenberg Traurig, P.A., dated August 24, 2010 ("Kaufman comment"); William A. Jacobson, Esq., Associate Clinical Professor, Cornell Law School, and Director, Cornell Securities Law Clinic, dated August 24, 2010 ("Cornell Securities Law Clinic comment"); S. Lawrence Polk, Esq., Sutherland Asbill & Brennan LLP, dated August 24, 2010 ("Polk comment"); John R. Cronin, Vermont Securities Director and Chair, NASAA Arbitration Project Group, dated August 25, 2010 ("NASAA comment"); Theodore M. Davis, Esq., dated August 25, 2010 ("Davis comment"); Eliot Goldstein, Esq., Law Offices of Eliot Goldstein, LLP, dated August 25, 2010 ("Goldstein comment"); Richard M. Layne, Esq., dated August 26, 2010 ("Layne comment"); Royal B. Lea, Esq., dated August 27, 2010 ("Lea comment"); Keith L. Griffin, Esq., Griffin Law Firm, LLC, dated August 27, 2010 ("Griffin comment"); Patricia Cowart, Esq., Chair, SIFMA Arbitration Committee, dated September 10, 2010 ("SIFMA comment"); Gail E. Boliver, Esq., Boliver & Bidwell, dated September 16, 2010 ("Boliver comment"); Scott C. Ilgenfritz, Esq., Johnson, Pope, Bokor, Ruppel & Burns, LLP, dated September 24, 2010 ("Ilgenfritz comment"); Matthew Farley, Esq., Drinker Biddle & Reath LLP, dated September 24, 2010 ("Drinker Biddle comment"); and Kathy A. Besmer, dated November 6, 2010 ("Besmer comment").

[5] *See* letter from Margo A. Hassan, Assistant Chief Counsel, FINRA Dispute Resolution, to Elizabeth Murphy, Secretary, Commission, dated February 8, 2011 ("Response Letter"). The text of the proposed rule change and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

[6] *See* note 3 *supra*.

[7] *See* Caruso, Bakhtiari, Cox, Pounds, Doss, Malecki, Smiley, Lewins, Raymond James, Mougey, PIABA, Cornell Securities Law Clinic, SIFMA, Boliver, and Ilgenfritz comments.

[8] *See* Lipner, Steiner, Port, McCauley, Nygaard, Gard, Shaw, Neuman, Krebsbach, Krosschell, Brodherson, Terry, James, Evans and Edmiston, Ellis, Ruby, Janney, Lagemann, Yorsz, Evangelista, Ulmer & Berne, Estell, Schillinger, Shaffner, Moynihan, Casey Ciklin, Bleecher, Kaufman, NASAA, Davis, Goldstein, Layne, Lea, Griffin, Drinker Biddle, and Besmer comments.

[9] *See* Stephens, Wallis, Henney, and Polk comments.

[10] Response Letter.

[11] *Id.*

[12] *Id.*

[13] *See* Lipner, Krebsbach, Evans and Edmiston, Shaffner, Bleecher, Griffin, Henney, NASAA, Yorsz, Goldstein, SIFMA, and Drinker Biddle comments.

asked to decide discovery disputes, and therefore the initial proposal included revisions to the introduction of the Discovery Guide stating that arbitrators may order production of documents not appearing on the Lists, and that arbitrators can order that parties do *not* have to produce all items on the Lists in a particular case.[14] Further, these revisions added guidance on how arbitrators should handle objections based on cost or burden of production.[15]

In addition to these changes, and in response to commenters' concerns, FINRA has proposed changes to the introduction to explain that arbitrators must use their judgment in considering requests for documents beyond those contained in the Lists and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide.[16] FINRA stated that, in addition to expanding the language in the Discovery Guide, if the SEC approves the proposed rule change, FINRA would revise the Arbitrator's Reference Guide, which is posted on the FINRA Web site, to include a discussion on how arbitrators should use the new Discovery Guide.[17] FINRA also stated that it would update its arbitrator training materials to ensure that FINRA makes arbitrators aware of the revisions.[18] In addition, FINRA stated that it would offer training on the revised Discovery Guide in a workshop that FINRA would post as an audio file on its Web site if the proposed rule change, as amended, is approved.[19]

2. Business Models and Types of Customer Claims

FINRA initially proposed adding language to the introduction of the Discovery Guide stating that parties and arbitrators should recognize that not all firms have the same business models and that certain items on the Lists may not be relevant in a particular case when the firm's business model (*e.g.,* full service firm, discount broker, or online broker) is taken into consideration.[20] Commenters requested that FINRA add "clearing firm" to the parenthetical listing examples of business models.[21] FINRA agrees that adding "clearing firm" to the parenthetical would be helpful to parties and arbitrators and has amended the proposed language of the parenthetical accordingly.[22] FINRA is also proposing in that same paragraph to replace the phrase "be relevant in" with the phrase "apply to" because "apply to" would more precisely convey the intended meaning of the sentence.[23] In addition, commenters asked for new language indicating that items on the Customer List may not apply in a particular case depending on the claims asserted.[24] FINRA agrees that adding such guidance regarding customer claims would be helpful, and has amended the proposed rule change accordingly.[25]

In the initial proposed rule change, FINRA included language stating that electronic files are "documents" within the meaning of the Discovery Guide.[26] Commenters suggested that FINRA should include additional guidance concerning electronic files.[27] FINRA responded that it understands that issues relating to electronic discovery are becoming more prevalent and intends to recommend that the Discovery Task Force include the topic on its agenda.[28] However, FINRA is not proposing any additional revisions concerning electronic discovery at this time.

3. Privilege

Several commenters raised concerns that List items might require production of privileged documents.[29] One commenter suggested that parties raise objections based on unspecified or unrecognized privileges.[30] Based on these comments, FINRA believes that additional guidance on acceptable grounds for assertions of privilege would be helpful to parties and arbitrators, and is proposing to add language to the introduction stating that parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and attorney work product doctrine.[31]

4. Enforcing Document Production

Commenters raised concerns about arbitrators not adequately enforcing the discovery rules, including through reluctance to impose sanctions for party failure to comply with discovery rules.[32] FINRA believes that the appropriate places to address the arbitrators' duty to enforce discovery requirements are the Code of Arbitration Procedure and FINRA's training materials.[33] FINRA stated that it trains arbitrators concerning the discovery rules and available sanctions.[34] FINRA also stated that, to reinforce the training, it had included a discussion in the revised Arbitrator's Reference Guide (which FINRA indicated would be posted to FINRA's Web site in the near future) that addresses discovery obligations and discusses sanctions.[35]

B. Document Production Lists

1. Eliminating the Discovery Guide

Several commenters asserted that FINRA should eliminate the Discovery Guide.[36] FINRA disagreed with the commenters and stated that experience with the current Discovery Guide since its inauguration in 1999 indicates that the Discovery Guide and its Lists help parties obtain the documents they need to develop a case.[37] FINRA believes that the proposed rule change, which incorporated user feedback after years of experience with the Discovery Guide, will improve the discovery process for customers, and for firms and their associated persons.[38]

2. Production Burden

Several commenters expressed the view that document production under the Guide is burdensome to investors.[39] Others raised concerns about the burdens imposed on firms and their associated persons.[40] FINRA stated that it created the Discovery Guide to facilitate the exchange of the kinds of documents that parties routinely sought during discovery and that arbitrators regularly ordered produced. FINRA also stated that the proposed revisions reflect experience gained over the years since FINRA implemented the Discovery Guide.[41] In addition, FINRA stated that

[14] Response Letter.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See* note 3 *supra.*

[21] *See* SIFMA and Drinker Biddle comments. The Drinker Biddle comment also asked FINRA to add "prime-brokerage firm" to the parenthetical. FINRA believes that adding "clearing firm" to the parenthetical will add sufficient clarity for the Guide's users and is not proposing to add "prime-brokerage firm" at this time.

[22] Response Letter.

[23] *Id.*

[24] *See* PIABA and Caruso comments.

[25] Response Letter.

[26] *See* note 3 *supra.*

[27] *See* Yorsz and Martens comments.

[28] Response Letter.

[29] *See* Krosschell, Pounds, Evans and Edmiston, Schillinger, PIABA, Polk, Layne, SIFMA, Drinker Biddle, and Janney comments.

[30] *See* Estell comments.

[31] *Id.*

[32] *See* Krebsbach, Lewins, PIABA, and Boliver comments.

[33] Response Letter.

[34] *Id.*

[35] *Id.*

[36] *See* Lipner, McCauley, Gard, Terry, Evans and Edmiston, and Bleecher comments.

[37] Response Letter.

[38] *Id.*

[39] *See* Lipner, McCauley, Neuman, Krebsbach, James, Evans and Edmiston, Doss, Ruby, Smiley, Estell, Mougey, Bleecher, NASAA, Davis, Layne, and Ilgenfritz comments.

[40] *See* Cox, Krebsbach, Janney, Evangelista, Ulmer & Berne, SIFMA, and Drinker Biddle comments.

[41] Response Letter.

balancing the desire to provide parties with the documents they need to prepare their cases with a desire to minimize production burdens is challenging, but, based on years of experience with the Discovery Guide and constituent feedback, FINRA believed that the proposed rule change, as amended, would strike an appropriate balance.[42]

3. Two List Format

Several commenters objected to FINRA's proposal to consolidate the Lists from 14 claim-specific lists to two general Lists (one for firms and their associated persons, and one for customers) citing, among other objections, additional production burdens and the potential for producing documents that are not needed in every case.[43] FINRA stated that it proposed the consolidation in response to suggestions from advocates for customers that FINRA eliminate the Lists for specific types of claims because customers are not required to plead causes of action under the Customer Code.[44] FINRA also stated that, along with consolidating the Lists, FINRA proposed expanding the guidance it gives to arbitrators in the Discovery Guide's introduction on how to handle discovery issues so that arbitrators understand that they may tailor the Discovery Guide to unique circumstances that arise in arbitration cases.[45] FINRA stated that the consolidation would better serve forum users and ultimately reduce the number and limit the scope of disputes involving document production.[46]

4. Time Periods and Scope of Production

Several commenters objected to the time periods specified in the proposed consolidated List items.[47] FINRA responded by stating that investor and industry representatives that collaborated with FINRA on the proposed rule change considered each List item on its own merits and discussed, over several meetings, the time periods for each item.[48] FINRA explained that, given the effort that went into determining appropriate time periods for production, FINRA was not proposing to change any of the time periods in the proposed rule change.[49] FINRA also stated that the Discovery Task Force may choose to revisit the time periods for production of certain documents after forum users have gained experience with the revised Discovery Guide.[50]

5. Product Cases

Several commenters raised concerns that the Guide does not sufficiently address claims alleging the defective structuring or widespread mismarketing of a specific security, or "product cases."[51] One commenter expressed the belief that the Guide should not address specific products.[52] FINRA responded by stating that it believes product cases are an appropriate subject for the Discovery Task Force, and that it intends to suggest that the Task Force consider the topic further.[53]

6. Distinguishing Customer Parties From Other Customers

Commenters asked FINRA to revise the proposed List items to distinguish between customers that are parties to a case and other, non-party customers.[54] FINRA agreed that making such a distinction in the proposed List items would add clarity to the Discovery Guide.[55] FINRA has accordingly amended the proposed preamble to the Lists to state that, throughout the Lists, FINRA will refer to customers that are parties to an arbitration case as "customer parties" and other, non-party customers as "customers."[56]

7. Accounts or Transactions at Issue

Several proposed List items called for a firm or associated person to produce documents relating to the accounts or transactions at issue.[57] Upon further consideration, FINRA has amended the proposed rule change by specifying that, in addition to documents relating to the accounts or transactions at issue, these items cover documents relating to the claims, and products or types of products, at issue.[58]

C. Individual List Items

In addition to the amendments described above, FINRA has made a number of revisions to the proposed rule change that are specific to individual items on the Lists.

1. List 1, Item 2

As initially proposed, this item would have called for production of all correspondence sent to customers or received by firms and their associated persons specifically relating to the accounts or transactions at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the securities or account types at issue.[59] Unless separately requested, the documents would not have included confirmation slips and monthly statements.

FINRA has made several changes to this proposed item that FINRA believes would clarify the item's application and provide additional guidance to parties and arbitrators.[60] As amended, the item would require production of all correspondence sent to the customer parties or received by the firm or its associated persons that relate to the claims, accounts, transactions, or products or types of products at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the products or account types that are at issue or that were used by the firm or its associated persons to solicit or provide services to the customer parties. In addition, if requested, the documents would include confirmation slips and monthly statements. Even if not requested, the documents would include confirmation slips and monthly statements that have handwritten notations or that are not identical to those the firm sent to the customer parties.

2. List 1, Item 4

Currently, for claims alleging unauthorized trading, the Discovery Guide presumes that firms will produce order tickets for the customers' transactions at issue. FINRA initially proposed to delete this requirement on

[42] *Id.*

[43] *See* Port, Cox, Shaw, Krebsbach, Brodherson, Janney, Yorsz, Shaffner, Martens, Ulmer & Berne, and SIFMA comments.

[44] FINRA stated that it proposed to update the Discovery Guide in 2008, and, although the 2008 proposal was withdrawn, FINRA incorporated many suggestions made in comments on that proposal, including the suggestion that FINRA consolidate the lists, in the current proposal. *See* Response Letter.

[45] Response Letter.

[46] *Id.*

[47] *See* Stephens, Caruso, Krosschell, Pounds, Evans and Edmiston, Smiley, Ulmer & Berne, Estell, Raymond James, Shillinger, Shafner, Mougey, PIABA, Cornell Securities Law Clinic, Davis, Goldstein, Layne, SIFMA, Boliver, and Drinker Biddle comments. Commenters asserted, among other objections, that time periods were too short, or too long, or were not consistent between customers and firms/associated persons.

[48] Response Letter.

[49] *Id.*

[50] *Id.*

[51] *See* Lipner, Bakhtiari, Malecki, Mougey, and Goldstein comments.

[52] *See* Krebsbach comments.

[53] Response Letter.

[54] *See* SIFMA and Raymond James comments.

[55] Response Letter.

[56] *Id.*

[57] *See* List 1, items 2, 7, 9, 11, 12, 13, and 17.

[58] Response Letter.

[59] *See* note 3 *supra.*

[60] Response Letter.

the grounds that production of order tickets is burdensome, and evidence relating to whether the claimants authorized a particular transaction would be produced under proposed List 1, Items 4, 6, and 8. Several commenters objected to the proposed deletion and stated, among other things, that order tickets provide evidence of whether a trade was solicited or unsolicited, evidence of whether a trade was reviewed and approved by supervisory personnel, and evidence of the time that an order was entered.[61] FINRA found the comments persuasive, and has amended the proposed item to restore the presumption that firms will produce order tickets for the customer parties' transactions at issue in cases alleging unauthorized trading.[62] FINRA believes that the arbitrators can effectively address issues of production burden on a case-by-case basis.[63]

3. List 1, Item 5(a)

As initially proposed, this item would have provided for production of all materials that the firm or its associated persons prepared, used or provided to customers relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only."[64] In response to comments, FINRA is proposing to amend the proposed item to clarify its intended scope by specifying that the documents include copies of news articles or outside research.[65]

4. List 1, Item 6

As initially proposed, this item would have required production of all notes the firm or its associated persons made, including, but not limited to, entries in any diary or calendar, relating to the customers or the customers' accounts or transactions at issue.[66] For clarity, FINRA has amended this proposed item to require production of all notes the firm or its associated persons made relating to the customer parties or the customer parties' claims, accounts, transactions, or products or types of products at issue, including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue.[67]

5. List 1, Item 7(a)

As initially proposed, this item would have required production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customers' accounts or trades therein for the period at issue.[68] FINRA has amended this proposed item to expand the guidance provided to parties and arbitrators by requiring production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customer parties' accounts or transactions therein or of the associated persons assigned to the customer parties' accounts for the period at issue.[69]

6. List 1, Item 14

As initially proposed, this item would have required production of portions of internal audit reports for the branch in which the customers maintained accounts that "focused on" associated persons or the accounts or transactions at issue.[70] FINRA has amended this item to clarify its intended scope by replacing "focused on" with "concern."[71]

7. List 1, Item 15

As initially proposed, this item would have required production of records of disciplinary action taken against a firm's associated persons by any regulator or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim.[72] FINRA has amended this proposed item to clarify its intended scope by including the same parenthetical reference to "state, federal or self-regulatory organization" that FINRA uses in other items in the Discovery Guide that refer to regulators.[73]

8. List 2, Item 1

As initially proposed, this item (relating to customer tax documents) would have stated that customers may redact information relating to medical and dental expenses and the names of charities on Schedule A of their tax return unless the information is related to the allegations in the Statement of Claim.[74] The proposed statement was followed by language indicating that income tax returns must be identical to those that were filed with the Internal Revenue Service.[75] To add clarity to the proposed item, FINRA has amended it by moving the sentence indicating that tax returns must be identical so that it appears immediately above the statement permitting redaction of the returns.[76]

9. List 2, Item 4

This item concerns the customers' accounts at firms that are not parties to the matter. For clarity, FINRA has amended the proposed item by distinguishing between non-party firms and party firms.[77]

10. List 2, Item 8

This item relates to telephone records. In the initial proposed rule change, FINRA stated that it was not proposing any substantive changes to the Discovery Guide's application to telephone records.[78] In response to comments regarding that statement, FINRA offered a clarification.[79] FINRA states that, under the current Discovery Guide, customers are required to produce certain documents relating to telephone records only if they are alleging unauthorized trading.[80] In contrast, proposed item 8 would require customers to produce the specified documents in every case, which is more than a ministerial change.[81]

11. List 2, Item 17

As initially proposed, this item would have required production of documents showing the customers' complete educational and employment background or, in the alternative, a description of the customers' educational and employment background if not set forth in resumes produced under item 16.[82] FINRA has amended this proposed item by revising it to require production of any existing description of the customer parties' educational and employment background if not set forth in resumes produced under item 16.

12. List 2, Item 19

This item concerns insurance products that provide a death benefit. As initially proposed, it would have

[61] *See* Stephens, Caruso, Nygaard, Krosschell, Evans and Edmiston, Schillinger, Layne, and Pounds comments.

[62] Response Letter.

[63] *Id.*

[64] *See* note 3 *supra.*

[65] *See* Response Letter. *Cf.* Estell comments (relating to news articles or outside research).

[66] *See* note 3 *supra.*

[67] Response Letter.

[68] *See* note 3 *supra.*

[69] Response Letter.

[70] *See* note 3 *supra.*

[71] Response Letter. *Cf.* Estell comments (relating to the term "focused on").

[72] *See* note 3 *supra.*

[73] Response Letter.

[74] *See* note 3 *supra.*

[75] *Id.*

[76] Response Letter.

[77] *Id.*

[78] *See* note 3 *supra.*

[79] Response Letter. In its comment, PIABA questioned whether there was an error in the rule text of List 2, Item 8(b) because it did not limit production to claims alleging unauthorized trading.

[80] Response Letter.

[81] *Id.*

[82] *See* note 3 *supra.*

required customers to produce all insurance information received from an insurance sales agent or securities broker relating to such insurance.[83] FINRA has amended the proposed item to clarify its intended scope by deleting the reference to "insurance" before "information."[84]

III. Commission's Findings

After careful review of the proposed rule change, the comment letters and the FINRA Response Letter, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[85] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[86] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the revisions to the Discovery Guide will help reduce the number and limit the scope of disputes involving document production and other matters, thereby improving the arbitration process for the benefit of the public investors, broker-dealer firms, and associated persons who use the process. The revisions to the Discovery Guide are the result of over six years of consultation by FINRA with its constituents. The Commission also expects that further improvement of the process should be possible through the Discovery Task Force's consideration of discovery issues as they arise.[87]

IV. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Exchange Act,[88] for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after publication of notice of the filing of Amendment No. 1 in the **Federal Register**. The proposed rule change was informed by FINRA's consideration of, and the incorporation of many suggestions made in, extensive comments on a 2008 proposal to update the Discovery Guide, and Amendment No. 1's modifications to the proposed rule change add clarity to the Discovery Guide and provide additional guidance to parties and arbitrators.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2010–035 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2010–035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–035 and should be submitted on or before April 27, 2011.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[89] that the proposed rule change (SR–FINRA–2010–035), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[90]

Cathy H. Ahn,

Deputy Secretary.

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[83] *See* note 3 *supra.*

[84] Response Letter.

[85] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[86] 15 U.S.C. 78*o*–3(b)(6).

[87] *Cf.* Response Letter (describing plans for further consideration of issues by the Discovery Task Force).

[88] 15 U.S.C. 78s(b)(2).

[89] 15 U.S.C. 78s(b)(2).

[90] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64163; File No. SR–NYSEAmex–2011–22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 29, 2011, NYSE Amex LLC ("NYSE Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by 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 proposes to amend Commentary .07 to NYSE Amex Rule 903 to expand the $2.50 Strike Price Program. The text of the proposed rule change is available at the principal office of Exchange, the Commission's Public Reference Room, on the Commission's Web site at *http://www.sec.gov,* and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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 purpose of this proposed rule change is to expand the current $2.50 Strike Price Program ("Program")[3] to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.[4] Additionally, the Exchange proposes to increase the number of option classes on individual stocks for which the intervals of strike prices will be $2.50 to 60 options classes.

Currently, Exchange Rule 903 at Commentary .07 permits the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $75. Specifically, the Exchange proposes to amend Commentary .07 to Exchange Rule 903 to amend the current text.

For example, consider a hypothetical where Caterpillar, Inc. ("CAT") was trading at $81. With approximately one month remaining until expiration, and with a front month at-the-money put option (the 80 strike) trading at approximately $1.30, the investor would be able to purchase a $77.50 strike put at an estimated $.60 per contract. Today, the next available strike of a one month put option is the 75 strike. While the 75 strike put would certainly trade at a lesser price than the 80 strike put,[5] the protection offered would only take effect with a 7.40% decline in the market as opposed to a 4.30% decline in the market. The additional choice would provide the investor an additional opportunity to hedge exposure (the opportunity to hedge with a reduced outlay) and thereby minimize risk if there were a decline in the stock price of CAT.

Another example would be if an investor desired to sell call options to hedge the exposure of an underlying stock position and enhance yield. Consider a hypothetical where CAT was trading at $81 and the second month (two months remaining) of a recently out-of-the-money call option (the 85 strike) was trading at approximately $2.35. If the investor where to sell the 85 call against an existing stock position, the investor could yield a return of approximately 2.90% over a two month period or an annualized return of 17.4%. By providing an additional $2.50 strike interval above $75, the investor would have the opportunity to sell the 82.50 strike instead of the 85 strike. If the 85 strike call were trading at $2.35, the 82.50 strike call would trade at approximately 3.30. By selling the 82.50 strike call at 3.30 against an existing stock position, the investor could yield a 4.07% return over a two month period or an annualized 24.40% return. Therefore, an additional choice of a $2.50 strike interval could afford varying yields to the investor.

The Exchange believes that the Program has to date created additional trading opportunities for investors, thereby benefiting the marketplace. The existence of $2.50 strike prices with strike intervals above $75 affords investors the ability to more closely tailor investment strategies to the precise movement of the underlying security and meet their investment, trading and risk management requirements.

The Exchange is also proposing to make a non-substantive amendment to the rule text to remove language referring to the original SEC approval of the Program.

The Exchange is also proposing to increase the number of option classes on individual stocks for which the intervals of strike prices will be $2.50 to 60 options classes. Currently, the Exchange may select up to 51 options classes on individual stocks for which the intervals of strike prices will be $2.50. Initially adopted in 1995 as a pilot program, the options exchanges at that time were permitted to list options with $2.50 strike price intervals up to $50 on a total of up to 100 option classes. In 1998, the pilot program was expanded and permanently approved to allow the options exchanges collectively to select up to 200 option classes on which to list options with $2.50 strike price intervals up to $50. Of these 200 options classes eligible for the Program, 51 classes were allocated to the Exchange pursuant to a formula approved by the Commission as part of the permanent approval of the Program.[6] In addition, each options exchange is permitted to list options with $2.50 strike price intervals on any option class that another options exchange selects under its program.

Since 1998, the 200 options classes have not been expanded, although increasingly more companies have completed initial public offerings from 1998 through 2010. Additionally, significantly more options classes are trading in 2010 as compared to 1998. The Exchange proposes to increase its allocation from 51 to 60[7] options classes to accommodate investor requests for $2.50 strikes in certain options classes. The Exchange believes that offering additional options classes would benefit investors.

Furthermore, the Exchange does not believe that this proposal would have a negative impact on the marketplace. The Exchange would compare this proposal with the $1 Strike Price expansion, wherein the Exchange expanded its $1 Strike Price Program from 55 individual stocks to 150 individual stocks on which an option series may be listed at $1 strike price intervals.[8] The Exchange believes that this proposal, wherein the Exchange is proposing to increase its allocation from 51 to 60 options classes is substantially less than the $1 Strike Price Program increase and therefore would have less impact than that program, which has not had any negative impact on the market in terms of proliferation of quote volume or fragmentation.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary system capacity to handle the potential

[3] *See* Securities Exchange Act Release No. 35993 (July 19, 1995), 60 FR 38073 (July 25, 1995) (approving File Nos. SR—Phlx–95–08, SR–Amex–95–12, SR–PSE–95–07, SR–CBOE–95–19, and SR–NYSE–95–12). *See also* Exchange Act Release No. 52893 (December 5, 2005) 70 FR 73488 (December 12, 2005) (a rule change to allow the listing of options with $2.50 strike price intervals for strike prices between $50 and $75).

[4] The term "primary market" is defined in NYSE Amex Rule 900.2NY(62), in respect of an underlying stock or Exchange-Traded Fund Share, as the principal market in which the underlying stock or Exchange-Traded Fund Share is traded.

[5] The 75 strike put would trade at $.30 in this example.

[6] *See* Securities Exchange Act Release No. 40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (approving File Nos. SR–Amex–98–21, SR–CBOE–98–29, SR–PCX–98–31, and SR Phlx–98–26).

[7] Currently, the Chicago Board Options Exchange ("CBOE") has an allocation of 60 options.

[8] *See* Securities Exchange Act Release No. 62452 (July 6, 2010) 75 FR 40011 (July 13, 2010).

additional traffic associated with the listing and trading of classes on individual stocks in the $2.50 Strike Price Program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 [9] (the "Act") in general, and furthers the objectives of Section 6(b)(5) of the Act [10] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. In addition, the Exchange believes that it has the necessary system capacity to handle the potential additional traffic associated with the listing and trading of additional series.

Rather, the Exchange believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. Accordingly, the Exchange believes that the proposal to expand the number of classes in the Program and to allow the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100 should further benefit investors and the market by providing greater trading opportunities for those underlying stocks that have low volatility and thus trade in a narrow range.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[13] Therefore, the Commission designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–2011–22 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–2011–22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2011–22 and should be submitted on or before April 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8141 Filed 4–5–11; 8:45 am]

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[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] *See* Securities Exchange Act Release No. 64157 (March 31, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[14] 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).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64161; File No. SR–BX–2011–017]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the BOX Rules To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 30, 2011, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f) (6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of the filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter IV, Section 6 (Series of Options Contracts Open for Trading) of the Rules of the Boston Options Exchange Group, LLC ("BOX") to expand the $2.50 Strike Price Program. The text of the proposed rule change is available from the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* at the Commission's Public Reference Room, and also on the Exchange's internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to expand the current $2.50 Strike Price Program ("Program") [4] to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.[5] Additionally, BOX proposes to specify that it may select up to sixty (60) option classes on individual stocks for which the intervals of strike prices will be $2.50, and to delete certain redundant parts of its rule related to the Program.

Currently, Supplementary Material .03 to Chapter IV, Section 6 of the BOX Rules permits the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $75. Specifically, BOX proposes to amend the current text of Supplementary Material .03 to Chapter IV, Section 6 of the BOX Rules to expand the Program.

For example, consider a hypothetical where Caterpillar, Inc. ("CAT") was trading at $81. With approximately one month remaining until expiration, and with a front month at-the-money put option (the 80 strike) trading at approximately $1.30, the investor would be able to purchase a $77.50 strike put at an estimated $.60 per contract. Today, the next available strike of a one month put option is the 75 strike. While the 75 strike put would certainly trade at a lesser price than the 80 strike put,[6] the protection offered would only take effect with a 7.40% decline in the market as opposed to a 4.30% decline in the market. The $77.50 strike put would provide the investor an additional choice to hedge exposure (the opportunity to hedge with a reduced outlay) and thereby minimize risk if there were a decline in the stock price of CAT.

Another example would be if an investor desired to sell call options to hedge the exposure of an underlying stock position and enhance yield. Consider a hypothetical where CAT was trading at $81 and the second month (two months remaining) of a recently out of-the-money call option (the 85 strike) was trading at approximately $2.35.

If the investor were to sell the 85 strike call against an existing stock position, the investor could yield a return of approximately 2.90% over a two month period or an annualized return of 17.4%. By providing an additional $2.50 strike interval above $75, the investor would have the opportunity to sell the 82.50 strike instead of the 85 strike. If the 85 strike call were trading at $2.35, the 82.50 strike call would trade at approximately 3.30. By selling the 82.50 strike call at $3.30 against an existing stock position, the investor could yield a 4.07% return over a two month period or an annualized 24.40% return. Therefore, an additional choice of a $2.50 strike interval could afford varying yields to the investor.

BOX believes that the Program has to date created additional trading opportunities for investors, thereby benefiting the marketplace. The existence of $2.50 strike prices with strike intervals above $75 affords investors the ability to more closely tailor investment strategies to the precise movement of the underlying security and meet their investment, trading and risk management requirements.

BOX is also proposing to specify that it may select up to 60 option classes on individual stocks for which the intervals of strike prices will be $2.50. BOX has participated in the industry wide $2.50 Strike Price Program since BOX's inception in 2004. Currently, the options exchanges may collectively select up to 200 options classes on individual stocks for which the intervals of strike prices will be $2.50. In addition, each options exchange is permitted to list options with $2.50 strike price intervals on any option class that another options exchange selects under its program.

The industry-wide collection of 200 options classes has not been expanded since 1998, although increasingly more companies have completed initial public offerings from 1998 through 2010. Additionally, significantly more options classes are trading in 2011 as compared to 1998. The Exchange proposes to specify that BOX may select up to 60 options classes to remain competitive with other exchanges and to offer investors additional investment choices. BOX believes that offering additional options classes would benefit investors.

Furthermore, BOX does not believe that this proposal would have a negative impact on the marketplace. BOX would compare this proposal with the $1 Strike Price expansion, wherein BOX, among several options exchanges,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The $2.50 Strike Price Program existed among the options exchanges when BOX began operations in 2004. Each options exchange is permitted to list options with $2.50 strike price intervals on any options class that another exchange selects under the Program. *See* Exchange Act Release Nos. 49068 (January 13, 2004) 69 FR 2775 (January 20, 2004) (Order Approving Establishment of BOX Rules) (BSE–2002–15) and 56655 (October 12, 2007) 72 FR 59126 (October 18, 2007) (Notice of Filing and Immediate Effectiveness of BSE–2007–47).

[5] The term "primary market" is defined in Chapter I, Section 1(a)(51) of the BOX Rules to mean the principal market in which an underlying security is traded.

[6] The 75 strike put would trade at $0.30 in this example.

expanded its $1 Strike Price Program from 55 individual stocks to 150 individual stocks on which an option series may be listed at $1 strike price intervals.[7] BOX believes that this proposed rule change that would, in part, result in an increase to the 200 options classes in the industry wide Program, is less than the $1 Strike Price Program increase among several exchanges and therefore would have less impact than that program, which has not had any negative impact on the market in terms of proliferation of quote volume or fragmentation. BOX believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation.

With regard to the impact of this proposal on system capacity, BOX has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary system capacity to handle the potential additional traffic associated with the listing and trading of additional classes on individual stocks in the $2.50 Strike Price Program.

Finally, BOX proposes to delete certain redundant parts of Chapter IV, Section 6 of the BOX Rules and the related Supplementary Material. The rule and related Supplementary Material are redundant in stating that BOX may list multiply-traded options classes selected by another exchange as part of the $2.50 Strike Price Program. BOX proposes to delete the repetitive portions of the rule and related Supplementary Material as unnecessary.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. BOX believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. In addition, BOX believes that it has the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes.

Rather, BOX believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. Accordingly, BOX believes that the proposal to expand the Program to allow the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100 should further benefit investors and the market by providing greater trading opportunities for those underlying stocks that have low volatility and thus trade in a narrow range. While expansion of the $2.50 Strike Price Program will generate additional quote traffic, BOX does not believe that this increased traffic will become unmanageable since the proposal is limited to a fixed number of classes. Further, BOX does not believe that the proposal will result in a material proliferation of additional series because it is limited to a fixed number of classes and BOX does not believe that the additional price points will result in fractured liquidity.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[12] Therefore, the Commission designates the proposal operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2011–017 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–BX–2011–017. 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

[7] *See* Exchange Act Release No. 62553 (July 22, 2010) 75 FR 44826 (July 29, 2010) (BX–2010–050).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[12] *See* Securities Exchange Act Release No. 64157 (March 31, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[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).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–017 and should be submitted on or before April 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8140 Filed 4–5–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64162; File No. SR–NYSEArca–2011–13]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 29, 2011, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by 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 proposes to amend Commentary .03 to NYSE Arca Rule 6.4 to expand the $2.50 Strike Price Program. The text of the proposed rule change is available at the principal office of the Exchange, the Commission's Public Reference Room, the Commission's Web site at *http://www.sec.gov* and *http://www.nyse.com.*

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 purpose of this proposed rule change is to expand the current $2.50 Strike Price Program ("Program")[3] to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.[4] Additionally, the Exchange proposes to increase the number of option classes on individual stocks for which the intervals of strike prices will be $2.50 to 60 options classes.

Currently, Exchange Rule 6.4 at Commentary .03 permits the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $75. Specifically, the Exchange proposes to amend Commentary .03 to NYSE Arca Rule 6.4 to amend the current text.

For example, consider a hypothetical where Caterpillar, Inc. ("CAT") was trading at $81. With approximately one month remaining until expiration, and with a front month at-the-money put option (the 80 strike) trading at approximately $1.30, the investor would be able to purchase a $77.50 strike put at an estimated $.60 per contract. Today, the next available strike of a one month put option is the 75 strike. While the 75 strike put would certainly trade at a lesser price than the 80 strike put,[5] the protection offered would only take effect with a 7.40% decline in the market as opposed to a 4.30% decline in the market. The additional choice would provide the investor an additional opportunity to hedge exposure (the opportunity to hedge with a reduced outlay) and thereby minimize risk if there were a decline in the stock price of CAT.

Another example would be if an investor desired to sell call options to hedge the exposure of an underlying stock position and enhance yield. Consider a hypothetical where CAT was trading at $81 and the second month (two months remaining) of a recently out-of-the-money call option (the 85 strike) was trading at approximately $2.35. If the investor were to sell the 85 call against an existing stock position, the investor could yield a return of approximately 2.90% over a two-month period or an annualized return of 17.4%. By providing an additional $2.50 strike interval above $75, the investor would have the opportunity to sell the 82.50 strike instead of the 85 strike. If the 85 strike call were trading at $2.35, the 82.50 strike call would trade at approximately 3.30. By selling the 82.50 strike call at 3.30 against an existing stock position, the investor could yield a 4.07% return over a two-month period or an annualized 24.40% return. Therefore, an additional choice of a $2.50 strike interval could afford varying yields to the investor.

The Exchange believes that the Program has to date created additional trading opportunities for investors, thereby benefiting the marketplace. The existence of $2.50 strike prices with strike intervals above $75 affords investors the ability to more closely tailor investment strategies to the precise movement of the underlying security and meet their investment, trading and risk management requirements.

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 35993 (July 19, 1995), 60 FR 38073 (July 25, 1995) (approving File Nos. SR–Phlx–95–08, SR–Amex–95–12, SR–PSE–95–07, SR–CBOE–95–19, and SR–NYSE–95–12). *See also* Exchange Act Release No. 52986 (December 20, 2005) 70 FR 76897 (December 28, 2005) (a rule change to allow the listing of options with $2.50 strike price intervals for strike prices between $50 and $75).

[4] The term "primary market" is defined in NYSE Arca Rule 6.1(27), in respect of an underlying stock, as the principal market in which the underlying stock is traded.

[5] The 75 strike put would trade at $.30 in this example.

The Exchange is also making a small revision to the rule text to remove a reference to Exchange-Traded Fund Shares ("ETF"), as the strike interval for ETFs has been superseded by Rule 6.4 Commentary .05, which permits strike price intervals for ETFs in $1 increments under $200.

The Exchange is also proposing to increase the number of option classes on individual stocks for which the intervals of strike prices will be $2.50 to 60 options classes. Currently, the Exchange may select up to 43 options classes on individual stocks for which the intervals of strike prices will be $2.50. Initially adopted in 1995 as a pilot program, the options exchanges at that time were permitted to list options with $2.50 strike price intervals up to $50 on a total of up to 100 option classes. In 1998, the pilot program was expanded and permanently approved to allow the options exchanges collectively to select up to 200 option classes on which to list options with $2.50 strike price intervals up to $50. Of these 200 options classes eligible for the Program, 43 classes were allocated to the Exchange pursuant to a formula approved by the Commission as part of the permanent approval of the Program.[6] In addition, each options exchange is permitted to list options with $2.50 strike price intervals on any option class that another options exchange selects under its program.

Since 1998, the 200 options classes have not been expanded, although increasingly more companies have completed initial public offerings from 1998 through 2010. Additionally, significantly more options classes are trading in 2010 as compared to 1998. The Exchange proposes to increase its allocation from 43 to 60[7] options classes to accommodate investor requests for $2.50 strikes in certain options classes. The Exchange believes that offering additional options classes would benefit investors.

Furthermore, the Exchange does not believe that this proposal would have a negative impact on the marketplace. The Exchange would compare this proposal with the $1 Strike Price expansion, wherein the Exchange expanded its $1 Strike Price Program from 55 individual stocks to 150 individual stocks on which an option series may be listed at $1 strike price intervals.[8] The Exchange believes that this proposal, wherein the Exchange is proposing to increase its allocation from 43 to 60 options classes is substantially less than the $1 Strike Price Program increase and therefore would have less impact than that program, which has not had any negative impact on the market in terms of proliferation of quote volume or fragmentation.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes on individual stocks in the $2.50 Strike Price Program.

2. Statutory Basis

The Exchange believes that this proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act")[9], in general, and furthers the objectives of Section 6(b)(5) of the Act[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. In addition, the Exchange believes that it has the necessary system capacity to handle the potential additional traffic associated with the listing and trading of additional series.

Rather, the Exchange believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. Accordingly, the Exchange believes that the proposal to expand the number of classes in the Program and to allow the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100 should further benefit investors and the market by providing greater trading opportunities for those underlying stocks that have low volatility and thus trade in a narrow range.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[13] Therefore, the Commission designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[6] *See* Securities Exchange Act Release No. 40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (approving File Nos. SR–Amex–98–21, SR–CBOE–98–29, SR–PCX–98–31, and SR Phlx–98–26).

[7] Currently, the Chicago Board Options Exchange ("CBOE") has an allocation of 60 options.

[8] *See* Securities Exchange Act Release No. 62450 (July 2, 2010) 75 FR 39712 (July 12, 2010).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] *See* Securities Exchange Act Release No. 64157 (March 31, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[14] 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).

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–NYSEArca–2011–13 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–2011–13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–13 and should be submitted on or before April 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8136 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64160; File No. SR–NASDAQ–2011–041]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ Stock Market, LLC To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 29, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by 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 NASDAQ Stock Market LLC proposes to amend Chapter IV, Supplementary Material to Section 6, Series of Options Open for Trading, at .03, to expand the $2.50 Strike Price Program.[3]

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com*, at the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov*, 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. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (a proposal to participate in the $2.50 Strike Price Program).

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 expand the current $2.50 Strike Price Program ("Program")[4] to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.[5] Currently, Chapter IV, Section 6 at Supplementary Material .03 permits the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $75. Specifically, the Exchange proposes to amend Commentary .03 to Chapter IV, Section 6 to amend the current text.

For example, consider a hypothetical where Caterpillar, Inc. ("CAT") was trading at $81. With approximately one month remaining until expiration, and with a front month at-the-money put option (the 80 strike) trading at approximately $1.30, the investor would be able to purchase a $77.50 strike put at an estimated $.60 per contract. Today, the next available strike of a one month put option is the 75 strike. While the 75 strike put would certainly trade at a lesser price than the 80 strike put,[6] the protection offered would only take effect with a 7.40% decline in the

[4] In 2007, NOM proposed to participate in the $2.50 Strike Price Program. The $2.50 Strike Price Program allows the options exchanges to list options in up to 200 classes at $2.50 strike price intervals for strike prices greater than $25 but less than $75. *See* Securities Exchange Act Release Nos. 40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (order approving File Nos. SR–Amex–98–21; SR–CBOE–98–29; SR–PCX–98–31; and SR–Phlx–98–26) ("1998 Order") and 52893 (December 5, 2005), 70 FR 73488 (December 12, 2005) (order approving File No. SR–Amex–2005–067). The 200 classes eligible for the $2.50 Strike Price Program were allocated among the options exchanges pursuant to a formula approved by the Commission as part of the permanent approval of the program. Each options exchange may list options with $2.50 strike price intervals on any options class that another exchange selects as part of its program. NOM's rules provide that NOM may list series at $2.50 strike price intervals in any multiply traded option once another exchange has selected that option to be a part of the program. *See* NOM Rule, Chapter IV, Section 6, Supplementary Material .03(a). NOM participates in the $2.50 Strike Price Program on the same terms and conditions as the other options exchanges. *See* Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080).

[5] The term "primary market" is defined in Exchange Rule 1000 in respect of an underlying stock or exchange-traded fund share as the principal market in which the underlying stock or exchange-traded fund share is traded.

[6] The 75 strike put would trade at $0.30 in this example.

market as opposed to a 4.30% decline in the market. The additional choice would provide the investor an additional to hedge exposure (the opportunity to hedge with a reduced outlay) and thereby minimize risk if there were a decline in the stock price of CAT.

Another example would be if an investor desired to sell call options to hedge the exposure of an underlying stock position and enhance yield. Consider a hypothetical where CAT was trading at $81 and the second month (two months remaining) of a recently out-of-the-money call option (the 85 strike) was trading at approximately $2.35. If the investor were to sell the 85 call against an existing stock position, the investor could yield a return of approximately 2.90% over a two month period or an annualized return of 17.4%. By providing an additional $2.50 strike interval above $75, the investor would have the opportunity to sell the 82.50 strike instead of the 85 strike. If the 85 strike call were trading at $2.35, the 82.50 strike call would trade at approximately 3.30. By selling the 82.50 strike call at 3.30 against an existing stock position, the investor could yield a 4.07% return over a two month period or an annualized 24.40% return. Therefore, an additional choice of a $2.50 strike interval could afford varying yields to the investor.

The Exchange believes that the Program has to date created additional trading opportunities for investors, thereby benefiting the marketplace. The existence of $2.50 strike prices with strike intervals above $75 affords investors the ability to more closely tailor investment strategies to the precise movement of the underlying security and meet their investment, trading and risk management requirements.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes on individual stocks in the $2.50 Strike Price Program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(5) of the Act[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. In addition, the Exchange believes that it has the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes.

Rather, the Exchange believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. Accordingly, the Exchange believes that the proposal to expand the Program to allow the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100 should further benefit investors and the market by providing greater trading opportunities for those underlying stocks that have low volatility and thus trade in a narrow range.

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[11] Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–NASDAQ–2011–041 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NASDAQ–2011–041. 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

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* Securities Exchange Act Release No. 64157 (March 31, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[12] 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).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–041 and should be submitted on or before April 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8124 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34–64159; File No. SR–CBOE–2011–029]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 30, 2011, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend Rule 5.5 to expand the Exchange's $2.50 Strike Price Program (the "Program") to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), 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 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 purpose of this proposed rule change is to amend Rule 5.5 to expand the Program to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.

The $2.50 Strike Price Program was initially adopted in 1995 as a joint pilot program of the options exchanges, whereby the options exchanges were permitted to list $2.50 strike prices up to $50 on a total of up to 100 option classes.[5] The Program was later permanently approved and expanded in 1998 to allow the options exchanges to select up to 200 classes on which to list $2.50 strike prices up to $50.[6] Of these 200 option classes eligible for the Program, 60 classes have been allocated to CBOE pursuant to a formula approved by the SEC.[7] Each options exchange, however, is permitted to list $2.50 strike prices on any option class that another exchange selects as part of the Program. In 2005, the Program was amended once again to allow the listing of $2.50 strike prices between $50 and $75.[8] The Exchange now proposes to allow the listing of $2.50 strike prices between $50 and $100. Below, CBOE provides two examples in support of its request to expand the strike setting parameters of the Program.

For example, consider a hypothetical stock XYZ, Inc., trading at $81. With approximately one month remaining until expiration, and with a front month at-the-money put option (the 80 strike) trading at approximately $1.30, the investor would be able to purchase a $77.50 strike put at an estimated $.60 per contract. Today, the next available strike would be the 75 strike. While the 75 strike put would certainly trade at a lesser price than the 80 strike put,[9] the protection offered would only take effect with a 7.40% decline in the market as opposed to a 4.30% decline in the market. The additional choice would provide the investor an additional opportunity to hedge exposure (the opportunity to hedge with a reduced outlay) and thereby minimize risk if there were a decline in the stock price of XYZ.

Another example would be if an investor desired to sell call options to hedge the exposure of an underlying stock position and enhance yield. Consider a hypothetical where XYZ was trading at $81 and a 2-month call option with a strike price of 85 was trading at approximately $2.35. If the investor were to sell the 85 call against an existing stock position, the investor could collect a premium equal to 2.90% of the XYZ share price, which would provide a cushion against a share price decline to $78.65. It would also provide enhanced returns relative to holding the stock alone, provided that the price of XYZ was below $87.35 at expiration. By providing an additional $2.50 strike interval above $75, the investor would have the opportunity to sell the 82.50

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 34–35993 (July 19, 1995), 60 FR 38073 (July 25, 1995) (SR–CBOE–95–19).

[6] *See* Securities Exchange Act Release No. 34–40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (SR–CBOE–98–29).

[7] *Id.*

[8] *See* Securities Exchange Act Release No. 34–52892 (December 5, 2005), 70 FR 73492 (December 12, 2005). (SR–CBOE–2005–39).

[9] The 75 strike put would trade at $.30 in this example.

strike instead of the 85 strike. If the 85 strike call were trading at $2.35, the 82.50 strike call would trade at approximately 3.30. By selling the 82.50 strike call at 3.30 against an existing stock position, the investor could collect a premium equal to 4.07% of the XYZ share price, which would provide a cushion against a share price decline to $77.70. It would also provide enhanced returns relative to holding the stock alone, provided that the price of XYZ was below $85.80 at expiration. Therefore, an additional choice of a $2.50 strike interval could afford varying yields to the investor.

The Exchange believes that the Program has to date created additional trading opportunities for investors, thereby benefiting the marketplace. The existence of $2.50 strike prices with strike intervals above $75 affords investors the ability to more closely tailor investment strategies to the precise movement of the underlying security and meet their investment, trading and risk management requirements.

Finally, the Exchange represents that it and the Options Price Reporting Authority have the necessary systems capacity to support the anticipated modest increase in new options series that will result from the proposed changes to the $2.50 Strike Program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[10] of the Act and the rules and regulations under the Act, in general, and furthers the objectives of Section 6(b)(5),[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation.

Rather, the Exchange believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. Accordingly, the Exchange believes that the proposal to expand the Program to allow the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100 should further benefit investors and the market by providing greater trading opportunities for those underlying stocks that have low volatility and thus trade in a narrow range.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[14] Therefore, the Commission designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–029 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CBOE–2011–029. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–029 and should be submitted on or before April 27, 2011.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[14] *See* Securities Exchange Act Release No. 64157 (March 31, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8123 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64158; File No. SR–NSX–2011–03]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Enable the Use of a Replace Message To Modify the Display Quantity of a Reserve Order, and Certain Other Conforming Changes to Exchange Rules

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 30, 2011, National Stock Exchange, Inc. 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 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

National Stock Exchange, Inc. ("NSX®" or "Exchange") is proposing to enable a Replace Message to be used to modify the display quantity of a Reserve Order (as defined in Rule 11.11(c)(2)), and proposes certain other conforming changes to its rules.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The 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

With this rule change, the Exchange is proposing to enable the Replace Message under NSX Rule 11.11(d) to be used to modify the display quantity of a Reserve Order (as defined in Rule 11.11(c)(2)). In addition, certain conforming modifications to the text and interpretation of Rule 11.14(a)(2) are proposed.

The proposed rule change would allow the Exchange's current "Cancel/Replace" order modifier functionality under Rule 11.11(d) to apply to the display quantity of Reserve Orders (such field being Tag 111 [3]). Currently, the Cancel/Replace functionality under Rule 11.11(d)(iii) allows only an adjustment to an order's price and quantity. As applied to Reserve Orders, the Exchange's trading system currently allows a Replace Message to be used to adjust only the reserve quantity, but not the display quantity. The proposed rule change would allow ETP Holders the ability to use the Replace Message to also adjust the display quantity of Reserve Orders (the Tag 111 field). Under the proposed rule change, the Replace Message could adjust both the display and non-display portion of a Reserve Order, including where the aggregate size of the order remains unchanged. Accordingly, the instant rule filing proposes to add an explanatory "Interpretation and Policy" to Rule 11.11(d) to clarify that the term "quantity term" in Rule 11.11(d)(iii) shall include either, or both, the display and non-display portion of a Reserve Order, including in cases where the aggregate size of the Reserve Order is not changed. The identical use of the Replace Message to adjust the Tag 111 field is similarly offered by at least one other exchange.[4]

The instant rule change also proposes to modify the language of NSX Rule 11.14 (Priority of Orders) with respect to how the use of cancel/replace affects an order's priority. The instant rule filing modifies Rule 11.14(a)(2) to provide that, where the quantity of an order has been reduced pursuant to a Replace Message, such order maintains price/time priority. This constitutes no changes to current Exchange system practice and is consistent with the trading systems of other markets.[5] An Interpretation and Policy is also proposed to be added to rule 11.14 to clarify how a Reserve Order's priority is impacted by quantity adjustments (to either the display or the non-display portion) through use of a Replace Message. Specifically, Interpretation and Policy .01 provides that a Replace Message's size decrement of a Reserve Order's display quantity (Tag 111) will not affect the order's priority only if total order size remains the same or decreases. Similarly, a Replace Message size decrement of a Reserve Order's total quantity will not affect the order's priority only if the display quantity also remains constant or decreases. Any increase in size of either the display portion or the total size of a Reserve Order will result in a new timestamp and cause that order to lose time priority.

The following chart summarizes the above-described impact on a Reserve Order's time priority, if any, due to the use of a Replace Message to adjust the quantity.

	Display qty (Tag 111) increases	Display qty (Tag 111) decreases	Display qty (Tag 111) same
Total Order Qty Increases	Lose Book Priority	Lose Book Priority	Lose Book Priority.
Total Order Qty Decreases	Lose Book Priority	Maintain Book Priority	Maintain Book Priority.
Total Order Qty Same	Lose Book Priority	Maintain Book Priority.	n/a.

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Tag 111, also known as Max Floor, is a standard FIX protocol.

[4] *See* DirectEdge (EDGA and EDGX) Rule 11.5(e) and DirectEdge FIX Specifications Version 1.11 (*http://www.directedge.com/Portals/0/docs/Direct%20Edge%20Next%20Gen%20FIX%20Manual.pdf*), at section 3.6.2 (providing that the Cancel/Replace functionality may be used to modify tag 111 (the displayed quantity of a Reserve Order)). The Exchange notes that, unlike the text of the cancel/replace rules of DirectEdge, the use of the Replace Message to adjust Tag 111 under the instant rule filing is proposed to be reflected in an Interpretation and Policy to NSX Rule 11.11(e) and not only in the Exchange's FIX specification.

[5] BATS (BZX and BYX) Rule 11.12(a)(3). *See also* DirectEdge (EDGA and EDGX) Rule 11.8(a)(4); Arca Rule 7.36(a)(3); and CBOE Rule 52.1(e).

The following examples illustrate the effect on a Reserve Order's time priority, if any, due to the use of a Replace Message to adjust the quantity. Each example assumes ETP Holder A has a first-in-time priority resting Reserve Order to sell 1000 shares total, with a display quantity of 500 (denoted as "1000/500").

Example 1 (Tag 111 Increases, Total Order Increases):

ETP Holder A submits a Replace Message to adjust quantity to 1100/600.

Example 1 Result: The order loses time priority because display quantity is increased.

Example 2 (Tag 111 Increases, Total Order Decreases):

ETP Holder A submits a Replace Message to adjust quantity to 900/600.

Example 2 Result: The order loses time priority because display quantity is increased, notwithstanding that total quantity is decreased.

Example 3 (Tag 111 Increases, Total Order Remains Same):

ETP Holder A submits a Replace Message to adjust quantity to 1000/600.

Example 3 Result: The order loses time priority because display quantity is increased, notwithstanding that total quantity remains the same.

Example 4 (Tag 111 Decreases, Total Order Increases):

ETP Holder A submits a Replace Message to adjust quantity to 1100/300.

Example 4 Result: The order loses time priority because total quantity is increased, notwithstanding that display quantity is decreased.

Example 5 (Tag 111 Decreases, Total Order Decreases):

ETP Holder A submits a Replace Message to adjust quantity to 800/400.

Example 5 Result: The order's time priority is maintained because display quantity is decreased and total quantity is not increased.

Example 6 (Tag 111 Decreases, Total Order Remains Same):

ETP Holder A submits a Replace Message to adjust quantity to 1000/400.

Example 6 Result: The order's time priority is maintained because display quantity is decreased and total quantity is not increased.

Example 7 (Tag 111 Remains Same, Total Order Increases):

ETP Holder A submits a Replace Message to adjust quantity to 1100/500.

Example 7 Result: The order loses time priority because total quantity is increased, notwithstanding that display quantity remains the same.

Example 8 (Tag 111 Remains Same, Total Order Decreases):

ETP Holder A submits a Replace Message to adjust quantity to 900/500.

Example 8 Result: The order's time priority is maintained because display quantity remains the same and total quantity is decreased.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it is designed, among other things, to promote clarity, transparency and full disclosure, in so doing, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change advances these objectives by making available to ETP Holders an order modifier that is currently in use elsewhere within the national market system and by clarifying order priority.[8] Moreover, the proposed rule change is not discriminatory in that it applies equally to those ETP Holders that choose to utilize such functionality.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NSX–2011–03 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–NSX–2011–03. 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

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *See supra,* footnotes 2 and 3 [sic].

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NSX has satisfied this requirement.

identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2011–03 and should be submitted on or before April 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8122 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64154; File No. SR–ODD–2011–02]

Self-Regulatory Organizations; the Options Clearing Corporation; Order Granting Approval of Accelerated Delivery of Supplement to the Options Disclosure Document Reflecting Certain Changes to Disclosure Regarding Variability Index Options and Relative Performance Index Options and Amendment to the Options Disclosure Document Inside Front Cover

March 31, 2011.

On May 21, 2010, the Options Clearing Corporation ("OCC") submitted to the Securities and Exchange Commission (" Commission"), pursuant to Rule 9b–1 under the Securities Exchange Act of 1934 ("Act"),[1] five preliminary copies of a supplement to amend its options disclosure document ("ODD") to reflect certain changes to disclosure regarding variability index options.[2] On January 20, 2011, the OCC submitted to the Commission five preliminary copies of a supplement to amend its ODD to add disclosure regarding relative performance index options.[3] The OCC is also updating the front inside cover page of the ODD so that it contains a current list of the U.S. exchanges that trade options issued by the OCC, and the current names and corporate addresses of these options exchanges. On March 16, 2011, the OCC submitted to the Commission five definitive copies of the March 2011 Supplement[4] to reflect all these changes, as described in more detail below.[5]

Variability Indexes

The ODD currently contains general disclosures on the characteristics and risks of trading standardized options on variability indexes. The current ODD states that variability indexes are indexes intended to measure the implied volatility, or the realized variance or volatility, of specified stock indexes. In May of 2010, the Commission approved the Chicago Board Options Exchange's ("CBOE") proposal to list and trade options on the CBOE Gold ETF Volatility Index.[6] The March 2011 Supplement amends disclosures in the ODD regarding variability index options to accommodate the listing and trading of options on the CBOE Gold ETF Volatility Index and similarly structured equity-based volatility indexes that are intended to measure the volatility of a single reference security. Specifically, the proposed March 2011 Supplement amends the discussion of variability index options to provide disclosure regarding the characteristics of options on equity-based volatility indexes[7] and their special risks.

Relative Performance Indexes

Currently, the ODD states that indexes that may underlie options include stock indexes, variability indexes, strategy-based indexes, and dividend indexes. Recently, the Commission approved the NASDAQ OMX PHLX LLC's ("Phlx") proposal to list and trade Alpha Index options.[8] Alpha Indexes measure the relative total return of one stock and one exchange-traded fund share. The proposed March 2011 Supplement amends disclosures in the ODD to add relative performance indexes as a type of index that can underlie an option in order to accommodate the listing and trading of options on the Alpha Index and similarly structured relative performance indexes.[9] Specifically, the proposed March 2011 Supplement adds new disclosure regarding the characteristics of options on relative performance indexes and their special risks. The Commission notes that the intent of this proposed March 2011 Supplement is to provide disclosure for relative performance options on indexes of which both index components are equity securities, and one of which could be a fund share.

Inside Cover of ODD

Lastly, the March 2011 Supplement amends the ODD to revise the inside front cover page. The revisions are as follows: (1) Adding the C2 Options Exchange, Incorporated and its corporate address to the inside front cover of the ODD; (2) updating Phlx's name to incorporate the Phlx's recent conversion to a limited liability company; and (3) to reflect NASDAQ OMX BX's recent change in corporate address. These changes will ensure that the ODD accurately identifies the markets on which options currently trade and accurately reflects the corporate name and address of those entities.

The proposed supplement is intended to be read in conjunction with the more general ODD, which discusses the characteristics and risks of options generally.[10] Rule 9b–1(b)(2)(i) under the Act[11] provides that an options market must file five copies of an amendment or supplement to the ODD with the

[11] 17 CFR 200.30–3(a)(12).

[1] 17 CFR 240.9b–1.

[2] *See* letter from Jean M. Cawley, Senior Vice President and Deputy General Counsel, OCC, to Sharon Lawson, Senior Special Counsel, Division of Trading and Markets ("Division"), Commission, dated May 20, 2010.

[3] *See* letter from Jean M. Cawley, Senior Vice President and Deputy General Counsel, OCC, to Sharon Lawson, Senior Special Counsel, Division, Commission, dated January 19, 2011.

[4] *See* letter from Jean M. Cawley, Senior Vice President and Deputy General Counsel, OCC, to Sharon Lawson, Senior Special Counsel, Division, Commission, dated March 15, 2011.

[5] The proposed March 2011 Supplement to the ODD amends the February 1994 version of the booklet entitled "Characteristics and Risks of Standardized Options," and portions of the May 2007, June 2008, December 2009 and May 2010 Supplements.

[6] *See* Securities Exchange Act Release No. 62139 (May 19, 2010), 75 FR 29597 (May 26, 2010) (SR–CBOE–2010–018) (order approving CBOE's proposed rules to list and trade CBOE Gold ETF Volatility Index options).

[7] For purposes of the ODD, the disclosure will make clear that an equity-based volatility index measures the implied volatility, or the realized variance or volatility of a specified reference security.

[8] *See* Securities Exchange Act Release No. 63860 (February 7, 2011), 76 FR 7888 (February 11, 2011) (SR–Phlx–2010–176) (order approving Phlx's proposed rules to list and trade Alpha Index options).

[9] For purposes of the ODD, relative performance indexes are a special type of strategy-based indexes that measure the relative performance—generally the relative total return—of two index components (the target component and the benchmark component). The index is calculated by measuring the total return of the target component relative to the total return of the benchmark component. The index will rise as and to the extent that the target component outperforms the benchmark component, and will fall as and to the extent that the opposite occurs. As stated in the March 2011 Supplement, as of the date of this Supplement, the only relative performance options approved for trading are options on indexes of which both index components are equity securities, and one of which could be a fund share.

[10] The Commission notes that the options markets must continue to ensure that the ODD is in compliance with the requirements of Rule 9b–1(b)(2)(i) under the Act, 17 CFR 240.9b–1(b)(2)(i), including when changes regarding variability index options and relative performance index options are made in the future. Any future changes to the rules of the options markets concerning variability index options and relative performance index options would need to be submitted to the Commission under Section 19(b) of the Act. 15 U.S.C. 78s(b).

[11] 17 CFR 240.9b–1(b)(2)(i).

Commission at least 30 days prior to the date definitive copies are furnished to customers, unless the Commission determines otherwise, having due regard to the adequacy of information disclosed and the public interest and protection of investors.[12] In addition, five copies of the definitive ODD, as amended or supplemented, must be filed with the Commission not later than the date the amendment or supplement, or the amended ODD, is furnished to customers. The Commission has reviewed the proposed supplement and amendment and finds, having due regard to the adequacy of the information disclosed and the public interest and protection of investors, that they may be furnished to customers as of the date of this order.

It is therefore ordered, pursuant to Rule 9b–1 under the Act,[13] that definitive copies of the March 2011 Supplement amending the ODD (SR–ODD–2011–02) to reflect changes to disclosure regarding variability index options and relative performance index options and to the inside front cover of the ODD, may be furnished to customers as of the date of this order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8118 Filed 4–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

File No. 500–1

In the Matter of Circuit Systems, Inc., Global Energy Group, Inc., Integrated Medical Resources, Inc., iNTELEFILM Corp., and Lot$off Corp.; Order of Suspension of Trading

April 4, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Circuit Systems, Inc. because it has not filed any periodic reports since the period ended January 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Energy Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Integrated Medical Resources, Inc. because it has not filed any periodic reports since the period ended September 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of iNTELEFILM Corp. because it has not filed any periodic reports since the period ended March 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lot$off Corp. because it has not filed any periodic reports since the period ended October 30, 1998.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on April 4, 2011, through 11:59 p.m. EDT on April 15, 2011.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2011–8291 Filed 4–4–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Centrack International, Inc., Alternafuels, Inc., Intelligent Medical Imaging, Inc., and Optimark Data Systems, Inc.; Order of Suspension of Trading

April 4, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Centrack International, Inc. because it has not filed any periodic reports since the period ended February 28, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Alternafuels, Inc. because it has not filed any periodic reports since the period ended December 31, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Intelligent Medical Imaging, Inc. because it has not filed any periodic reports since the period ended September 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Optimark Data Systems, Inc. because it has not filed any periodic reports since the period ended August 31, 1999.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on April 4, 2011, through 11:59 p.m. EDT on April 15, 2011.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2011–8290 Filed 4–4–11; 4:15 pm]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

State Trade and Export Promotion (STEP) Pilot Grant Program

AGENCY: Office of International Trade; U.S. Small Business Administration (SBA)

ACTION: SBA Program Announcement No. OIT–STEP–2011–01, Modification #1.

SUMMARY: Program announcement No. OIT–STEP–2011–01 has been modified as follows:

• The application closing date has been extended from April 26 to May 10, 2011.

• Section III. C. 4, INELIGIBLE APPLICANTS FOR THIS COOPERATION AGREEMENT, (p.8), Add: [**Note:** An applicant will not be considered a pass-through if it is an agency or instrumentality of the government of a State (*i.e.,* is subject to the unilateral control of the State) or if it has been officially designated by a State as being the sole entity responsible for conducting the State's trade and export activities prior to the date of application submission for a STEP grant.]

• Section IV A. 1, *Governor's Letter of Endorsement for Applications,* (p. 8), Add: If, prior to applying for the STEP

[12] This provision permits the Commission to shorten or lengthen the period of time which must elapse before definitive copies may be furnished to customers.

[13] 17 CFR 240.9b–1.

[14] 17 CFR 200.30–3(a)(39).

grant, a state has designated another agency or instrumentality to have unilateral control of conducting the state's trade export activities, the Letter of Endorsement must: (a) Provide the name of the agency or instrumentality, (b) confirm that the organization will be responsible for conducting the grant activities; and (c) confirm that the state has legal authority and fiduciary responsibility for the grant.

• Appendix 1 (pp. 24–25) has been updated based on the latest data available from the U.S Department of Commerce.

SUPPLEMENTARY INFORMATION: The Small Business Jobs Act of 2010 authorizes the U.S. Small Business Administration to establish a 3-year pilot program, known as the State Trade and Export Promotion (STEP) Grant Program, to make grants to States to assist eligible small business concerns. The objective of the STEP Grant Program is to increase the number of small businesses that are exporting, and increase the value of exports by small businesses in the States. Eligible applicants are each of the States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa. Applicants may apply at *http://www.Grants.gov.*

FOR FURTHER INFORMATION CONTACT: E-mail questions about the STEP Grant Program to *STEP@sba.gov.*

Dated: March 31, 2011.

Luz Hopewell,

Acting Associate Administrator, Office of International Trade.

[FR Doc. 2011–8105 Filed 4–5–11; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers. (OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than June 6, 2011. Individuals can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above e-mail address.

1. *Authorization to Obtain Earnings Data from SSA—0960–0602.* SSA collects information on Form SSA–581 to identify an earnings record, verify authorized access to the earnings record, and produce an itemized statement for release to the proper party. The respondents are various private or public organizations, or agencies needing detailed earnings information.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 32,000.

Frequency of Response: 1.

Average Burden per Response: 2 minutes.

Estimated Annual Burden: 1,067 hours.

2. *Teacher Questionnaire and Request for Administrative Information—20 CFR 416.1103(f)—0960–0646.* When determining the effects of a child's impairment(s), SSA obtains information about the child's functioning from teachers, parents, and others who observe the child on a daily basis. SSA obtains results of formal testing, teacher reports, therapy progress notes, individualized education programs, and other records of a child's educational aptitude and achievement using Forms SSA–5665 and SSA–5666. The respondents are parents, teachers, and other education personnel.

Type of Request: Revision of an OMB-approved information collection.

Form No.	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–5665–BK	400,000	1	40	266,667
SSA–5666	397,000	1	30	198,500
Totals	797,000	.....	.....	465,167

II. SSA submitted the information collection below to OMB for clearance. Your comments on the information collection would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than May 6, 2011. You can obtain a copy of the OMB clearance package by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above e-mail address.

Statement Regarding the Inferred Death of an Individual by Reason of Continued and Unexplained Absence—20 CFR 404.720 & 404.721—0960–0002. Section *202(d)–(i)* of the Social Security Act provides for the payment of various monthly survivor benefits and a lump sum death payment to certain survivors upon the death of a fully or currently insured individual. In cases where insured wage earners are absent from their homes for at least seven years, and there is no evidence these individuals are alive, SSA may presume they are deceased and pay their survivors the appropriate benefits. SSA uses the information from Form SSA–723 to determine if we may presume the death of a missing wage earner, and if so, to establish a date of presumed death. The respondents are relatives, friends, neighbors, or acquaintances of the presumed deceased wage earner or the person who is filing for survivors benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 3,000.

Frequency of Response: 1.

Average Burden per Response: 30 minutes.

Estimated Annual Burden: 1,500 hours.

Date: April 1, 2011.

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2011–8127 Filed 4–5–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 7398]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct two open meetings to prepare for upcoming events at the International Maritime Organization (IMO) in London, United Kingdom. The first of these meetings will be held at 9:30 a.m. on Wednesday, May 4, 2011, in Room 2501 of the United States Coast Guard Headquarters Building, 2100 Second Street, SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the eighty ninth Session of the International Maritime Organization's (IMO) Maritime Safety Committee (MSC 89) to be held May 11–20, 2011.

The primary matters to be considered at MSC 89 include:

—Adoption of the agenda; report on credentials
—Decisions of other IMO bodies
—Consideration and adoption of amendments to mandatory instruments
—Measures to enhance maritime security
—Goal-based new ship construction standards
—LRIT-related matters
—Dangerous goods, solid cargoes and containers
—Ship design and equipment
—Stability and load lines and fishing vessels safety
—Training and watchkeeping
—Bulk liquids and gases
—Flag State implementation
—Radiocommunications and search and rescue
—Technical assistance sub-programme in maritime safety and security
—Capacity-building for the implementation of new measures
—Formal safety assessment
—General cargo ship safety
—Piracy and armed robbery against ships
—Implementation of instruments and related matters
—Relations with other organizations
—Application of the Committee's Guidelines
—Work programme
—Election of Chairman and Vice-Chairman for 2012
—Any other business
—Consideration of the report of the Committee on its eighty-ninth session

The second open meeting of the SHC will be held at 9:30 a.m. on Tuesday May 24th, 2011, in Room 51309 of the United States Coast Guard Headquarters Building, 2100 Second Street, SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the fifty-seventh Session of the International Maritime Organization's (IMO) Subcommittee on Safety of Navigation (NAV 57) to be held June 6—10, 2011.

The primary matters to be considered at NAV 57 include:

—Adoption of the Agenda
—Decisions of other IMO bodies
—Routeing of ships, ship reporting and related matters
—Amendments to the Performance standards for Voyage Data Recorders (VDR) and Simplified VDR (S–VDR)
—International Telecommunication Union (ITU) matters, including Radiocommunication ITU–R Study Group matters
—Development of an e-navigation strategy implementation plan
—Review of vague expressions in International Convention for the Safety of Life at Sea (SOLAS) regulation V/22
—Development of policy and new symbols for Automatic Identification System (AIS) aids to navigation
—Casualty analysis
—Consideration of International Association of Classification Societies (IACS) unified interpretations
—Development of performance standards for inclinometers
—Biennial agenda and provisional agenda for NAV 58
—Election of Chairman and Vice-Chairman for 2012
—Any other business
—Report of the Maritime Safety Committee

Members of the public may attend these two meetings up to the seating capacity of the rooms. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend one or both of these meetings should contact the following coordinators at least 7 days prior to the meetings:

—For the MSC 89 meeting on May 4, contact LCDR Jason Smith, by e-mail at *jason.e.smith2@uscg.mil,* by phone at (202) 372–1376, by fax at (202) 372–1925, or in writing at Commandant (CG–52), U.S. Coast Guard, 2100 2nd Street, SW., Stop 7126, Washington, DC 20593–7126 not later than April 27, 2011. Requests made after April 27, 2011 might not be able to be accommodated.
—For the NAV 57 meeting on May 24, Mr. Edward J. LaRue Jr., by e-mail at *Edward.J.LaRue@uscg.mil,* by phone at (202) 372–1564, by fax at (202) 372–1991, or in writing at Commandant (CG–5533), U.S. Coast Guard, 2100 2nd Street, SW, Stop 7683, Washington, DC 20593–7683 not later than May 17, 2011. Requests made after May 17 might not be able to be accommodated.

Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *http://www.uscg.mil/imo.*

Dated: April 1, 2011.

Jon Trent Warner,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2011–8171 Filed 4–5–11; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice: 7409]

Notice of Public Meeting on FY 2012 Refugee Admissions Program

There will be a meeting on the President's FY 2012 U.S. Refugee Admissions Program on Thursday, May 12, 2011 from 2 p.m. to 4 p.m. The meeting will be held at the Refugee Processing Center, 1401 Wilson Boulevard, Suite 700, Arlington, Virginia. The meeting's purpose is to hear the views of attendees on the appropriate size and scope of the FY 2012 U.S. Refugee Admissions Program.

Persons wishing to attend this meeting must notify the Bureau of Population, Refugees, and Migration at telephone (202) 453–9257 by 5 p.m. on Thursday, May 5, 2011, to reserve a seat. Persons wishing to present written comments should submit them by 5 on

Thursday, May 5, 2011 via e-mail to *spruellda@state.gov* or fax (202) 453–9393.

If you have questions about the public meeting, please contact Delicia Spruell, PRM/Admissions Program Officer at (202) 453–9257. Information about the U.S. Refugee Admissions Program may be found at *http://www.state.gov/g/prm/*.

Dated: March 30, 2011.

David Robinson,

Principal Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State.

[FR Doc. 2011–8174 Filed 4–5–11; 8:45 am]

BILLING CODE 4710–33–P

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as amended; Proposed Collection, Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Notice.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR 1320.8(d)(1).

FOR MORE INFORMATION CONTACT: Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Mark Winter, Tennessee Valley Authority, 1101 Market Street (MP–3C), Chattanooga, Tennessee 37402–2801; (423) 751–6004.

DATES: Comments should be sent to the Agency Clearance Officer no later than June 6, 2011.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular Submission.

Title of Information Collection: EnergyRight® Program.

Frequency of Use: On occasion.

Type of Affected Public: Individuals or households.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 271.

Estimated Number of Annual Responses: 29,000.

Estimated Total Annual Burden Hours: 8,700.

Estimated Average Burden Hours per Response: .3.

Need For and Use of Information: This information is used by distributors of TVA power to assist in identifying and financing energy improvements for their electrical energy customers.

James W. Sample,

Director, Enterprise Information Security and Policy.

[FR Doc. 2011–8130 Filed 4–5–11; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2011–0033]

Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by June 6, 2011.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 2011–0033 by any of the following methods:

Web Site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

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

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Greg Wolf, 202–366–4655, Department of Transportation, Federal Highway Administration, Office of Program Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Emergency Relief Funding Applications.

OMB Control #: 2125–0525

Background: Congress authorized in Title 23, United States Code, Section 125, a special program from the Highway Trust Fund for the repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of natural disasters or catastrophic failures from an external cause. This program, commonly referred to as the Emergency Relief or ER program, supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. The applicability of the ER program to a natural disaster is based on the extent and intensity of the disaster. Damage to highways must be severe, occur over a wide area, and result in unusually high expenses to the highway agency. Examples of natural disasters include floods, hurricanes, earthquakes, tornadoes, tidal waves, severe storms, and landslides. Applicability of the ER program to a catastrophic failure due to an external cause is based on the criteria that the failure was not the result of an inherent flaw in the facility but was sudden, caused a disastrous impact on transportation services, and resulted in unusually high expenses to the highway agency. A bridge suddenly collapsing after being struck by a barge is an example of a catastrophic failure from an external cause. The ER program provides for repair and restoration of highway facilities to pre-disaster conditions. Restoration in kind is therefore the predominate type of repair expected to be accomplished with ER funds. Generally, all elements of the damaged highway within its cross section are eligible for ER funds. Roadway items that are eligible may include: Pavement, shoulders, slopes and embankments, guardrail, signs and traffic control devices, bridges, culverts, bike and pedestrian paths, fencing, and retaining walls. Other eligible items may include: Engineering and right-of-way costs, debris removal, transportation system management strategies, administrative expenses, and equipment rental expenses. This information collection is needed for the FHWA to fulfill its statutory obligations regarding funding determinations for ER eligible damages following a disaster. The

regulations covering the FHWA ER program are contained in 23 CFR part 668.

Respondents: 50 State Transportation Departments, the District of Columbia, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the Virgin Islands.

Estimated Average Annual Burden: The respondents submit an estimated total of 30 applications each year. Each application requires an estimated average of 250 hours to complete.

Estimated Total Annual Burden Hours: Total estimated average annual burden is 7,500 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection of information is necessary for the U.S. DOT's performance, including whether the information will have practical utility; (2) the accuracy of the U.S. DOT's estimate of the burden of the proposed information collection; (3) ways to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: March 31, 2011.

Juli Huynh,

Chief, Management Programs and Analysis Division.

[FR Doc. 2011–8100 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2011–0032]

Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION.** We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by June 6, 2011.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 2011–0032 by any of the following methods:

Web Site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

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

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ann Shemaka, 202–366–1575, Department of Transportation, Federal Highway Administration, Office of Bridge Technology, 1200 New Jersey Avenue, SE., Washington, DC 20590, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Highway Bridge and National Bridge Inspection Programs previously titled National Bridge Inspection Standards.

OMB Control #: 2125–0501.

Background: The Highway Bridge and National Bridge Inspection Programs require bridge inspection and reporting at regular intervals for all highway bridges greater than 20 feet in length located on public roads. Title 23, U.S.C., Section 144 defines the Highway Bridge Program. Title 23, U.S.C., Section 151 defines the National Bridge Inspection Program. They are further defined in regulation, 23 CFR 650 C, National Bridge Inspection Standards, and 23 CFR 650 D, Highway Bridge Program. Inspections of fracture critical bridges and underwater inspections are also required at prescribed intervals. The bridge inspection information that is provided to the FHWA on an annual basis is summarized on the Structure Inventory and Appraisal (SI&A) Sheet. The inspection information is used for multiple purposes, including: (1) The determination of the condition of the Nation's bridges; (2) as a basis for setting initial priorities for the replacement or rehabilitation of bridges under the Highway Bridge Program (HBP); and (3) for apportioning HBP funds to the States for bridge replacement or rehabilitation. In order to apportion funds for the HBP, the law requires that a cost to replace or rehabilitate each bridge needs to be determined. In order to determine that cost, the FHWA collects data on new and replaced bridges from the States annually. In addition, the information is used for strategic national defense needs and for preparing an annual report to Congress on the status of the Nation's highway bridges.

Respondents: 52 State highway agencies including the District of Columbia and Puerto Rico, and Federal agencies will be conducting 286,200 inspections.

Estimated Average Burden per Response: The estimated average burden for each inspection is 8 hours. The estimated average burden for each cost collection report is 90 hours. The estimated average burden for follow up on critical findings is 40 hours.

Estimated Total Annual Burden Hours: The annual burden associated with the inspection is 2,289,600 hours. The annual burden associated with the cost report is 4,680 hours. The annual burden associated with follow up on critical findings is 2,080 hours for a combined annual burden of 2,296,360 hours.

Responses =	**286,200**	
X	8 hrs	
	2,289,600	
+	4,680	90 hours x 52 for unit cost data collection
+	2,080	40 hours x 52 responses for follow up on critical findings
Burden Hours =	**2,296,360**	

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection of information is necessary for the U.S. DOT's performance, including whether the information will have practical utility; (2) the accuracy of the U.S. DOT's estimate of the burden of the proposed information collection; (3) ways to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: March 31, 2011.

Juli Huynh,

Chief, Management Programs and Analysis Division.

[FR Doc. 2011–8101 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0030]

Spyker Automobielen B.V.; Receipt of Application for Extension of Temporary Exemption From Certain Requirements of FMVSS No. 208

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of receipt of petition for extension of a temporary exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection.*

SUMMARY: In accordance with the procedures in 49 CFR Part 555, Spyker Automobielen B.V. (Spyker) has applied for an extension of a previously granted temporary exemption from certain advanced air bag requirements of FMVSS No. 208, *Occupant Crash Protection,* for its C line of vehicles. The basis of the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

NHTSA is publishing this notice of receipt of the application in accordance with the requirements of 49 U.S.C. 30113(b)(2), and has made no judgment on the merits of the application.

DATES: You should submit your comments not later than May 6, 2011.

FOR FURTHER INFORMATION CONTACT: William H. Shakely, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–212, Washington, DC 20590. *Telephone:* (202) 366–2992; *Fax:* (202) 366–3820.

Comments: We invite you to submit comments on the application described above. You may submit comments identified by the docket number at the heading of this notice by any of the following methods:

- *Web Site: http://www.regulations.gov*. Follow the instructions for submitting comments on the electronic docket site by clicking on "Help and Information" or "Help/Info."
- *Fax:* 1–202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number. 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 discussion below. We will consider all comments received before the close of business on the comment closing date indicated above. To the extent possible, we will also consider comments filed after the closing date.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. *Telephone:* (202) 366–9826.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html*.

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512).

SUPPLEMENTARY INFORMATION:

I. Overview of Petition for Economic Hardship Exemption

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Spyker has submitted a petition (dated October 13, 2010) asking the agency for

an extension of a temporary exemption from certain advanced air bag requirements of FMVSS No. 208 for its C line of vehicles. The existing exemption was set to expire on December 15, 2010. The basis for the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. After filing its petition, Spyker submitted additional information regarding its compliance efforts.

The agency closely examines and considers the information provided by manufacturers in support of these factors, and, in addition, pursuant to 49 U.S.C. 30113(b)(3)(A), determines whether an exemption is in the public interest and consistent with the Safety Act.[1] Spyker requested an extension until May 15, 2012. Copies of Spyker's petition and its supplemental statement [2] are available for review and have been placed in the docket for this notice.

A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

Additionally, although 49 U.S.C. 30113(b) states that exemptions from a Safety Act standard are to be granted on a "temporary basis," [3] the statute also expressly provides for renewal of an exemption on reapplication. Manufacturers are nevertheless cautioned that the agency's decision to grant an initial petition in no way predetermines that the agency will repeatedly grant renewal petitions, thereby imparting semi-permanent exemption from a safety standard. Exempted manufacturers seeking renewal must bear in mind that the agency is directed to consider financial hardship as but one factor, along with the manufacturer's on-going good faith efforts to comply with the regulation, the public interest, and consistency with the Safety Act generally, as well as other such matters provided in the statute.

We note that under 49 CFR 555.8(e), "If an application for renewal of a temporary exemption that meets the requirements of § 555.5 has been filed not later than 60 days before the termination date of an exemption, the exemption does not terminate until the Administrator grants or denies the application for renewal." In this case, Spyker submitted its petition for extension by the deadline stated in 49 CFR 555.8(e).

II. Advanced Air Bag Requirements and Small Volume Manufacturers

The agency published the final rule requiring advanced air bags in May 2000. The rule was intended to improve protection for occupants of different sizes, belted and unbelted, under FMVSS No. 208, while minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags. The rule accomplished this by establishing new test requirements and injury criteria and specifying the use of an entire family of test dummies: The then-existing dummy representing 50th percentile adult males, and new dummies representing 5th percentile adult females, 6-year-old children, 3-year-old children, and 1-year-old infants.

The advanced air bag requirements were a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of air bags. This plan also included an extensive consumer education program to encourage the placement of children in rear seats. The new requirements were phased in beginning with the 2004 model year. The requirements did not apply to small manufacturers until September 1, 2006.

In recent years, NHTSA has addressed a number of petitions for exemption from the advanced air bag requirements of FMVSS No. 208. The majority of these requests have come from small manufacturers that have petitioned on the basis of substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

Although NHTSA has granted a number of these petitions in situations where the manufacturer is supplying standard air bags in lieu of advanced air bags,[4] NHTSA is considering (1) whether it is in the public interest to continue to grant such petitions, particularly in the same manner as in the past, given the number of years these requirements have now been in effect and the benefits of advanced air bags, and (2) to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bags, should be expected.

Given the passage of time since the advanced air bag requirements were established and have been implemented, and in light of the benefits of advanced air bags, NHTSA is concerned that it may not be in the public interest to continue to grant exemptions from these requirements, particularly in the same manner as in the past. The costs of compliance with the advanced air bag requirements of FMVSS No. 208 are costs that all entrants to the U.S. automobile marketplace should expect to bear. Furthermore, NHTSA understands that, in contrast to the initial years after the advanced air bag requirements went into effect, low volume manufacturers now have access to advanced air bag technology. Accordingly, NHTSA tentatively concludes that the expense of advanced air bag technology may not now be sufficient, in and of itself, to justify the grant of a petition for a hardship exemption from the advanced air bag requirements.

NHTSA further notes that exemptions from motor vehicle safety standards are to be granted on a "temporary basis." [5] In prior petitions, NHTSA has granted temporary exemptions from the advanced air bag requirements as a means of affording eligible manufacturers a transition period to comply with the exempted standard. Accordingly, in deciding whether to grant an exemption based on substantial economic hardship, NHTSA ordinarily considers the steps that the manufacturer has already taken to achieve compliance, as well as the future steps the manufacturer plans to take during the exemption period and the estimated date by which full compliance will be achieved.[6]

NHTSA invites comment on whether and in what circumstances (*e.g.,* nature of vehicles, number of vehicles, level of efforts to comply with the requirements, timing as to number of years since the requirements were implemented, etc.) it should continue to grant petitions for exemptions from the advanced air bag requirements of FMVSS No. 208. We note that any policy statements we may make in this area would not have the effect of precluding manufacturers from submitting subsequent petitions for exemption. However, we believe it could be helpful for manufacturers to know our general views in advance of submitting a petition.

[1] The Safety Act is codified as Title 49, United States Code, Chapter 301.

[2] Spyker has requested confidential treatment under 49 CFR Part 512 for certain business and financial information submitted as part of its petition for temporary exemption. Accordingly, the information placed in the docket does not contain the information that is the subject of this request.

[3] 49 U.S.C. 30113(b)(1).

[4] *See, e.g.,* grant of petition to Panoz, 72 FR 28759 (May 22, 2007); grant of petition to Koenigsegg, 72 FR 17608 (April 9, 2007).

[5] 49 U.S.C. 30113(b)(1).

[6] 49 CFR 555.6(a)(2).

III. Spyker's Petition

Background—Spyker, a Netherlands corporation, was founded in 2000 and has been producing a small number of luxury sports cars since February 2002. On July 6, 2005, NHTSA granted Spyker a three-year hardship exemption from several FMVSSs, including the "basic" air bag requirements and advanced air bag provisions of FMVSS No. 208 (S4.1.5.3; S14), as well as 49 CFR part 581, *Bumper Standard* (70 FR 39007 (July 6, 2005)). This exemption was set to expire on June 15, 2008. In this same grant, NHTSA also exempted the first ten Spyker C8 vehicles imported into the United States from S7 of FMVSS No. 108, *Lamps, reflective devices, and associated equipment.*

On March 25, 2009, NHTSA granted Spyker a 30-month limited extension from the child and 5th percentile adult female driver out-of-position portions of the advanced air bag provisions of FMVSS No. 208 (S19, S21, S23, and S25) (74 FR 12925 (Mar. 25, 2009)). This extension was set to expire on December 15, 2010, but has been extended automatically by the filing of Spyker's application for an extension.

Requested Exemption—Spyker has applied for a further extension of its temporary exemption. Specifically, Spyker requests that the exemption from the child and 5th percentile adult female driver out-of-position portions of the advanced air bag provisions of FMVSS No. 208 (S19, S21, S23, and S25) be extended until May 15, 2012.

Eligibility—A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113(d)). In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle. The statutory provisions governing motor vehicle safety (49 U.S.C. Chapter 301) do not state that a manufacturer has substantial responsibility as manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers the statutory definition of "manufacturer" (49 U.S.C. 30102) to be sufficiently broad to include sponsors, depending on the circumstances. Thus, NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

Spyker Automobielen B.V. is a small volume manufacturer of luxury sports cars. Since 2005, Spyker Automobielen B.V. has manufactured less than 100 vehicles annually worldwide, and the company projects that it will manufacture 103 vehicles in 2011. However, the petition stated that Spyker Automobielen B.V. is a wholly owned subsidiary of Spyker Cars NV, a publicly traded Netherlands corporation. In 2008, when Spyker Automobielen B.V. was granted a limited extension of its temporary exemption, Spyker Cars NV had no ownership interest in any other vehicle manufacturer nor was it under any common control with another automobile manufacturer.[7] Since that time, Spyker Cars NV has acquired Saab Automobile AG, a large Swedish car manufacturer. Spyker asserts that Spyker Automobielen B.V. is financially and operationally independent from Saab Automobile AG and that, based on past NHTSA determinations regarding the issue of sponsorship, Spyker Automobielen B.V. remains eligible for a temporary exemption based on economic hardship.

Since filing its petition, Spyker has informed the agency that Spyker Cars NV plans to sell Spyker Automobielen B.V. to CPP Global Holdings, a private holding company in the United Kingdom. Because of the relationship between Spyker Automobielen B.V., Spyker Cars NV, and Saab Automobile AG, and, in light of the plans to sell Spyker Automobielen B.V. to CPP Global Holdings, NHTSA will closely examine whether Spyker is eligible for a financial hardship exemption. NHTSA specifically requests comments on the issue of Spyker's eligibility.

Economic Hardship—Spyker stated that its previously established financial hardship [8] continues due to the worldwide economic recession, which resulted in fewer global sales than Spyker had predicted. Specifically, Spyker suffered a net operating loss of approximately 131,971,000 Euros ($171,562,300) [9] from 2004 to 2009. Spyker projected a further loss in 2010 of 12,000,000 Euros ($15,600,000). Moreover, based on 2011–2013 projections, Spyker estimated that if the extension is denied, Spyker will bear a loss of over 32,465,000 Euros ($42,204,500) during that time, as opposed to a loss of approximately 8,132,000 Euros ($10,571,600) if the extension is granted, representing a difference of 24,333,000 Euros ($31,632,900). Spyker also stated that the loss of sales in the U.S. that would result if the extension is denied could not be made up in the rest of the world because the U.S. is the largest and most important market for the vehicle. Spyker argued that such consequences demonstrate "substantial economic hardship" within the meaning of 49 U.S.C. 30113(b)(3)(B)(i).

Good Faith Efforts to Comply—Spyker stated that when it filed its original petition for exemption in 2004, its C line vehicles had no air bags. Spyker indicated that it started developing an "interim" driver air bag system for the C line vehicles, which went into production in December 2007. Additionally, Spyker stated that it began development of an "interim" passenger air bag for the C line in April 2007, which went into production in March 2008.

Spyker indicated that its "interim" air bag system is capable of dual performance and meets the 35 mph belted test for both the driver and passenger positions. Spyker stated that this latter achievement brings its vehicles into compliance with paragraph S14.7 of FMVSS No. 208 (35 mph belted test using 5th percentile adult female dummies) two years ahead of the September 1, 2012 deadline. Additionally, Spyker indicated that its C8 vehicle meets the requirements of S14.5, S15, and S17. However, Spyker stated that the "interim" air bag system still cannot meet all of the advanced air bag requirements.

Spyker stated that it is continuing to work with Continental to develop and test its advanced air bag system and expects compliance by May 15, 2012. In support of its statements, Spyker submitted a detailed schedule for development of the advanced air bag system showing completion by May 2012. Spyker stated that it investigated using Saab facilities and equipment to develop its advanced air bag systems, but the company decided to continue working with Continental.

Public Interest—The petitioner put forth several arguments in favor of a finding that the requested exemption is consistent with the public interest and would not have a significant adverse impact on safety. Specifically:

1. Spyker stated that the exempted vehicles will comply with all FMVSSs other than the provisions that are the subject of this extension request.

2. The petitioner stated that an exemption will benefit U.S. employment and U.S. companies because Spyker vehicles are distributed

[7] *See* 74 FR 12926–27.

[8] *See* 74 FR 12925.

[9] All dollar values are based on an exchange rate of 1 Euro = $1.30.

by a U.S. company, Spyker of North America, and are sold and serviced in the U.S. through a network of 18 dealers. Spyker argued that denial of an extension will negatively impact these companies.

3. Spyker argued that if the exemption is not granted, U.S. consumer choice would be harmed and that the agency has long maintained that the National Traffic and Motor Vehicle Safety Act seeks, if possible, to avoid limiting consumer choice.

4. The petitioner argued that given their exotic design and high-performance nature, the C line vehicles are not expected to be used extensively, nor are they expected to carry children with any frequency.

NHTSA specifically invites comment on the likelihood that a child or infant will be a passenger in a Spyker vehicle sold in the U.S.

5. Spyker stated that as of the submission date of its application for extension, approximately 60 exempted C line vehicles have been imported into the U.S. and there have been no reports of any air bag-related injuries.

6. Spyker stated that an important safety feature that the C line vehicles offer is enhanced occupant protection. The petitioner stated that occupants are positioned in a protective "cell" because the main chassis structure is built around them.

Agency Review of Petition—Upon receiving a petition, NHTSA conducts an initial review of the petition with respect to whether the petition is complete and whether the petitioner appears to be eligible to apply for the requested exemption. The agency has tentatively concluded that the petition is complete. The agency has not made any judgment on the eligibility of the petitioner or the merits of the application, and is placing a non-confidential copy of the petition in the docket.

IV. Issuance of Notice of Final Action

We are providing a 30-day comment period. After considering public comments and other available information, we will publish a notice of final action on the application in the **Federal Register**.

Issued on: March 31, 2011.

Joseph S. Carra,

Acting Associate Administrator for Rulemaking.

[FR Doc. 2011–8082 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2006–26275; Notice No. 11–3]

Petition for Rulemaking—Classification of Polyurethane Foam and Certain Finished Products Containing Polyurethane Foam as Hazardous Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice; closing of comment period and denial of petition P–1491.

SUMMARY: On March 30, 2007, a notice [72 FR 15184] was published in the **Federal Register** soliciting comments on the merits of a petition for rulemaking filed by the National Association of State Fire Marshals (NASFM). The NASFM petitioned PHMSA to classify polyurethane foam and certain finished products containing polyurethane foam as hazardous material for purposes of transportation in commerce. The comment period for the notice closed June 28, 2007. Subsequently, on October 19, 2007, the NASFM requested that action be deferred on the petition, and that the public docket be re-opened to allow interested persons to submit additional comments on the March 30, 2007 notice, and on supplemental information submitted by the petitioner. On May 7, 2008, a notice [73 FR 25825] was published in the **Federal Register** re-opening the comment period and indicating that it would remain open until further notice had been published in the **Federal Register**. Since re-opening of the comment period, no additional or supplemental information have been submitted to PHMSA to support the contention that polyurethane foam and certain finished products containing polyurethane foam should be designated as hazardous materials when transported in commerce. As well, no further comments have been submitted to suggest we continue to pursue any further action on this subject.

Therefore, in light of the fact that the comment period had been extended and remained opened for more than three years, with no further comment or data having been submitted to PHMSA to support proposals contained in petition P–1491 or the NASFM's October 19, 2007 supplemental letter, issuance of this notice closes the comment period for the March 30, 2007 Notice [72 FR 15184] and the May 7, 2008 Notice [73 FR 25825], under Docket No. PHMSA–2006–26275.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), which may also be found at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Helen L. Engrum, Office of Hazardous Materials Standards (202) 366–8553, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

On October 31, 2006, the National Association of State Fire Marshals (NASFM) submitted a petition for rulemaking to the U. S. Department of Transportation (DOT) through the Pipeline and Hazardous Materials Safety Administration (PHMSA) under the provisions of 49 CFR 106.95 (formerly 49 CFR 106.31). The NASFM requested that the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) be amended to classify polyurethane (PU) foam and certain finished products containing PU foam as a hazardous material for purposes of transportation in commerce. The NASFM is made up of senior-level public safety officials from the 50 States and the District of Columbia. The NASFM petition was received and acknowledged by PHMSA and assigned petition number P–1491; Docket No. PHMSA–2006–26275. On March 30, 2007, a notice [72 FR 15184] was published in the **Federal Register** soliciting comments on the merits of the petition for rulemaking filed by the NASFM.

A. Summary of Petition P–1491

As a matter of safety for emergency responders and the public, the National Association of State Fire Marshals (NASFM) petitioned the Department to classify PU foam and certain finished products containing PU foam as a hazardous material for purposes of transportation in commerce. The NASFM regards this proposal as critical to the safety of emergency responders and the public they are sworn to protect, and said that the safety of emergency responders begins with information—at minimum, responders have the absolute right to know when they are dealing with hazardous materials, so they may take special precautions at incidents. The petitioners' interest extends to ensuring that hazardous materials are used, stored and transported in safe ways. According to the NASFM, regulations exist across agencies that regulate the use and storage of PU foam, but a gap exists in ensuring the safe transportation of this hazardous material, and because it is not officially classified as a hazardous material for purposes of transportation, the NASFM believes the safety of emergency responders and the public is compromised.

B. NASFM's Proposed Rulemaking Procedure

In its petition, the NASFM proposed the following procedure based on its understanding of the PHMSA rulemaking process: "Issue an interim final rule designating bulk shipments of Polyurethane (PU) Foam as a Class 9 (Miscellaneous) hazardous material. As part of this interim final rule,

Phase I

- Assign a North American Identification Number to PU foam.
- Except shippers/carriers from requiring shipping papers, employee training, specific packaging requirements, and placarding.
- Require carriers to display Orange Panels with the identification number to identify the presence of PU foam for initial responders.
- Require transportation incidents involving PU foam fires to be reported to PHMSA.
- Publish a Safety Alert identifying measures initial responders can take to protect themselves and the general public during this initial response phase of the incident involving PU foam.
- Incorporate the measures published in the Safety Alert into the 2008 Emergency Response Guidebook (ERG).

Cotton can be used as an example of how PU can be initially regulated. The following is recommended for inclusion in the Hazardous Materials Table (49 CFR 172101):

Column 1—Symbols	D (Domestic).
Column 2—HM description and proper shipping name	Polyurethane Foam.
Column 3—Hazard Class or Division	9.
Column 4—Identification Number	NA XXXX (to be assigned by PHMSA).
Column 5—Packing Group	Leave blank.
Column 6—Label Codes	None.
Column 7—Special Provisions	To be determined by PHMSA.
Column 8—Packaging (8A, 8B, and 8C)	None.
Column 9—Packaging Limitations	To be determined by PHMSA and the Federal Aviation Administration.
Column 10—Vessel Stowage	To be determined by PHMSA and the US Coast Guard.

This should not be considered a significant rulemaking because there are a limited number of carriers transporting bulk PU foam.

Phase IIA

Initiate domestic rulemaking to finalize interim final rule and explore the need for additional regulatory oversight of products manufactured using PU foam through the issuance of a notice of proposed rulemaking.

Phase IIB

Introduce PU foam as a proposed work item at the 30th session of the Transport of Dangerous Goods Sub-Committee.

Phase IIA and IIB can be conducted simultaneously.

C. NASFM's Follow-Up Requests for Exceptions or Exemptions

On June 26, 2007, the NASFM submitted a letter to the docket stating that the dialogue resulting from the public comment period on this petition has caused the NASFM to consider amending the petition to exempt mattresses that meet the new Federal fire safety requirements (16 CFR part 1633), institutional and other upholstered furniture that meets California Technical Bulletin 133, and charitable organizations, such as the Salvation Army whose trucks may occasionally carry upholstered furniture and mattresses. Previously, the NASFM had contacted the Business and Institutional Furniture Manufacturers Association (BIFMA), the International Sleep Products Association (ISPA), and the Salvation Army to determine if they wish the NASFM to amend its petition as noted. The resulting correspondence (i.e., copies of letters from the NASFM written to BIFMA, ISPA, and the Salvation Army asking them if they wish to be excepted from the proposals in the PU foam petition) was submitted to the docket as an attachment to the June 26, 2007 letter to the docket.

On August 7, 2007, the NASFM submitted a letter to PHMSA requesting an amendment of its original petition (P–1491) to provide exceptions. It requested that if the PU proposals from petition P–1491 are adopted, the following categories or organizations should be excepted:

(1) Mattresses that meet or exceed the Federal standard for flammability (open flame) of mattress sets in accordance with 16 CFR part 1633; [CPSC]

(2) Upholstered furniture in compliance with the standard California Technical Bulletin 133; and

(3) Charitable not-for-profit organizations.

D. NASFM's Request To Defer Action on Petition P–1491 and Extend the Comment Period

On October 19, 2007, the NASFM submitted a letter to PHMSA asking to defer any action on its petition (P–1491) and to re-open the public docket to allow additional consideration of the flammability risks posed by PU foam and finished products containing PU foam. In its letter, the NASFM noted that PU foam and products containing PU foam "do not fit neatly within the Agency's long-standing definition for flammable solids," and suggests that the Agency should consider whether another, more appropriate definition should be developed to convey the risks associated with these materials. The NASFM also suggests that Federal, State, and industry standards-setting agencies and organizations should consider developing a standard test and definition applicable to polyurethane foam. According to the NASFM:

Other branches of the U.S. Department of Transportation, the U.S. Coast Guard, and the U.S. Consumer Product Safety Commission regulate these materials and each agency has its own tests, standards and terms to define the same combustible properties. The same is true of the International Building Code, International Fire Code, and the National Fire Protection Association's standard for automatic fire extinguishers (NFPA 13), all of which contain the language to provide authority to regulate polyurethane foam as a hazardous material requiring special protection. These model codes are referenced in countless Federal, State and local statutes. In effect, the polyurethane foam in the dashboard of a truck is regulated while the polyurethane foam shipped on the truck is not. The polyurethane foam shipment is regulated as a fire hazard in the factories in which it is made and used, in the warehouses in which it is stored, in the retail stores that offer it to the public and in the home. It is regulated in the seats of a commercial aircraft, but not in the cargo hold of that same aircraft.

The NASFM stated that the question is not whether PU foam is dangerously flammable, but whether PHMSA has a more appropriate means of classifying PU foam as a hazardous material for transportation. For this reason, the NASFM asked to defer action on its petition and to re-open the public docket. The NASFM believes that additional public comment may be useful to solicit ideas on how best to classify PU foam under PHMSA's existing definitions, possible statutory changes to clarify questions such as this, and comments on whether a single standardized test might be feasible.

On May 7, 2008, PHMSA re-opened the public docket and extended the comment period of the preceding original notice [72 FR 15184] to allow additional public comment on the question of whether there is a more appropriate means of classifying PU foam as a hazardous material for purposes of transportation in commerce. In the subsequent notice [73 FR 25825] re-opening the comment period, PHMSA said that we appreciated and shared the NASFM's concern for public safety and effective emergency response, and agreed with the NASFM that the comment period on this issue should be extended to permit interested persons to provide more data and information on the definitional issue raised by the NASFM in its October 19, 2007 letter. PHMSA indicated that the comment period would remain open until further notice had been published in the **Federal Register**, and that this action did not constitute a decision by DOT/PHMSA to undertake a rulemaking action on the substance of the petition. The notice was issued solely to obtain comments on the merits of the petition to assist PHMSA in making a decision of whether to proceed with a rulemaking. We were particularly interested in substantive comments that address the following items: (1) Estimated incremental costs or savings; (2) Anticipated safety benefits; (3) Estimated burden hours associated with the proposals related to information collection; (4) Impact on small businesses; and (5) Impact on the national environment.

We asked that the commenters address the safety implications of the proposals contained in the NASFM's petition. We were particularly interested in data and information related to regulation of PU foam by other agencies, such as the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), the U.S. Coast Guard (USCG), and the National Fire Protection Association (NFPA), and whether the standards used by these agencies could be adapted for use in the transportation environment. We invited interested persons to supplement comments they may have already submitted to address the issues raised in the NASFM's October 19, 2007 letter, to highlight other issues that we should consider in making a decision on the petition, or to provide additional data and information in support of previously stated positions. To date, no further information or additional comments have been received, including any comments on the issues raised in the NASFM October 19, 2007 letter, suggesting that Federal, State, and industry standards-setting agencies and organizations should consider developing a standard test and definition applicable to PU foam.

II. Summary of Comments Received on the March 30, 2007 Notice [72 FR 15814]

The purpose of the notice [72 FR 15184] was to solicit comments on the merits of a petition for rulemaking (P–1491) filed by the NASFM requesting classification of PU foam and certain finished products containing PU foam as a Class 9 (Miscellaneous) hazardous material, whether or not it meets the Class 9 (Miscellaneous) definition in § 173.140 of the HMR. The majority of commenters did not support the NASFM request to classify PU foam and certain finished products containing PU foam as a Class 9 (Miscellaneous) hazardous material during transportation. Under the HMR, a Class 9 (Miscellaneous) material presents a hazard in transportation but does not meet the definition of any other hazard class. Class 9 (Miscellaneous) materials are: (a) Any material which has an anesthetic, noxious or other similar property which could cause extreme annoyance or discomfort to a flight crew member so as to prevent the correct performance of assigned duties; or (b) Any material that meets the definition of an elevated temperature material, a hazardous substance, and a hazardous waste, or a marine pollutant.

Twenty-nine (29) of the thirty (30) comments received opposed the proposals to classify PU foam as a hazardous material, saying, among other reasons, that there is little or no evidence or data demonstrating the dangers of PU foam in transportation. Most commenters believe that the transportation safety risks of such materials have not been documented and the costs of increased regulation would be prohibitive. Many commenters said that PU foam does not exhibit hazard characteristics that meet any of the hazard class definitions in the HMR, and that the NASFM did not provide any data, documentation, or information that would warrant a change.

Comments were received from the following trade associations, companies, organizations and individuals:

LIST OF COMMENTERS

Commenters	Position
1. American Chemistry Council (Center for the PU Industry)	Opposed.
2. American Home Furnishings	Opposed.
3. American Moving and Storage Assoc.	Opposed.
4. American Trucking Associations	Opposed.
5. Association of Rotational Moulders International	Opposed.
6. Bayer Material Science	Opposed.
7. Bodman Attorneys & Counselors (for Lear Corporation)	Opposed.
8. The Business and Institutional Furniture Manuf. Assoc.	Opposed.

LIST OF COMMENTERS—Continued

Commenters	Position
9. The Council on Safe Transportation of Hazardous Articles	Opposed.
10. Ken A. Cruishank (DOE Subcontractor)	Opposed.
11. Foam Supplies, inc.	Opposed.
12. Dangerous Goods Advisory Council	Opposed.
13. General Plastics Manufacturing Company	Opposed.
14. Gonzalez, Saggio, Harlan LLP (for Johnson Controls, Inc.)	Opposed.
15. Hickory Chair	Opposed.
16. Hickory Springs Manufacturing Company	Opposed.
17. High Point Furniture Industries	Opposed.
18. Huntsman Polyurethanes	Opposed.
19. International Sleep Products Association	Opposed.
20. International Vessel Operators Dangerous Goods Assoc., Inc.	Opposed.
21. Metal Construction Association	Opposed.
22. McIntyre Law Firm, PLLC (for the PU Foam Assoc.)	Opposed.
23. National Tank Truck Carriers, Inc.	Opposed.
24. National Association of State Fire Marshals	Support.
25. National Home Furnishings Association	Opposed.
26. North American Automotive Hazmat Action Committee	Opposed.
27. Polyisocyanurate Insulation Manufacturers Association	Opposed.
28. Ritchie Industries, Inc.	Opposed.
29. Sealed Air Corporation	Opposed.
30. Charles (Chuck) Williamson (Retired from Plastics Industry)	Opposed.

A. One Commenter Supports Granting of Petition P–1491

The NASFM believes that the proposals in its petition have merit. On May 9, 2007, the NASFM commented to the Docket. The NASFM stated that PHMSA has clear authority to grant the petition, and that the NASFM has provided sufficient justification in support of the proposed action. The NASFM said it enthusiastically supports PHMSA's innovative approach to encouraging cooperative problem-solving among stakeholders via "enterprise" dialogues, and therefore welcomes this opportunity to elaborate on the petition. The NASFM noted that this public comment addresses the question of whether polyurethane foam and products containing it are hazardous materials, and is the first of three submissions the NASFM will make to this docket.

In its comment, the NASFM affirmed that the American Chemistry Council's Center for the Polyurethanes Industry (CPI) describes itself as representing "the leading companies engaged in the business of polyurethanes." CPI members are committed to environmental and social sustainability and the health, safety and security of its employees and communities. Over the years, the NASFM has observed the Center and its predecessor, the Alliance for the Polyurethanes Industry (API), translate these words into stewardship that often goes well beyond minimum mandatory levels of safety. Attached to this comment were articles, MSDS, and a technical bulletin, marked as Attachments A, B, C, D, and E. The attachments addressed fire safety guidelines on flexible PU used in upholstered furniture and bedding, proper handling and storage of flexible PU, several MSDS on PU from two manufacturers, and an article on the problem of flammability of foamed plastics in storage.

On June 12, 2007, the NASFM acknowledged in its comments that in the notice PHMSA had requested data on known transportation incidents involving polyurethane foam and products containing it. The NASFM went on to say that even if polyurethane foam and products containing it were currently classified as hazardous materials for transportation, incident data might not be readily available. Because PU foam is not classified as a hazardous material for transportation, it might follow that finding examples of incidents would be difficult. Federal Law requires immediate and detailed reporting of serious transportation incidents where the term "serious" is defined as a fatality or injury caused by the hazardous material, loss of more than 119 gallons of product, closure of a major transportation artery, or change of an aircraft's flight plan.

The NASFM said that it is willing to undergo a detailed review of fire department reports from incidents involving commercial vehicles. In separate correspondence to the U.S. DOT, the NASFM said that it will soon propose a detailed assessment of fire department records to identify transportation incidents where shipments of PU foam and product containing it contributed to the severity of the fire. To this end, on June 12, 2007, the NASFM submitted to the U.S. DOT, Bureau of Transportation Statistics (BTS) "an unsolicited research proposal." The NASFM said that details of the proposal were included in an attachment from the firm of TriData Corporation, "an acknowledged expert in fire statistics and well known to the Department." The NASFM requested funding from BTS to utilize multiple data sources to determine the extent PU foam is involved in transportation incidents. To date, PHMSA has no knowledge of the BTS response to the NASFM's request for funding and research into incidents involving the transportation of PU foam.

In its June 28, 2007 comment to the docket, the President of the NASFM stated:

> Whether or not a hazardous material has been technically classified as a hazardous material does not affect the temperature of a fire or the smoke and gases from that fire. When a clearly hazardous material is not officially classified, the hazard is all that much greater because emergency responders have no way of knowing the risks as they attempt to rescue trapped vehicle occupants, protect nearby lives and property, and suppress the fire.
>
> Firefighters are trained to look for placards, read manifests and consult with experts before they choose tactics. The American Chemistry Council's Chemtrec program handles 300 telephone calls a day, many from emergency responders at the scene of incidents seeking information on a hazardous material listed on a manifest or placard. Responders know that water can cause an explosion when used with some hazardous materials and that some suppression foams

do not work on certain hazardous materials. Responders know that evacuation may be necessary depending on the hazardous material and weather conditions. But when responders have no way of knowing that a burning substance is hazardous, they have no way of taking any of these precautions.

No one questions the fact that polyurethane foam ignites easily, spreads fire aggressively, and generates large volumes of highly toxic smoke and gases. Polyurethane foam is classified as a combustible solid where it is manufactured, stored, sold and used in construction. Other branches of the U.S. Department of Transportation recognize the exceptionally poor fire performance of polyurethane foam, as do the National Transportation Safety Board, the U.S. Coast Guard, The Departments of Defense and Commerce, and the U.S. Consumer Product Safety Commission.

The U.S. Department of Transportation has broad powers to protect the public, ensure the safety of emergency responders and classify and regulate hazardous materials. The National Association of State Fire Marshals, on behalf of its members as well as emergency responders nationwide, asks the Department to use its authority to ensure that responders have some way of knowing when they are dealing with transportation incidents involving this exceptionally hazardous material.

PHMSA notes that we did not receive any individual comments from firefighters, emergency responders, or firefighter associations. The NASFM has said that it speaks on behalf of firefighters and emergency responders nationwide.

B. Commenters Opposed to Granting Petition P–1491

The majority of commenters opposed the proposals contained in the petition. The American Home Furnishings Alliance (AHFA) opposed the petition and said about 80 percent of the upholstery sold in the United States is manufactured domestically. To remain competitive, domestic producers rely on lean manufacturing and distribution regimens. Process management software ensures that the right quantities of wood frame parts, polyurethane foam, and polyester fiber are delivered to furniture plants in response to individual orders at retail. Consequently, AHFA members are vitally interested in the efficient safe transportation of bulk foam, foam cushions and other furniture components. Regulatory changes that would disrupt this just-in-time manufacturing process are a recipe for job loss. AHFA asked that PHMSA weigh the logistical burdens the proposed regulation would have on the furniture industry and its carriers against any safety benefit likely to be accrued.

The McIntyre Law Firm, PLLC, on behalf of the Polyurethane Foam Association (PFA), suggested that PHMSA dismiss the petition. In 1994, PHMSA issued an interpretation as a result of an inquiry from James T. McIntyre, Counsel for the PFA, in response to a request for a determination that the HMR does not apply to flexible PU foam. In the interpretation response, PHMSA concluded that flexible PU foam is able to burn, but are not self-reactive, do not meet the definition of a Division 4.1 (flammable solid) material, do not release flammable gas or vapor likely to create a flammable mixture with air in a transport vehicle, do not meet any hazard class definition and, therefore, it is not regulated by the HMR for purposes of transportation in commerce. In concluding that PU foam is not a Division 4.1 hazardous material, DOT determined that it does not fit within any class, which would include Class 9 (Miscellaneous). Thus, Mr. McIntyre stated that the petition is asking for a reversal of that determination, but it cites no justifiable basis for doing so.

The American Chemistry Council (ACC) stated that polyurethanes are an important contributor of the U.S. economy and such a rulemaking could have serious repercussions for consumers and small businesses. The ACC said that in 2004, the total production of polyurethane in the United States was approximately 6,692.5M pounds. Because of this large production volume, the polyurethanes industry directly creates 47,500 jobs paying $2 billion in wages to its employees and generates $19.7 billion in revenues. Increased regulations would result in increased cost for transporting these products on our nation's roadways, without any evidence that such classification would result in safer transportation of PU foam and products containing PU. Finally, classifying such widely used products as a hazardous material has the potential to create unnecessary concern with emergency responders. ACC said that this could have unintended negative consequences in the effectiveness of the existing hazardous material emergency response program.

The Business and Institutional Furniture Manufacturers Association (BIFMA) said that as written the proposal appears to regulate shipment of "urethane" foam whether in bulk or in finished goods. In addition to commercial furniture, this could conceivably be extended to clothing, shoes, and other products where the percentage of urethane foam is also small and the products have little or no fire hazard in their final form. BIFMA members are currently dealing with many overlapping and often conflicting rules on furniture flammability. For example, the CPSC is in the process of developing more rigorous flammability rules for upholstered furniture at the same time that environmental agencies are banning chemical fire retardants that are often required to achieve flame resistance performance. The entire regulatory environment for furniture flammability is changing, and the proposed regulation of urethane foam as a hazardous material would further complicate the use and handling of these materials in a way that could be detrimental to many manufacturers, distributors, and consumers, alike.

The Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA) stated that while we understand the intent of the NASFM to enhance safety to emergency responders, they see insignificant safety benefits that might be anticipated through this petition. Emergency responders are already trained to be aware of hazards associated with vehicle fires due not only to the contents of the vehicle but the components built into the vehicle, many of which employ vinyl and other polymers due to their strength and durability and the "creature comforts" the public demands. PU foam may also be in common use as an insulating material in refrigerated delivery trucks such as those involved in delivery of dairy products or frozen foods, and in refrigerated freight containers. COSTHA said to attempt to identify, classify, and mark all of these articles and substances for transportation might tend to create complacency or a false sense of safety when responding to fires involving vehicles not so marked.

The Dangerous Goods Advisory Council (DGAC) stated that while it appreciates the concerns expressed by the NASFM, DGAC does not consider the petition compelling and recommends that PHMSA deny the petition. Further, while oftentimes materials not subject to the HMR have the potential for extensive damage in tunnels, they do not consider the HMR to be the appropriate means of controlling risks to tunnels posted by non-hazardous materials. In fact, the referenced Mont Blanc tunnel fire which resulted in 39 deaths and an estimated cost of $2.5 billion involved the burning of 9 tons of margarine, road bed material and nearby vehicles.

The National Tank Truck Carriers, Inc. (NTTC) stated that polyurethane foam does not meet the definition of a hazardous material, even as a Miscellaneous Class 9 material. NTTC noted, in this instance, the effort to have it both ways by requiring an orange

label, while also exempting shippers and carriers from complying with the normal hazardous materials requirements regarding shipping papers, training, and placarding, et al., demonstrates the weakness of the petition. It is unclear how emergency response will be improved. NTTC said that what is foreseeable, however, is that the requested action would unnecessarily open the door to consideration of numerous other non-hazardous products. In addition, it would weaken the international harmonization of hazardous materials that PHMSA is working to further, and which NTTC supports. In short, NTTC views the petition as "an attempt to fit a round peg into a square hole," and urged the Administrator to deny the petition.

The International Sleep Products Association (ISPA) opposes the petition and requests that PHMSA dismiss it. ISPA said that most mattress producers assemble finished mattresses from components supplied by third parties, and that many mattresses sold in the United States today contain flexible PU foam to provide cushioning and support. All finished mattresses, including those that contain flexible PU foam, must meet various flammability standards. For example, since the mid-1970s, the Consumer Product Safety Commission (CPSC) has required that all mattresses resist ignition from a smoldering cigarette. 16 CFR part 1632. Beginning July 1, 2007 the CPSC will require that all mattresses withstand an open-flame ignition (such as a match, lighter, or candle). 16 CFR part 1633. ISPA said that PHMSA should dismiss the petition because it provides no legal or factual basis for designating PU foam as a hazardous material.

The American Trucking Associations (ATA) said that one of the most troubling aspects of the petition is the difficulty motor carriers would experience in complying with the suggested requirement to mark trucks to indicate the presence of polyurethane foam. Polyurethane foam is ubiquitous. In addition to its use in furniture, pillows, mattresses, car seats, and carpet padding, it is used as insulation in refrigerators, freezers and truck bodies. It is used as a packaging material. It also is used as a decorative coating and is molded into car bumpers. The ATA said that motor carriers take seriously their responsibility to comply with DOT regulations, and that the regulatory requirements requested in this petition set up motor carriers to fail—as motor carriers face a regulatory requirement to mark trucks containing polyurethane foam, but have no corresponding way to know whether a shipper has tendered articles containing polyurethane foam.

III. PHMSA Is Denying the NASFM Petition P–1491

In accordance with 49 CFR 106.95, Petition P–1491 is denied for the following reasons:

(1) In conclusion, the majority of commenters do not believe that PU foam, nor products that contain PU foam, meet any of the defining criteria under the HMR, and do not constitute an "unreasonable" risk to health, safety and property when transported in commerce. PHMSA agrees with the majority of the commenters. A PU fire is similar to house fires and other fires with organic materials. A PU fire does not require special fire fighting agents, procedures, or protective equipment and, therefore, does not pose an unreasonable danger to first responders. PHMSA believes that the information in the compendium do not support the petition. Thus, classifying PU foam as a hazardous material is unwarranted and inconsistent with the standards for classification set forth in the HMR.

(2) PU foam is not designated as a hazardous material because it is not considered a substance or material capable of posing an acute or unreasonable risk to health, safety and property when transported in commerce. The petition does not provide sufficient supporting data to warrant the adoption of the petition.

(3) PU foam products are solid organic materials. Like many other plastic products, PU foam products were not deemed to meet the "Readily combustible solid" definition and test criteria when DOT and the UN Committee of Experts developed the definition, test method, and criteria in 1990. The Material Safety Data Sheets (MSDS) submitted by the NASFM did not identify PU foam products as hazardous materials. Rather, the MSDS recognizes that PU foam products when exposed to fire will melt into liquid and the flash point of the liquids is >500 °F, which is outside of the range and criteria of Flammable liquid or Combustible liquid, as defined in 49 CFR 173.120.

(4) The safety implications of the proposals in the petition were given careful considerations as we went through the process of determining whether regulatory action was needed. While we understand the intent of the NASFM to improve safety of emergency responders, anticipated safety benefits associated with the transportation of PU foam would be insignificant, since emergency responders are already trained to be aware of hazards associated with vehicle fires due to components built into the vehicle, many of which employ vinyl and other polymers because of their strength and durability.

(5) The NASFM stated in the petition that this should not be considered a significant rulemaking because there are a limited number of carriers transporting bulk PU foam. However, if the proposal to classify PU foam as a hazardous material was adopted, it could be applied universally to all PU foam products. To attempt to identify, classify, and mark all of these articles and substances for purposes of transportation in commerce would be a much larger impact, greater than transportation. The costs associated with implementing the petition would far exceed the benefits.

Issued in Washington, DC, on March 31, 2011.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 2011–8103 Filed 4–5–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35237]

City of Davenport, Iowa—Construction and Operation Exemption—in Scott County, Iowa

By petition filed on July 21, 2009, the City of Davenport, Iowa (the City) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct approximately 2.8 miles of rail line in southern Eldridge, northern Davenport, and an unincorporated area of Scott County, Iowa. The new line will provide the Eastern Iowa Industrial Center, an industrial park, with rail access. The City will hire an operator to provide service on the line, but the City also will be required to ensure continued rail service.

In a decision served on October 19, 2009, the Board instituted a proceeding under 49 U.S.C. 10502(b). No comments opposing the petition have been filed.

The Federal Highway Administration (FHWA), the lead Federal agency on this rail project, and the City issued an Environmental Assessment (EA) for public review and comment on March 17, 2008. On July 8, 2008, the FHWA issued its Record and Finding of No Significant Impact and recommended 3 environmental conditions to mitigate the impacts of the project. After the Board's Office of Environmental

Analysis (OEA) independently reviewed the FHWA EA, OEA prepared and issued on January 28, 2010, a Review of Environmental Matters and Final Environmental Recommendations in which OEA recommended that the Board adopt the FHWA EA and impose the 3 environmental conditions recommended by the FHWA. Due to a subsequent proposed change by the City in project design and in the rail alignment, OEA, the FHWA, the Iowa Department of Transportation, and the City conducted a reevaluation of the project. In December 2010, the FHWA and OEA determined that no supplemental environmental review would be required and that the same 3 environmental conditions should be imposed.

After considering the entire record, including both the transportation aspects of the petition and the potential environmental issues, the Board granted the requested construction and operation exemption in a decision served today, subject to compliance with the environmental mitigation measures listed in the Appendix to the decision. Petitions to reopen must be filed by April 26, 2011.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: March 30, 2011.

By the Board, Chairman Elliott and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–8158 Filed 4–5–11; 8:45 am]

BILLING CODE 4915–01–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing—April 13, 2011 Washington, DC.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

Name: William A. Reinsch, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on "the national security implications of the economic relationship between the United States and the People's Republic of China."

Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on April 13, 2011, to address "China's Current and Emerging Foreign Policy Priorities."

Background: This is the fifth public hearing the Commission will hold during its 2011 report cycle to collect input from leading academic, industry, and government experts on national security implications of the U.S. bilateral trade and economic relationship with China. The April 13 hearing will examine emerging issues and new interest groups in Chinese foreign policy, as well as China's relationships with select countries of concern to the United States. The April 13 hearing will be co-chaired by Commissioners Carolyn Bartholomew and Peter Brookes.

Any interested party may file a written statement by April 13, 2011, by mailing to the contact below. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Transcripts of past Commission public hearings may be obtained from the USCC Web Site *http://www.uscc.gov.*

Date and Time: Wednesday, April 13, 2011, 8:40 a.m. to 3:30 p.m. Eastern Standard Time. A detailed agenda for the hearing will be posted to the Commission's Web Site at *http://www.uscc.gov* as soon as available.

ADDRESSES: The hearing will be held on Capitol Hill in Room 216 of the Hart Senate Office Building, located at Constitution Avenue and 2nd Street, NE., in Washington, DC 20002. Public seating is limited to about 50 people on a first come, first served basis. *Advance reservations are not required.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Michael Danis, Executive Director for the U.S.-China Economic and Security Review Commission, 444 North Capitol Street, NW., Suite 602, Washington DC 20001; phone: 202–624–1407, or via e-mail at *contact@uscc.gov.*

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: March 31, 2011.

Michael Danis,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2011–8078 Filed 4–5–11; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board; Notice of Meetings

The Department of Veterans Affairs gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the panels of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board will meet from 8 a.m. to 5 p.m. on the dates indicated below:

Panel	Date(s)	Location
Hematology	May 25, 2011	L'Enfant Plaza Hotel.
Surgery	May 25, 2011	Crowne Plaza DC/Silver Spring.
Endocrinology-B	May 26, 2011	L'Enfant Plaza Hotel.
Endocrinology-A	June 2–3, 2011	L'Enfant Plaza Hotel.
Infectious Diseases-B	June 2, 2011	Hamilton Crowne Plaza.
Nephrology	June 2, 2011	Crowne Plaza DC/Silver Spring.
Neurobiology-A	June 2–3, 2011	Crowne Plaza DC/Silver Spring.
Neurobiology-E	June 3, 2011	Crowne Plaza DC/Silver Spring.
Pulmonary Medicine	June 3, 2011	Crowne Plaza DC/Silver Spring.
Cellular & Molecular Medicine	June 6, 2011	Crowne Plaza DC/Silver Spring.
Epidemiology	June 7, 2011	VA Central Office.*
Mental Hlth & Behav Sci-B	June 7–8, 2011	L'Enfant Plaza Hotel.
Mental Hlth & Behav Sci-A	June 8–9, 2011	L'Enfant Plaza Hotel.
Neurobiology-C	June 8–10, 2011	Crowne Plaza DC/Silver Spring.
Oncology	June 9–10, 2011	L'Enfant Plaza Hotel.

Panel	Date(s)	Location
Immunology	June 9, 2011	L'Enfant Plaza Hotel.
Infectious Diseases-A	June 9, 2011	L'Enfant Plaza Hotel.
Cardiovascular Studies	June 10, 2011	Crowne Plaza DC/Silver Spring.
Neurobiology-D	June 10, 2011	Crowne Plaza DC/Silver Spring.
Clinical Research Program	June 13, 2011	VA Central Office.*
Gastroenterology	June 13, 2011	L'Enfant Plaza Hotel.

The addresses of the hotels and VA Central Office are:
Plaza Washington DC/Silver Spring, 8777 Georgia Avenue, Silver Spring, MD.
Hamilton Crowne Plaza, 1001–14th Street, NW., Washington, DC.
L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC.
* VA Central Office, 131 M Street, NE., Washington, DC.
* Teleconference.

The purpose of the Merit Review Board is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review consideration. Proposals submitted for review by the Board involve a wide range of medical specialties within the general areas of biomedical, behavioral and clinical science research.

The panel meetings will be open to the public for approximately one hour at the start of each meeting to discuss the general status of the program. The remaining portion of each panel meeting will be closed to the public for the review, discussion, and evaluation of initial and renewal research proposals.

The closed portion of each meeting involves discussion, examination, reference to staff and consultant critiques of research proposals. During this portion of each meeting, discussion and recommendations will deal with qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, as well as research information, the premature disclosure of which could significantly frustrate implementation of proposed agency action regarding such research proposals.

As provided by subsection 10(d) of Public Law 92–463, as amended, closing portions of these panel meetings is in accordance with 5 U.S.C., 552b(c)(6) and (9)(B). Those who plan to attend or would like to obtain a copy of minutes of the panel meetings and rosters of the members of the panels should contact LeRoy G. Frey, PhD, Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 at (202) 443–5674.

Dated: March 31, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of General Counsel.

[FR Doc. 2011–8114 Filed 4–5–11; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Clinical Science Research and Development Service Cooperative Studies Scientific Evaluation Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Clinical Science Research and Development Service Cooperative Studies Scientific Evaluation Committee will be held on April 25, 2011, at The Ritz-Carlton Hotel, 1150 22nd Street, NW., Washington, DC. The meeting is scheduled to begin at 9 a.m. and end at 3 p.m.

The Committee advises the Chief Research and Development Officer through the Director of the Clinical Science Research and Development Service on the relevance and feasibility of proposed projects and the scientific validity and propriety of technical details, including protection of human subjects.

The session will be open to the public for approximately 30 minutes at the start of the meeting for the discussion of administrative matters and the general status of the program. The remaining portion of the meeting will be closed to the public for the Committee's review, discussion and evaluation of research and development applications.

During the closed portion of the meeting, discussions and recommendations will deal with qualifications of personnel conducting the studies, staff and consultant critiques of research proposals and similar documents and the medical records of patients who are study subjects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. As provided by section 10(d) of Public Law 92–463, as amended, closing portions of this meeting is in accordance with 5 U.S.C. 552b(c)(6) and (c)(9)(B).

Those who plan to attend should contact Dr. Grant Huang, Deputy Director, Cooperative Studies Program (125), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail at *grant.huang@va.gov* or phone at (202) 443–5600.

Dated: March 31, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of General Counsel.

[FR Doc. 2011–8115 Filed 4–5–11; 8:45 am]

BILLING CODE P

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Part II

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 11 and 101
Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 11 and 101

[Docket No. FDA–2011–F–0172]

RIN 0910–AG57

Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: To implement the menu labeling provisions of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), the Food and Drug Administration (FDA) is proposing requirements for providing certain nutrition information for standard menu items in certain chain restaurants and similar retail food establishments. The Affordable Care Act, in part, amended the Federal Food, Drug, and Cosmetic Act (FD&C Act), among other things, to require restaurants and similar retail food establishments that are part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items to provide calorie and other nutrition information for standard menu items, including food on display and self-service food. Under provisions of the Affordable Care Act, restaurants and similar retail food establishments not otherwise covered by the law may elect to become subject to the Federal requirements by registering every other year with the FDA. Providing calorie and other nutrition information in restaurants and similar retail food establishments would assist consumers in making healthier dietary choices.

DATES: Submit either electronic or written comments on the proposed rule by June 6, 2011. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 by May 6, 2011 (see the "Paperwork Reduction Act of 1995" section of this document). See section III.G of this document for the proposed effective date of any rule that may publish based on this proposal.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2011–F–0172 and/or RIN 0910–AG57, by any of the following methods, except that comments on information collection issues under the Paperwork Reduction Act of 1995 must be submitted to the Office of Regulatory Affairs, Office of Management and Budget (OMB) (see the "Paperwork Reduction Act of 1995" section of this document).

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name, Docket No. FDA–2011–F–0172, and RIN 0910–AG57 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Claudine Kavanaugh, Office of Foods, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, rm. 3234, Silver Spring, MD 20993, 301–796–4647.

SUPPLEMENTARY INFORMATION:

I. Background

A. Public Health Impacts of Overconsumption of Calories and Poor Nutrition

The U.S. Centers for Disease Control and Prevention (CDC) identifies as overweight an adult whose body-mass index, or BMI, (defined as weight in kilograms divided by the height in meters squared) is between 25 and 29.9. CDC defines an obese adult as a person 20 years of age or older whose BMI is 30 or above (Ref. 1). Data published by CDC indicate that 68 percent of the adult U.S. population is overweight or obese under this definition, including 34 percent who are considered obese (Ref. 1). For adults, being overweight or obese increases the risk for a number of chronic diseases, including coronary heart disease, type 2 diabetes, stroke, hypertension, arthritis, and certain types of cancer (Refs. 1 and 2). A BMI over 35 is associated with excess mortality, primarily from cardiovascular disease, diabetes, and certain types of cancer (Refs. 1, 3–5). Cardiovascular disease, cancer and diabetes are the leading causes of death and disability in the US, accounting for 70 percent of all deaths in the U.S. (Ref. 6). In 2005, 133 million Americans (almost one out of every two adults) had at least one chronic illness (Ref. 6). As noted previously, overweight and obesity are important contributors to the morbidity and mortality associated with these diseases.

CDC defines obesity in children as a BMI at or above the 95th percentile plotted on CDC BMI-for-age and sex growth charts. Overweight in children is defined as BMI-for-age from the 85th up to the 95th percentile (Ref. 7). Using this definition, CDC data indicate that about 32 percent of children and adolescents, aged 2 to 19, are overweight or obese (Ref. 8). Overweight and obesity in childhood is associated with a risk for obesity in adulthood, with the associated health risks. In addition, children with high BMI face health problems even in childhood, including elevated lipid concentrations and blood pressure (Ref. 8).

The primary risk factors for overweight and obesity in the general population are overconsumption of calories (*i.e.,* eating more calories than are needed to maintain body weight) and physical inactivity (*i.e.,* getting an amount of exercise below the amount required to burn excess calories consumed over the amount needed to maintain body weight) (Ref. 9 at pp. 1, 8, 9). Americans now consume an estimated one-third of their total calories on foods prepared outside the home (Ref. 10) and now spend almost half of their annual food dollars on foods prepared outside the home (Refs. 11 and 12.). Consumers are generally unaware of, or inaccurately estimate, the number of calories in restaurant foods (Ref. 13). In one survey of 193 adults, the participants underestimated the calorie content in foods prepared outside of the home they perceived to be "healthier" food choices by nearly half, an average of almost 650 calories per item (Ref. 14).

B. Nutrition Labeling Requirements That Currently Apply to Packaged Foods

The Nutrition Labeling and Education Act of 1990 (NLEA) amended the FD&C

Act, in part, by adding section 403(q), which specifies, in pertinent part and with certain exceptions, that a food is considered to be misbranded unless its label or labeling bears nutrition information. See 21 U.S.C. 343(q)(1)). In general, when a food is in package form, the required nutrition labeling information (Nutrition Facts) must appear on the label of the food. (Title 21 of the Code of Federal Regulations (CFR) § 101.9 (21 CFR 101.9). FDA's final regulations establishing nutrition labeling requirements were published in 1993 (58 FR 2079, January 6, 1993) and are found at § 101.9. Regulations implementing the NLEA require nutrition information for a food product intended for human consumption and offered for sale unless an exemption is provided for the product (§ 101.9(a)). The declaration of nutrition information on the label and labeling of food must include information about the levels of the following nutrients: total calories, calories from fat (unless the product contains less than 0.5 g of fat), total fat, saturated fat, *trans* fat, cholesterol, sodium, total carbohydrate, dietary fiber, sugars, protein, vitamins, and minerals. Research conducted by FDA and others shows that many consumers use the Nutrition Facts to make their food choices (Ref. 15). However, this nutrition information is generally not available for foods sold in restaurants and similar retail food establishments, which make up an increasing proportion of the American diet.

C. The Exemption From Federal Nutrition Labeling Requirements for Food Sold in Restaurants and Other Retail Food Establishments Under NLEA

The NLEA amendments to the FD&C Act included an exemption for nutrition labeling for food that is "served in restaurants or other establishments in which food is served for immediate human consumption" or "sold for sale or use in such establishments" (403(q)(5)(A)(i)) (21 U.S.C. 343(q)(5)(A)(i)). The NLEA amendments to the FD&C Act also included an exemption for food of the type described in section 403(q)(5)(A)(i) that is primarily processed and prepared in a retail establishment, ready for human consumption, "offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment" (21 U.S.C. 343(q)(5)(A)(ii)). However, these exemptions were contingent on there being no nutrient content claims or health claims made on the label or labeling, or in the advertising, for the food. Current provisions in § 101.10 require restaurants and other establishments in which food is offered for human consumption that make either a nutrient content claim (defined in § 101.13) or health claim (defined in § 101.14) to provide certain nutrition information upon request. For example, if a menu lists an entrée as being low in fat, information about the amount of fat in the entrée must be available upon request. FDA notes that this requirement is and will still be in place if this proposed rule is finalized.

FDA provided examples of restaurants or other establishments in which food is offered for human consumption, in which food sold generally was exempted from nutrition labeling requirements under NLEA, in § 101.9(j)(2). The agency also provided in § 101.9(j)(3) examples of food sold in establishments in which food is processed and prepared, ready for human consumption, offered for sale to consumers but not for immediate consumption, and not offered for sale outside of the establishments. These regulations are further discussed in section III.A of this document.

In recent years, there has been growing support among public health experts for providing calorie and other nutrition information on restaurant menus in order to help consumers make more informed food choices. (Refs. 13, 16–18) There is also evidence of consumer preference for calorie information on menus. For example, more than 70 percent of respondents to a national telephone survey of 580 adults supported the idea of listing calorie information on restaurant menus (Ref. 19). In a subset of 150 individuals from an experimental study in Minneapolis-St. Paul, MN about the influence of nutritional labeling on fast-food meal choices, 79 percent of respondents said they would use calorie information if it was provided (Ref. 20).

Some State and local jurisdictions have enacted laws or regulations requiring calorie declaration for food offered for sale at restaurants and other establishments. However, the requirements of these laws differed among the States and local jurisdictions. For example, some laws applied to retail food establishments with 15 or more locations, while others applied to retail food establishments with 20 or more locations. Some jurisdictions required only calories on menus and menu boards while others required additional nutrient declarations (*e.g.,* variations of the following: total grams of *trans* fat, grams of saturated fat, grams of carbohydrates, and milligrams of sodium). Some State and local laws required a statement on menus and menu boards regarding daily intake amounts for calories and other nutrients and other laws did not require such a statement. The wording of those required statements varied (Refs. 21 and 22).

D. Requirements of Section 4205 of the Patient Protection and Affordable Care Act

On March 23, 2010, the Affordable Care Act (Pub. L. 111–148) was signed into law. Section 4205 of the Affordable Care Act ("section 4205") amends section 403(q) of the FD&C Act, which governs nutrition labeling requirements, and section 403A of the FD&C Act, which governs Federal preemption of State and local food labeling requirements. As amended, section 403(q) requires restaurants and similar retail food establishments that are part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items ("chain retail food establishments") to provide calorie information for standard menu items, including food on display and self-service food, and to provide, upon consumer request, additional written nutrition information for standard menu items. Such food is deemed to be misbranded if these requirements are not met. More specifically, the following information must be provided for standard menu items that are sold in chain retail food establishments:

- The number of calories contained in each standard menu item as usually prepared and offered for sale on a menu or menu board (the calorie declaration must be "adjacent to" the name of the standard menu item, so as to be "clearly associated with" the item);
- A succinct statement concerning suggested daily caloric intake posted prominently on the menu or menu board designed to enable the public to understand in the context of a total daily diet, the significance of the calorie information provided on menus and menu boards;
- Additional nutrition information for standard menu items in a written form ("written nutrition information"), available on the premises, which must be made available to consumers upon request;
- A "prominent, clear, and conspicuous" statement on the menu or menu board regarding the availability of the written nutrition information; and
- The number of calories (per item or per serving) on a sign adjacent to self-service food and food on display. This food includes food sold at salad bars, buffet lines, cafeteria lines or similar self-service facilities, and self-service

beverages and food on display that is visible to consumers.

Section 4205 of the Affordable Care Act became effective on the date the law was signed, March 23, 2010; however, some provisions depend on FDA to issue rules before they can be required. With respect to chain retail food establishments, the provisions that became requirements upon enactment are:

- Disclosing the number of calories contained in each standard menu item as usually prepared and offered for sale on menus and menu boards;
- Providing written nutrition information to consumers upon request;
- Providing a "prominent, clear, and conspicuous" statement on menus and menu boards about the availability of the written nutrition information; and
- Providing calorie information (per serving or per food item) for self-service items and food on display, on a sign adjacent to each food item.

The law also specifies that FDA must issue regulations that:

- Establish requirements for a succinct statement concerning daily caloric intake, posted prominently on the menu or menu board, designed to enable the public to understand in the context of a total daily diet, the significance of the calorie information provided on menus and menu boards;
- Establish standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item; and
- Specify how an authorized official of any restaurant or similar retail food establishment not subject to the requirements of section 403(q)(5)(H) may elect to be subject to the requirements by registering biannually the name and address of such restaurant or similar retail food establishment with FDA.

Although these provisions became requirements at the time the law was signed, FDA has previously announced that we intend to exercise our enforcement discretion until the final rule is published and in effect. *See* 76 FR 4360 (Jan. 25, 2011). FDA believes that this approach to implementing section 4205 will minimize uncertainty and confusion among all interested persons. The agency also believes that expeditious completion of the rulemaking process will most rapidly lead to full and consistent availability of the newly required nutrition information for consumers.

Given that FDA does not intend to enforce the self-executing provisions at this time, we encourage our State and local partners to proceed in a similar way. We do, however, encourage establishments that already have calorie and nutrition information available to continue to provide that information to consumers.

Section 403(q)(5)(H)(x) requires that FDA propose implementing regulations no later than one year after enactment of the ACA (21 U.S.C. 343(q)(5)(H)(x)). In addition, section 4205 authorizes FDA to require, by regulation, chain retail food establishments to disclose information about a nutrient, not explicitly required to be disclosed by section 4205, in the written nutrition information, if FDA determines that such information should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices (21 U.S.C. 343(q)(5)(H)(vi)).

Section 403(q)(5)(H)(viii)(I) establishes calorie disclosure requirements for certain articles of food sold from a vending machine that is operated by a person who is engaged in the business of owning or operating 20 or more vending machines (21 U.S.C. 343(q)(5)(H)(viii)(I)). Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposal related to calorie declaration for food sold in vending machines.

Section 4205 required FDA to publish a notice in the **Federal Register** specifying the terms and conditions under which restaurants or similar retail food establishments and vending machine operators not subject to the requirements of section 4205 could elect to be subject to requirements by registering with FDA (21 U.S.C. 343(q)(5)(H)(ix)). FDA has published this notice. See 75 FR 43182, July 23, 2010. Voluntary registration is discussed in section III.C. of this document.

E. FDA Activities Related to Implementation of Section 4205

On July 7, 2010, FDA published a notice in the **Federal Register** entitled "Disclosure of Nutrient Content Information for Standard Menu Items Offered for Sale at Chain Restaurants or Similar Retail Food Establishments and for Articles of Food Sold From Vending Machines" ("docket notice") (75 FR 39026 (July 7, 2010)), to solicit comments and suggestions on the new law. Comments to the docket were due September 7, 2010. In response to this docket notice, FDA received approximately 875 responses, each containing one or more comments. Many of these comments, in general, supported the nutrient disclosure requirements in chain retail food establishments and for food sold from vending machines, whereas some comments opposed such requirements.

On July 23, 2010, FDA published a **Federal Register** notice entitled, "Voluntary Registration by Authorized Officials of Non-Covered Retail Food Establishments and Vending Machine Operators Electing to Be Subject to the Menu and Vending Machine Labeling Requirements Established by Section 4205 of the Patient Protection and Affordable Care Act of 2010" ("registration notice") (75 FR 43182 (July 23, 2010)). In response to this notice, FDA received seven responses, none of which addressed registration.

On August 25, 2010, FDA published a "Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws" ("preemption guidance") (75 FR 52427 (August 25, 2010)). The preemption guidance discusses the preemptive effect of section 4205 and identifies the provisions of amended section 403(q) that became requirements upon enactment. Our current thinking on the preemptive effect of section 4205 is set out in section IX. of this document.

Also on August 25, 2010, FDA published a "Draft Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010" ("draft implementation guidance") (75 FR 52426, August 25, 2010). The draft implementation guidance described which provisions became requirements upon enactment of the law and which provisions FDA would implement through rulemaking. FDA received approximately 80 responses to this draft implementation guidance, each containing one or more comments. On January 25, 2011, FDA published in the **Federal Register** a notice withdrawing the draft implementation guidance (76 FR 4360 January 25, 2011)). FDA now intends to complete the notice and comment rulemaking process for section 4205 before initiating enforcement activities. In the course of developing this proposed rule, we have considered the comments received on the draft guidance.

We describe in more detail and respond to the comments to the notices and guidance documents, including the withdrawn draft implementation guidance, in this proposal. Some of the comments to the notices and guidances are duplicative. Therefore, in this document, when responding to

comments from the docket notice, the registration notice, or the draft implementation guidance, we will generally refer to them simply as "comments" without identifying to which document these were submitted. Comments that are outside the proposed scope of this rulemaking, such as those concerning labeling of ingredients, allergen labeling, and labeling of genetically engineered foods, will not be discussed.

II. Legal Authority

As stated in section I.D. of this document, on March 23, 2010, the Affordable Care Act (Pub. L. 111–148) was signed into law. Section 4205 amended section 403(q)(5) of the FD&C Act (21 U.S.C. 343(q)(5)) by amending section 403(q)(5)(A) and by creating new clause (H), which requires, in relevant part, covered establishments to provide certain nutrient declarations for standard menu items. Under section 403(a)(1) of the FD&C Act (21 U.S.C. 343(a)(1)), such declarations must be truthful and nonmisleading. Because food that is not in compliance with section 403 is deemed misbranded, food to which these requirements apply is deemed misbranded if these requirements are not met. In addition, under section 201(n) of the FD&C Act (21 U.S.C. 321(n)), the labeling of a food is misleading if it fails to reveal facts that are material in light of representations actually made in the labeling. Section 403(q)(5)(H)(x) requires that the Secretary of Health and Human Services (Secretary) issue proposed regulations no later than one year after enactment. Section 701(a) (21 U.S.C. 371(a)) vests the Secretary with the authority to issue regulations for the efficient enforcement of the FD&C Act. Thus, FDA has the authority to issue this proposed rule under sections 201(n), 403(a)(1), 403(q)(5)(H), and 701(a) of the FD&C Act.

FDA is proposing requirements that covered establishments provide calorie and other nutrition information for standard menu items, including food on display and self-service food. Also, FDA is proposing the terms and conditions for voluntary registration by establishments that are not automatically subject to the requirements of section 4205 that elect to become subject to the requirements. FDA is proposing to set out these provisions in new § 101.11.

III. The Proposal

A. Summary

This proposal would add a new section 101.11 to 21 CFR and make additional changes to FDA's regulations as needed to conform existing regulations to the new statutory requirements. In this section, we explain the provisions of the new proposed section 101.11, beginning with the definitions of several key terms in the proposal.

B. Definitions

The menu labeling requirements of section 4205 apply to standard menu items offered for sale in "covered establishments":

1. "Restaurants or similar retail food establishments" that are
- Part of a chain with 20 or more locations,
- "doing business under the same name", and
- "offering for sale substantially the same menu items"; and

2. Other restaurants or similar retail food establishments that have been voluntarily registered to be subject to the Federal requirements by an "authorized official".

Covered establishments must provide calorie information on "menus" and "menu boards," and other nutrition information upon request, for "standard menu items," including "combination meals," "food on display," "self-service food," and "variable menu items." The new nutrition labeling requirements do not apply to "custom orders," "daily specials," "food that is part of a customary market test," and "temporary menu items."

To establish the scope of establishments, labeling, and food covered by section 4205, FDA must define these and other key terms. Therefore, we are proposing in the introductory paragraph of § 101.11(a) that the definitions of terms in section 201 of the FD&C Act (21 U.S.C. 321) are applicable to these terms when used in proposed § 101.11. Additional terms are defined alphabetically in the proposed codified. Here, they are discussed in the order they are mentioned in the outline above, organized into three categories: (1) Terms related to the scope of establishments covered, (2) the terms menu and menu board, and (3) terms related to foods covered.

1. Scope of Establishments Covered

The menu labeling requirements in section 4205 of the Affordable Care Act apply to foods "offered for sale in a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering substantially the same menu items." They also apply to restaurants or similar retail food establishments that voluntarily register to become subject to the Federal requirements. Some of the questions related to the scope of establishments covered are very complex, and FDA offers several alternatives for public comment.

Covered Establishment

We are proposing in § 101.11(a) that the term "covered establishment" means a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items, as well as restaurants or similar retail food establishments that voluntarily register to become subject to the Federal requirements. FDA derived this proposed definition from the criteria in sections 403(q)(H)(i) and (ix)(I) of the FD&C Act. Section 403(q)(H)(i) describes which restaurants and similar retail food establishments must meet the new requirements: Restaurants and similar retail food establishments that are part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items. Section 403(q)(H)(ix)(I) allows restaurants or similar retail food establishments not otherwise subject to the requirements in section 403(q)(H) to register voluntarily to be subject to them (see section III.C below). Both restaurants and similar retail food establishments described in section 403(q)(H)(i) and those that register under section 403(q)(ix)(I) are subject to, or "covered" by, the nutrition labeling requirements of section 4205.

Terms within the definition of "covered establishment" are discussed below. We note that we have not proposed a definition for the statutory criterion, "part of a chain with 20 or more locations." For the purposes of this proposal, FDA is assuming the common meanings of the words in that phrase. However, FDA requests comment on whether the phrase should be defined in the final rule. In particular, we request comment on the terms "chain" and "location" in the context of the various types of corporate or other business arrangements or structures that might be relevant, including contracting arrangements.

Restaurant and Similar Retail Food Establishment

While the core coverage may seem clear, the relevant statutory term

("restaurants and similar retail food establishments") is ambiguous. It is possible to imagine a range of interpretations, calling for relatively narrow coverage (including only restaurants and those establishments that are closely analogous to restaurants) or relatively broad coverage (including a range of establishments that sell food retail). FDA offers here a proposed interpretation alongside several alternatives for public comment. Under the proposed interpretation, explained in detail below, a retail food establishment is "similar" to a restaurant, and hence, covered, if it offers for sale restaurant or restaurant-type food and its primary business activity is the sale of food to consumers. FDA gives examples of included and excluded establishments below.

Statutory context. As a starting point for developing a regulatory definition, we look to statutory context. As noted earlier, the 1990 NLEA amendments exempted two categories of food relevant for this discussion: (1) Food "which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or used in such establishments," and (2) food "which is processed and prepared primarily in a retail establishment, which is ready for human consumption, which is the type described in [(1)] and which is offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment." 21 U.S.C. 343(q)(5)(A)(i) and (ii). These are referred to in this document as "restaurant food" and "restaurant-type food," respectively.

When promulgating regulations in 1993 to implement NLEA, FDA interpreted the categories of restaurant and restaurant-type food broadly. The agency provided the following examples of restaurant food: Food sold in institutional food service establishments, transportation carriers, delicatessens and retail confectionery stores where there are facilities for immediate consumption on the premises, food service vendors such as mall cookie counters, and sidewalk carts where foods are generally consumed immediately where purchased or while the consumer is walking away, including similar foods sold from convenience stores; and food delivery systems or establishments where ready-to-eat foods are delivered to homes or offices. 21 CFR 101.9(j)(2)(ii). The agency included the following examples of restaurant-type food: Ready-to-eat foods that processed and prepared on-site and sold by independent delicatessens, bakeries, or retail confectionary stores where there are no facilities for immediate consumption; by in-store delicatessen, bakery, or candy departments; or at self-service food bars such as salad bars. FDA also issued guidance on the labeling of foods sold in restaurants and other retail establishments selling restaurant or restaurant-type foods (Ref. 23).

Section 4205 amended the statutory exemption from Federal nutrition labeling requirements for restaurant and restaurant-type food. In determining the scope of section 4205, FDA considered which restaurant and restaurant-type foods should remain exempt from the Federal nutrition labeling requirements and which should be covered by the new Federal nutrition labeling requirements of section 4205.

Public comments. In response to the docket notice and other **Federal Register** notices published in 2010, described in section I.E. above, FDA received numerous comments on the types of establishments that should be covered under section 4205. Some comments that were submitted to FDA supported the inclusion of a broad list of establishments such as those that had been exempted from nutrition labeling in FDA's implementing regulations of the NLEA. Some of these comments stated that concession stands at bowling alleys, amusement parks, stadiums, casinos, miniature golf courses, and other entertainment venues should be covered as well. These comments asserted that such establishments should be covered because consumers need to have access to calorie and other nutrition information for foods sold from such concession stands, and requiring nutrition information in all of these establishments provides a level playing field. A few of these comments maintained that establishments such as grocery stores and convenience stores contain facilities such as bakeries or cafes that are indistinguishable from their stand-alone counterparts and, therefore, should be covered by section 4205.

Other comments opposed the inclusion of concession stands at entertainment venues such as movie theaters, and restaurants at hotels, stating that the primary purpose of going to these establishments is not to buy food, but instead for entertainment or lodging. A few comments suggested that FDA adopt a definition that excludes establishments whose sale of prepared food (excluding pre-packaged snacks that already list nutritional information) is less than 35 percent of gross revenue. One comment suggested that FDA examine the percentage of sales derived at a particular retail location from food served for immediate consumption on the premises, and that, if more than 25 percent of total sales at a retail location are derived from the sale of food served for immediate consumption on the premises, the retail outlet is similar to a restaurant and should fall within the scope of § 4205.

Some comments opposed the inclusion of convenience stores and some grocery stores. The comments stated that not all chain convenience stores have menus or sell the same food items at all locations. The comments asserted that food in convenience stores is not standardized and that the foods differ depending on the techniques and preferences of the store employees preparing the foods. By contrast, according to the comments, food sold in restaurant chains is typically standardized and prepared in a homogeneous manner as dictated by corporate policy. The comments stated that some grocery stores have cafes, food courts, or otherwise sell restaurant food directly to consumers. Some comments contended that only grocery stores with seating areas should be covered. Other comments stated that FDA does not have authority under section 4205 to regulate individual departments or operations within a retail food establishment unless that establishment as a whole is similar to a restaurant.

FDA received a few comments regarding the possible inclusion of food-service contractors, which the comments described as companies that provide managed food and facility services to a variety of institutions, including hospitals, schools, stadiums/arenas and businesses, as covered establishments. Some of these comments stated that menus at establishments operated by food service contractors can vary from day-to-day and month-to-month. However, if food-service contractors have quick-service restaurants, the comments support calorie labeling in these establishments.

We considered these comments, in addition to the language and purpose of the statute, when deliberating on how to define restaurants and similar retail food establishments for purposes of this rulemaking. We also noted the existence of hybrid establishments, such as chain coffee vendors operating in retail bookstores and soup and sandwich counters, cafes, and food courts in grocery or convenience stores. For example, a grocery store may have a salad bar from which consumers select various foods that are ready for human consumption, processed and prepared primarily in the grocery store, and not offered for sale outside of the grocery

store. In addition, many establishments, such as certain coffee shops in bookstores, operate in or consist of multipurpose businesses, where entertainment, restaurant food and other goods and services are offered together or in close proximity.

Proposed definition. FDA tentatively concludes that a retail food establishment is an establishment whose primary business activity is the sale of food to consumers. FDA also tentatively concludes that in order for a retail food establishment to be "similar" to a restaurant, it must offer for sale restaurant or restaurant-type food. Although there are many types of establishments where consumers come into contact with food for purchase, FDA notes that the statutory text focuses explicitly on restaurants and retail food establishments that are "similar" to restaurants, rather than on all establishments where food is sold (often incidentally to or quite separately from the establishment's primary purpose). In light of the statutory language, FDA is proposing in 101.11(a) that the term "restaurant or similar retail food establishment" means a retail establishment that offers for sale restaurant or restaurant-type food, where the sale of food is the primary business activity of that establishment. FDA acknowledges that the statutory language is not entirely clear, and invites comments on various alternatives, but currently believes that the proposed definition fits best with the natural meaning of the language and its proper scope.

The sale of food would be considered to be a retail establishment's primary business activity if either (1) the establishment presents or has presented itself publicly as a restaurant (*e.g.,* through consumer-, industry- or investor-oriented materials) or (2) greater than 50 percent of a retail establishment's gross floor area is used for the preparation, purchase, service, consumption, or storage of food. Examples of when an establishment is presenting itself as a restaurant could include calling itself a restaurant on a consumer-oriented Web site, listing itself under "Restaurants" in the phone book, and using the term "restaurant" in its signage. Note that if a portion of the establishment were to present itself publicly as a restaurant (*e.g.,* a "café car" on a train), the first criterion would not necessarily be satisfied; the question would be how the establishment as a whole presents or has presented itself. See the discussion of facilities within establishments below. For the second criterion, gross floor area would include all floor space, wall to wall, including areas under built-in counters, cooking equipment, seating, and similar furniture. Multi-purpose seating areas used substantially for activities other than food consumption, such as seating in entertainment venues (*e.g.,* shows, sport stadiums), would not be counted in the share of floor space devoted to the sale of food. FDA notes that some establishments may have seating outside for the consumption of food (*e.g.,* outdoor cafes). We seek comment on whether this space should be considered in determining gross floor area.

As an alternative to using percentage of gross floor area as an indicator of the primary business activity of an establishment, FDA is seeking comment on an approach based on the percent revenue of the business. Under this alternative approach, the sale of food would be considered to be a retail establishment's primary business activity if either (1) the establishment presents or has presented itself publicly as a restaurant or (2) more than 50 percent of the establishment's revenues are generated by the sale of food. FDA requests comment on this alternative means of determining an establishment's primary business activity. We specifically seek comment on whether 50 percent is the appropriate threshold or whether it should be higher or lower. We also welcome comment on other suggested alternative criteria for identifying the primary business activity of an establishment.

Under the proposal that includes gross floor space, restaurants and similar retail food establishments would likely include table service and quick-service (or fast food) dining establishments, cafeterias,[1] pastry and retail confectionary stores, coffee shops, snack bars, and ice cream parlors, as well as grocery stores and convenience stores that sell restaurant or restaurant-type food. In addition, multi-purpose establishments that offer restaurant or restaurant-type food and include areas for entertainment (*e.g.,* games or children's shows) would be restaurants or similar retail food establishments if they present themselves or have presented themselves publicly as restaurants, regardless of whether the amount of floor space dedicated to the sale of food is greater than 50 percent of the venue's gross floor space.

Correspondingly, establishments that do not sell restaurant or restaurant-type food or whose primary business activity is not the sale of food would not be considered restaurants or similar retail food establishments and would not have to comply with the menu labeling provisions of 403(q)(5)(H). For example, where a multi-purpose establishment has never presented itself publicly as a restaurant and the percentage of the establishment's gross floor area devoted to the sale of food is less than 50 percent, the establishment would not be a restaurant or similar retail food establishment under this proposal. FDA expects that most movie theaters, amusement parks, general merchandise stores with in-house concession stands, hotels, and transportation carriers such as trains and airplanes will not be considered restaurants or similar retail food establishments under this proposal, because, in general, they do not present themselves to the public as restaurants, nor are they likely to meet the floor space (or revenue) threshold.

The following table provides examples of establishments that FDA expects would be considered restaurants or similar retail food establishments under the proposal and those that would not. Note that whether a specific establishment would be considered a restaurant or similar retail food establishment would depend on whether that specific establishment met the proposed regulatory criteria. In addition, a restaurant or similar retail food establishment is covered by the new menu labeling requirements if it is part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items, or it voluntarily registers with FDA.

[1] Many cafeterias located within other establishments, *e.g.,* most school and hospital cafeterias, would be considered part of larger establishments they are situated within and would not be covered by the proposed rule. See the discussion of facilities located within larger establishments below.

TABLE 1—ARE THE FOLLOWING ESTABLISHMENTS "RESTAURANTS OR SIMILAR RETAIL FOOD ESTABLISHMENTS" UNDER THE PROPOSED RULE?

Generally yes	Generally no
Table service dining establishments	Movie theaters
Quick service (fast food) establishments	Amusement parks
Cafeterias	General merchandise stores
Pastry and retail confectionary stores	Hotels
Coffee shops	Trains
Snack bars	Planes
Ice cream parlors	
Multi-purpose establishments that have presented themselves publicly as restaurants	
Establishments within larger establishments that are part of a chain with locations outside of the larger establishment's chain (*e.g.,* chain coffee shop in a bookstore; see discussion below)	
Grocery stores	
Convenience stores	

Note: While the appropriate categorization will often be straightforward, the word "generally," used in the headings, is an important qualification. For example, some grocery and convenience stores may meet the definition of "restaurants or similar retail food establishments" under this proposed rule, while others may not.

Many facilities that sell restaurant or restaurant-type food are located within larger retail establishments, such as a coffee shop in a bookstore, a hot dog stand in a stadium, a quick-service counter in an establishment selling a range of packaged foods and household products ("Superstore XYZ"), or a concession stand in an entertainment venue. Some of these facilities would be considered separate retail establishments, while others would be considered part of their larger retail establishments.

If a facility selling restaurant or restaurant-type food is part of a chain with locations outside of the chain of the larger retail establishment, the facility would be considered a separate retail establishment. For example, if a coffee shop in a bookstore is part of a chain of coffee shops with locations outside of the chain of bookstores, the coffee shop would be considered a separate retail establishment. When determining the primary business activity of the coffee shop, only the representations of the coffee shop itself and the coffee shop's floor area would be considered. The coffee shop in the bookstore would most likely meet the proposed definition of a restaurant or similar retail food establishment.

If, by contrast, a facility selling restaurant or restaurant-type food is not part of a chain with locations outside of the chain of the larger retail establishment, the facility would be considered part of the larger retail establishment. For example, if Superstore XYZ has a café that appears only in other locations of the Superstore XYZ chain, the café would be considered part of Superstore XYZ. When determining the primary business activity of Superstore XYZ, the agency would ask whether the superstore as a whole presents or has presented itself as a restaurant and what percentage of the gross floor area of the superstore as a whole, including the café, is dedicated to the sale of food. Because the café would not be considered an "establishment," it would not be eligible for being a "restaurant or similar retail food establishment" under this proposal. As a result, whether the cafe independently presents itself as a restaurant (*e.g.,* by listing itself in the phone book under "Restaurants") or has greater than 50% of its floor space devoted to the sale of food would be irrelevant.

As another example, a movie theater concession stand that appears only in other movie theaters in that particular chain of movie theaters would not be considered a separate establishment for the purposes of this proposed rule. Because movie theaters usually do not present themselves as restaurants and do not dedicate more than 50 percent of their gross floor area to the sale of food, they generally would not fall within the definition of restaurant or similar retail food establishment in this proposed rule.

FDA requests comment on whether such facilities within larger establishments should be included within the definition of restaurants and similar retail food establishments in the final rule. FDA particularly requests comment on this approach with respect to movie theaters, other entertainment-type venues, and Superstores that offer restaurant or restaurant-type food.

An alternative. One alternative to our proposed definition is to define "restaurant or similar retail food establishment" to mean a retail establishment where the sale of restaurant or restaurant-type food—as opposed to food in general—is the primary business activity of that establishment. Restaurant or restaurant-type food here would not include packaged food that is required to bear Nutrition Facts. Under this alternative, the agency would consider the sale of restaurant or restaurant-type food to be a retail establishment's primary business activity if either (1) the establishment presents itself or has presented itself publicly as a restaurant, or (2) a total of more than 50 percent of a retail establishment's gross floor area is used for the preparation, purchase, service, consumption, or storage of restaurant or restaurant-type food or its ingredients. As with the proposed definition, multi-purpose seating areas used substantially for activities other than food consumption, such as seating in entertainment venues (*e.g.,* shows, sport stadiums) would not be counted in the share of floor space devoted to the sale of restaurant or restaurant-type food. Under this alternative, FDA solicits comment on whether a percent revenue approach to determining an establishment's primary business activity is the sale of restaurant or restaurant-type foods.

Under this alternative, "restaurant or similar retail food establishment" would include table service and quick-service (or fast food) dining establishments, cafeterias, pastry and retail confectionary stores, coffee shops, snack bars, and ice cream parlors. Establishments where the primary business activity is not the sale of restaurant or restaurant-type food would not be considered restaurants or similar retail food establishments. In contrast with the proposed definition, establishments that are unlikely to be considered restaurants or similar retail food establishments under this alternative include grocery and convenience stores, in addition to hotels and transportation carriers such as trains and airplanes. The option would

not cover grocery and convenience stores because it would not count the floor space used to sell food that is not restaurant or restaurant-type food (*e.g.,* packaged food) in determining the primary business activity.

The following table provides examples of establishments that FDA expects would be considered restaurants or similar retail food establishments under the alternative and those that would not. Note that whether a specific establishment would be considered a restaurant or similar retail food establishment would depend on whether that establishment met the alternative regulatory criteria. In addition, a restaurant or similar retail food establishment is only covered by the new menu labeling requirements if it is part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items.

TABLE 2—ARE THE FOLLOWING EESTABLISHMENTS "RESTAURANTS OR SIMILAR RETAIL FOOD ESTABLISHMENTS" UNDER THE ALTERNATIVE TO THE PROPOSED DEFINITION?

Generally yes	Generally no
Table service dining establishment	Movie theaters
Quick service (fast food) establishments	Amusement parks
Cafeterias	General merchandise stores
Pastry and retail confectionary stores	Hotels
Coffee shops	Trains
Snack bars	Planes
Ice cream parlors	Grocery stores
Multi-purpose establishments that have presented themselves publicly as restaurants	Convenience stores
Establishments within larger establishments that are part of a chain with locations outside of the larger establishment's chain (*e.g.,* chain coffee shop in a bookstore; see discussion below)	

Note: While the appropriate categorization will usually be straightforward, the word "generally," used in the headings, is an important qualification. For example, some grocery and convenience stores will qualify as similar retail food establishments under the rule, while others may not. The answer depends on the definition proposed in this section.

Requests for comment. We request comment on the proposed definition and on the alternatives. We are also interested in comments on whether we should use "primary business activity," or a different test, as a basis for determining whether an establishment is a restaurant or similar retail food establishment. We also request comment on whether we should choose a different number for the cutoff for the percent of gross floor area for determining the primary business activity of the retail establishment or whether we should choose the percent revenue approach discussed above or different criteria for determining primary business activity, such as whether the consumer pays for admission to the establishment.

As we have noted, some comments have urged a broader test on public health grounds. Any such test must explain how it is consistent with statutory language. For example, if FDA adopted a percentage revenue threshold test for determining primary business activity and set the threshold at 25%, as some comments suggested, would chain movie theater concessions be included? If so, would this test be appropriate, given the statutory language? We are also interested in comments on the impact of the proposed definition and alternatives on the sale of restaurant or restaurant-type food by large chain "Superstores" or by contractors servicing similar food outlets in 20 or more locations. FDA notes that one food contractor commented that it offers quick service or fast food concepts in some of its locations. The comment further stated that menus in these locations are highly standardized and consistent across locations. The comment supported calorie labeling on menus and menu boards and the availability of additional written nutrition information for these types of locations. Comments supporting or opposing the possible definitions discussed here should include a rationale and should explain the impact of the recommendation on the implementation of section 4205.

Doing Business Under the Same Name

The menu labeling requirements apply to restaurants and similar retail food establishments that are part of a chain with 20 or more locations "doing business under the same name." We are proposing in § 101.11(a) that the term "doing business under the same name" means sharing the same name, where the term "same name" includes names that are either exactly the same, or are slight variations on each other due, for example, to the region, location or size.

In some cases, a chain retail food establishment's name may vary slightly from the names of other establishments in the same chain, often reflecting the location or size of the establishment. For example, a quick-service restaurant, "Joe's Burgers New York Ave.," located on New York Avenue, might have another location on Pennsylvania Avenue called "Joe's Burgers Pennsylvania Ave." As another example, a dine-in restaurant with the name "ABC" might have an outlet in an airport called "ABC Express" that offers take-out. FDA is proposing that the term "same name" includes names that are slight variations on each other, for example, based on region, location or size (*e.g.,* "Joe's Burgers New York Ave." and "Joe's Burgers Pennsylvania Ave." or "ABC" and "ABC Express"). FDA requests comment on this definition. Specifically, we request comment on whether the relevant term should be understood instead to refer to the underlying name of ownership, such as the name of a parent company, or the name of the entity conducting corporate business on behalf of the establishment, such as the name of a contractor operating an establishment, regardless of the public name used by individual establishments.

Offering for Sale Substantially the Same Menu Items

We are proposing in § 101.11(a) that the term "offering for sale substantially the same menu items" means offering for sale menu items that use the same general recipe and are prepared in substantially the same way with substantially the same food components, even if the name of the menu item varies. For example, a chain restaurant may make a sandwich and call it "Bay View Crab Cake," whereas another restaurant in that chain that makes the same sandwich prepared the same way and with the same ingredients may call it "Ocean View Crab Cake." These two restaurants would be offering for sale the same menu item. In addition, restaurants and similar retail

food establishments that are part of a chain can still be offering for sale substantially the same menu items if the availability of some menu items varies within the chain. For example, a covered restaurant in a chain may have a limited menu and not carry all the standard menu items as another restaurant in the chain. However, if most of the standard menu items in the restaurant with the limited menu are sold in the restaurant with the more extensive menu, these two restaurants would be offering for sale substantially the same menu items. As another example, a chain retail food establishment might offer standard menu items that are mostly the same, except for a few that are unique to that chain retail food establishment. That chain retail food establishment would still be offering for sale substantially the same menu items as the other establishments in the chain. In this proposed definition, the term "menu items" refers to food items that are offered for sale in a restaurant or similar retail food establishment.

Authorized Official

Restaurants and similar retail food establishments that are not automatically covered by the new menu labeling requirements can voluntarily register to be subject to them. Section 403(q)(5)(H)(ix) provides that "[a]n authorized official of any restaurant or retail food establishment * * * not subject to the requirements of this clause may elect to be subject to the requirements of such clause, by registering biannually the name and address of such restaurant or similar retail food establishment * * * with the Secretary, as specified by the Secretary by regulation." We are proposing in § 101.11(a) that the term "authorized official of a restaurant or similar retail food establishment" means the owner, operator, agent in charge, or any other person authorized by the owner, operator, or agent in charge of a restaurant or similar retail food establishment not subject to the requirements of section 4205 to voluntarily register the establishment with FDA to become subject to the requirements of section 4205. FDA tentatively concludes that it is appropriate for the owners, operators, or agents in charge to be able to authorize other persons to register on their behalf.

Summary of Proposed Scope of Covered Establishments

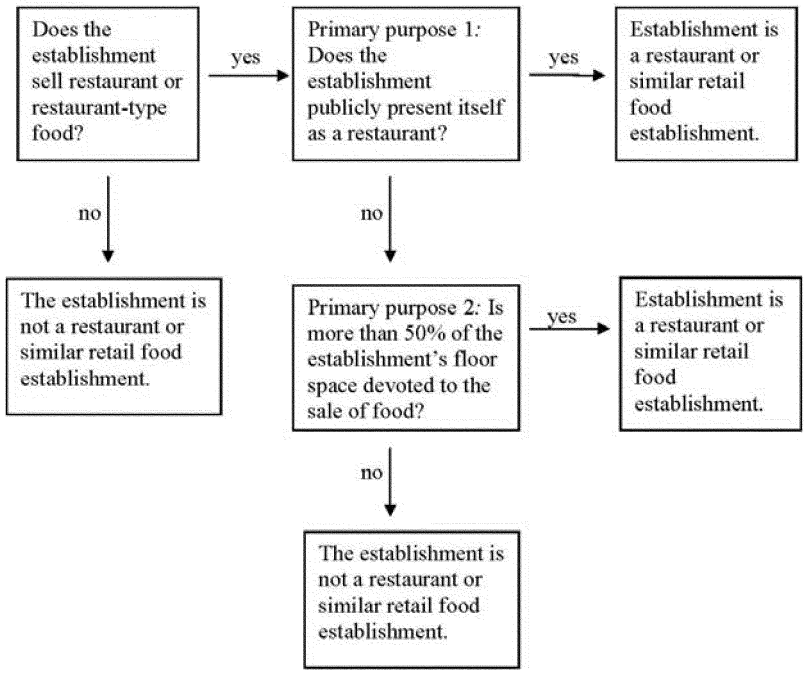
When is an entity an establishment? If an entity is free-standing, it would be an establishment. If an entity is inside an establishment, then the entity could be considered a separate establishment or it could be considered part of the establishment in which it is situated. If the entity is part of a chain with locations outside of the chain of the larger establishment, then the entity would be a separate establishment. If not, the entity would be considered part of the larger establishment.

TABLE 3—WHEN IS AN ENTITY AN ESTABLISHMENT?

	Is the entity an establishment?
The entity is free-standing.	Yes.
The entity is inside an establishment and:	
• It only appears in locations of the larger establishment's chain (*e.g.,* Superstore XYZ Café in Superstore XYZ).	No.
• It is part of a chain with locations outside of the larger establishment's chain (*e.g.,* coffee shop in a bookstore that is part of a chain of coffee shops with locations that are free-standing).	Yes.

When is an establishment a restaurant or similar retail food establishment? To be a restaurant or similar retail food establishment, an establishment must sell restaurant or restaurant-type food. In addition, the sale of food in general must be the establishment's primary purpose. The sale of food is an establishment's primary purpose if (1) the establishment publicly presents itself or has publicly presented itself as a restaurant, or (2) the establishment dedicates more than 50% of its floor space to the sale of food. This is demonstrated in following flow chart:

Figure 1.



When is a restaurant or similar retail food establishment a covered establishment? A restaurant or similar retail food establishment is a "covered establishment" if (1) it is part of a chain with 20 or more locations, doing business under the same name, and offering for sale substantially the same menu items, or (2) it has voluntarily registered with FDA to be subject to the Federal requirements. FDA refers to the first category as "chain retail food establishments."

TABLE 4—STATUTORY CRITERIA FOR CHAIN RETAIL FOOD ESTABLISHMENTS:

Statutory criteria	Proposed interpretation
Part of a chain with 20 or more locations	The restaurant or similar retail food establishment is part of a chain with at least 19 other establishments.
Doing business under the same name	Establishments in the chain share the same name or have names that are slight variations on each other, due to, for example, region or size (e.g., ABC and ABC Express, Joe's Burgers New York Ave. and Joe's Burgers Pennsylvania Ave).
Offering for sale substantially the same menu items	Establishments in the chain offer for sale menu items that use the same general recipes and are prepared in substantially the same ways with substantially the same food components, even if the name of the menu item varies. Establishments can be offering for sale substantially the same menu items even if the availability of some menu items varies within the chain.

Voluntary registration. If a restaurant or similar retail food establishment is not part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items, the establishment may voluntarily elect to be subject to the new Federal requirements by registering with FDA.

2. Menu and Menu Board

Covered establishments are required to post calories and other information on menus and menu boards. Section 403(q)(5)(H)(xi) provides that "the term 'menu' or 'menu board' means the primary writing of the restaurant or other similar retail food establishment from which a consumer makes an order selection." We are proposing in § 101.11(a) to essentially codify this definition. The proposed regulatory definition also clarifies that menus include breakfast, lunch and dinner menus; dessert menus; beverage menus; children's menus; other specialty menus; electronic menus; and menus on the Internet. Menus may be in different forms, *e.g.,* booklets, pamphlets, or single sheets of paper. Menu boards include drive-through menu boards as well as display boards above ordering counters.

In developing this proposed definition, FDA considered comments expressing various opinions on what constituted a menu or menu board. According to several comments, FDA should allow electronic devices, such as Internet-enabled smart phones, text messaging, and kiosks, to serve as primary writings. One comment requested that FDA clarify whether a writing posted on the Internet would only be considered a menu if a consumer may place an order online. Several comments asserted that marketing materials (*e.g.,* banners, table tents) should not be considered menus.

FDA tentatively concludes that "menu" or "menu board" includes any writing of the covered establishment that is the primary writing from which a consumer makes an order selection.

FDA considered whether "primary" should be from the perspective of the establishment or the consumer. If covered establishments were only required to label the writing they consider to be their primary writing from which consumers make order selections, only one writing would be required to be labeled. For example, at a quick service restaurant that has two menu boards, one above a counter inside and one outside at a drive-through, the one the restaurant considers its "primary writing" would be labeled, but the other might not. Given the importance for all consumers to have access to nutrition information when making order selections, FDA proposes that "primary writing" should be interpreted from a consumer's vantage point. For example, while a printed menu may be the "primary writing" of a restaurant used by a customer ordering food while dining inside the restaurant itself, a menu mailed as a flyer mailed to another customer's home could be the "primary writing" of the restaurant used by that customer ordering take-out or delivery from the same restaurant. Both the printed menu and the menu flyer would meet the definition of "menu" or "menu board" under proposed § 101.11(a). We recognize that some establishments may send menus as a form of advertising. FDA tentatively concludes advertisements for food fall outside the scope of section 4205. However, take-out and delivery menus, which include all or a significant portion of items offered for sale and serve as the primary writing from which consumers make their order selections, would be menus under the proposed rule. FDA requests comment on these tentative conclusions.

FDA notes that many consumers order restaurant or restaurant-type food from restaurants or similar retail food establishments over the phone or Internet. FDA tentatively concludes that if consumers can order from a covered establishment online, over the phone, or by fax, using a writing of the covered establishment on the Internet as the primary writing from which he or she makes his or her order selection, then the writing on the Internet is a menu for the purposes of section 403(q)(5)(H).

3. Food Covered

Section 4205 requires covered establishments to provide calorie and other nutrition information for "food that is a standard menu item," including combination meals, variable menu items, self-service food, and food on display. The new requirements do not apply to custom orders, daily specials, food that is part of a customary market test, and temporary menu items.

Food

The term "food" is defined in section 201(f) of the FD&C Act, in relevant part, as "articles used for food or drink for man * * * chewing gum, and articles used for components of any such article." 21 U.S.C. 321(f). Under section 201 of the FD&C Act, this definition applies "for purposes of this Act." Therefore, articles of food that are offered for sale in covered establishments as standard menu items, including food on display and self-service foods would generally be subject to section 403(q)(5)(H). The term "food" includes foods that are also regulated by other U.S. Government agencies, such as meat, poultry, and processed egg products, which are also regulated by the United States Department of Agriculture (USDA), and alcoholic beverages regulated by the Alcohol and Tobacco Tax and Trade Bureau (TTB) within the United States Department of the Treasury.[2] Comments submitted to FDA supported the position that meat, poultry, processed egg products, and alcoholic beverages are considered "articles of food" subject to the requirements of amended section 403(q) because they are foods as defined in the FD&C Act and they provide a significant amount of calories.

Other comments stated that TTB, which regulates the labeling of certain alcohol beverages pursuant to the provisions of the Federal Alcohol Administration Act (FAA Act) (27 U.S.C. 201 *et seq.*), does not currently require nutrition labeling for the alcoholic beverages it regulates, as required for packaged food regulated by FDA. The comments stated further that while TTB requires a statement of average analysis on labels that make calorie or carbohydrate claims, this statement includes only calories, carbohydrates, protein, and fat. See TTB Ruling 2004–1. *http://www.ttb.gov/rulings/2004-1.pdf.* The comments noted that TTB does not require the declaration of sugar, fiber, sodium, or cholesterol content on a beer label. As a result, these comments stated that beer brewers would have to undertake a substantial testing program to be able to provide that nutrition information for consumers. In addition, one comment expressed concern with obtaining nutrition information, stating that beers produced by small brewers have greater variation in alcohol content and ingredients than beers within the existing "regular beer" category in USDA's nutrition database. However, this comment stated that general classifications can be established that will provide industry members and consumers with accurate calorie and nutritional information. The comment further stated that industry members could work with USDA to develop easily measured criteria, such as original gravity measurement, that would provide a consistent benchmark for brewers and accurate information for consumers. The comment also maintained that, absent agreement between FDA and TTB with respect to labeling formats, action by small brewers to provide nutrition information pursuant to amended section 403(q) would contradict current TTB guidance and create uncertainty when a pending TTB rulemaking on "serving facts" is completed.[3] Accordingly, the comment urged FDA to delay the application of the new requirements to alcohol beverages pending agreement between FDA and TTB on a consistent methodology.

FDA has considered these comments and consulted with TTB and USDA in developing this proposed rule. Section 4205 amends section 403(q) of the FD&C Act (21 U.S.C. 343(q)), which generally provides nutrition labeling requirements for certain foods. Section 4205 provides nutrition labeling requirements directed specifically toward standard menu items sold in covered establishments. FDA tentatively concludes that the nutrition disclosure requirements in amended section 403(q)(5)(H) for standard menu items offered for sale in covered establishments apply to foods for human consumption, including meat, poultry, and processed egg products, even though they are also regulated by USDA. This tentative conclusion is consistent with FDA's position that FDA has jurisdiction under the FD&C Act over meat, poultry, and

[2] FDA exclusively regulates the labeling of alcoholic beverages that are not under TTB's jurisdiction, including beers that do not meet the definition of a "malt beverage" under the Federal Alcohol Administration Act (FAA Act) (27 U.S.C. 201 *et seq.*) and wine beverages containing less than 7 percent alcohol by volume. See, *e.g.,* FDA, "Guidance for Industry: Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration; Draft Guidance." August 2009. *Available at http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm166239.htm.* Malt beverage is defined in section 117(a)(7) of the FAA Act (27 U.S.C. 211(a)(7)) and TTB regulations at 27 CFR 7.10.

[3] In the **Federal Register** of July 31, 2007 (72 FR 41860), TTB published a proposed rule to amend its regulations to require a statement of the percentage of alcohol on all alcoholic beverages and a serving facts panel, which would include a statement of calories, carbohydrates, fat and protein. This proposed rule has not been finalized.

processed egg products in interstate commerce.

While alcohol beverages are "food" under the FD&C Act, FDA recognizes that at least one court has held that TTB has exclusive jurisdiction over the labels of the alcohol beverages it regulates under the FAA Act. *Brown-Forman Distillers Corp.* v. *Mathews,* 435 F. Supp. 5 (W.D.Ky. 1976). Providing nutrition information required in section 4205 for alcohol beverages should result in a similar public health benefit as providing the information for a food for which the labeling is exclusively regulated by FDA. However, it is not clear that Congress intended for the nutrition information disclosures required by section 4205 to apply to alcohol beverages, given that the labels of the majority of alcohol beverages are regulated by TTB. For the purposes of this proposal, FDA tentatively concludes that the new menu labeling requirements do not apply to alcohol beverages. Therefore, proposed § 101.11(b)(1)(ii) provides that the labeling requirements do not apply to alcohol beverages. We request comment on whether alcohol beverages should be within the scope of the requirements of section 4205 and proposed 21 CFR 101.11. In any case, the provisions of section 4205 do not apply to and have no effect on the labels of food products sold in packaged form, including meat, poultry and processed egg products that are regulated by USDA or on the labels of alcoholic beverages regulated by TTB under the FAA Act.

Restaurant Food

We are proposing in § 101.11(a) that "restaurant food" means food that is served in restaurants or other establishments in which food is served for immediate human consumption, *i.e.,* to be consumed either on the premises where the food is purchased or while walking away, or that is sold for sale or use in such establishment. This definition corresponds to the way the agency uses the term "restaurant food" in § 101.10, "Nutrition labeling of restaurant foods." See 61 FR 40320 (Aug. 2, 1996). It also reflects the food described in section 403(q)(5)(A)(i) of the FD&C Act.

Restaurant-Type Food

We are proposing in § 101.11(a) that "restaurant-type food" means food of the type described in the definition of "restaurant food" that is ready for human consumption, offered for sale to consumers but not for immediate consumption, processed and prepared primarily in a retail establishment, and not offered for sale outside of that establishment. This definition reflects the food described in section 403(q)(5)(A)(ii).

Standard Menu Item

We are proposing in § 101.11(a) that the term "standard menu item" means a restaurant or restaurant-type food that is routinely included on a menu or menu board or that is routinely offered as a self-service food or food on display. FDA notes that, unlike the term "menu," the term "standard menu item" is not defined in section 4205. In developing this proposed definition, FDA considered the relationships between sections 403(q)(5)(H)(i), (ii), and (iii). Section 403(q)(5)(H)(i), entitled "General requirements for restaurants and similar retail food establishments," requires covered establishments to "disclose the information described in subclauses (ii) and (iii)," "in the case of food that is a standard menu item." Sections 403(q)(5)(H)(ii)(I)(aa) and (II)(aa) require calorie declarations on menus and menu boards, respectively, and section 403(q)(5)(H)(iii) requires calorie declarations for self-service food and food on display.

FDA considered whether only self-service food and food on display that appear on menus or menu boards should be covered. However, the examples Congress provides for self-service food and food on display in section 403(q)(5)(H)(iii) ("food sold at a salad bar, buffet line, cafeteria line, or similar self-service facility, and for self-service beverages or food that is on display and that is visible to customers") generally do not appear on menus or menu boards—customers often simply pick up their selections and pay a cashier. In addition, in certain establishments where customers do order self-service food or food on display, *e.g.,* where "salad bar" or "breakfast buffet" is listed on a printed menu at a sit-down restaurant, the individual items on the salad bar or the breakfast buffet generally are not listed on the printed menu. Any signs identifying the individual foods on the salad bar or buffet are intended to be viewed after the customer orders.

These examples—salad bars, buffet lines, and cafeteria lines—are explicitly named in section 403(q)(5)(H)(iii), so they must fall within the scope of the new law. Therefore, FDA proposes to interpret "standard menu item" to mean a food that is routinely listed on a menu or menu board or that is routinely offered as self-service food or food on display. For example, a hamburger, a combination meal, and a specific type of pizza (*e.g.,* "deluxe pizza") that regularly appear on a restaurant menu would be considered standard menu items. Potato salad that is routinely offered at a salad bar, pancakes that are routinely offered at a buffet, and pudding that is routinely offered at a cafeteria line would be considered standard menu items, as well. This interpretation allows for the types of foods on display and self-service foods described in section 403(q)(5)(H)(iii) to be covered and gives meaning to the reference in section 403(q)(5)(H)(i) to section 403(q)(5)(H)(iii) ("in the case of food that is a standard menu item * * * the [covered establishment] shall disclose the information described in subclauses (ii) and (iii)."). Correspondingly, FDA tentatively concludes that "menu item" should be considered a food item that is listed on a menu or menu board or that is offered as a self-service food or food on display. FDA requests comment on the proposed definition of standard menu item.

Multiple Servings

Some comments contended that foods sold in multiple servings such as a bucket of chicken pieces, rotisserie chicken, and full rack of ribs are not standard menu items because they are not sold for immediate consumption. Other comments stated that bakery items such as individually sold bagels or cookies also should not be covered. Other comments did not oppose a requirement for providing some calorie and other nutrition information for these multiple-serving foods, but recommended that the calorie declaration for them be by serving, which, they contended, would be more meaningful. Two industry comments stated that they received consumer complaints when the calories were declared for whole pizzas, as was required by some jurisdictions. The comments stated that the consumers claimed that this type of declaration was confusing and impractical, and they asserted that nutrition and calorie information should be disclosed per slice. Other comments stated that the calories should be declared for the food offered for sale and not for each serving.

FDA disagrees with the comments that stated that multi-serving foods are not standard menu items. Section 403(q)(5)(H) requires that calories be disclosed for standard menu items at covered establishments, regardless of how many servings included in the item. Multi-serving foods that are routinely included on a menu or menu board (*i.e.,* the primary writing of the restaurant or similar retail food establishment from which a customer makes an order selection) or routinely offered as a self-service food or food on

display would meet FDA's proposed definition of standard menu item. FDA requests comments on this issue.

Combination Meal

We are proposing in § 101.11(a) that the term "combination meal" means a standard menu item that consists of more than one food item; for example, a meal that includes a sandwich, a side item, and a drink would be a combination meal. A combination meal may be represented on the menu or menu board in narrative form, numerically, or pictorially. A combination meal may include one or more variable items and may itself be a variable menu item, as that term is defined in this section. For example, the side item may have several options (*e.g.,* fries, salad, or onion rings) or the drink may vary (*e.g.,* soft drinks, milk, or juice), and the customer selects which of these items will be included in the meal.

Variable Menu Item

We are proposing in § 101.11(a) that the term "variable menu item" means a standard menu item that comes in different flavors, varieties, or combinations, and is listed as a single menu item. As examples, variable menu items may have flavoring options, (*e.g.,* a milkshake that is available in vanilla, chocolate, or strawberry flavors) or topping options (*e.g.,* pizza prepared with a selection of toppings).

Self-Service Food

We are proposing in § 101.11(a) that the term "self-service food" means restaurant or restaurant-type food that is offered for sale at a salad bar, buffet line, cafeteria line, or similar self-service facility, and self-service beverages. This definition covers food that the customer serves himself or herself, such as food at hot and cold food bars or beverages in a self-service beverage machine in a restaurant. FDA considers the term "facility" as it is used in section 403(q)(5)(H)(iii) to refer to a self-service fixture in a covered establishment, and not necessarily to the entire establishment. For example, a salad bar in a pizzeria would be a self-service facility, while the pizzeria as a whole would be a covered establishment if it as part of a chain of 20 or more locations doing business under the same name and offering for sale substantially the same menu items. Self-service foods are a subset of food on display.

Food on Display

We are proposing in § 101.11(a) that the term "food on display" means restaurant or restaurant-type food that is visible to the customer before the customer makes a selection, so long as there is not an ordinary expectation of further preparation by the consumer before consumption. Under the proposed definition, food on display would include food packaged at the customer's request, such as a slice of pizza sold at a counter or an entrée item served on a buffet line, or pre-wrapped by the establishment for direct customer selection, such as a sandwich prepared on the premises and displayed in a case. FDA tentatively concludes that this term includes food that is behind a glass counter or another viewing apparatus for the purposes of showing a serving or meal suggestion. Food on display would not encompass meats and cheeses sold at delicatessens in grocery stores, given that there is an ordinary expectation that the consumer will further prepare those foods before consumption, *e.g.,* by using the meat and cheese to make a sandwich.

Custom Order

We are proposing in § 101.11(a) that the term "custom order" means a food order that is prepared in a specific manner based on an individual consumer's request, which requires the restaurant or similar retail food establishment to deviate from its usual preparation of a menu item. For example, a club sandwich ordered without the bacon would be considered a custom order if the establishment usually includes bacon in its club sandwich.

Daily Special

We are proposing in § 101.11(a) that the term "daily special" means a menu item that is prepared and offered for sale on a particular day, that is not routinely listed on a menu or offered by the covered establishment, and that is promoted by the covered establishment as a special menu item for that particular day. Often, such items are added to the menu on a particular day through inserted slips of paper or written on erasable menu boards. However, an item that is offered for sale every week on Mondays is routinely offered and therefore would not be considered a daily special. In addition, if a standard menu item is offered at a discounted price on a particular day, the item would not be considered a daily special. For example, if a turkey club sandwich is a standard menu item at a restaurant and normally costs 5 dollars, but on Fridays the same turkey club sandwich is specially advertised as costing only 4 dollars, FDA tentatively concludes that the nutrient content disclosure requirements for standard menu items would still apply to the turkey club sandwich on Fridays; the sandwich would not be considered a "daily special" under § 101.11(a) merely because it is specially discounted. Similarly, if a covered establishment offers individual menu items together at a discount on a particular day, they would also not be a daily special. FDA requests comment on this definition.

Food That Is Part of a Customary Market Test

We are proposing in § 101.11(a) that the term "food that is part of a customary market test" means food that is marketed in a covered establishment for fewer than 90 consecutive days in order to test consumer acceptance of the product.

Some comments from industry stated that the 90-day time period should be calculated per market, not per chain, and asked that we clarify when the 90-day time period begins. These comments also stated that 90 days may not be long enough for a test market.

FDA points out that the 90-day time period is a statutory requirement. FDA proposes to interpret the 90-day time period to mean consecutive days beginning when the menu item is first offered for sale in the specific location. This interpretation is based on FDA's understanding of how test marketing is ordinarily done. FDA requests comment about our interpretation of a 90-day consecutive time frame on the test marketing of products.

Temporary Menu Item

We are proposing in § 101.11(a) that the term "temporary menu item" means a food that appears on a menu or menu board for less than a total of 60 days per calendar year. As with the 90-day time period for food that is part of a customary market test, the 60-day time period for temporary menu items is a statutory requirement. To provide flexibility, the 60 days includes the total of consecutive and non-consecutive days the item appears on the menu.

C. Requirements for Covered Establishments

1. Applicability

FDA is proposing in § 101.11(b)(1)(i) that menu labeling requirements apply to standard menu items offered for sale in covered establishments. As discussed in section I.D., under 403(q)(5)(H)(i), menu labeling requirements apply to food that is a standard menu item that is offered for sale in a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations doing business under the same

name and offering for sale substantially the same menu items. Whether a chain has 20 or more locations does not depend on the type of ownership of its locations (*e.g.,* whether owned by the corporate owner of the chain or individual franchisees).

As discussed in section III.C. of this document, section 403(q)(5)(H)(ix) includes a provision that permits restaurants and similar retail food establishments not subject to the requirements of section 403(q)(5)(H) (*e.g.,* a restaurant that is part of a chain with fewer than 20 locations) to register with FDA to voluntarily elect to become subject to the requirements of section 403(q)(5)(H). Consequently, FDA is proposing in § 101.11(b)(1) (ii) that the menu labeling requirements apply to foods that are standard menu items offered for sale in chain retail food establishments and restaurants or similar retail food establishments that voluntarily register with FDA.

2. Foods to Which the Requirements of Section 4205 Do Not Apply

Section 4205 provides that the menu labeling requirements do not apply to certain foods. These foods are "items that are not listed on a menu or menu board (such as condiments and other items placed on the table or counter for general use); daily specials, temporary menu items appearing on the menu for less than 60 days per calendar year, or custom orders; or such other food that is part of a customary market test appearing on the menu for fewer than 90 days, under terms and conditions established by the Secretary" (21 U.S.C. 343(q)(5)(H)(vii)).

FDA received several comments on these foods to which the menu labeling requirements in section 4205 are nonapplicable. Some comments stated that these foods should not be exempt from the requirements of section 4205. Some of these comments stated that condiments that come with meals should be included as part of the calorie declaration. One comment stated that if the condiment is non-nutritive, it should be excluded from the calorie labeling requirement, but if the condiment contains more than 10 calories per serving (*e.g.,* salad dressing, mayonnaise, pickles, olives, maple syrup, or honey), calorie labeling requirements should apply. Another comment suggested that FDA remove the calorie declaration exemption for 60–90-day temporary items so that restaurants cannot continually change their menus to avoid calorie labeling.

We note that section 403(q)(5)(H)(vii)(I)(aa) provides that the nutrient content disclosure requirements in sections 403(q)(5)(H)(i)–(vi) do not apply to "items not listed on a menu or menu board (such as condiments and other items placed on the table or counter for general use)." (21 U.S.C. 343(q)(5)(H)(vii)(I)(aa)). FDA tentatively concludes that this provision should be read narrowly, based on the parenthetical language. If the provision is read broadly to deem all "items not listed on a menu or menu board" beyond the scope of the law, then most self-service food and food on display would not be covered, including food at salad bars, buffet lines, and cafeteria lines. Given that Congress explicitly named these as examples of self-service facilities to which the calorie disclosure requirements in section 403(q)(5)(H)(iii) apply, the current proposal narrowly interprets this provision.

Given the phrase "for general use," FDA tentatively concludes that it is reasonable to interpret this provision to apply to food, such as many condiments, that are available for use by any customer in the covered establishment, regardless of the customer's particular order or food selection. Examples include salt and pepper placed on tables for use by whomever sits there, large ketchup and mayonnaise dispensers placed on a counter to be used by any customer, and lemons placed near a drink station. In contrast, the nutrient content disclosure requirements in section 403(q)(5)(H) would apply to salad dressing at a salad bar that is only available to customers who order the salad bar. The labeling requirements would also apply to salad dressing at salad bars where customers pay for salad by weight, where the weight of the salad dressing affects the price of the item.

FDA tentatively concludes that section 403(q)(5)(H)(vii)(I)(aa) does not refer to condiments that are part of a standard menu item, as it is usually prepared and offered for sale (*e.g.,* mustard, mayonnaise, and ketchup that are part of a hamburger or sandwich as usually prepared and offered for sale). Sections 403(q)(5)(H)(ii)(I)(aa) and (II)(aa) specify that covered establishments must provide, on menus and menu boards, "the number of calories contained in the standard menu item, as usually prepared and offered for sale." 21 U.S.C. 343(q)(5)(H)(ii)(I)(aa) and (II)(aa). Caloric value of these condiments must be included as part of the total caloric declaration for a standard menu item, because the condiments are a part of the standard menu item as it is usually prepared and offered for sale.

As discussed in III.B. of this document, FDA proposes to define a temporary menu item as one that appears on a menu or menu board of a covered establishment for less than 60 days per calendar year. For example, a pumpkin-flavored latte that only appears on the menu of a coffee shop in November would be a temporary menu item. FDA tentatively interprets the 60-day calendar limit to mean less than 60 days per year in total; the 60 days do not have to be consecutive.

Also discussed in III.A. of this document, FDA proposes to define a food that is part of a customary market test to be a food appearing on a menu or menu board for less than 90 days for which the covered establishment wishes to test consumer acceptance. For example, many restaurants advertise "for a limited time only" sandwiches that have new components. FDA recognizes that in some cases, a chain of restaurants or similar retail food establishments tests a new product in different locations within the chain and in more than one region of the country at different times. FDA tentatively concludes that "a customary market test," for the purposes of this section, refers to a test in a single covered establishment. Based on FDA's understanding of how test marketing is generally conducted, FDA proposes that a food that is part of a market test is an item that appears on a menu or menu board of a covered establishment for less than 90 consecutive calendar days. A food may be part of a customary market test at more than one location of a chain at a time. A food might also be a standard menu item at one location while being part of a customary market test at another.

Note that self-service food and food on display that do not appear on menus or menu boards would not be considered temporary menu items or food that is part of a customary market test. Based on the statutory language, both of these categories of nonapplicability only capture food "appearing on the menu" for a limited amount of time. Therefore, even if a self-service food or food on display that does not appear on a menu or menu board is only offered by a covered establishment for a limited time, such as a pumpkin-spice muffin available only in November, the nutrition information declaration requirements in section 403(q)(5)(H) would still apply. Self-service foods or foods on display in covered establishments that do not appear on menus can still belong to other categories of food to which the nutrition information declaration requirements do not apply, such as daily specials or custom orders.

Based on the reasons above, FDA is proposing in § 101.11(b)(1)(ii) that the requirements in § 101.11(b)(2) shall not apply to condiments and other items placed on the table for general use; daily specials; temporary menu items; custom orders; or food that is part of a customary market test. In addition, as discussed in III.B. of this document, FDA is proposing that the requirements in § 101.11(b)(2) shall not apply to alcohol beverages.

3. Information That Must Be Declared by Covered Establishments

a. Calorie declaration on menus and menu boards. Section 403(q)(5)(H)(ii) requires covered establishments to disclose on menus and menu boards, in a clear and conspicuous manner, the number of calories contained in standard menu items as usually prepared and offered for sale. The covered establishment must provide the calorie information adjacent to the name of the standard menu item so as to be clearly associated with the standard menu item (*e.g.,* 21 U.S.C. 343(q)(5)(H)(ii)(I)(aa)).

Some comments stated that the statutory requirements for menu labeling should apply only to the menu that most consumers use the most; for example, one national pizzeria chain stated that most of its customers order through the Internet and that therefore the information should only be required to be posted there. Another comment suggested that each company should be permitted to select its own "primary" menu on which calories must be disclosed, based on technological capabilities and customer ordering patterns. FDA disagrees with these comments. Based on section 403(q)(5)(H)(ii), FDA tentatively concludes that these calorie declarations must be provided on all menus and menu boards of the covered establishment. For example, section 403(q)(5)(H)(ii)(I)(aa) states that a calorie disclosure must appear "on the menu listing the item for sale." The same standard menu item could be listed on multiple menus, *e.g.*, a 12" cheese pizza at a pizzeria might appear on the menu for customers dining in and also on the online menu for customers ordering over the Internet. The calorie declaration for each standard menu item must appear on each menu that lists the standard menu item, in accordance with section 403(q)(5)(H)(ii). FDA requests comments on this approach to calorie declarations and multiple menus.

Some comments stated that FDA should allow flexibility for drive-through menu boards and allow calorie disclosures on stanchions (free-standing boards, generally placed next to drive-through menu boards, used to post calorie information) because of lack of space. These comments stated that the drive-through menu boards are not large enough to add calorie labeling and that some local zoning laws do not permit restaurants with drive-through windows to build larger menu boards.

FDA tentatively concludes that stanchions inadequately convey calorie information. A situation in which customers need to look to one board (the menu board) for important food-selection information, such as price, and another (the stanchion) for calories, is likely to be more difficult for customers attempting to use the declared calorie information at the point of selection. This is particularly true in the drive-through context, where customers have a restricted field of vision from their car windows, and they may have a relatively short time to consider the menu board prior to ordering, because customers often cannot view the full menu while waiting in line. Moreover, we note that 403(q)(5)(H)(II)(aa) requires the number of calories contained in standard menu items to be disclosed on the menu board itself. Therefore, we have not included separate stanchions as an option for displaying calories at drive-through restaurants and similar retail food establishments. FDA requests comment on how the use of stanchions would enable customers to use calorie information when they are making selections from a drive-through menu board.

In the draft implementation guidance that was subsequently withdrawn, FDA recommended that calories be declared in a type size at least as large as the name of the standard menu item or price, whichever is larger, and with the same prominence, *i.e.*, the same color and contrasting background as the standard menu item.

Some comments supported FDA's draft guidance on type size, color, and background. Other comments stated that these recommendations were too prescriptive and went beyond the statutory requirement that calorie information must be disclosed in a clear and conspicuous manner. Some comments stated that having the calories in the same color makes the calorie declaration less prominent. Other comments suggested different colors or the use of check marks based on calorie content, *e.g.*, for particular foods, check marks may be made by the food to inform consumers how many times a day or week they should consume that food. One comment suggested that FDA require that the calories be "easily readable, in a typeface similar to other information about each standard menu item, and in a font no less than nine points."

FDA recognizes that menus and menu boards come in a variety of sizes. Therefore, it would not be appropriate to require a specific type size and font for all menus and menu boards. However, if the calorie declarations on menus and menu boards are not declared in a clear and conspicuous manner, the declarations would not be in compliance with the requirements in section 403(q)(5)(H)(ii). FDA tentatively concludes that a calorie declaration on a menu or menu board would not be disclosed in a clear and conspicuous manner if the declaration is too light in color or is presented in a color that does not sufficiently contrast with the background. FDA agrees with the comments asserting that the agency should provide more flexibility with regard to calorie declarations than was suggested in the draft implementation guidance. FDA proposes in § 101.11(b)(2)(i)(A)(*1*) that a calorie declaration must be made in the same color, or in a color at least as conspicuous as, the color of the name of the associated standard menu item on the menu or menu board. Further, FDA proposes that a calorie declaration must have the same contrasting background as the background used for the name of the associated standard menu item on the menu or menu board. In addition, the calorie declaration must be in a font size large enough to be "clear and conspicuous." We understand that menus and menu boards often have limited space. We think that it is important to provide flexibility to businesses while, at the same time, fulfilling the requirements of the statute and providing consumers with easily readable information. FDA is proposing that a calorie declaration must be no smaller than the type size of the name or price of the associated standard menu item on the menu or menu board whichever is smaller. We request comment on this tentative conclusion.

FDA is proposing in § 101.11(b)(2)(i)(A)(*3*) that the term "Calories" or "Cal" must appear as a heading above a column listing the number of calories for each standard menu item on that menu or menu board, or adjacent to the number of calories for each standard menu item. If a column is used for the listing of calories, the term "Calories" or "Cal" must appear in a type size no smaller than the smallest type size of the name or price of any menu item and in the same color, or in a color at least as conspicuous as and in the same contrasting background as that name or price. If the term "Calories" or

"Cal" appears adjacent to the number of calories for the standard menu item, the term "Calories" or "Cal" must appear in the same type size and in the same color and contrasting background as the number of calories.

We tentatively conclude that permitting the flexibility of using the abbreviation "Cal" would assist covered establishments that have limited space on their menus or menu boards in meeting the requirements of section 403(q)(5)(H). Allowing calories to be stated as a header of a column would provide additional flexibility.

One comment asserted that drive-thru menu boards are limited in size and space as compared to interior menu boards, thus making it challenging to list calories in a clear and conspicuous manner. The comment recommended that FDA only should require the statement "Nutrition information is available upon request" on the drive-through menu boards of a covered establishment and require the establishment to have brochures available at the drive-through window. However, FDA notes that section 403(q)(5)(H)(ii)(II) expressly requires covered establishments to post calorie declarations on menu boards, including drive-through menu boards. Therefore, proposed § 101.11(b)(2)(i)(A) would apply to all menu boards at covered establishments, including drive through menu boards.

FDA is proposing in § 101.11(b)(2)(i)(A)(*2*) to require that covered establishments declare calories on menus and menu boards to the nearest 5-calorie increment up to and including 50 calories, and to the nearest 10-calorie increment above 50 calories. For foods that have fewer than 5 calories, the declaration may be expressed as zero. These rounding rules are consistent with the declaration of calories for packaged foods as provided in § 101.9(c)(1).

b. Determination of calories for standard menu items that come in different flavors, varieties, or combinations. Section 403(q)(5)(H)(v)) requires that FDA establish, by regulation, standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, that are listed as single menu items (21 U.S.C. 343(q)(5)(H)(v)). This section includes as examples of these foods soft drinks, ice cream, pizza, doughnuts, and children's combination meals. As discussed in section II.A. of this document, FDA proposes to define these items as variable menu items. Section 403(q)(5)(H)(v) states that FDA may establish these standards as averages, ranges, or other methods.

FDA recognizes that, under this proposal, some combination meals as discussed in section III. A. of this document would be variable menu items, while others would not. The calorie declaration on a menu or menu board for a combination meal that consists of a fixed combination, where the customer has no choice as to which flavors, varieties, or combinations of items are included, would be governed by proposed § 101.11(b)(2)(i)(A) and (B). Such a combination meal would not be considered a variable menu item.

Some standard menu items come in different varieties, such as a single scoop of ice cream that comes in different flavors and a medium soft drink that comes in a variety of sodas. For some of these variable menu items, the difference between the number of calories in the lowest calorie variety and the highest could be wide. For example, calories for a large soft drink could range from zero calories for a diet soft drink to more than 400 calories for a non-diet soft drink. For combination meals, the difference in caloric value has the potential to be especially large, given that multiple items in the combination meal might vary. A combination meal may contain a sandwich, side dish and drink. The side dish may be fries, onion rings, or a salad. The number of calories may be much fewer if the consumer chooses the salad with light dressing and bottled water or a diet drink than if the consumer chooses the fries and a sweetened drink. On the other hand, for other variable menu items, the range of calories in the possible varieties is likely small (*e.g.,* donuts with different flavors of icing), such that a calorie or other nutrient difference among the varieties is not nutritionally significant.

Section 403(q)(5)(H)(v) specifically states that we must establish standards for determining and disclosing the nutrient content information for standard menu items that come in different flavors, varieties, or combinations, through means determined by FDA, including averages, ranges, or other methods. Some comments supported the use of ranges because, they asserted, displaying an average calorie content when the lower and upper limits are so dissimilar would be misleading. Other comments suggested that FDA require median values for calories if the values for all flavors, varieties, or combinations are within 20 percent of the median and require ranges if calories are not within 20 percent of the median. Some comments maintained that sugar-free (no calorie or very low calorie) should be listed separately from sugar-sweetened beverages. A few comments recommended that FDA allow covered establishments to pick among ranges, medians, and averages. Some comments disagreed with permitting ranges and suggested that the foods must be labeled individually. One comment suggested that FDA require covered establishments to group similar items where the item of greatest caloric value contains less than 5 percent more calories that the item of lowest caloric value and display items separately if the calorie difference is greater than 5 percent. A few comments recommended that the calorie information for items such as sandwiches, pizza, or burritos that are intended to be prepared in a large number of different ways be displayed for the standard preparation of the item, with the standard preparation of the item clearly noted on the menu, menu board, or food tag or next to the food on display. The calorie content for each additional food component, according to the comment, should then be displayed on the menu, menu board, food tag, or next to the food on display for each food component.

FDA is proposing in § 101.11(b)(2)(i)(A)(*4*) that the calories must be declared as a range for standard menu items that come in different flavors, varieties, or combinations but are listed as a single menu item. For example, the calories for different flavors of ice cream or combination meals would be disclosed in the format "xx-yy" where "xx" is the caloric content of the lowest calorie flavor or combination, and "yy" is the caloric content of the highest calorie flavor or combination. However, we considered a number of other options in developing this proposal.

Option 1: Single value. We considered requiring calorie values for all variable menu items to be presented as single values, either in the form of an average (obtained by summing up the calorie content of all options and then dividing by the number of options) or a median of all options (obtained by determining the "middle" number of calories from the list of options). For example, if there were three options for a sandwich, one with 400 calories, one with 450 calories, and one with 600 calories, the average would be 483 calories ((400+450+600)/3 = 483) (which would be rounded to 480 for the calorie declaration), and the median would be 450. The tradeoff between using an average or median value is between closer reflection of the distribution of possible choices and simplicity of calculation. If the median

is declared, a change in this number would change the declared calories, even if no other variation had a change in calorie content and even if the overall range of calories did not change. On the other hand, changes in numbers other than the middle number would not generally affect the median. Taking the example above, if the calories in the middle option for the sandwich changed from 450 to 420 (*e.g.,* because the covered establishment changed the cheese in that sandwich to lower fat cheese), then the number of calories disclosed would be 420, because 420 is the new median. In contrast, if the calories in the middle option stayed 450, but the calories in the highest option changed from 600 to 750 (*e.g.,* because the establishment changed the sandwich's sauce formulation and changed the bun on the sandwich to a bun with higher fat content), number of calories disclosed would be 450, because 450 remains the median.

If the average is declared, the calorie declaration would likely change in response to a calorie change in any option. As a result, the reported number is less prone to manipulation. For example, if the calories in the middle option in the sandwich above changed from 450 to 420, the average would change from 483 (rounded to 480 for the calorie declaration) to 473 (rounded to 470 for the calorie declaration). If the highest option for the sandwich above changed from 600 to 750, the average would change from 483 (rounded to 480 for the calorie declaration) to 533 (rounded to 530 for the calorie declaration).

Presenting calorie declarations of variable menu items as single values—whether as averages or median values—offers the benefit of maximizing space on a menu or menu board. However, single values have a drawback in that they fail to convey to consumers the nutrient content of the specific choices available within that variable menu item group. Posting an average or median value may also mask dramatic differences that can exist in caloric intake for certain variable menu items, especially where calorie ranges are large.

Option 2: Range. We considered requiring calories for all variable menu items to be reported in the form of a range. FDA recognizes that there may be some cases where disclosing a range may be more difficult than disclosing a single value, such as when menu space is limited. In addition, a range is arguably less useful to consumers in cases where calorie ranges are very small or where calorie ranges are very large and consumers cannot distinguish which varieties or combinations of items may offer lower calories or determine the exact amount of calories in their specific choice. However, a range format provides consumers with more information about the caloric content of the options available within a given variable menu item group; it provides the lowest value, the highest value, and therefore the window within which a consumer's choice will fall.

Option 3: Hybrid combining averages and ranges. We considered a number of approaches that would require declaration of a single average value for variable menu items whose calorie ranges fall within specified bounds and declaration of a range for variable menu items whose calorie ranges fall outside those bounds. This option has the benefit of allowing single values to be used on a menu or menu board for variable items that have relatively narrow ranges, while ensuring that the full range of calories is provided for wider ranges.

Within this option, we considered different approaches for determining when a range and when an average value should be reported. First, we considered requiring an average value unless the highest calorie option contains over 25 percent more calories than the lowest calorie option. At that point, a range would be disclosed instead. For example, if the lowest calorie item contains 400 calories, the calorie declaration would be an average unless the highest calorie item exceeds 500 calories ($400 \times 25\% = 100$; 400 + 100 = 500). Taking a variable menu item that has 400, 430, or 490 calories, the number of calories in the highest calorie item (490) is less than 25% more than the number of calories in the lowest calorie item (490 < 500), so the calorie declaration would be the average: 440 ((400+430+480)/3 = 440). Taking a variable menu item that has 400, 430, or 550 calories, the highest calorie item (550) has more than 25% more calories than the lowest calorie item (550 > 500), so the calorie declaration would be a range: 400–550.

Our rationale for considering the 25 percent is based in our nutrient content claim regulations. FDA permits a "reduced calorie" claim on a food if the food contains at least 25 percent fewer calories per reference amount customarily consumed than an appropriate reference food. In the preamble for the regulations on nutrient content claims (58 FR 2302 at 2348), FDA stated that the terms "less" and "reduced" should be used only when a nutritionally significant reduction in the level of the nutrient has been reached so as not to mislead consumers into believing that a product would provide a nutritionally significant reduction in the level of a nutrient when it would not. FDA concluded that an appropriate minimum reduction for the terms "reduced" and "less" is 25 percent based on various factors.

Second, we considered an approach that would require an average value to be reported for all variables that fall within 20 percent of the average value; a range would otherwise be required. Using 20 percent as a cutoff for determining whether to use an average or a range would be consistent with the number used for compliance purposes. See § 101.9(g). For example, if the calories for a variable menu item are 400, 430 or 490, the highest calorie option has 22.5% more calories than the lowest calorie option, so the calorie declaration under the 20 percent cutoff approach would be the range: 400–490 calories.

An additional approach could be to have a special rule for low calorie foods. The number of calories in low calorie foods, i.e., those with 40 or fewer calories, could be declared by an average even if the difference in the calories between the lower and higher calorie variable menu item is greater than 25 or 20 percent. For example, if the calories for flavored teas ranged from 5 to 20 calories, a difference of 300 percent ($(20–5)/5 \times 100$), the range would not be necessary, and an average, *e.g.,* 12.5 calories could be used. In addition, consistent with calorie declaration of packaged food, calories less than 5 would be declared as 0. Therefore, the average calories for the flavored tea would be 10 ((20+0)/2). The rationale for using 40 calories as the cutoff is that foods that contain 40 calories or less are eligible to bear a "low calorie" claim (§ 101.60(b)(2)).

We note that a difference of 20 or 25 percent may translate into a substantial amount of calories where the calorie values are high (*e.g.*, for some combination meals), resulting in the reporting of single values for some large calorie ranges. So, we also considered using a fixed 100 calorie maximum range as a cutoff. Using this approach, variable items with large numbers of calories in all options would declare the range of calories more often than if we used a percentage cutoff. Variable items with smaller numbers of calories for all options would declare a range less often. For example, a hamburger combination meal that ranges from 1,000 to 1,200 calories would be listed as a single calorie value (1,100 calories) under the 25 percent approach, but as a range (1,000–1,200 calories) under the 100 calorie cutoff approach, since the

difference between the two values is greater than 100 calories. On the other hand, under the 25 percent approach, calories for a single ice cream scoop that varies from 240 to 320 calories depending on the flavor would be displayed as a range, because the highest calorie option is 33 percent more caloric than the lowest calorie option ((320–240)/240 = 33%). But because the difference is only 80 calories, under the 100 calorie rule, the average, *i.e.* 280 calories, would be disclosed.

Option 4. If only 2 options are available for an item (*e.g.*, a sandwich with fries or with fruit), provide both numbers with a forward slash between (*e.g.*, 450/350). If three or more options are available, provide the range in calories. We considered this option because some variable menu items may have only two choices and the use of a slash may be more reflective of the fact that there are two choices than the use of a dash. For example, for a chicken sandwich that comes in grilled and crispy versions, with 470 and 610 calories, respectively, declaring the calories as 470/610 may better reflect the two discrete choices than declaring the calories as 470–610. On the other hand, the calorie declaration for a combination meal that comes with a choice of sides, *e.g.*, tater tots or French fries, and various soft drinks would be a range (*e.g.*, 1380–1810).

Option 5. If only 2 options are available for an item (*e.g.* a sandwich with fries or with fruit), provide both numbers with a forward slash between (*e.g.* 450/350). For foods with 3 or more options, use one of the hybrid approaches outlined in Option 3.

Since many of these options could result in menus with different formats and wide variations in the ranges, we intend to conduct consumer research to evaluate how well consumers understand the caloric information presented in each of the formats and whether mixed formats on a single menu or menu board might be confusing to consumers. FDA intends to make the results of our consumer research available to the public prior to publication of the final rule and will allow sufficient time for interested stakeholders to comment on the results of our research.

FDA is proposing that the calorie declaration be in a range for all variable menu items (Option 2). Requiring a range for all variable menu items gives consumers a consistent format across all items. FDA recognizes that in some instances, the calorie range may be so wide that the consumer may still need the calorie information for the particular menu item before he or she can make a fully informed purchase decision. We want to ensure that the calorie declaration is understood by consumers and will help them make better food choices. We seek comment on whether the proposed method of declaring calories is appropriate and would not be misleading to consumers. We are especially interested in any consumer research on the issue. We are also interested in comment and research on the options that we considered but did not propose and whether any of the other options individually or in combination would be preferable and why. In developing the final rule on this proposal, we will consider the results of our research and all relevant comments and data.

FDA also requests comment on complexities that may be raised by certain variable menu items. For example, some menus with combination meals list an option to increase the size of components of those meals for a discounted additional price. FDA is considering whether those listings should be labeled with the number or range of calories they add to the standard combination meal, and requests comment. FDA also recognizes that the Internet may allow for the use of different methods for disclosing calories. For example, interactive menus online may present opportunities for more innovative ways of providing tailored calorie information, *e.g.,* providing a calorie tracker in the ordering frame that tallies calories as customers make order selections. FDA requests comment on this issue. While this may be especially suitable for ordering certain variable menu items, such as when selecting a crust and toppings for pizza, FDA requests comment on whether different methods should be used for nutrient content declarations for interactive internet menus in general.

4. Succinct Statement Concerning Suggested Daily Caloric Intake Required on Menus and Menu Boards

Sections 403(q)(5)(H)(ii)(I)(bb) and (II)(bb) require that chain retail food establishments post a succinct statement concerning suggested daily caloric intake ("succinct statement") on menus and menu boards, as specified by the Secretary by regulation, that is designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided on the menu and menu board (21 U.S.C. 343(q)(5)(H)(ii)(I)(bb) and (II)(bb)). Some comments stated that the succinct statement should take into account the different caloric needs of individuals based on age, gender, and physical activity. Comments suggested various statements including:

- "2,000 calories meets the daily caloric needs of most adults; however, individual dietary needs may vary."
- "A 2,000 calorie diet is being used as a basis for general nutrition advice. However, individual calorie needs may vary."
- "This is ____ percent of a 2,000 calorie diet."
- "To maintain a healthy weight, most adults need no more than 2,000 calories per day."

Some comments stated that a different statement should be used on children's menus because children have different caloric needs. According to one comment, if 2,000 calories is used as a reference point, parents may overestimate the caloric needs of their children. One comment suggested the following for a children's menu:

> The recommended caloric intake for a day varies from ____ to ____ for adolescents and adults, from ____ to ____ for school-age children, and from ____ to ____ for pre-school children above age two years.

Caloric declarations on menus and menu boards in covered establishments that provide the number of calories contained in standard menu items will give consumers information that is useful in selecting more healthful food choices. FDA recognizes that individual daily caloric needs may differ based on several factors including gender, age, and activity level (Ref. 9 at page 13). For this reason, it is important that consumers be able to place the calorie declarations in the context of their individual dietary needs. As described in section I. B of this document, nutrition labeling on packaged foods has been required for approximately 20 years, and consumers are familiar with and use this information. The Nutrition Facts on packaged foods uses 2,000 calories as a reference amount on which to base recommended intake for macro- and micronutrients for individuals 4 years of age and older (§ 101.9(c)(9)). A 2,000-calorie reference value is close to the midpoint of the range of energy requirements for sedentary adults (1,600–2,600 cals) (Ref. 9 at page 14).

FDA initially proposed a reference value of 2,350 for the Nutrition Facts (55 FR 29476 at 29486); in response to comments, however, FDA selected 2,000 as the reference value in the 1993 final rule. As stated in the preamble to the final rule: "The rationale for selecting 2,000 calories as opposed to other lower values varied, but reasons given included the fact that it is consistent with widely used food plans, it

approximates the caloric requirements for postmenopausal women who are at-risk for excessive intake of calories and fat, and it is a "rounded down" value for 2,350 calories." FDA also noted in the preamble to the final rule that some comments noted that "2,000 calories is easier to use in quick, mental calculations compared to other calorie levels such as 1,900 or 2,350 calories." 58 FR 2206 at 2217.

FDA tentatively concludes that 2,000 calories is an appropriate reference value to include in the succinct statement. However, not everyone should eat 2,000 calories per day. Individual caloric needs differ depending on various factors such as age, gender, and physical activity. For example young children and sedentary adults may have caloric needs below 2,000 calories (1,200–1,600 calories) whereas some adult men and active adults of either sex may need more than 2,000 calories (2,200–3,200). Considering the statutory directive and current nutrition advice (Ref. 9), FDA tentatively concludes that, to help ensure that the succinct statement is designed to enable consumers to understand, in the context of a total daily diet, the significance of the calorie information provided on menus and menu boards, certain principles should be met:

- The statement should be succinct;
- The statement should be in plain language that consumers can understand;
- The total caloric value should be framed appropriately so that it is not viewed as a recommendation for daily intake for every consumer;
- The statement should give consumers a means to compare the calorie declaration for a menu item to total calories and;
- The statement should inform consumers that individual needs vary.

Using these principles and considering suggestions from the comments, FDA developed the following statements:

- "Using 2,000 calories per day as a reference point, consider how the menu item you select fits within your total daily calorie needs, which may be higher or lower depending on age, physical activity, gender."
- "A 2,000 calorie daily diet is used as a general reference point for nutrition advice. Individual calorie needs vary depending on age, physical activity, gender."
- "Typical daily caloric intake for women is 1,600 to 2,000 calories, for men is 2,000 to 3,000 calories and for children (ages 4 to 14) is 1,800 to 2,500 calories. Be sure to include the calories of the menu item you select as a part of your total daily caloric intake." [4]

We have also included the following statement that was suggested from comments because we tentatively concluded that the statement satisfied the principles described above.

- "A 2,000 calorie daily diet is used as the basis for general nutrition advice; however, individual calorie needs may vary."

FDA concludes that the above statements satisfy the principles developed by the Agency to ensure that the succinct statement is designed to enable consumers to understand, in the context of a total daily diet, the significance of the calorie information provided on menus and menu boards. FDA seeks comment on the principles developed by the agency, including whether all the principles are needed to help consumers understand the significance of the calorie information provided on menus and menu boards. In addition, we have concerns about whether consumers will understand the statements, especially those statements that use terms such as "reference point," "fits within," and "calorie needs vary."

When deliberating on which of the four (4) bulleted statements listed above should be required on menu and menu boards, FDA considered the language in each statement, our previously noted concerns with certain phrases, the availability of space on menu boards, and the statutory directive regarding the succinct statement. Given these considerations, we tentatively conclude that the statement that best addresses these considerations is "A 2,000 calorie daily diet is used as the basis for general nutrition advice; however, individual calorie needs may vary." We are proposing in § 101.11(b)(2)(i)(B) to require this statement be posted on menus and menu boards.

FDA seeks comment on whether this proposed statement is adequately designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information provided on menus and menu boards. FDA is particularly interested in comments with alternative suggested statements that are consistent with the principles identified above and requests that any such statements be accompanied by data, such as consumer research.

Some comments stated that FDA should consider a different succinct statement on children's menus and reference the calorie needs for children in specific age ranges. We seek comment on whether FDA should require a different statement on menus that are targeted to children. Such a statement may include language such as "The daily caloric intake for children ____ years of age is ____ to ____ depending on whether they are boys or girls as well as their age and level of physical activity." (The blanks are to be filled in with information on current dietary guidelines.) Comments submitted to the agency on whether a different statement should be required or recommended for children's menus should provide a rationale, data (*e.g.* consumer research), or other information supporting such statement. The agency is particularly interested in any consumer research that demonstrates that the statement is understood by consumers.

We intend to conduct consumer research to evaluate consumer response to these statements. FDA intends to make the results of our consumer research available to the public prior to publication of the final rule and to allow sufficient time for interested stakeholders to comment on the results of our research.

Section 4205 requires that the succinct statement be posted on menus and menu boards prominently and in a clear and conspicuous manner. We are proposing in § 101.11(b)(2)(i)(B)(1) that the required succinct statement appear in a type size no smaller than the smallest type size for any calorie declaration appearing on the same menu or menu board with the same color, or in a color at least as conspicuous, as the caloric declaration and with the same contrasting background as the caloric declarations. FDA is proposing in § 101.11(b)(2)(i)(B)(2) that for menus, the succinct statement must appear on the bottom of each page of the menu. On menu pages that also bear the statement regarding the availability of the written nutrition information described in section III.C.5. of this document, the succinct statement must appear directly above that statement of availability. FDA is proposing in § 101.11(b)(2)(i)(B)(3) that the succinct statement appear on the bottom of menu boards, directly above the statement of availability. FDA tentatively concludes that these requirements will help ensure that the succinct statement is prominent, clear, and conspicuous, as required by sections 343(q)(5)(H)(ii)(I)(bb) and (II)(bb) (21

[4] This statement was developed for focus group testing based on the data upon which the 2,000 calorie reference value used in the Nutrition Facts was derived. The aim was to test a data-derived statement that provided specific calorie ranges for various subpopulations. More recent data from the 2010 Dietary Guidelines suggest that these ranges should be revised; however, the difference in numbers does not impact the objective of testing the utility and comprehension of the statement by the focus group participants.

U.S.C. 343(q)(5)(H)(ii)(I)(bb) and (II)(bb)).

5. Nutrition Information That Must Be Made Available in a Written Form

Section 403(q)(5)(H)(ii)(III) requires that covered establishments must provide, in a written form and upon consumer request, the nutrition information required under clauses (C) and (D) of section 403(q)(1) of the FD&C Act. 21 U.S.C. 343(q)(5)(H)(ii)(III). The written nutrition information must be available on the premises of the establishment and the establishment must post on the menu or menu board a prominent, clear and conspicuous statement regarding the availability of the information (21 U.S.C. 343(q)(5)(H)(ii)(III) and (IV)). FDA requests comment on interpreting the phrase "on the premises" for menus appearing on the Internet.

a. *Statement of availability.* Section 403(q)(5)(H)(ii)(IV) requires that covered establishments post on menus and menu boards a prominent, clear, and conspicuous statement regarding the availability of the written nutrition information (21 U.S.C. 343(q)(5)(H)(ii)(IV)). Therefore, FDA is proposing in § 101.11(b)(2)(i)(C) to require the following statement regarding the availability of the written form of additional nutrition information proposed in § 101.11(b)(2)(ii)(A) on menus and menu boards in covered establishments:

Additional nutrition information available upon request.

FDA is also proposing in § 101.11(b)(2)(i)(C) that this statement ("statement of availability") appear in a type size no smaller than the smallest type size for any calorie declaration appearing on the same menu or menu board, with the same prominence, *i.e.,* the same color, or in a color as least as conspicuous as and in the same contrasting background as the calorie declarations. FDA is proposing that for menus, the statement of availability must appear on the bottom of the first page with menu items in the same type size and font as the calorie declaration and must appear immediately below the succinct statement proposed in § 101.11(b)(2)(i)(B). For menus with more than two (2) pages, the statement must appear either on every page with menu item, or on the first page, so long as a symbol (*e.g.,* asterisk) follows the term "Calories" or "Cal" where it first appears on each subsequent page, clearly referring to the statement of availability appearing on the first page of the menu. FDA is proposing that the statement appear on the bottom of menu boards, immediately below the succinct statement required in § 101.11(b)(2)(i)(B). FDA tentatively concludes that this manner of providing the statement of availability will satisfy the requirements in amended section 403(q)(5)(H)(ii)(IV) that the statement be prominent, clear, and conspicuous. We seek comment on whether the statement of availability will adequately inform consumers about the availability of the written nutrition information. In addition, we seek comment on whether the placement, font, and background requirements are appropriate to ensure that the statement of availability is prominent, clear, and conspicuous.

FDA recognizes that some restaurants or similar retail food establishments have relatively few standard menu items, and, as a result, may have menu boards that list relatively few items in very large font. FDA requests comment on whether it is appropriate in these cases to tie the font size of the two statements required to appear at the bottom of menu board to the calorie disclosures.

b. Required nutrients. Section 403(q)(5)(H)(ii)(III) specifies that the written form must provide "the nutrition information required under clauses (C) and (D) of subparagraph (1) [21 U.S.C. 343(q)(1)(C) and (D)]," which require declaration of the following nutrition information:

- The total number of calories derived from any source, and the total number of calories derived from the total fat;
- The amount of each of the following nutrients: Total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein.

FDA is proposing in § 101.11(b)(2)(ii)(A) to require that the nutrition information in written form contain the information listed above, with two changes. The nutrition labeling requirements under sections 403(q)(1)(C) and (D) were added to the FD&C Act by NLEA and are the nutrients originally required to be provided in the mandatory nutrition information for packaged foods. FDA has since revised by regulation the nutrients required to be provided on the label or labeling of food in relevant part by removing the complex carbohydrates requirement from section 403(q)(1)(D) and requiring that information regarding the amount of *trans* fats be included in the label or labeling of food subject to section 403(q)(1). FDA proposes to make analogous revisions with respect to the written form required by section 403(q)(5)(H)(ii)(III). These are explained further below.

In addition, we note that, because section 403(q)(5)(H)(ii)(IV) refers only to clauses (C) and (D) of section 403(q)(1), covered establishments are currently not required to provide the information about vitamins and minerals required to be on the labels and labeling of foods pursuant to clause (E) of section 403(q)(1).

c. Removal of complex carbohydrates from the requirements of 403(q)(1)(D). Section 403(q)(2)(B), which was added to the FD&C Act by NLEA, provides that "[i]f the Secretary determines that the information relating to a nutrient required by subparagraph (1)(C), (1)(D), or (1)(E) or clause (A) of this subparagraph to be included in the label or labeling of food is not necessary to assist consumers in maintaining healthy dietary practices, the Secretary may by regulation remove information relating to such nutrient from such requirement." Pursuant to this authority, FDA removed the requirement for bearing the amount of complex carbohydrates in the label or labeling of food, based on a determination that for complex carbohydrates "there was no consensus on a clear definition for the term 'complex carbohydrates' as it relates to physiological effects, health benefits, or dietary guidelines," there was a "lack of methods for reliably determining the amounts present," and without a specific definition for "complex carbohydrates it [was] not possible to include quantitative information in the nutrition label that would assist consumers in maintaining healthy dietary practices." (58 FR 2079 at 2101, Jan. 26, 1993); See § 101.9(c)(1) (no regulation requiring that labeling bear nutrition information regarding complex carbohydrates). Because the agency removed the requirement that the label or labeling of food include information regarding "complex carbohydrates" from section 403(q)(1)(D), declaration of complex carbohydrates is no longer a requirement under section 403(q)(1)(D). As a result, this proposed rule does not include complex carbohydrates among the nutrients that must be included in the written form required to be available to consumers under section 403(q)(5)(H)(ii)(III). FDA also received a comment stating that FDA should not include complex carbohydrates in the nutrition information in written form because, among other reasons, the amount of complex carbohydrates is not required to be included on the Nutrition Facts of packaged foods.

d. Addition of trans fat to the requirements of 403(q)(5)(H)(ii)(III). Section 403(q)(5)(H)(vi) provides that "if the Secretary determines that a nutrient,

other than a nutrient required under [section 403(q)(5)(H)(ii)(III)], should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, declaration of such nutrient in the written form" (21 U.S.C. 343(q)(5)(H)(vi)). Similarly, section 403(q)(2)(A) (21 U.S.C. 343(q)(2)(A)) provides that "[i]f the Secretary determines that a nutrient other than a nutrient required by subparagraph (1)(C), (1)(D), or (1)(E) should be included in the label or labeling of food subject to subparagraph (1) for [the] purposes of providing information regarding the nutritional value of such food that will assist consumers in maintaining healthy dietary practices, the Secretary may by regulation require that information relating to such additional nutrient to be included in the label or labeling of such food." 21 U.S.C. 343(q)(2)(A).

In 2003, FDA amended its regulations on nutrition labeling, through rulemaking (68 FR 41434, July 11, 2003), to require in § 101.9(c)(2)(ii) that *trans* fatty acids be declared in the label or labeling of conventional foods subject to section 403(q)(1) of the FD&C Act. In that rulemaking, FDA determined that the current scientific evidence consistently showed that *trans* fats are associated with increased low density lipoprotein (LDL)-cholesterol levels and, therefore, that lower intakes of both saturated and *trans* fats are important dietary factors in reducing the risk of coronary heart disease (CHD) in the general population and for those at increased risk for CHD. Further, FDA stated that the current authoritative reports at that time, such as the 2000 Dietary Guidelines for Americans (Ref. 24 at p. 30), recommended that Americans cut back or limit the intake of *trans* fats. Thus, the agency concluded that persons interested in following these recommendations and maintaining optimal LDL-cholesterol levels must be able to determine levels of both saturated and *trans* fats in food products. Information on saturated fat content was already available in the Nutrition Facts on the labels of certain foods. The agency determined that the most practical way to inform consumers of the level of *trans* fat in these foods was for that information to be included in the Nutrition Facts. In the time since the final rule on *trans* fat labeling was published in 2003, the scientific evidence on *trans* fat has continued to support the relationship between *trans* fat and risk of CHD. Authoritative reports published since 2000 have included recommendations on the reduction of intake of *trans* fat. For example, the Institute of Medicine (IOM) has stated that *trans* fat consumption should be kept as low as possible while consuming a nutritionally adequate diet (Ref. 25). Additionally, the 2010 Dietary Guidelines for Americans recommended that *trans* fat intake be as low as possible (Ref. 9 at pp. x and 25). Therefore, for the same public health reasons that supported the requirement that the amount of *trans* fat be declared on the label or labeling of conventional foods subject to 403(q)(1) of the FD&C Act, we are proposing to require covered establishments to declare the amount of *trans* fat in standard menu items in the written form required by section 403(q)(5)(H)(ii)(III).

e. Nutrients in insignificant amounts. FDA recognizes that some standard menu items may contain insignificant amounts of the nutrients required to be disclosed in the written form. See 21 U.S.C. 343(q)(5)(H)(ii)(III). Section 403(q)(5)(C) of the FD&C Act states that: " * * * If a food contains insignificant amounts, as determined by the Secretary, of all the nutrients required by subparagraphs (1) and (2) to be listed in the label or labeling of food, the requirements of such subparagraphs shall not apply to such food if the label, labeling or advertising of such food does not make any claim with respect to the nutritional value of such food. If a food contains insignificant amounts, as determined by the Secretary, of more than one-half the nutrients required by subparagraphs (1) and (2) to be in the label or labeling of the food, the Secretary shall require the amounts of such nutrients to be stated in a simplified form prescribed by the Secretary."

As directed by this statutory provision, FDA determined that "[a]n 'insignificant amount' shall be defined as that amount that allows a declaration of zero in nutrition labeling, except that for total carbohydrates, dietary fiber, and protein, it shall be an amount that allows a declaration of "less than 1 gram." § 101.9(f)(1). Further, FDA established regulations at § 101.9(j)(4) that exempt foods that contain insignificant amounts of all the nutrients required to be included in the declaration of nutrition information on the label and labeling of food, provided that the food bears no nutrition claims or other nutrition information in any context on the label, labeling or advertising. FDA tentatively concludes that if a standard menu item contains insignificant amounts of all of the nutrients required to be declared in the written form pursuant to section 403(q)(5)(H)(ii)(II) (i.e., the nutrition information required under clauses (C) and (D) of section 403(q)(1)), a covered establishment is not required to include nutrition information regarding such food in the written form provided that the food does not make a nutrient content claim as defined in § 101.13 or Subpart D of part 101 or a health claim as defined in § 101.13 and permitted by regulation in Subpart E in part 101.

In addition, FDA established regulations at § 101.9(f)(1) that allow for the use of a simplified form of nutrition information labeling if a food contains insignificant amounts of more than one-half of the nutrients required to be disclosed in the label or labeling of food in sections 403(q)(1) and (2) of the FD&C Act. Specifically, § 101.9(f) provides that the declaration of nutrition information may be presented in the simplified format, set forth in the regulation, when a food contains insignificant amounts of eight (8) or more of the following fourteen (14) nutrients: Calories, total fat, saturated fat, *trans* fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars, protein, vitamin A, vitamin C, calcium, and iron. In addition, § 101.9(f)(2)(i) requires that the simplified format must include information on the following nutrients: Total calories, total fat, total carbohydrate, protein, and sodium. In the preamble to the 1993 final rule on nutrition labeling for packaged food, FDA explained that this nutrition information is "essential to aid consumers in learning about the relative nutritional qualities of all foods, and it allows them to judge the consequences of the food selections they make." (58 FR 2079, 2142 (Jan. 6, 1993)).

Section 4205 provides that section 403(q)(5)(C) shall apply to any regulations promulgated by FDA regarding the written nutrition information required by section 403(q)(5)(H)(ii)(II). However, section 403(q)(5)(C) and § 101.9(f) address some nutrients that are not required to be declared in the written nutrition information, specifically vitamin A, vitamin C, calcium, and iron. A covered establishments only is required to declare, in the written form, the nutrition information required under clauses (C) and (D) of 403(q)(1), which does not include vitamins and minerals. See 21 U.S.C. 343(q)(5)(H)(ii)(III). Consequently, at this time, FDA tentatively concludes that a covered establishment is required only to declare, in the written nutrition information, ten of the fourteen nutrients specified in § 101.9(f), specifically: Calories (derived from any

source, and derived from the total fat), total fat, saturated fat, *trans* fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars, and protein. As a result, FDA tentatively concludes that if a standard menu item contains insignificant amounts of more than one-half of the nutrients required to be declared in the written nutrition information under proposed § 101.11(b)(2)(ii)(A), this nutrition information may be presented in a simplified format for that standard menu item. FDA is proposing in § 101.11(b)(2)(ii)(B) that the written nutrition information for a standard menu item offered for sale in a covered establishment may be presented in a simplified format when the standard menu item contains insignificant amounts of six (6) or more of the following ten (10) nutrients: Calories, total fat, saturated fat, *trans* fat, cholesterol, sodium, total carbohydrates, dietary fiber, sugars and protein. In addition, we are proposing that the simplified format must include information on the nutrients required in § 101.9(f)(2)(i) and (ii) (*i.e.,* total calories, total fat, total carbohydrate, protein, and sodium). The statement "Not a significant source of ____ (with the blank filled in with the names of the nutrients required to be declared in the written nutrient information and calories from fat that are present in insignificant amounts) must appear following the written nutrition information. (See example in section III.B.3.e. of this document.) FDA tentatively concludes that this nutrition information is essential to aid consumers in learning about the relative nutritional qualities of all foods, and it allows them to judge the consequences of the food selections they make.

f. Standards for determining and disclosing the nutrient content of foods for variable menu items. Section 403(q)(5)(H)(v) requires that FDA establish, by regulation, standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children's combination meals (21 U.S.C. 343(q)(5)(H)(v)) (proposed to be called "variable menu items"). Further, this section provides that FDA may establish these standards through means determined by the agency, including averages, ranges or other methods. Consequently, we considered these means in developing standards for disclosing nutrition information in the written form for standard variable menu items, as well as the comments. FDA considered the following options:

Option 1. List the nutrition information for each nutrient in the variable menu item as a range.

For example, nutrition information for a meal that consists of a cheeseburger, side dish (fries or salad with fat-free dressing), and medium soft drink (diet or regular) would be provided in a written form that provides the following information:

- Total calories: 620–1,150 calories
- Calories from fat: 220–410 calories
- Total fat: 24–46 g
- Saturated fat: 8–15 g
- Trans fat: 0–1 g
- Cholesterol: 75–90 mg
- Sodium: 1,240–1,560 mg
- Total carbohydrates: 70–155 g
- Sugars: 21–66 g
- Dietary fiber: 4–7 g
- Protein: 29–34 g

For variable menu items with variations that contain calorie amounts and levels of nutrients that vary widely, this type of nutrient declaration minimally assists consumers in maintaining healthy dietary practices, since it does not provide them with a way to determine the nutrient levels of the particular variations they are choosing between. The consumer may not be able to determine how to make a selection to get fewer of the nutrients the consumer wishes to avoid and more of the nutrients that the consumer wants to consume.

Option 2. List the nutrition information for each component in the variable menu item.

Using the example described above in option 1, for a meal that consists of a cheeseburger, side dish (fries or salad with fat-free dressing), and medium soft drink (diet or regular), under option 2, the covered establishment would be required to provide information for the required nutrients for each component of the meal, *i.e.,* the cheeseburger, the fries, the salad with fat-free dressing, a medium soft drink, and a diet soft drink. The declaration may appear as follows, which includes the proposed simplified formats for the medium cola and diet cola:

Cheeseburger:

- Total calories 470 calories
- Calories from fat 190 calories
- Total fat 21 g
- Saturated fat 8 g
- Trans fat 1 g
- Cholesterol 75 mg
- Sodium 880 mg
- Total carbohydrate 43 g
- Sugars 10 g
- Dietary fiber 2 g
- Protein 26 g

Medium fries:

- Total calories 420 calories
- Calories from fat 180 calories
- Total fat 20 g
- Saturated fat 3.5 g
- Trans fat 0 g
- Cholesterol 0 mg
- Sodium 500 mg
- Total carbohydrate 54 g
- Sugars 0 g
- Dietary fiber 6 g
- Protein 5 g

Garden salad with fat-free dressing:

- Total calories 150 calories
- Calories from fat 30 calories
- Total fat: 3 g
- Saturated fat 0 g
- Trans fat 0 g
- Cholesterol 0 mg
- Sodium 340 mg
- Total carbohydrate 27 g
- Sugars 11 g
- Dietary fiber 2 g
- Protein 3 g

Medium Cola:

- Total calories 200 calories
- Total fat 0 g
- Sodium 5 mg
- Total carbohydrate 56 g
- Sugars 56 g
- Protein 0 g
- Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, and dietary fiber.

Medium Diet Cola:

- Total calories 0 calories
- Total fat 0 g
- Sodium 40 mg
- Total carbohydrate 0 g
- Sugars 0 g
- Protein 0 g
- Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, and dietary fiber

This option provides the consumer with all the required nutrient information for each component of the combination meal in a format that facilitates quick comparisons between different menu items. This option also likely reduces duplication, particularly for combination meals, since most items in combination meals are likely to be available as individual standard menu items.

In addition, when the nutrition information for different flavors, varieties, or components of combinations are the same, the nutrition information for these food items would need only be listed once, with the food items grouped together. For example:

Raspberry or Peach Flavored Iced Tea (14 ounces):

- Total calories 5 calories
- Total fat 0 g
- Sodium 15 mg
- Total carbohydrate 1 g
- Sugars 0 g
- Protein 0 g

- Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, and dietary fiber

For some variable menu items, the number of possible variations is so large that providing the nutrient information required in proposed § 101.11(b)(2)(ii)(A) in written form would be impractical if FDA required the information to be disclosed for each conceivable option. For example, a pizza with a choice among many toppings has a very large number of possible permutations. FDA tentatively concludes that it is more reasonable to require written nutrition information for the basic preparation of the pizza (*e.g.,* plain, deep- dish 12" pizza) and then provide the additional written nutrition information for each possible topping. Therefore, FDA proposes that the nutrition information required in § 101.11(b)(2)(ii)(A) must be provided for the basic preparation of the item and, separately, for each topping or other variable component.

Option 3. If a standard menu item only has two variations (*e.g.* a sandwich with fruit or with fries), provide both numbers for each nutrient in each option with a forward slash between (*e.g.* 450/700). If three or more options are available, provide the range in calories. For example, for a grilled chicken sandwich with either small fries or fruit the nutrients would be declared as:

- Total calories: 450/700 calories
- Calories from fat: 70/200 calories
- Total fat: 7/23 g
- Saturated fat: 1.5/4.5 g
- Cholesterol: 90/90 mg
- Trans fat: 0/0 g
- Sodium: 1160/1430 mg
- Total carbohydrate 63/87 g
- Sugars 27/9 g
- Dietary fiber 3/6 g
- Protein 35/38 g

This option could result in a mixed format within the written nutrition information, *i.e.,* two different types of declarations, one with numbers separated by slashes and one with numbers separated by dashes. We question whether this approach has the potential to be confusing to consumers due to the mixed format and if consumers would be able to distinguish that the nutrient declarations separated by a slash represent the actual amount of nutrients in the two options and that the nutrients declarations separated by a dash actually represents a range of nutrients where the actual amount of nutrients for the item they decide to choose could be anywhere within that range.

For the reasons described above in this section, FDA tentatively concludes that Option 2 provides the most direct and clear information for consumers. Consequently, we are proposing in § 101.11(b)(2)(ii)(C) that for foods that come in different varieties, flavors, and combinations, the nutrient information in the written form required in § 101.11(b)(2)(ii)(A) must be declared for each variety, flavor, and each food component of the combination meal. For those foods that come in different varieties, flavors, and combinations where the number of possible variations is so large that providing the nutrition information in written form for each permutation would be impractical (e.g., pizza, ice cream), FDA is proposing that the nutrition information required in § 101.11(b)(2)(ii)(A) must be provided for the basic preparation of the item and, separately, for each topping or other variable component. The nutrition information in written form may also be provided for every possible variation. FDA specifically requests comment on this proposed requirement as well as alternatives that would provide clear, truthful, and non-misleading information to the consumers about the specific food they purchase.

FDA is also proposing that if the calories and other nutrients are the same for different flavors, varieties, and each substitutable component of the combination meal, each variety, flavor, and substitutable component of the combination meal is not required to be listed separately. All items that have the same nutrient levels could be listed together with the nutrient levels listed only once.

g. Format and manner for the written nutrition information. FDA is proposing that the nutrition information must be presented in the order listed in proposed § 101.11(2)(ii) and that the information must be presented in a clear and conspicuous manner.

FDA is not proposing a specific manner for providing the written nutrition information. Instead, FDA is proposing in § 101.11(2)(ii)(D) that the written nutrition information may be provided on a counter card, sign, poster, handout, loose leaf binder, booklet, or electronic device, such as a computer, on a menu or in any other material that similarly permits the declaration in written form of the required nutrient content information for all standard menu items.

FDA's proposed approach is consistent with the many comments that stated that the manner in which the written nutrition information is made available should be flexible. One comment recommended that the written nutrition information should be made available electronically at kiosks in lieu of paper copies. Some comments recommended that the information appear on the register tape and others recommended that it appear on the menus themselves. A few comments stated that the information should be allowed on food wrappers or tray liners, while one comment opposed the use of liners and wrappers, stating that the information should be provided immediately prior to or at the point of purchase. FDA would not object to the use of tray liners or wrappers to be used as a means to provide nutrition information, as long as the tray liners or wrappers are available upon request to the consumers, and the tray liner or wrapper contains nutrition information for all standard menu items offered for sale at the covered establishment.

Another comment recommended that FDA provide additional nutrition information in Spanish and other languages depending on the region of the country in which the retail food establishment is located. FDA would not object to covered establishments providing information in other languages, in addition to English. FDA notes, however, that if the information is provided in other languages, all of the required information must be provided in that language. This is consistent with labeling requirements for packaged foods, except that covered establishments in Puerto Rico may provide the information in Spanish only. § 101.15(c).

Unlike the statutory requirements about calorie declarations, which must be placed on menus and menu boards, there is more opportunity for the industry to determine how best to present the written nutrition information. In determining how to present the nutrition information in written form, a covered establishment might consider the extensiveness of the menu and levels of technology capability, among other factors. Allowing flexibility in meeting the requirements of this section is consistent with the current regulation for nutrition labeling in restaurant foods in § 101.10, which permit the disclosure of nutrition information for foods that bear nutrient content or health claims by various means. We request comment on whether we should be more prescriptive in the format and manner of the declarations in order to ensure they are useful to consumers.

In considering whether to require more specific formats, FDA is particularly concerned with whether there are ways to provide information to consumers with diseases related to obesity and being overweight. For example, we seek comment on whether

FDA should require nutrients that are particularly important for consumers with obesity and diabetes to monitor in order to maintain healthy dietary practices (e.g., total calories, total fat, sodium, sugar) to be bolded or placed in a separate table of nutritional content. In addition, FDA requests comment on whether and how additional written nutrition information should be required to be available on the Internet, *e.g.,* when a covered establishment provides a menu on its Web site.

6. Requirements for Self-Service Food and Food on Display

a. General requirements for self-service food and food on display. Section 403(q)(5)(H)(iii) provides that calories per food item or per serving must be disclosed for self-service food and food on display (21 U.S.C. 343(q)(5)(H)(iii)). Covered establishments must provide this calorie information on a sign adjacent to each food offered.

As discussed in section III.B. of this document, FDA proposes to define "food on display" as food that is visible to the customer before the customer makes an order selection. FDA is proposing to define "self-service food" as food that is available at a salad bar, buffet line, cafeteria line, or similar self-service facility, and self-service beverages.

b. Display of calories for self-service foods or foods on display. Section 403(q)(5)(H)(i) and (iii) requires that covered establishments place adjacent to each standard menu item that is a self-service food and food on display a sign that lists calories per displayed food item or per serving (21 U.S.C. 343(q)(5)(H)(i) and (iii)). Some comments stated that for foods sold at salad bars or buffet lines, the calorie information must be near each item, and not, for example, in a pamphlet on or near the salad bar or buffet line. One comment asserted that the placement of signs adjacent to each food item creates a potential for insanitary conditions, and suggested that the calorie information be placed at the beginning of the self-service line and hung above self-serve stations.

FDA tentatively concludes that when a self-service food or food on display is already accompanied by an individual sign, adjacent to the food, that provides the food's name, price, or both, listing calories per displayed food item or per serving on that sign satisfies the requirement of section 403(q)(5)(H)(iii). Placing a separate sign with calorie information adjacent to a food that is already accompanied by a sign bearing its name, price, or both, could make it more difficult for consumers to clearly associate the calorie information with its corresponding self-service food or food on display. Therefore, given FDA's authority to specify the manner of nutrient content disclosures under section 403(q)(5)(H)(x)(bb), FDA is proposing in § 101.11(b)(2)(iii) that the calorie declaration appear on the sign with the name, price, or both, of the self-service food or food on display, if applicable.

FDA proposes that the calorie declaration on such a sign must state the number of calories and use the term "Calories" or "Cal," both in a type size no smaller than the type size of the name or the price of the food item whichever is smaller in the same color, or a color at least as conspicuous as that name or price, with the same contrasting background. FDA requests comment on whether establishments that already provide an individual sign identifying each food on display or self-service food with its name, price, or both should have the option of providing a separate individual sign for each food on display or self-service food for the calorie declaration, so long as the sign with the calorie declaration is adjacent to and clearly associated with its corresponding food.

When a self-service food or food on display is not already accompanied by an individual sign, adjacent to the food, that provides the food's name, price, or both, FDA proposes that the covered establishment place a sign adjacent to each food with the number of calories per serving or per item, as appropriate, and the term "Calories" or "Cal." FDA proposes that the calorie declaration on these signs be clear and conspicuous, and requests comment on whether additional or more specific formatting requirements are necessary.

Often, self-service food or food on display is displayed per item, such that the customer generally takes one item or is generally served one item (*e.g.,* a baked potato at a buffet, a cupcake at a bakery, a cup of pudding at a cafeteria). FDA tentatively concludes that for self-service food or food on display that is displayed per item, where an item represents one serving, the calorie declaration should be per item.

For self-service food or food on display that is not displayed per item (*e.g.,* potato salad at a buffet or ice cream at an ice cream parlor), FDA tentatively concludes that the calorie declaration should be per serving. Covered establishments may use the size of the serving utensil as the serving measure (*e.g.* 300 calories per single scoop of ice cream), or they may use common household measurements (*e.g.,* 400 calories per cup of potato salad. FDA requests comment on the appropriate measurement units for declaring calories per serving for self-service foods and foods on display.

With respect to multiple-serving foods, FDA tentatively concludes that if the food on display or self-service food is a discrete item such as a whole rotisserie chicken, and it is sold as such, then the calories must be displayed for the whole item. FDA would not object to the voluntary declaration of the calories per serving as well as the calories per food item, as long as such declaration is truthful and not misleading. However, if individual portions of a multi-serving food on display or self-service food are served to consumers or available for consumers to serve themselves (*e.g.,* cake by the slice or pizza by the slice), then, under this proposal, the calories must be displayed per serving.

c. Self-serve beverages. A few comments stated that calorie labeling for self-serve beverages, such as soft drinks, juices, shakes, smoothies, coffees, teas, and similar drinks is difficult because of factors including the wide range of calories per ounce of the different types of beverages; the variability in serving size within a chain and in different establishments; and the amount of ice dispensed for certain beverages. The comments also stated that there is limited space on menus and beside beverage dispensers. Some comments asserted that the calorie declaration should be on menus or menu boards, because that is where the consumer makes decisions; one of these comments stated that to the extent that it is appropriate to make calorie information available in places other than the menu or menu board, it should be provided in a consistent manner (*i.e.,* the calorie declarations on menus, menu boards, and adjacent to self-service fountain machines and other self-service beverage equipment should all be consistent and based on the same serving size or other agreed upon unit of measure).

The comments stated that FDA must work with covered establishments, as well as with the beverage industry, to determine the appropriate serving size (*e.g.,* 12 fluid ounces) or other standard (*e.g.,* ranges, averages, per cup assuming one-third ice fill, *etc.*) on which a reasonable approximation of beverage calorie content should be based. Some comments recommended that FDA exempt self-service fountain machines and other self-service beverage dispensing equipment from displaying calorie information until FDA satisfies the FD&C Act's requirement to

"establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks."

FDA recognizes that covered establishments may have different sizes for beverages that are listed on the menu as small, medium and large. Consumers may be confused when they order the same item (*e.g.,* a small cola) in two different establishments and are presented with two different calorie declarations. For example, in one establishment, a small cola may be 140 calories and in another establishment a small cola is 190 calories. The difference in the calories could be based on the fact that the two cups sold as "small" may have different volumes (*e.g.,* 12 ounces versus 16 ounces). FDA is considering whether the amount of calories declared should be based on the number of ounces. We anticipate that if we adopt this view in the final rule, we would not object to the covered establishment listing the number of ounces as part of the size declaration *e.g.,* "140 calories per 12 ounces (small)." FDA requests comment on this issue.

Similar to the ice cream parlor that lists all of its flavors on the menu board, some covered establishments list beverages individually on a menu or menu board. In such situations, calorie information must be provided in both locations, in accordance with section 403(q)(5)(H)(ii) and (iii). When a general term for a set of beverages that includes different flavors or varieties is listed on a menu or menu board (*e.g.,* "soda"), we are proposing that the calories be declared as a range, like any other variable menu item (see proposed § 101.11(b)(2)(i)(4)). The self-service beverage dispenser itself must have calorie declarations for each flavor or variety offered, such that the calorie declaration is clearly associated with its corresponding flavor or variety. For example, the restaurant may place above each dispenser for soft drinks small signs labeled with the amount of calories for each beverage. As with other self-service foods or foods on display, if a self-service beverage already has an individual, identifying sign, the calorie declaration must appear on that identifying sign, so long as it is in a type size no smaller than the type size of the name of the beverage with the same prominence.

d. Applicability of 403(q)(5)(H)(ii) to self-service food and food on display. Section 403(q)(5)(H)(i) states, "in the case of food that is a standard menu item * * * [the covered] establishment shall disclose the information described in subclauses (ii) and (iii)." The word "and" between the references to subclause (ii) and subclause (iii) indicates that for each standard menu item, including self-service food and food on display, covered establishments should follow requirements in section 403(q)(5)(H)(ii) as applicable and section 403(q)(5)(H)(iii) as applicable. FDA tentatively concludes that when these self-service foods and food on display appear on menus or menu boards, the menus or menu boards must bear the calorie declarations required by sections 403(q)(5)(H)(ii)(I)(aa) and (II)(aa). FDA also tentatively concludes that covered establishments must provide the nutrition information in written form required under 403(q)(5)(H)(ii)(III) for these self-service foods and foods on display, and the statements required by 403(q)(5)(H)(ii)(I)(bb), (II)(bb), and (IV) on their corresponding menus and menu boards.

(1) Calorie Declarations

As discussed above, FDA proposes to define "menu" or "menu board" as the primary writing of the covered establishment from which a consumer makes an order selection. Under this definition, most self-service food and food on display would not appear on menus or menu boards. However, some would. For example, an ice cream parlor might list all of its flavors on a menu board and also have bulk containers of ice cream on display and visible to customers in a display case. In this situation, calorie declarations must be provided adjacent to the ice cream flavors on the menu board under 403(q)(5)(H)(ii)(II)(aa) and on signs adjacent to the individual ice cream bulk containers themselves under 403(q)(5)(H)(iii).

As another example, a coffee shop might have baked goods identified by small signs adjacent to each food declaring the name and, often, the price of each baked good. In many cases, these baked goods on display do not appear on the establishment's menu board. Because these signs are the only writings of the establishment from which consumers select baked goods to order, FDA tentatively concludes that they are the primary writings from which consumers ordering baked goods make their order selections.

Unlike self-service beverages such as fountain drinks that have specific size and product options, for a narrow category of self-service food or food on display where a general menu item corresponds to a wide set of self-service food or food on display, a calorie declaration adjacent to the name of the general menu item on a menu or menu board might not be helpful to the consumer. For example, the food choices on buffet lines are typically extensive, and the customers have control over the portions of each food choice they serve themselves. In addition, many buffets are all-you-can-eat. FDA notes that it would be almost impossible for covered establishments to provide useful calorie information for the general menu item "lunch buffet," given that there is no clearly identifiable upper bound to the amount of calories a customer ordering the "lunch buffet" would consume. Therefore, FDA tentatively concludes that it would be most useful for consumers, and most practical for retail food establishments, if the calorie information is provided for each individual item on the lunch buffet in accordance with section 403(q)(5)(H)(iii), but not adjacent to the name "lunch buffet" on the menu or menu board. Given FDA's authority to under section 403(q)(5)(H)(v), FDA is proposing in § 101.11(b)(2)(i)(A)(*4*) to instead require covered establishments to include on the menu or menu board a statement referring customers to the self-service facility for calorie information, e.g., "See lunch buffet for calorie declarations." FDA requests comment on this tentative conclusion.

(2) Additional Written Nutrition Information for Self-Service Food and Food on Display

Section 403(q)(5)(H)(ii)(III) requires certain additional nutrition information to be available to the consumer in written form upon request. Because section 403(q)(5)(H)(i) states that covered establishments must disclose the information in section 403(q)(5)(H)(ii) for standard menu items, FDA tentatively concludes that covered establishments must provide the additional written nutrition information described in section 403(q)(5)(H)(ii)(III) for self-service foods and food on display that are standard menu items.

Similar to our tentative conclusion regarding calorie declarations for general menu items such as "lunch buffet" discussed above, FDA tentatively concludes that it would be most useful for consumers, and most practical for covered establishments, if the additional written nutrition information is provided for each individual item on the lunch buffet, not for "lunch buffet" generally. This tentative conclusion is consistent with FDA's proposal for providing additional written nutrition information for variable menu items by component. FDA requests comment on this tentative conclusion.

(3) Succinct Statement and Statement of Availability of Additional Written Nutrition Information for Food on Display

As discussed earlier, a narrow set of food on display has identifying signs adjacent to each food item that are the primary writings of the establishment from which consumers make order selections. FDA recognizes that sections 403(q)(5)(H)(ii)(I)(bb), (II)(bb), and (IV) apply to these foods under a straightforward reading of the statute. However, the obligation to provide the two statements related to suggested daily caloric intake and the availability of additional written nutrition information under 403(q)(5)(H)(ii) seem to pose difficulties, given the generally small size of these individual signs. In addition, from a consumer's perspective, it is probably unnecessary for these two statements to appear on every single individual identifying sign. Lastly, FDA is instructed to "consider * * * space on menus and menu boards" in promulgating these regulations (403(q)(5)(H)(x)).

FDA tentatively concludes that each individual sign could be considered its own menu, but that a set of signs that are in close proximity to each other, such as those that might identify items in a bakery display counter, could be viewed together as the primary writing from which consumers choose among those items to order. Therefore, FDA is proposing in § 101.11(b)(iii)(B) that covered establishments may place the statements required under 403(q)(5)(H)(ii) on the individual food-specific signs, but they also have the option of placing them on a separate, larger sign, in close proximity to food on display, that can be easily read as the consumer is making his or her order selection. Similarly, FDA tentatively concludes that signs identifying food on display that are the primary writing from which consumers select the corresponding items to order and are in close proximity to a menu board, such that the menu board can be easily read as the customer is viewing the food on display, could be considered part of that menu board. For example, some coffee shops offer baked goods in a display case directly in front of the menu board. In these situations, the statements that appear on the menu board itself under 403(q)(5)(H)(ii)(II)(bb) and (IV) would be sufficient. FDA requests comment on these conclusions and whether additional restrictions related to presenting these statements in these contexts are necessary.

e. Requirements for Self-Service Foods and Foods on Display That Are Packaged Foods That Bear the Nutrition Information Required by Section 403(q)(1) of the FD&C Act and § 101.9

Some packaged food, such as bags of chips or packages of cookies, are offered for sale in covered establishments individually or as parts of combination meals. A packaged food that is required to bear nutrition information on its label under 403(q)(1) of the FD&C Act and FDA's implementing regulations at *§* 101.9 would not be a restaurant or restaurant-type food, because restaurant or restaurant-type food includes only food previously exempt from those nutrition labeling requirements. Therefore, such food would not be covered by the proposed menu labeling requirements. However, FDA tentatively concludes that some packaged food offered for sale in covered establishments is "food served in restaurants or other establishments in which food is served for immediate consumption or that is sold for sale or use in such establishments." While it happens to bear Nutrition Facts, it is not required to do so. This food would meet the proposed definition of "restaurant food" and therefore would be covered by the menu labeling requirements.

Such packaged food already includes on its label the nutrition information that FDA is proposing be required to be disclosed in the written form in § 101.11(b)(2)(ii). As noted in section III.B.5. this information would include the number of calories, calories from fat, total fat, saturated fat, cholesterol, *trans* fat, sodium, total carbohydrates, sugars, dietary fiber, and total protein in the food. In some cases, the packaged food is placed on a shelf, rack, counter, or other area where the food can be accessed by a consumer before the consumer purchases the food. So long as the consumer is able to examine the nutrition information on the label of the packaged food before purchasing the food and the food complies with the nutrition labeling requirements set forth in 403(q)(1) of the FD&C Act and *§* 101.9, the label for the packaged food will provide to consumers, in written form, the nutrition information that FDA is proposing be required in the written nutrition information. Therefore, FDA tentatively concludes that this type of packaged food would satisfy the requirements of § 101.11(b)(2)(ii), so long as consumers are able to examine the nutrition information on the label of the packaged food before purchasing the food.

In addition, the label of such packaged food includes calorie information for the food per item or per serving. FDA tentatively concludes that a packaged food that is a self-service food or food on display that bears the nutrition information required by 403(q)(1) of the FD&C Act and § 101.9 satisfies the calorie disclosure requirement for self-service food or food on display in section 403(q)(5)(H)(iii) of the FD&C Act, so long as a consumer is able to examine the calorie information on the label prior to purchase. Covered establishments would not be required to place signs that list calories per displayed food item or per serving adjacent to such packaged foods. The agency tentatively concludes that these proposals will provide flexibility for industry without sacrificing nutrition information provided to consumers.

Covered establishments still would be required to post calorie information on menus and menu boards for packaged foods that are standard menu items listed on menus and menu boards. For example, a covered establishment may list "chips" on its menu board, referring to packaged bags of chips that are available as self-service foods or foods on display within the establishment. In this situation, the establishment would be required to disclose on the menu board calorie information for the packaged chips, even though the establishment may not be required to place a sign that lists calories per displayed food item or per serving adjacent to the packaged chips themselves.

In addition, if a covered establishment lists on its menu or menu board a combination meal that includes a packaged food, the establishment would be required to disclose the total calorie information for the combination meal, including the packaged food. For example, a covered establishment may list on its menu board a combination meal that includes a soft drink, sandwich, and packaged chips. In this case, the covered establishment would be required to disclose on the menu board the total calorie information for the combination meal, which would include the soft drink, sandwich, and packaged chips, because these food items together make up the combination meal. FDA requests comments on these proposals and tentative conclusions.

8. Determination of Nutrient Content

Section 403(q)(5)(H)(iv) requires that a covered establishment "shall have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in [21 CFR 101.10] (or any successor regulation) or in a related

guidance of the Food and Drug Administration." 21 U.S.C. 343(q)(5)(H)(iv). FDA is proposing in § 101.11(c)(1) that nutrient content disclosures may be determined by nutrient databases, cookbooks, laboratory analyses, and other reasonable means, including the use of labels on packaged foods that comply with the nutrition labeling requirements of section 403(q)(1) of the FD&C Act and *§* 101.9. FDA notes that covered establishments must ensure that the nutrition declaration is truthful and not misleading in accordance with section 403(a)(1) under the FD&C Act. Further, FDA is proposing in § 101.11 that for compliance purposes, a covered establishment is required to upon request provide information on the reasonable basis used to determine the nutrient content disclosures for their standard menu items, self-serve foods and foods on display. This proposed requirement is discussed in more detail below in section E. In addition, because the nutrients that are required to be declared in covered establishments are a subset of those required to be declared in the labeling of food in § 101.9, FDA is proposing in § 101.11 an approach for determining compliance modeled after § 101.9(g). Proposed § 101.11(c)(2) provides for two classes of nutrients for purposes of compliance: Class I (added nutrients) and Class II (naturally occurring (indigenous) nutrients). FDA is proposing that for Class I protein or dietary fiber, the nutrient content of an appropriate composite sample must be at least equal to the value for that nutrient declared in the nutrition information in the written form. Other requirements would include that the amount of calories, sugars, total fat, saturated fat, *trans* fat, cholesterol, and sodium contained in an appropriate composite of a standard menu item must not be more than 20 percent in excess of the declared value. Additionally, the amount of protein, total carbohydrates and dietary fiber contained in an appropriate composite of a standard menu item must not be less than 80 percent of the declared value. FDA also is proposing that for variable menu items that disclose calories in ranges, the lowest calorie declaration in the range would be used to determine compliance. FDA requests comments on the appropriate variability from declared nutrition information for compliance purposes, including whether § 101.11 should mirror § 101.9 in this respect.

D. Voluntary Registration for Restaurants or Similar Retail Food Establishments That Are Not Chain Retail Food Establishments and Elect To Be Subject to the Requirements of Section 4205

Section 403(q)(5)(H)(ix) provides that restaurants and similar retail food establishments *not* automatically subject to the requirements of section 403(q)(5)(H) may elect to become subject to the requirements by registering biannually with FDA (21 U.S.C. 343(q)(5)(H)(ix)). On July 23, 2010, as required by section 403(q)(5)(H)(ix), FDA published in the **Federal Register** a notice ("registration notice") specifying the terms and conditions for implementation of voluntary registration, pending promulgation of regulations (75 FR 43182 (July 23, 2010)).

Section 4205 preempts State and local nutrition labeling requirements for chain retail food establishments that are not "identical" to the Federal requirements, as discussed more fully in section IV of this document (21 U.S.C. 343–1(a)(4)). Under amended section 403A(a)(4), restaurants and similar retail food establishments that are not chain retail food establishments but elect to become subject to the Federal requirements by registering voluntarily with FDA are not subject to State or local nutrition labeling requirements, unless those State or local requirements are "identical to" Federal requirements. Restaurants and similar retail food establishments that register are subject to the requirements of amended section 403(q) and FDA's implementing regulations to the same extent as chain retail food establishments.

FDA anticipates that registrations will primarily be submitted by restaurants and similar retail food establishments with fewer than 20 locations in States and localities that have non-identical menu labeling requirements. An authorized official would be permitted to register multiple restaurants or similar retail establishments within a chain on a single registration form, provided that the official is an authorized official for all of the restaurants or similar retail food establishments included on the form. In addition, the authorized official of an individual restaurant or retail food establishment may register that restaurant or retail food establishment on a single registration form.

FDA is proposing in § 101.11(c)(2) that the authorized official of a restaurant or similar retail food establishment as defined in § 101.11(a)(10) may register with FDA. FDA is also proposing in § 101.11(c)(2) that an authorized official may register an individual restaurant or similar retail food establishment or multiple restaurants or similar retail food establishments that are part of chain on a single registration form.

FDA is proposing in § 101.11(c)(3) that authorized officials for restaurants and similar retail food establishments must provide FDA with the following information:

- The name, address, phone number, e-mail address, and contact information for the authorized official;
- The name, address, and e-mail address of each restaurant or similar retail food establishment being registered, as well as the name and contact information for an official onsite, such as the owner or manager, for each specific restaurant or similar retail food establishment;
- All trade names the restaurant or similar retail food establishment uses;
- Preferred mailing address (if different from location address for each establishment) for purposes of receiving correspondence; and
- Certification that the information submitted is true and accurate, that the person or firm submitting it is authorized to do so, and that each registered restaurant or similar retail food establishment will be subject to the requirements of § 101.11.

FDA has created and made available at a Web site, *http://www.fda.gov/menulabeling,* a form (OMB No. 0910–0664) that contains fields requesting this information. Authorized officials of restaurants and similar retail food establishments electing to be subject to the requirements of section 403(q)(5)(H) can obtain information to register by visiting *http://www.fda.gov/menulabeling.* Registrants must use this form to ensure that complete information is submitted.

FDA prefers that the information be submitted by e-mail by typing complete information into the form (PDF), saving it on the registrant's computer, and sending it by e-mail to *menulawregistration@fda.hhs.gov.* If e-mail is not available, the registrant can either fill in the form (PDF) and print it out (or print out the blank PDF and fill in the information by hand or typewriter), and either fax the completed form to (301) 436–2804 or mail it to FDA, White Oak Building 22, Room 0209, 10903 New Hampshire Ave., Silver Spring, MD 20993.

In section 4205, Congress provided that registration must be renewed biannually (21 U.S.C. 343(q)(5)(H)(ix)(I)). Although "biannual" is defined as occurring twice every year,

the word is also defined as occurring every other year. (Ref. 26). FDA tentatively concludes that registration every other year is a more reasonable interpretation of this requirement, because it does not seem warranted or necessary for a restaurant or similar retail food establishment to tell FDA every 6 months that the establishment wants to be subject to Federal jurisdiction. Thus, FDA is proposing in § 101.11(d)(5) that authorized officials must register every other year within 60 days prior to the expiration of the establishment's current registration with FDA, and the registration will automatically expire if not renewed.

E. Substantiation Documentation

Covered establishments must provide nutrient content disclosures that are not false or misleading to comply with section 403(a)(1). Covered establishments also must have a reasonable basis for their nutrient content disclosures under section 403(q)(5)(H)(iv). It is clear under section 403 that covered establishments must substantiate the accuracy of their nutrient content disclosures and the fact that those disclosures have a reasonable basis. Under section 701(a), FDA has authority to issue regulations for the efficient enforcement of FD&C Act, including sections 403(a)(1) and 403(q)(5)(H)(iv).

Without access to substantiation documentation for a covered establishment's nutrient content disclosures, FDA cannot efficiently determine whether a covered establishment's nutrient content disclosures are truthful and not misleading, as required by section 403(a)(1) of the FD&C Act. Without access to substantiation documentation of the bases of nutrient content disclosures, the requirement that nutrient content disclosures have reasonable bases in particular would be unenforceable. Accordingly, FDA is proposing the substantiation requirements in § 101.11(c)(2) as necessary for the efficient enforcement of the FD&C Act.

F. Conforming Amendments

As a result of the amendments to the FD&C Act made by section 4205, conforming amendments must be made in part 101 of Title 21 of the CFR. Section 4205 amended section 403(q)(5)(A) of the FD&C Act, which provided, in part, that the nutrition labeling requirements in section 403(q)(1)–(4) did not apply to food served in restaurants or other establishments in which food is served for immediate consumption or which is sold for sale or use in such establishments. It also did not apply to food which is processed and prepared primarily in a retail establishment, which is ready for human consumption, which is of the type described in subclause (i), and which is offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment. Based on this exemption, FDA promulgated regulations in § 101.9(j) that exempt from nutrition labeling requirements these foods, so long as they do not bear nutrition claims or other nutrition information in any context on the label or in labeling or advertising. Section 101.10 requires nutrition labeling for a restaurant food that bears a nutrient content or health claim, except that information on the nutrient amounts that are the basis for the claim may serve as the functional equivalent of complete nutrition information.

With the new requirements of section 403(q)(5)(H) for standard menu items offered for sale in certain restaurants and similar retail food establishments, provisions in § 101.9(j) need to be amended. In particular, covered establishments with annual gross sales made or business done in sales to consumers that is not more than $500,000 or with annual gross sales made or business done in sales of food to consumers of not more than $50,000 are now required to provide nutrition information under section 403(q)(5)(H). Thus, the exemption in § 101.9(j)(1) needs to be amended to reflect that, in providing the nutrition information required under § 101.11, a covered establishment would not become subject to § 101.9. In addition, the exemptions from nutrition labeling in § 101.9(j)(2) and (3) need to be revised to exclude standard menu items sold in covered establishments and reference the special labeling requirements for those foods in § 101.11. Similarly, § 101.10 needs to be amended to include the provision that for restaurant foods sold in covered establishments, the information required in the written nutrition information required by proposed § 101.11(b)(2)(ii)(A) would meet the requirements of § 101.10, when applicable. Therefore, FDA is proposing conforming amendments in § 101.9(j) and § 101.10.

FDA is proposing to exempt electronic signatures submitted to satisfy the requirements of this proposed section from the requirement to comply with part 11—Electronic Records; Electronic Signatures (21 CFR part 11) and proposing to amend part 11 to reflect this exemption. We expect this exemption to facilitate the registration process for those who voluntarily choose to register under section 403(q)(5)(H)(ix).

G. Proposed Effective Date

FDA received several comments regarding the effective date of the final rule that would issue based on this proposal. Many comments suggested that FDA provide one to two years before the effective date because covered establishments would need that much time to make the changes necessary to comply with the regulations. One comment requested an effective date of three years because this timeframe was needed to defray the costs of new menu boards. Others suggested that six months was a reasonable timeframe.

FDA is proposing that the final rule become effective six months from the date of its publication. Compliance is expected to yield significant public health benefits because consumers will have calorie and other nutrition information when they make menu choices. Because of this benefit, the agency finds that it is reasonable to make the requirements effective as soon as practicable. Based on the comments and on what covered establishments will need to do to come into compliance, the agency tentatively finds that making the final rule effective six months after publication is practicable. FDA recognizes, however, the potential difficulties of implementing the rule in this timeframe, and we request comment on whether the effective date should be extended for a greater period of time after the publication of the final rule. We request comment on whether a nine-month or one-year implementation timeframe would be more appropriate.

H. Compliance

As discussed in section II of this document, FDA is proposing these regulations under sections 201(n), 403(a), 403(q), as amended by section 4205 of the Patient Protection and Affordable Care Act of 2010, and 701(a) of the FD&C Act. Failure to comply with the regulations, if adopted by the agency, will render the food misbranded under sections 201(n), 403(a), or 403(q) of the FD&C Act. Introducing, delivering for introduction, or receiving a misbranded food in interstate commerce, or misbranding a food while it is in interstate commerce or being held for sale after shipment in interstate commerce, are prohibited acts under section 301 of the FD&C Act and subject to enforcement action.

FDA addressed the issue of enforcement of section 4205 in a draft guidance entitled, "Draft Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010." The agency announced the availability of the draft guidance in the **Federal Register** on August 25, 2010 (75 FR 52426). In that draft guidance, FDA stated that it expected to refrain from enforcing the provisions of section 4205 that became requirements immediately upon enactment of the law until a date that it would specify in final guidance. Based on extensive comments on the draft guidance, however, FDA decided to withdraw the draft guidance and to exercise enforcement discretion until after it had completed notice and comment rulemaking (76 FR 4360 (January 25, 2011)).

FDA seeks comment on how we should implement these regulations. In particular, we seek comment, supported by data, concerning how much time is needed for covered establishments to come into compliance with the final rule, including, if possible, data on whether specific provisions of the rule can be more quickly implemented than others (see section V.E., below). We seek comment on whether we should provide for staggered implementation based on the size of a chain or of a specific franchisee. Again, any suggestions should be supported by data. Given that FDA does not intend to enforce the self-executing provisions at this time, we encourage our State and local partners to proceed in a similar way.

IV. Summary of Preliminary Regulatory Impact Analysis

The summary analysis of benefits and costs included in this document is drawn from the detailed Preliminary Regulatory Impact Analysis (PRIA) that is available at *http://www.regulations.gov,* Docket No. FDA–2011–F–0172, and is also available on FDA's Web site at *http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm.*

A. Introduction

FDA has examined the impacts of the proposed rule under Executive Orders 12866 and 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits (both quantitative and qualitative) 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 an "economically" significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Using the Small Business Administration (SBA) definitions of small for industrial subsectors in accommodations, food service, recreation, and retail food stores (NAICS 72, 71, 445), FDA tentatively concludes that a significant number of firms affected by this proposed rule are small businesses.

Section 4205 of the Affordable Care Act and the proposed requirements apply to chain retail food establishments, as that term is used in this document (*i.e.,* a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items), and establishments that voluntarily register with FDA to become subject to the requirements of section 4205. Some chain retail food establishments may meet the SBA definitions of: Less than $7 million in annual sales for most accommodation and food service or recreation subsectors (NAICS 72, 71); less than $20.5 million in annual sales for Food Service Contractors (NAICS 722310); or less than $27 million in annual sales for supermarkets and convenience store chains (NAICS 44510 and 445120). In addition, some chain retail food establishments are owned or operated by entities, including franchisees or cooperative members that may meet the SBA definitions described above.

Establishments that voluntarily register to be subject to the Federal requirements, which may be individually owned or part of a firm that controls establishments within a chain of less than 20 locations, may meet the SBA definition described above. While the voluntary nature of the registration implies that these latter firms see a positive net benefit from becoming subject to the Federal requirements, this does constitute a potentially significant economic impact. Therefore, the agency tentatively concludes that the rule will have a significant economic impact on a substantial number of small entities. This tentative conclusion is discussed further in section V.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA expects this proposed rule to result in 1-year expenditures that would meet or exceed this amount. This tentative conclusion is discussed further in section VI.

FDA asks for comments about the data and the methods used for estimating the regulatory impact of the proposed rule.

B. Need for This Regulation

This proposed rule is necessary to implement Section 4205 of the Affordable Care Act, which amends sections 403(q)(5) and 403A of the FFDCA, and requires disclosure of calorie and other nutrition information by covered establishments. These nutrition labeling requirements should help consumers to make more informed choices about the nutritional content of the food they purchase. The provision of calorie and other nutrition information for restaurant and restaurant-type foods, as those terms are used in this document, offered for sale by covered establishments should help consumers limit excess calorie intake and understand how the foods that they purchase at these establishments fit within their daily caloric and other nutritional needs. FDA notes as well that Executive Order 13563 specifically directs agencies to "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include * * * disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."

Economic justifications for regulatory interventions in private markets rely on the presence of some market failure. In the case of restaurant and restaurant-type foods, the private market is particularly robust and competitive. Hundreds of thousands of retail food establishments and tens of thousands of

individual firms vie for consumer dollars across the United States. High estimates of failure rates for restaurants (Ref. 27), with relatively steady growth rates in number of establishments (Ref. 28) indicate that entry in the industry occurs often, and survival is hard fought: Restaurants must be responsive to consumer needs and desires in order to survive. The competitiveness of the industry suggests that if a sizable fraction of consumers were willing to pay for—and discriminate based on—the availability of nutrition information, then the industry would provide it to them. In fact, many retail food establishments do provide nutrition information for at least a fraction of their offerings, either through available brochures, or, increasingly, on the Internet. A 2006 study found that 34 percent of the top 300 chain restaurants (by sales volume) had nutrition information available to consumers in some form (Ref. 29).

Notwithstanding this point, and although many of the usual market failures that justify regulatory action, such as the existence of market power or public goods, cannot be found here (Refs. 30 and 31), the primary support for government intervention is an absence of sufficient nutritional information, produced by an inadequate incentive for restaurants to produce that information on their own. An absence of adequate information is of course a standard market failure, justifying disclosure requirements or provision of information in many contexts.

In terms of explaining the inadequate incentive for restaurants to provide sufficient nutrition information, a central reason involves consumer demand. There are systematic biases in how consumers weigh current or immediate benefits (from eating more, or higher calorie, foods) against future or long-term costs (higher probability of obesity and its co-morbidities). These biases are directly related to the proposed requirements: The temporal disconnect inherent between food consumption choices and their potential health costs may work against an efficient provision of nutrition information for food (Ref. 32). A primary issue here is that long-term risks may not be sufficiently salient to produce adequate consumer demand for relevant information disclosure. Without that information, consumers may fail to make informed choices and may undervalue the future costs of excessive calorie consumption, relative to the current benefits from such consumption (Refs. 29, 33 and 34).

Studies suggest that one problem involves the fact that because food decisions are made so often, and the marginal effect of any one meal on future obesity is small, the cumulative costs of a large number of relevant decisions may be neglected. These studies suggest that some or many consumers will not demand calorie information, because the issue of calories often lacks salience, or relevance, for consumers at the time of purchase and consumption, even though they may experience regret about their decisions at a latter date. This tendency may explain why consumers have not generally demanded calorie and other nutrition information for restaurant and restaurant-type food, although they do, at a later point in time, value that information. Furthermore, restaurants and similar retail establishments face costs in providing calorie and other nutrition information, including opportunity costs of limited time and space in which to convey information to the consumer. That is, just as a firm has to decide which possible menu items to leave off a menu board with limited space (thus giving up the opportunity to sell those items), it must choose which pieces of information about its menu items it wants to convey. Adding an additional piece of information means that a firm may need to downplay or remove some other valuable piece of information. In addition, providing calorie information may have complex and unintended effects on revenue and profits as consumers respond to that information. Given the costs and the uncertain reception of displayed calorie information most restaurants have chosen not to display this information at the point of purchase.

The proposed requirements respond to the apparent market failure in information provision stemming from existing restaurant incentives and present-biased preferences. Specifically, the proposed requirements provide that calorie information for standard menu items must be posted in covered establishments. Providing this nutrition information will likely increase the salience of the information and promote informed choice as well. It will also likely raise consumer awareness regarding the number of calories in restaurant and restaurant-type foods, and thus may serve to highlight the potential future costs of additional calorie consumption. This increased attention to the number of calories in food offered for sale by covered establishments may then result in an increased availability of lower calorie options, and an increased demand for these options.

C. Summary of Costs and Benefits of the Proposed Requirements and Regulatory Options

In this section FDA describes the bases of benefits and costs of the proposed requirements and summarizes the results of the detailed PRIA.

Benefits in response to the proposed requirements. Obesity and overweight are major public health concerns in the United States and among the top leading health indicators addressed by the United States Healthy People 2020 goals. Nationally representative data have consistently exhibited a steady increase in the prevalence of obesity over the past three decades (Ref. 35). As noted in section I.A., 34 percent of the adult U.S. population is obese and 34 percent is overweight (Ref. 1). In addition, about 31 percent of children and adolescents, aged 2 to 19, are overweight or obese (Ref. 8).

Excess body weight has many health (Ref. 36), social (Refs. 37 and 38), psychological (Refs. 39 and 40), and economic consequences (Ref. 41) for the affected individuals. Lower life expectancy, elevated risk of diabetes, hypertension, stroke and other cardiovascular disease has been documented to rise simultaneously with the increased prevalence of obesity (Ref. 36). The economic impact is especially evident for health-care costs in terms of greater health-care utilization and higher medical expenditures (Ref. 42). More specifically, as noted, medical expenditures attributable to overweight and obesity accounted for more than 9 percent of the total U.S. medical expenditures in 1998, or between $86 billion, and $147 billion (Ref. 42). Another estimate indicates that obesity costs American families, businesses and government approximately $117 billion in 2010 (Ref. 43).

The primary risk factors for overweight and obesity in the general population are overconsumption of calories (*i.e.,* eating more calories than are needed to maintain body weight) and physical inactivity (*i.e.,* getting an amount of exercise below the amount required to burn excess calories consumed over the amount needed to maintain body weight (Ref. 9).

One contributor out of the complex and multi-facet set of factors is food offered for sale by restaurants and similar retail food establishments. The proportion of total food expenditure spent on such foods increased from 34 percent during the 1970s up to approximately 50 percent by 2004, where it has remained through 2009 (Ref. 44). These foods are generally high in calories, fat and portion size (Ref. 45),

and they tend to be lower in fiber and other essential nutrients such as calcium as compared to home-prepared foods (Ref. 10).

Restaurant food and restaurant-type food form a significant and increasing part of U.S. diets. According to one study, "food away from home" (this term is roughly comparable to restaurant and restaurant-type foods) constituted about a third of calories consumed annually by the average adult or child in the United States in the most recent comprehensive published study (Ref. 10). Another study of adults found that "food away from home" adds an additional 130 calories per meal, on average, relative to a similar meal prepared at home (Ref. 46). The difference in calorie consumption between "food away from home" and food prepared at home was greater for study participants who were overweight or obese; among those individuals, the away-from-home meals had 240 more calories per meal relative to meals prepared at home (Ref. 46).

Although many factors contribute to obesity, to the extent that the proposed requirements would mitigate the prevalence of obesity and of co-morbidities, society would gain the opportunity cost of the averted medical expenditures and an increase in productivity from averted debilitation and death. In addition to informing consumers about the calorie content for restaurant and restaurant-type foods offered for sale by covered food establishments, major predicted elements of the consumer and industry response to this proposed rule may include:

1. Increased awareness regarding the caloric content for foods offered for sale by covered establishments, which may help reduce the present-bias in preferences, and thus encourage the consumption of lower calorie options.

2. Increased consumer interest in lower calorie options, and greater transparency regarding calorie content of menu items, which may give firms an incentive to:

a. Reduce the calorie content of existing items through reformulation or by decreasing portion size.

b. Provide additional items with lower calorie formulations.

These changes may reduce consumers' caloric intake from foods sold in covered establishments, and this reduction in caloric intake may in turn contribute to a reduction in obesity in the U.S. population. Note that any reduction in calorie intake in these settings may be at least partially offset by increases in calorie intake during other meals or snacks. This substitution of one calorie source for another has been demonstrated in the context of menu labeling (Ref. 47) and in the context of other attempts to modify food choices (Ref. 48). Because FDA lacks data on how consumers will substitute between caloric sources, as well as specific information on the responsiveness of calorie demand to new information, the benefit estimations given here may be higher or lower than those that will be realized if the rule is finalized as proposed. Finally, there may be additional benefits to the extent that consumers use the written nutrition information to make food selections.

Industry and consumer costs in response to the proposed requirements. Meeting the proposed requirements will have costs for both the industry and consumers. Typically, new costs to an industry are borne by both consumers and firms: Prices rise to reflect new costs, but generally not by enough to completely offset them. If the expense of meeting the proposed requirements cause prices to increase for some or all restaurant and restaurant-type foods offered for sale by covered establishments, then the consumption of these foods will fall, further reducing profits for some, or all, of these establishments. Consumers would need to pay more for this food, requiring some reduction in other, valued, consumption.

One difficulty in determining the cost burden stems from the relatively complicated ownership structures in some of the covered sectors. Restaurants and similar retail food establishments can be corporate-owned, franchised as part of a large or small independent chain, or cooperatively-organized and doing business under the same name. Data for separate firms operating under the same name, such as franchises of a particular brand or corporate name, are difficult or impossible to acquire. Therefore, for this analysis FDA counts affected establishments and chains, which may in fact serve one, several, or many, underlying firms. Except for some potential costs of nutrition analysis, the costs of the proposed rule are analyzed at either the chain or the establishment level, so that the overall costs are not primarily a function of the actual number of firms affected.

The major elements of cost for this proposed rule are:

1. Collecting and managing records of nutritional analysis for each standard menu item.

2. Revising or replacing existing menus, menu boards and other affected displays.

3. Training employees to understand nutrition information in order to help ensure compliance with the proposed requirements.

Although not required by the proposed requirements, some chains or establishments may respond to increased consumer interest on caloric content of restaurant and restaurant-type food by reformulating existing menu items or by introducing new, lower calorie items. While the costs associated with formulating these items have not been included in the cost estimation, FDA has included the cost associated with analyzing new or reformulated items. Because the rate at which these items are introduced may be affected by the propose requirements, FDA requests comment and data on whether the proposed requirements will accelerate the rate of new item introduction and how the cost of these items may be affected by the proposed requirements.

Finally, because they are not required by the proposal, FDA has not included any costs associated with developing online or other electronic calorie calculators for variable menu items. FDA requests comment and data on the costs of these kinds of calorie tools.

Summary of benefits and costs. We summarize the estimated costs and benefits of the proposed requirements and some regulatory options in Tables 5a–5b. The full analysis is provided in the detailed PRIA. Costs of complying with the proposed requirements have been estimated for three major areas: Cost of nutrition analysis, cost of menu and menu board replacement, and costs of training. These costs have been aggregated across an estimate of the total number of chains and establishments that would be defined as covered under the proposed rule. In the case of the proposed rule, FDA estimates that there would be approximately 278,600 covered establishments organized under 1,640 chains. The initial mean estimated cost of complying with the proposed requirements is $315.1 million, with an estimated mean ongoing cost of $44.2 million. Annualized over 10 years, the mean estimated annual cost of the proposed requirements is $76.8 million at a 3 percent discount rate, and $82.3 million at a 7 percent discount rate. FDA has estimated low and high annualized cost estimates for the proposed requirements of $33.4 million and $120.5 million with a 3 percent discount rate, and $34.9 million and $130.1 million with a 7 percent discount rate. The bases for this wide range of cost estimates and the main drivers of this uncertainty are collected and discussed in the detailed PRIA.

Initial costs are estimated to be $1,100 per covered establishment. Note

however, that this figure combines the average per establishment cost of $1,800 per limited service eating establishments—i.e., those most likely to have more than one menu board or major display serving as a menu—with full service restaurants averaging less than $1,000 per establishment. These averages do not show the very wide range of costs that individual establishments and chains will bear, based on their very different approaches to nutrition analysis, menu design and overall market niche.

FDA has not estimated the actual benefits associated with proposed requirements. Food choice and consumption decisions are complex, and FDA is unaware of any comprehensive data allowing accurate predictions of the effect of the proposed requirements on consumer choice and establishment menus. Therefore, FDA has constructed a plausible individual effect of the proposed rule, and has conducted a break-even analysis in order to determine the proportion of the U.S. obese adult population that would need to attain this minimal response in order for the proposed requirement to yield a positive net benefit. Using a 100 calorie per week reduction in intake as the benchmark effect, FDA estimates that at least 0.06 percent of the adult obese population would need to reach at least this benchmark in order for the rule to break even on the primary, or mean annualized cost.

TABLE 5a—ACCOUNTING STATEMENT: ANNUALIZED COST AND BREAK-EVEN BENEFIT POINT FOR THE PROPOSED REQUIREMENTS

	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits						
Annualized Monetized ($millions/year)	Not quantified					
Annualized Quantified:						
Qualitative: FDA estimates that at least 0.06 percent of the adult obese population would need to reduce caloric intake by at least 100 calories per week in order for benefits from the proposed requirements to reach a break even point on annualized costs (at either 3% or 7%).						
Costs						
Annualized Monetized ($millions/year)	$82.3 76.8	$34.9 33.4	$130.1 120.5	2009 2009	7% 3%	10 10

Regulatory Options. In addition to a baseline, FDA has identified five regulatory options for this proposed rule as required by Executive Order 12866. The estimated benefits and costs of these options relative to the proposed rule are given in Table 5b.

(0) Baseline for the purpose of analysis—No new Federal regulatory action.

(1) Option 1, the proposed rule, the definition of "restaurants or similar retail food establishments," limited to retail establishments that offer for sale restaurant or restaurant type food where the sale of food is the primary business activity of that establishment. This option encompasses limited- and full-service restaurants, snack bars (including coffee shops, pastry shops, sandwich counters and similar establishments), cafeterias, drinking places, convenience stores and grocery stores that are chain retail food establishments as defined in this proposed rule. The proposed rule has an effective date of six months after the publication of the final rule.

(2) Option 2, with requirements similar to the proposed rule, but with "restaurant or similar retail food establishment" limited to retail establishments where the sale of restaurant food or restaurant-type food is the primary business activity. This option covers all establishments included in Option 1, with the exception that grocery and convenience stores would not be subject to the proposed requirements.

(3) Option 3, with requirements similar to the proposed rule, but with scope broadened to include a wide variety of establishments that serve restaurant or restaurant-type food.

(4) Option 4, with requirements similar to the proposed rule, but with an effective date starting three months after publication of the final rule instead of six months after publication of the final rule.

(5) Option 5, with requirements similar to the proposed rule, but with an effective date starting 12 months after publication of the final rule instead of six months after publication of the final rule.

TABLE 5b—SUMMARY OF ESTIMATED ANNUALIZED COMPLIANCE COSTS FOR EACH OPTION

Summary of options	Primary estimate (in millions)	Low estimate (in millions)	High estimate (in millions)	Percent discount rate (10 year horizon)	Proportional cost relative to primary estimate of the proposed requirements	Proportional dollar sales of restaurant food relative to primary estimate of the proposed requirements
(Baseline)	N/A	N/A	N/A	N/A	N/A	
Option 1: The Proposed Rule	$76.8 82.3	$33.4 34.9	$120.5 130.1	3% 7%	0.0%	0.0%
Option 2: Smaller Scope	65.9 72.5	29.1 31.6	103.2 113.8	3% 7%	−12.5%	−5.0%

TABLE 5b—SUMMARY OF ESTIMATED ANNUALIZED COMPLIANCE COSTS FOR EACH OPTION—Continued

Summary of options	Primary estimate (in millions)	Low estimate (in millions)	High estimate (in millions)	Percent discount rate (10 year horizon)	Proportional cost relative to primary estimate of the proposed requirements	Proportional dollar sales of restaurant food relative to primary estimate of the proposed requirements
Option 3: Larger Scope	86.9 92.9	38.2 39.9	135.5 145.8	3% 7%	+13.3%	+11.2%
Option 4: Shorter Compliance Time ..	84.2 91.0	35.8 37.8	132.4 144.0	3% 7%	+9.4%	0.0%
Option 5: Longer Compliance Time ...	76.2 81.6	31.9 33.2	120.5 130.1	3% 7%	−2.4%	0.0%

FDA estimates that Option 2, which limits the scope of the proposed requirements to establishments that either present themselves as restaurants or have more than 50 percent of their floor area used for restaurant or restaurant-type food, has a ten-year annualized cost of between $29.1 million per year and $103.2 million per year with a 3 percent discount rate, with a primary estimate of $65.9 million. Averaged over primary, low and high estimates, the costs of Option 2 are 12.5 percent lower than those of the proposed requirements. Although FDA does not have adequate data on the proportion of calories consumed at different types of establishments, as a rough estimate of the coverage of Option 2 relative to the proposed requirements, we use the proportion of dollar sales of restaurant or restaurant type food relative to the establishments covered by the proposed rule. In the case of Option 2, limiting the scope of covered establishments would reduce the coverage of restaurant or restaurant-type food sales by 5.0 percent. These changes are discussed more fully in the detailed analysis.

Option 3 which considers a wider set of establishments that service restaurant or restaurant-type foods, including lodging, transport, entertainment, general retail and other establishments, has costs that are 13.3 percent higher than those of the proposed requirements and coverage of sales that is 11.2 percent higher. Option 4, which shortens the compliance time to 3 months, has costs that are 9.4 percent higher than the proposed, and Option 5, which lengthens compliance time to 12 months has costs that are estimated to be 2.4 percent lower. These options do not change the set of covered establishments relative to the proposed rule.

Finally, although registration by firms wishing to register with FDA in order to come under the proposed requirements and the associated preemption from State or local regulations is voluntary, and is only likely to occur to the extent that the costs of registration and compliance with Federal regulation is lower than that of State or local regulation, this registration constitutes a collection of information under the Paperwork Reduction Act of 1995. Therefore, FDA has also estimated the burden associated with this collection of information in section VII of this document. For full documentation and discussion of these estimated costs and benefits see the detailed PRIA, available at *http://www.regulations.gov,* enter Docket No. FDA–2011–F–0172.

V. Initial Regulatory Flexibility Analysis

FDA has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities consistent with statutory objectives. FDA tentatively concludes that this proposed rule will have a significant economic impact on a substantial number of small entities. Although chains with 20 or more establishments will generally have total sales in excess of SBA's small business limits, many of these establishments are actually operated by franchisees, independent operators licensing a chain store brand, or some other types of small business. The majority of the costs of the proposed rule will be borne at the establishment level, in particular, the cost of new menus and of employee training. Because of this, many of these small businesses will be directly responsible for meeting of the costs of compliance.

FDA has built substantial flexibility into the proposed rule. The wide range in cost estimates given in Section IV. of this document is a function of the variety of approaches that business may choose to take to comply with the proposed requirements. The proposed rule does not prescribe the method or materials used to disclose calorie information or other nutrition information, beyond format and style requirements. In addition, the proposed rule does not require any employee training, and it allows for a variety of approaches for nutritional analysis. Therefore, businesses may choose among a wide variety of less, or more, expensive avenues for compliance depending on their situation.

Controllers of chain level brands have significant latitude to impose lesser or greater costs on their associated establishments. Examples include the extent to which franchisors may impose more expensive menu board designs on franchisees, or the extent to which franchisors impose training requirements. Because the proposed rule provides flexibility for the disclosure of nutrition information in covered establishments, the proposed rule gives small businesses (and gives owners of chain brands) the leeway to select cheaper methods to meet the proposed requirements, such as the use of stickers or menu strips, or more expensive methods, such as menu redesign or replacement.

Tying additional flexibility to the size of the firm could mean greater confusion for customers and competitors, because individual establishments within very large chains might differ in how or when they disclosed calories. Tying additional flexibility to the size of the chain would mean that some small firms in large chains would have less flexibility, and potentially higher costs, than large firms in small chains. Rather than attempt to

make a division between large and small firms, FDA has attempted to build in substantial flexibility for all firms.

Finally, section 4205 allows restaurants and similar retail food establishments that are not subject to the proposed requirements to voluntarily register with FDA to become subject to the requirements. By voluntarily registering, such an establishment is in effect indicating that the burdens of registering, which include reporting to FDA contact information for the authorized official and the establishment, and being subject to the Federal requirements, is outweighed by the benefits.

VI. Unfunded Mandates

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA has determined that this proposed rule has met the threshold under the Unfunded Mandates Reform Act. FDA has carried out the cost-benefit analysis in the detailed PRIA, available at *http://www.regulations.gov,* enter Docket No. FDA–2011–F–0172. The other requirements under the Unfunded Mandates Act of 1995 include assessing the proposed rule's effects on:

- Future costs;
- Particular regions, communities, or industrial sectors;
- National productivity;
- Economic growth;
- Full employment;
- Job creation; and
- Exports.

Note that because restaurant and restaurant-type foods are goods that by definition are not transported over long distances, international or interstate trade issues are not relevant here: the imposition of regulatory costs will not cause firms to shift production to locations that are not chain retail food establishments as the term is used in this document. Furthermore, because the costs of the proposed rule are low relative to the revenue generated by even the smallest chain retail food establishments, the proposed rule will not significantly affect employment, economic growth or national productivity.

VII. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA). A description of these provisions is given below with an estimate of the annual reporting, recordkeeping, and third party disclosure burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Requirements for Nutrition Labeling for Standard Menu Items in Restaurants and Similar Retail Food Establishments (OMB Control Nos. 0910–0664 and 0910–0665)—Revision—Section 4205 of the Affordable Care Act, which amends sections 403(q)(5) and 403A of the FD&C Act, requires disclosure of calorie and other nutrition information by chain retail food establishments, as that term is used in this proposed rule. In particular, a restaurant or similar retail food establishment with 20 or more locations doing business under the same name and offering for sale substantially the same menu items must provide nutrition information for standard menu items. Section 4205 became effective on the date the law was signed, March 23, 2010. A restaurant or similar retail food establishment that is not subject to the requirements of section 403(q)(5)(H) may elect to become subject to the requirements of section 403(q)(5)(H) by registering biannually with FDA. Section 4205 required FDA to publish a notice in the **Federal Register** within 120 days of the date of enactment of the legislation, providing information on the terms and conditions for persons who voluntarily elect to be subject to nutrition disclosure requirements specified in the legislation.

A. Statutory Compliance

To comply with the PRA and with the statutory deadline under the provisions of section 4205 for publication of registration information, FDA initially obtained a 6-month OMB approval of the collection of information requirements under the emergency processing provisions of the PRA. With OMB approval of the collection of information requirements of section 4205, FDA took several actions: (1) Developed an electronic form, "Menu And Vending Machine Labeling Voluntary Registration," Form FDA 3757, (2) as required by section 4205, published a notice in the **Federal Register** of July 23, 2010 (75 FR 43182) (the July 23, 2010, notice) to explain how retail food establishments and vending machine operators not otherwise subject to the provisions of section 4205 may voluntarily elect to become subject to them, and (3) developed and implemented the guidance entitled, "Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws." This guidance among other things clarified section 4205's effect on State and local menu and vending machine labeling laws, to ensure that industry and State and local government understood the immediate effects of the law.

FDA has requested a 3-year approval of the information collection requirements under the same assigned OMB Control Nos. 0910–0664 and 0910–0665. In the **Federal Register** of January 31, 2011, FDA published two notices announcing the submission to OMB of the information collection requests for No. 0910–0664 (76 FR 5384) and No. 0910–0665 (76 FR 5380). As noted, the information collection requests previously submitted sought OMB approval of the reporting, recordkeeping, and third party disclosure burdens of section 4205, not the provisions of this proposed rule. With this proposed rule, FDA is submitting a revised information collection request seeking OMB approval of the changes caused by the proposed rule.

B. Revision of OMB Control Nos. 0910–0664 and 0910–0665 by the Proposed Rule

This proposed rule provides detail on how chain retail food establishments can comply with section 403(q)(5)(H)

and how restaurant or similar retail food establishments not subject to the requirements of section 403(q)(5)(H) can voluntarily register to become subject to the requirements. Certain provisions of the proposed rule revise the information collection requirements that have been approved by OMB under OMB Control Nos. 0910–0664 and 0910–0665. First, proposed § 101.11(b) would require third party disclosure to consumers of nutrition information by chain retail food establishments. Second, proposed § 101.11(d)(3) would require reporting of information by restaurants and similar retail food establishments that voluntarily register to become subject to the requirements of section 403(q)(5)(H). In addition, proposed § 101.11(c)(6) would require covered establishments to provide certain information to FDA to substantiate the nutrition information provided to consumers. The following analysis provides FDA's estimate of the changes caused by the proposed rule to the previously approved annual reporting, recordkeeping, and third party disclosure burdens.

C. Consolidation of OMB Control No. 0910–0664 Under 0910–0665

This is a revision request in which the burden hours for the information collection request under OMB control number 0910–0664, "Restaurant Menu and Vending Machine Labeling: Registration for Small Chains Under Section 4205 of the Patient Protection and Affordable Care Act of 2010" are being consolidated under the information collection request assigned OMB control number 0910–0665, "Restaurant Menu and Vending Machine Labeling: Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010." In addition, these information collection requests will be further revised by the proposal related to calorie declaration for food sold in vending machines that will be separately published in the **Federal Register**. The revised information collection request for 0910–0665 will be renamed "Restaurant Menu and Vending Machine Labeling: Registration, Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010."

D. Analysis of Changes in Burden Estimates Caused by the Proposed Rule

The analysis of burden included in this document is drawn from the detailed PRIA that is available at *http://www.regulations.gov,* enter Docket No. FDA–2011–F, and is also available on FDA's Web site at *http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm.*

Description of Respondents: The likely respondents to this information collection are covered restaurants and similar retail food establishments, including restaurants and similar retail food establishments not subject to section 4205 that voluntarily register. In this analysis, we use the term "restaurant" to refer to the subset of restaurants and similar retail food establishments, as defined in this document, that self-identify as establishments whose primary business activity is the sale of "meals and beverages for immediate consumption" in economic census surveys.

FDA estimates the burden of this collection of information as follows:

TABLE 6—ESTIMATED ANNUAL RECORDKEEPING BURDEN: NUTRITION ANALYSIS AND RECORDING FOR PROPOSED 101.11(C)(6)

Type of respondent	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours	Capital costs
Restaurant Chains	514	80	41,088	4	164,352	$11,381,376
Restaurant Firms	11,560	5	57,800	4	231,200	16,010,600
Grocery and Convenience Store Chains	570	40	22,800	4	91,200	6,315,600
Grocery and Convenience Store Firms	2,350	5	11,750	4	47,000	3,254,750
Total initial hours					533,752	42,226,212
New/Reformulated items	1,640	12	19,680	4	78,720	5,451,360
New chains	30	80	2400	4	9,600	$664,800
Total recurring hours					88,320	6,116,160
Total burden hours					622,072	

Recordkeeping

The time burden for nutrition analysis on restaurants and similar retail food establishments is the time necessary for creating a record, managing the contracts for analysis, and communicating the results of the analysis to the establishments. FDA estimates the hourly burden per record to be 4 hours. Under the proposed requirements, FDA estimates that approximately 514 restaurant chains will be required to acquire new calorie and other nutrition information. On average, we estimate that a chain retail food establishment has 80 items on its menu. The hourly burden for restaurant chains is 164,352 hours (514 chains × 80 items/chain × 4 hours/item). FDA estimates that an average of 11,560 firms that are part of the restaurant chains may need to acquire nutrition analysis for 5 items that are specific to their establishments. The burden for these restaurant firms is 231,200 hours (11,560 firms × 5 items/firm × 4 hours/item).

FDA estimates that there are 570 covered grocery and convenience store chains with an average of 40 standard menu items per chain. The hourly burden for grocery store chains is 91,200 hours (=570 chains × 40 items/chain × 4 hours/item). FDA estimates that an average of 2,350 firms that are part of the grocery or convenience store chains may need to acquire nutrition analysis for 5 items that are specific to their establishments. The burden for these restaurant firms is 47,000 hours (2,350 firms × 5 items/firm × 4 hours/item).

FDA has estimated that each of the 1,640 chains with chain retail food establishments will introduce new items or reformulate existing items on average 12 times per year. The recurring hourly burden of recordkeeping for new items

is 78,720 hours (1,640 chains × 12 items/chain × 4 hours/item).

FDA estimated that 30 new chains will have chain retail food establishments as defined by the proposed rule each year. With an average number of menu items of 80 per chain, this would result in approximately 9,600 hours (30 chains x 80 items/chain x 4 hours/item). Adding the burden from new items to this amount gives a total recurring burden of 88,320 hours for recording nutrition information by chains associated with restaurants or similar retail food establishments. These hourly burdens are given in Table 6.

The final column of Table 6 gives the estimated capital costs associated with calorie and nutrition analysis. These are the costs of acquiring nutrition analyses. FDA has estimated that the average cost of a full analysis is $277 per menu item. These costs are calculated by multiplying this per item cost by the number of items in column 3 multiplied by the number of recordkeepers in column 2.

The current total recordkeeping burden for menu labeling as required by section 4205, now under review at OMB under No. 0910–0665, is 455,304 hours. The estimated recordkeeping burden under the proposed rule is 622,072 hours, an increase of 166,768 hours. This increase is due to a net increase in the estimated number of respondents.

The proposed rule caused several changes in our previous estimates of the recordkeeping burden. Most significantly, the proposed requirements are not extended to a variety of other establishments selling restaurant or restaurant-type foods that do not have as their primary purpose the sale of food. This change decreased the estimated burden by eliminating 67,200 hours previously estimated for other chains, and 24,000 hours previously estimated for vending operators (recordkeeping burden hours for vending operators are estimated in the separately published proposal related to calorie declaration for food sold in vending machines). In Line 1 of Table 6, total restaurant chain hours have changed from 241,488 hours to 164,352 hours, a decrease of 77,136 hours, because our estimate of the number of chains has declined by 2, from 516 to 514, due to improved data on how these sectors are organized and because our estimate of the number of standard menu items per recordkeeper has declined from 117 to 80 due to the exclusion of alcoholic beverages from the requirements of the proposed rule. Lines 2 and 4 of Table 6, reflects the addition of 11,560 restaurant firms and 2,350 grocery or convenience firms that may need to acquire nutrition analysis for 5 items that are specific to their establishments. The additional burden for these restaurant firms results in an increase of 231,200 hours and 47,000 hours respectively.

Better data on the number of new and reformulated items introduced yearly, partially offset by a substantial decrease in the set of covered sectors, also increased the estimate of this burden from 24,096 to 78,720 hours, an increase of 54,624 hours. The estimate of the burden of new chains having recurring annual costs, increased because the estimated number of menu items for these chains increased from 60 to 80. This increase occurred because the proposed rule is limited to establishments with more standard menu items. These changes increased the total recurring hours due to new chains from 7,200 to 9,600 hours, an increase of 2,400 hours. Finally, this proposed rule does not address vending machine operators, so an additional 120 hours were dropped. The net effect of these increases and decreases in the burdens estimated for different sectors is an increase in the estimated recordkeeping burden of 166,768 hours (231,200 hours + 54,624 + 2,400 + 47,000 − 67,200 hours − 24,000 hours − 77,136 hours − 120 hours = 247,221 hours).

Total initial capital costs increased from $26.9 million to $36,962,326 because of the addition of the associated restaurant and grocery or convenience firms, and the removal of other sectors, and the decrease in the number of items per chain for restaurants. Better data, which increased the estimate of the number of new items per firm from 4 to 12, led to an increase in recurring new item capital costs from $1.6 million to $5,451,360. New chain recurring capital costs increased from $0.5 million to $664,800 because of the increase in the number of items per chain.

TABLE 7—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN: NUTRIENT DISCLOSURE FOR PROPOSED § 101.11(B)

Type of respondent	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure (in hours)	Total hours	Capital costs
Limited Service	91,000	3	273,000	2	546,000	$150,150,000
Snack Bars and Cafeterias	25,200	1	25,200	2	50,400	13,860,000
Full Service Restaurants	23,900	1	23,900	1	23,900	4,349,800
Grocery and Convenience Chains	47,400	1	47,400	2	94,800	26,070,000
Total initial hours					715,100	194,429,800
New Chains (Recurring)	600	2	1,200	2	2,400	660,000
Total recurring hours					2,400	
Total burden hours					717,500	

Third Party Disclosure

The third party disclosure burden for restaurants and similar retail food establishments is the time necessary to display calorie information on menus, menu boards, displayed food and other required locations. In practice, this is the time necessary to change out redesigned menus, menu boards, and displays. FDA estimates two hours of time per change.

FDA has estimated that limited-service restaurant chains have an average of 3 menu boards or displays per establishment. With 91,000 establishments, the total hourly burden estimated for third party disclosure at these restaurants is 546,000 hours (91,000 establishments × 3 displays/establishment × 2 hours/display).

For the 25,200 snack bars and cafeterias, FDA estimates 1 menu board per establishment would need replacement. The total hourly burden estimated for third party disclosure at these eating places is 50,400 hours (25,200 establishments × 1 displays/establishment × 2 hours/display).

For full-service restaurants, FDA estimates that an average of 25 percent will not be able to coordinate the required menu update with an already scheduled change, so that approximately 23,900 establishments (95,500 establishments × 25%) will need to replace existing menus. With an average 1 hour to change out menus per establishment, the total burden hour estimate for full service restaurants is 23,900.

For grocery and convenience store chains, FDA estimates an average of one major menu board or display per establishment. With 47,400 establishments, the total hourly burden for these establishments is 94,800 hours (= 47,400 outlets × 1 displays/outlet × 2 hours/display).

FDA estimates that initial first year disclosure burden for restaurants or similar retail food establishments will be 620,300 hours.

FDA estimates that there will be 30 new chains each year with chain food retail establishments that will need to disclose calorie and other nutrition information under. At 20 establishments per chain, there will be 600 new chain food retail establishments each year that will need to disclose calorie and other nutrition information. Taking an average number of disclosures equal to 2, the total hourly burden for disclosure due to new chains is 2,400 hours (600 establishments × 2 displays/establishment × 2 hours/display).

The final column of Table 7 gives the estimated capital costs associated with third party disclosure. These are the costs of acquiring new menu boards or menus. FDA has estimated that the average cost of menu board to be $550. Capital costs for limited service chains and grocery or convenience chains are calculated by multiplying this per menu board cost by the frequency of disclosures in column three multiplied by the number of respondents in column two.

For full-service restaurants without menu boards, the capital costs would stem from the initial replacement of menus. With an average of 91 menus per establishment, at an average cost of $2 per menu, capital cost per disclosure is $182. The total capital cost of third party disclosure for full-service restaurants is estimated to be $4,349,800.

The current total third party disclosure burden for menu labeling as required by section 4205, now under review at OMB under No. 0910–0665, is 15,001,748 hours. The estimated third party disclosure burden under the proposed rule is 717,500 hours, a decrease of 14,284,248 hours. This decrease is due to a decrease in the estimated number of respondents.

The proposed rule caused several changes in our previous estimate of the third party disclosure burdens. Most importantly, the proposed rule covers a substantially smaller set of chains and establishments than initially estimated for section 4205. The estimate of the total initial hourly burden has decreased from 964,348 hours to 715,100 hours, a decrease of 249,248 hours, because of this change and because of a better estimate of the number of menu boards and menus in restaurants that are not limited-service restaurants. The estimated number of new chains is unchanged at 600, and the burden estimate remains at 2,400 hours. Finally, we decreased the estimated burden by eliminating 14,035,000 hours previously estimated for vending operators (third party disclosure burden hours for vending operators are estimated in the separately published proposal related to calorie declaration for food sold in vending machines). The total decrease in estimated third party disclosure burden is 14,284,248 hours (249,248 hours + 14,035,000 hours = 14,284,248 hours).

The capital costs for initial restaurant third party disclosure have dropped from $265.3 million to $194,429,800 for the same reason the hourly burden dropped: There is a lower number of estimated displays. The recurring capital costs have fallen from $0.7 million to $660,000 because of different rounding.

TABLE 8—ESTIMATED ANNUAL REPORTING BURDEN, VOLUNTARY REGISTRATION UNDER PROPOSED § 101.11(c)(3) [1]

Type of respondent	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
Restaurants	373	1	373	2	746
Grocery and Convenience Stores	594	1	594	2	1,188
Total initial hours					1,934
New registrations	19	1	19	1	19
Re-registrations	948	0.5	474	0.5	237
Total recurring hours					256
Total burden hours					2,190

Reporting

The registration provisions of the proposed rule would require an every other year reporting to FDA by authorized officials of restaurants or similar retail food establishments that are not subject to the requirements of section 4205. FDA bases its per respondent burden on the PRA analysis for section 415 of the FFDCA (21 U.S.C. 350d) as laid out for the rule "Registration of Food Facilities under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002" (Ref. 49). FDA estimates that the initial collection of the information, and presentation of it in a format that will meet the agency's registration regulations, will require a burden of approximately two hours per registration for the first year because the registration system will not be fully automated.

FDA estimates that renewal registrations after the first year will require substantially less time because chains are expected to be able to affirm or edit the existing information in an online account in a way similar to other FDA firm registration systems. Therefore, FDA estimates that re-registration will take 0.5 hours for each registrant. Because some establishments that had previously been registered will choose not to do so at some point, and some new establishments will become registered, there will also be new registrations once the system is fully

operational. FDA estimates that initial registration under the fully operational system will take one hour.

The pool of potential registrants will be restaurants and similar retail food establishments that are not subject to the requirements of section 4205, including establishments located in jurisdictions with non-identical menu labeling laws that are not preempted. Of the pre-existing state and local laws, including regulations in New York City, Seattle, Philadelphia, Oregon, Massachusetts, Maine, Vermont, Nashville, Montgomery County (MD), California, and 5 New York State counties, the minimum number of establishments in a chain to which any of them currently apply is 15, and section 4205 applies to establishments that are part of chains with 20 or more establishments (*i.e.,* locations). Therefore, some restaurants and similar retail food establishments that are part of chains with between 15–19 establishments have an incentive to register. However, chains with fewer establishments, or chains in other jurisdictions, may choose to register because they are growing quickly, or because they are concerned about possible regulation. Therefore, for the purposes of this analysis, FDA counts chains with between 10 and 19 establishments, inclusive.

From the analysis in the detailed PRIA, approximately 27 percent of restaurant establishments are in jurisdictions with State or local menu labeling laws. NPD's Spring 2010 ReCount report shows a total of 20,000 establishments are part of chains with between 10 and 19 establishments (Ref. 50). If establishments were evenly distributed geographically, then 5,414 establishments from 373 restaurant chains might have an incentive to register with the FDA. The initial hourly burden for these restaurant chains is 746 hours (373 chains × 1 responses/chain/year × 2 hours/response).

The U.S. Census Bureau's County Business Patterns data shows that 30 percent of grocery stores and 10 percent of convenience stores are in jurisdictions that have relevant menu labeling regulations (Ref. 2). Taking 30 percent of an estimated 22,000 stores yields 6,600 stores run by approximately 455 chains. Taking 10 percent of an estimated 20,100 convenience stores in the 10 to 19 segment yields 2,011 stores run by approximately 139 chains. The hourly burden associated with registration for grocery and convenience store chains is 1,188 hours (594 chains × 1 responses/chain/year × 2 hours/response).

FDA estimates that the rate of growth for chains entering the 10–19 establishment segment will match the rate of growth out of this segment, so that the number of registrants will remain constant. County Business Patterns data shows an average growth rate in the number of establishments to be two percent per year over the eight years from 1999 to 2007 for restaurants (Ref. 28). Taking the restaurant growth rate for establishments of approximately 2 percent per year, new registrants will amount to approximately 19 per year, with the remaining 948 registrants only renewing their registration every other year. The recurring yearly burden for registration will be 1 hour per new registrant and 0.25 hours for continuing registrants. This yields a recurring hourly burden of 256 hours per year (19 new small chains × 1 hour/chain + 948 returning chains × .5 hours/chain × .5 response/year). These estimates are reported in Table 8.

The current total reporting burden for menu labeling registration as required by section 4205, now under review at OMB under No. 0910–0664, is 820 hours. The estimated reporting burden under the proposed rule is 2,190 hours, an increase of 1,370 hours. This increase is due to an increase in the estimated number of respondents.

The proposed rule caused several changes in our previous estimate of the reporting burdens. The estimated number of restaurants that would submit initial registrations was increased from 362 to 868, and the burden estimate increased from 724 hours to 1,934 hours, an increase of 1,210 hours. The estimated number of new registrations increased from 7 to 19 and the burden estimate from these new registrations also increased from 7 to 19 hours, an increase of 12 hours. The estimated number of restaurants that would submit re-registrations was increased from 362 to 948, and the burden estimate increased from 89 hours to 237 hours, an increase of 148 hours. Thus, the total increase in estimated reporting burden is 1,370 hours (1,210 hours + 12 hours + 148 hours = 1,370 hours).

FDA received comments on the initial proposed collection of information related to section 4205 in Docket No. FDA–2010–N–0567; Agency Information Collection Activities; Proposed Collection; Comment Request; Restaurant Menu and Vending Machine Labeling: Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010. Several comments were submitted on the accuracy of the information collection burden analysis for convenience stores.

In compliance with the PRA, the agency has submitted the revised information collection provisions of this proposed rule to OMB for review. Interested persons are requested to send comments regarding the information collection to OMB (see **DATES** and **ADDRESSES** sections of this document).

VIII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts "any requirement for nutrition labeling of food that is not identical to the requirement of section [21 U.S.C. 343(q)]" 21 U.S.C. 343–1(a)(4), except that this provision does not apply "to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under [21 U.S.C. 343(q)(5)(H)(ix)]." 21 U.S.C. 343–1(a)(4). If this proposed rule is made final, the final rule would create requirements for nutrition labeling of food under 21 U.S.C. 343(q) that would preempt certain non-identical State and local nutrition labeling requirements.

Section 4205 of the Affordable Care Act (ACA) also included a Rule of Construction providing that "Nothing in the amendments made by [section 4205] shall be construed—(1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)] (as added by subsection (b)) and is expressly preempted under subsection (a)(4) of such section; (2) to apply to any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or

component of the food; or (3) except as provided in section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)(ix)] (as added by subsection (b)), to apply to any restaurant or similar retail food establishment other than a restaurant or similar retail food establishment described in section 403(q)(5)(H)(i) of such Act [21 U.S.C. 343(q)(5)(H)(i)]." Public Law 111–148, § 4205(d), 124 Stat. 119, 576 (2010).

FDA interprets the provisions of Section 4205 of the ACA related to preemption to mean that States and local governments may not impose nutrition labeling requirements for food sold in restaurants and similar retail food establishments ("R/SRFEs") that must comply with the Federal requirements of 21 U.S.C. 343(q)(5)(H), unless the State or local requirements are identical to the Federal requirements. In other words, States and localities cannot have additional or different nutrition labeling requirements for food sold either (1) in R/SRFEs that are "part of a chain with 20 or more locations doing business under the same name * * * and offering for sale substantially the same menu items" ("chain R/SRFEs") or (2) in R/SRFEs that voluntarily elect to be subject to the requirements of 21 U.S.C. 343(q)(5)(H) by registering biannually under 21 U.S.C. 343(q)(5)(H)(ix).

Otherwise, for certain food that is not subject to the nutrition labeling requirements of 21 U.S.C. 343(q), States and localities may impose nutrition labeling requirements. First, States and localities can have nutrition labeling requirements for food sold in non-chain R/SRFEs that have not registered under 21 U.S.C. 343(q)(5)(H)(ix). This exception to preemption is clear from the language of 21 U.S.C. 343–1(a)(4) ("except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations * * * unless such [R/SRFE] complies with the voluntary provision of nutrition information requirements under [21 U.S.C. 343(q)(5)(H)(ix)").

Second, States and localities can have certain nutrition labeling requirements for other food that is exempt from nutrition labeling under 21 U.S.C. 343(q)(5)(A)(i) or (ii) provided that such food is not required to have nutrition labeling under 21 U.S.C. 343(q)(5)(H). For example, certain food sold in schools, hospitals, and movie theaters would not, under the proposal, be required to have nutrition labeling under 21 U.S.C. 343(q)(1)–(4)(see 21 U.S.C. 343(q)(5)(A)(i) and (ii) and 21 CFR 101.9(j)(2) and (3)) or under 21 U.S.C. 343(q)(5)(H), as interpreted by FDA in the proposed rule, because these establishments would not be R/SRFEs. Under FDA's interpretation of the Rule of Construction in Section 4205(d)(1), nutrition labeling for food in these non-R/SRFEs would not be "nutrient content disclosures of the type required under [21 U.S.C. 343(q)(5)(H)]" and, therefore, would not be preempted. This interpretation of section 4205 of the ACA does not alter the ability of the States and localities to regulate nutrition labeling except with respect to the chain R/SRFEs and the non-chain R/SRFEs that voluntarily register. Therefore, under this interpretation, States and localities would be able to continue to require nutrition labeling for food sold by entities determined not to be R/SRFEs (*e.g.,* for movie theaters and transportation carriers).

An alternative to FDA's interpretation of the provisions of Section 4205 of the ACA related to preemption, which is not being proposed, could leave less room for States and localities to require nutrition labeling on food exempt from Federal nutrition labeling requirements under 21 U.S.C. 343(q)(5)(A)(i) or (ii). Under this alternative interpretation, State or local nutrition labeling requirements for food sold in establishments that are not "restaurants or similar retail food establishments," as defined in the proposed rule if made final, would be ineligible for the exception to preemption in 21 U.S.C. 343–1(a)(4), because that exception by its literal terms only covers nutrition labeling requirements for food offered for sale in covered R/SRFEs (*i.e.,* those not part of a chain of 20, *etc.*). Under this alternative interpretation, the Rule of Construction would simply clarify that the scope of 21 U.S.C. 343–1(a)(4) does not extend beyond the limits expressly identified in 343–1(a)(4). "Nutrition content disclosures of the type required under [21 U.S.C. 343(q)(5)(H)]" would mean, generally, requirements to disclose calories and/or other nutrition information (*e.g.,* fat, saturated fat, sodium, protein) in written form, on menus or elsewhere.

Under this alternative interpretation, States and localities could not have nutrition labeling requirements covering certain foods in non-R/SRFEs, such as schools and hospitals unless they successfully petitioned FDA. Federal law provides that, upon petition, FDA may exempt State or local requirements from the express preemption provisions of 21 U.S.C. 343–1(a) under certain conditions. 21 U.S.C. 343–1(b). FDA has promulgated regulations at 21 CFR 100.1 describing the petition process that is available to State and local governments to request such exemptions from preemption.

Under the interpretation being proposed by FDA, for certain food that is not subject to the nutrition labeling requirements of 21 U.S.C. 343(q)(5)(H), States and localities may establish or continue to impose nutrition labeling requirements. Under the alternative interpretation described above, there would be restaurant and restaurant-type food in non-R/SRFEs, such as schools, hospitals, and movie theaters, for which the Federal government has not required nutrition labeling and for which States and localities would also be precluded from establishing such labeling requirements unless they successfully petitioned FDA and a rulemaking was completed. This approach would risk creating a regulatory gap that would be inconsistent with the purposes of section 4205. It would also impose a restriction and burden on the States and localities that is inconsistent with the Federalism principles expressed in Executive Order 13132, as well as a substantial administrative burden on FDA in the event states petition for exemption.

FDA requests comments on the agency's interpretation of the provisions of Section 4205 of the ACA related to preemption, as well as on the alternative interpretation, described in this Federalism section. FDA also requests comments on the use of the petition process in this context. In addition, the agency requests comments on other potential interpretations that interested persons identify as appropriate given both the preemption-related language of Section 4205 and the statutory goals. For example, could 21 U.S.C. 343–1(a)(4), as amended by Section 4205, be interpreted as not preempting State or local nutrition labeling requirements if 21 U.S.C. 343(q) and FDA's implementing regulations do not directly impose nutrition labeling requirements on food in an establishment?

In addition, the express preemption provisions of 21 U.S.C. 343–1(a)(4) do not preempt any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food. This is clear from both the literal language of 21 U.S.C. 343–1(a)(4) with respect to the scope of preemption and from the Rule of Construction at Section 4205(d)(2) of the ACA.

IX. Environmental Impact

The agency has determined under 21 CFR 25.30(k) 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.

X. 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.

XI. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

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List of Subjects

21 CFR Part 11

Administrative practice and procedure, Computer technology, Reporting and recordkeeping requirements.

21 CFR Part 101

Food Labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 11 and 101 be amended as follows:

PART 11—ELECTRONIC RECORDS; ELECTRONIC SIGNATURES

1. The authority citation for 21 CFR part 11 continues to read as follows:

Authority: 21 U.S.C. 321–393; 42 U.S.C. 262.

2. Section 11.1 is amended by adding paragraph (g) to read as follows:

§ 11.1 Scope.

* * * * *

(g) This part does not apply to electronic signatures obtained under § 101.11(d) of this chapter.

PART 101—FOOD LABELING

3. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

4. Section 101.9 is amended by revising paragraph (j)(1)(i) and paragraphs (j)(2) introductory text and (j)(3) introductory text to read as follows:

* * * * *

(j) * * *

(1)(i) Food offered for sale by a person who makes direct sales to consumers (*e.g.,* a retailer) who has annual gross sales made or business done in sales to consumers that is not more that $500,000 or has annual gross sales made or business done in sales of food to consumers of not more than $50,000, provided, that the food bears no nutrition claims or other nutrition information in any context on the label or in labeling or advertising. Claims or other nutrition information subject the food to the provisions of this section, § 101.10, or § 101.11, as applicable.

* * * * *

(2) Except as provided in § 101.11, food products that are:

* * * * *

(3) Except as provided in § 101.11, food products that are:

* * * * *

5. Section 101.10 is revised to read as follows:

§ 101.10 Nutrition labeling of restaurant foods whose labels or labeling bear nutrient content claims or health claims.

Nutrition labeling in accordance with § 101.9 shall be provided upon request for any restaurant food or meal for which a nutrient content claim (as defined in § 101.13 or in subpart D of this part) or a health claim (as defined in § 101.14 and permitted by a regulation in subpart E of this part) is made, except that information on the nutrient amounts that are the basis for the claim (*e.g.,* "low fat, this meal provides less than 10 grams of fat") may serve as the functional equivalent of complete nutrition information as described in § 101.9. For standard menu items that are offered for sale in covered establishments (as defined in § 101.11(a)), the information in the written nutrition information required by § 101.11(b)(2)(ii)(A) will serve to meet the requirements of this section. Nutrient levels may be determined by nutrient databases, cookbooks, or analyses or by other reasonable bases that provide assurance that the food or meal meets the nutrient requirements for the claim. Presentation of nutrition labeling may be in various forms, including those provided in § 101.45 and other reasonable means.

6. Section 101.11 is added to subpart A to read as follows:

§ 101.11 Nutrition labeling of standard menu items in covered establishments.

(a) *Definitions.* The definitions of terms in section 201 of the Federal Food, Drug, and Cosmetic Act apply to such terms when used in this section. In addition, for purposes of this section:

Authorized official of a restaurant or similar retail food establishment means the owner, operator, agent in charge, or other person authorized by the owner, operator, or agent in charge to register the restaurant or similar retail food establishment, which is not otherwise subject to section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act, with FDA for the purposes of paragraph (d) of this section.

Combination meal means a standard menu item that consists of more than one food item, for example a meal that includes a sandwich, a side dish, and a drink. A combination meal may be represented on the menu or menu board

in narrative form, numerically, or pictorially. Some combination meals may include a variable menu item (or be a variable menu item as defined in this paragraph where the components may vary. For example, the side dish may vary among several options (*e.g.,* fries, salad, or onion rings) or the drinks may vary (*e.g.,* soft drinks, milk, or juice) and the customer selects which of these items will be included in the meal.

Covered establishment means a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership, *e.g.,* individual franchises) and offering for sale substantially the same menu items, as well as a restaurant or similar retail food establishment that is registered to be covered under section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act.

Custom order means a food order that is prepared in a specific manner based on an individual customer's request, which requires the restaurant or similar retail food establishment to deviate from its usual preparation of a menu item, *e.g.,* a club sandwich without the bacon if the establishment usually includes bacon in its club sandwich.

Daily special means a menu item that is prepared and offered for sale on a particular day, that is not routinely listed on a menu or offered by the covered establishment, and that is promoted by the covered establishment as a special menu item for that particular day.

Doing business under the same name means sharing the same name. The term "same name" includes names that are either exactly the same, or are slight variations of each other, for example, due to the region, location or size (*e.g.,* "New York Ave. Burgers" and "Pennsylvania Ave. Burgers" or "ABC" and "ABC Express").

Food on display means restaurant or restaurant-type food that is visible to the customer before the customer makes a selection, so long as there is not an ordinary expectation of further preparation by the consumer before consumption.

Food that is part of a customary market test means food that is marketed in a covered establishment for fewer than 90 consecutive days in order to test consumer acceptance of the product.

Gross floor area means all space, wall to wall, including areas under built-in counters, cooking equipment, seating, and similar furniture.

Menu or *menu board* means the primary writing of the restaurant or similar retail food establishment from which a customer makes an order selection, including, but not limited to, breakfast, lunch and dinner menus; dessert menus; beverage menus, children's menus, other specialty menus, electronic menus, and menus on the Internet. The menus may be in different forms, *e.g.,* booklets, pamphlets, or single sheets of paper. Menu boards include those inside a restaurant or similar retail food establishment as well as drive-through menu boards at restaurants or similar retail food establishments.

Offering for sale substantially the same menu items means offering for sale menu items that use the same general recipe and are prepared in substantially the same way with substantially the same food components, even if the name of the menu item varies, (*e.g.* "Bay View Crab Cake" and "Ocean View Crab Cake"). "Menu items" in this definition refers to food items that are listed on a menu or menu board or that are offered as self-service food or food on display. Restaurants and similar retail food establishments that are part of a chain can still be offering for sale substantially the same menu items if the availability of some menu items varies within the chain.

Restaurant or similar retail food establishment means a retail establishment that offers for sale restaurant or restaurant-type food, where the sale of food is the primary business activity of that establishment. The sale of food is the retail establishment's primary business activity if the establishment presents itself, or has presented itself publicly as a restaurant, or a total of more than 50 percent of that retail establishment's gross floor area is used for the preparation, purchase, service, consumption, or storage of food.

Restaurant food means food that is served in restaurants or other establishments in which food is served for immediate human consumption, *i.e.,* to be consumed either on the premises where that the food is purchased or while walking away; or which is sold for sale or use in such establishments.

Restaurant-type food means food of the type described in the definition of "restaurant food" that is ready food human consumption, offered for sale to consumers but not for immediate consumption, processed and prepared primarily in a retail establishment, and not offered for sale outside of that establishment.

Self-service food means restaurant or restaurant-type food that is available at a salad bar, buffet line, cafeteria line, or similar self-service facility and that is served by the customers themselves. Self-service food also includes self-service beverages.

Standard menu item means a restaurant or restaurant-type food that is routinely included on a menu or menu board or routinely offered as a self-service food or food on display.

Temporary menu item means a food that appears on a menu or menu board for less than a total of 60 days per calendar year. The 60 days includes the total of consecutive and non-consecutive days the item appears on the menu.

Variable menu item means a standard menu item that comes in different flavors, varieties, or combinations, and is listed as a single menu item.

(b) Requirements for nutrition labeling for food sold in covered establishments.—(1) *Applicability.* (i) The labeling requirements in this paragraph (b) apply to standard menu items offered for sale in covered establishments.

(ii) The labeling requirements in this paragraph (b) do not apply to alcohol beverages; items such as condiments that are placed on the table for general use; daily specials; temporary menu items; custom orders; and food that is part of a customary market test.

(2) *Nutrition information.* (i) The following must be provided on menus and menu boards:

(A) The number of calories contained in each standard menu item listed on the menu or menu board, as usually prepared and offered for sale must be declared in the following manner:

(*1*) The number of calories must be listed adjacent to the name or the price of the associated standard menu item, in a type size no smaller than the name or the price of the associated standard menu item, whichever is smaller, in the same color, or a color at least as conspicuous as the name of the associated standard menu item, and with the same contrasting background as the name of the associated standard menu item.

(*2*) To the nearest 5-calorie increment up to and including 50 calories and to the nearest 10-calorie increment above 50 calories, except that amounts less than 5 calories may be expressed as zero.

(*3*) The term "Calories" or "Cal" must appear as a heading above a column listing the number of calories for each standard menu item or adjacent to the number of calories for each standard menu item. If the term "Calories" or "Cal" appears as a heading above a column of calorie declarations, the term must be in a type size no smaller than the smallest type size of the name or price of any menu item on that menu or

menu board in the same color or a color at least as conspicuous as that name or price and in the same contrasting background as that name or price. If the term "Calories" or "Cal" appears adjacent to the number of calories for the standard menu item, the term "Calories" or "Cal" must appear in the same type size and in the same color and contrasting background as the number of calories.

(*4*) For variable menu items, the calories must be declared as a range, in the format "xx–yy" where "xx" is the caloric content of the lowest calorie variety, flavor, or combination, and "yy" is the caloric content of the highest calorie variety, flavor, or combination. If the variable menu item appears on the menu or menu board and is a self-service food or food on display, and there is no clearly identifiable upper bound to the range, e.g., all-you-can-eat buffet, then the menu or menu board must include a statement, adjacent to the name or price of the item, referring customers to the self-service facility for calorie information, e.g., "See buffet for calorie declarations." This statement must appear in a type size no smaller than the name or price of the variable menu item, whichever is smaller, and in the same color or a color at least as conspicuous as that name or price, with the same contrasting background as that name or price.

(B) The following statement designed to enable consumers to understand, in the context of a total daily diet, the significance of the calorie information provided on menus and menu boards: "A 2,000 calorie daily diet is used as the basis for general nutrition advice; however, individual calorie needs may vary."

(*1*) This statement must be posted prominently and in a clear and conspicuous manner in a type size no smaller than the smallest calorie declaration appearing on the same menu or menu board and in the same color or in a color at least as conspicuous as the calorie declarations and with the same contrasting background as the calorie declarations.

(*2*) For menus, this statement must appear on the bottom of each page of the menu. On menu pages that also bear the statement regarding the availability of the written nutrition information required in paragraph (b)(2)(i)(C) of this section, this statement must appear directly above the statement required in paragraph (b)(2)(i)(C).

(*3*) For menu boards, this statement must appear on the bottom of the menu board, immediately above the statement required in paragraph (b)(2)(i)(C) of this section.

(C) The following statement regarding the availability of the additional written nutrition information required in paragraph (b)(3)(i) of this section must be on all forms of the menu or menu board: "Additional nutrition information available upon request."

(*1*) This statement must be posted prominently and in a clear and conspicuous manner in a type size no smaller than the smallest calorie declaration appearing on the same menu or menu board and in the same color or in a color at least as conspicuous as the caloric declarations, and with the same contrasting background as the caloric declarations.

(*2*) For menus, the statement must appear on the bottom of the first page with menu items. For menus with more than two pages, the statement must appear:

(*i*) At the bottom of every page with menu items; or

(*ii*) At the bottom of only the first page with menu items, as long as a symbol (*e.g.,* asterisk) clearly referring to the required statement appearing on the first page of the menu follows the term "Calories" or "Cal", where the term first appears on each page after the page with the statement.

(3) For menu boards, the statement must appear on the bottom of the menu board immediately above or below the succinct statement required in paragraph (b)(2)(i)(B) of this section.

(ii) The following nutrition information for a standard menu item must be available in written form on the premises of the restaurant or similar retail food establishment and provided to the customer upon request. This nutrition information must be presented in the order listed and using the measurements listed, except as provided in paragraph (b)(2)(ii)(B) of this section. Rounding of these nutrients must be in compliance with § 101.9(c). The information must be presented in a clear and conspicuous manner:

(A)(*1*) Total number of calories derived from any source (cal),
(*2*) Total number of calories derived from the total fat (fat cal),
(*3*) Total fat (g),
(*4*) Saturated fat (g),
(*5*) *Trans* fat (g),
(*6*) Cholesterol (mg),
(*7*) Sodium (mg),
(*8*) Total carbohydrate (g),
(*9*) Dietary fiber (g),
(*10*) Sugars (g),
(*11*) Protein (g).

(B) If a standard menu item contains insignificant amounts of all the nutrients required to be disclosed in paragraph (b)(2)(ii)(A) of this section, the establishment is not required to include nutrition information regarding the standard menu item in the written form. However, if the covered establishment makes a nutrient content claim or health claim, the establishment is required to provide nutrition information on the nutrient that is the subject of the claim in accordance with § 101.10. For standard menu items that contain insignificant amounts of six or more of the required nutrients, the declaration of nutrition information required by paragraph (b)(2)(ii)(A) of this section may be presented in a simplified format.

(*1*) An insignificant amount is defined as that amount that allows a declaration of zero in nutrition labeling, except that for total carbohydrates, dietary fiber, and protein, it must be an amount that allows a declaration of "less than one gram."

(*2*) The simplified format must include information on the following nutrients: Total carbohydrates, total fat, protein, and sodium, calories from fat, and any other nutrients identified in paragraph (b)(2)(ii)(A) of this section that are present in more than insignificant amounts. These nutrients may be in a column, list, or table. If the simplified format is used, the statement "Not a significant source of ____" (with the blank filled in with the names of the nutrients required to be declared in the written nutrient information and calories from fat that are present in insignificant amounts) must be included at the bottom of the list of nutrients.

(C) For variable menu items, the nutrition information listed in paragraph (b)(2)(ii)(A) of this section must be declared as follows for each size offered for sale:

(*1*) The nutrition information required in paragraph (b)(2)(ii)(A) of this section must be declared for the basic preparation of the item and, separately, for each topping, flavor, or variable component.

(*2*) If the calories and other nutrients are the same for different flavors, varieties, and substitutable components of the combination meal, each variety, flavor and substitutable component of the combination meal is not required to be listed separately. All items that have the same nutrient levels could be listed together with the nutrient levels listed only once.

(D) The written nutrition information required in paragraph (b)(2)(ii)(A) of this section may be provided on a counter card, sign, poster, handout, booklet, loose leaf binder, or electronic device such as a computer, or in a menu, or in any other form that similarly permits the written declaration of the required

nutrient content information for all standard menu items. If the written information is not in a form that can be given to the customer upon request, it must be readily available in a manner and location on the premises that allows the customer/consumer to review the written nutrition information upon request.

(iii) The following must be provided for food that is self service or on display.

(A) When a self-service food or food on display is already accompanied by an individual sign, adjacent to the food, that provides the food's name, price, or both, the calories per item or per serving must be provided on the sign. When a self-service food or food on display is not already accompanied by an individual sign, adjacent to the food, that provides the food's name, price, or both, the covered establishment must place a sign adjacent to each food with the number of calories per serving or per item in a clear and conspicuous manner.

(*1*) For purposes of § 101.10(b)(2)(ii)(A), "per item" means per each discrete unit offered for sale, for example, a bagel, a slice of pizza, a muffin, or a multi-serving food such as a whole cake.

(*2*) For purposes of § 101.10(b)(2)(ii)(A), "per serving" means:

(i) Per each common household measure, *e.g.,* cup, scoop, tablespoon, offered for sale as dispensed using a serving instrument such as a scoop, ladle, cup, or measuring spoon; or

(ii) Per unit of weight offered for sale, *e.g.,* per half pound or pound.

(*3*) The calories must be declared in the following manner:

(*i*) To the nearest 5-calorie increment up to and including 50 calories and to the nearest 10-calorie increments above 50 calories except that amounts less than 5 calories may be expressed as zero.

(ii) If the food is not already accompanied by a sign with the food's name, price or both, the calorie declaration, accompanied by the term "Calories" or "Cal", must appear on a sign adjacent to the standard menu item in a clear and conspicuous manner if the food is not already accompanied by a sign with the food's name, price or both. If the food is already accompanied by a sign with the food's name, price, or both, the calorie declaration and the term "Calories" or "Cal" must appear on that sign in a type size no smaller than the name or price of the menu item, whichever is smaller, in the same color or a color that is at least as conspicuous as that name or price using the same contrasting background.

(B) For food on display identified by a menu adjacent to the food itself, the statement that puts the calorie information in the context of a recommended total daily caloric intake as required by paragraph (b)(2)(i)(B) of this section and the statement regarding the availability of the additional written nutrition information required by paragraph (b)(2)(i)(C) of this section. These two statements may appear either on the sign adjacent to the standard menu item or on a separate, larger sign, in close proximity to the food on display, that can be easily read as the consumer is making order selections. This requirement is satisfied if the two statements appear on a large menu board that can be easily read as the consumer is viewing the food on display.

(C) The nutrition information in written form required by paragraph(b)(2)(ii) of this section, except for packaged food that bears nutrition labeling information required by § 101.9 if the packaged food, including its label, can be examined by a consumer before purchasing the food.

(c) *Determination of nutrient content.* (1) A restaurant or similar retail food establishment must have a reasonable basis for its nutrient disclosures. Nutrient levels may be determined by nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in § 101.10.

(2) Two classes of nutrients are defined for purposes of compliance:

(i) *Class I.* Added nutrients in standard menu items; and

(ii) *Class II.* Naturally occurring (indigenous) nutrients. If any ingredient which contains a naturally occurring (indigenous) nutrient is added to a standard menu item, the total amount of such nutrient in the standard menu item is subject to class II requirements unless the same nutrient is also added.

(3) A standard menu item with a nutrient declaration of protein, total carbohydrate, or dietary fiber, shall be deemed to be misbranded under section 403(a) of the Federal Food, Drug, and Cosmetic Act unless it meets the following requirements:

(i) *Class I protein or dietary fiber.* The nutrient content of the appropriate composite is at least equal to the value for that nutrient declared in the nutrition information in written form.

(ii) *Class II protein, total carbohydrate, or dietary fiber.* The nutrient content of the appropriate composite is at least equal to 80 percent of the value for that nutrient declared in the nutrition information in written form. Provided, that no regulatory action will be based on a determination of a nutrient value that falls below this level by a factor less than the variability generally recognized for the analytical method used in that food at the level involved.

(4) A standard menu item with a nutrient declaration of calories, sugars, total fat, saturated fat, *trans* fat, cholesterol, or sodium shall be deemed to be misbranded under section 403(a) of the Federal Food, Drug, and Cosmetic Act if the nutrient content of the appropriate composite is greater than 20 percent in excess of the value for that nutrient declared on the menu, menu board or in the nutrition information in written form for calories or in the nutrition information in written form for all other nutrients. Provided, that no regulatory action will be based on a determination of a nutrient value that falls above this level by a factor less than the variability generally recognized for the analytical method used in that food at the level involved.

(5) Reasonable excesses of protein, total carbohydrate, dietary fiber, over the declared amounts are acceptable within current good manufacturing practice. Reasonable deficiencies of calories, sugars, total fat, saturated fat, *trans* fat, cholesterol, or sodium under declared amounts are acceptable within current good manufacturing practice.

(6) A restaurant or similar retail food establishment must provide to FDA, within a reasonable period of time upon request, information substantiating nutrient values including the method and data used to derive these nutrient levels. This information must include the following:

(i) For nutrient databases:

(A) The identity of the database used.

(B) The recipe or formula used as a basis for the nutrient declarations. The recipe posted on the database must be identical to that used by the restaurant or similar retail food establishment to prepare the menu item.

(C) For the specified amounts of each ingredient identified in the recipe, a detailed listing (*e.g.,* printout) of the amount of each nutrient that that ingredient contributes to the menu item.

(D) If this information is not available because the nutrition information was derived from a computer program, which is designed to provide only a final list of nutrient values for the recipe, a certificate of validation attesting to the accuracy of the computer program.

(E) A detailed listing (*e.g.,* printout) of the nutrient values determined for each menu item.

(F) If this information is not derived through the aid of a computer program

which provides a final nutrient analysis for the menu item, worksheets used to determine the nutrient values for each of these menu items.

(G) Any other information pertinent to the final nutrient levels of the menu item *(e.g.,* information about what might cause slight variations in the nutrient profile such as moisture variations).

(H) A statement signed by a responsible individual employed by the covered establishment that can certify that the information contained in the nutrient analysis is complete and accurate and that the recipe used to prepare the menu item is identical to that used for the nutrient analysis.

(ii) For published cookbooks that contain nutritional information for recipes in the cookbook:

(A) The name, author and publisher of the cookbook used.

(B) If available, information provided by the cookbook about how the nutrition information for the recipes was obtained.

(C) A copy of the recipe used to prepare the menu item and a copy of the nutrition information for that menu item as provided by the cookbook.

(D) A statement signed by a responsible individual employed by the covered establishment certifying that the recipe used to prepare the menu item by the restaurant or similar retail food establishment is the same recipe provided in the cookbook. (Recipes may be divided as necessary to accommodate differences in the portion size derived from the recipe and that are served as the menu item but no changes may be made to the proportion of ingredients used.)

(iii) For analyses:

(A) A copy of the recipe for the menu item used for the nutrient analysis.

(B) The identity of the laboratory performing the analysis.

(C) Copies of analytical worksheets used to determine and verify nutrition information.

(D) A statement signed by a responsible individual employed by the covered establishment that can certify that the information contained in the nutrient analysis is complete and accurate and an additional signed statement certifying that the recipe used to prepare the menu item is identical to that used for the nutrient analysis.

(iv) For nutrition information provided by other reasonable means:

(A) A detailed description of the method used to determine the nutrition information.

(B) Documentation of the validity of that method.

(C) A recipe or formula used as a basis for the nutrient determination. The recipe used in determining these nutrient values must be the same recipe used by the restaurant and similar retail food establishment to prepare the item.

(D) Any data derived in determining the nutrient values for the menu item.

(E) A statement signed by a responsible individual employed by the covered establishment that can certify that the information contained in the nutrient analysis is complete and accurate and that the recipe used to prepare the menu item is identical to that used for the nutrient analysis.

(d) *Voluntary registration to be subject to the menu labeling requirements.* (1) *Applicability.* A restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items may voluntarily register to be subject to the requirements established in this section. Restaurants and similar retail food establishments that voluntarily register will no longer be subject to non-identical State or local nutrition labeling requirements.

(2) *Who may register?* The authorized official of a restaurant or similar retail food establishment as defined in paragraph (a) of this section, which is not otherwise subject to paragraph (b) of this section, may register with FDA.

(3) *What information is required?* Authorized officials for restaurants and similar retail food establishments must provide FDA with the following information on Form FDA 3757 (7/10).

(i) The contact information (including name, address, phone number, and e-mail address for the authorized official);

(ii) The contact information (including name, address, phone number, and e-mail address) of each restaurant or similar retail food establishment being registered, as well as the name and contact information for an official onsite, such as the owner or manager, for each specific restaurant or similar retail food establishment;

(iii) All trade names the restaurant or similar retail food establishment uses;

(iv) Preferred mailing address (if different from location address for each establishment) for purposes of receiving correspondence; and

(v) Certification that the information submitted is true and accurate, that the person submitting it is authorized to do so, and that each registered restaurant or similar retail food establishment will be subject to the requirements of section 403(q)(5)(H) of the Federal Food, Drug and Cosmetic Act and this section.

(vi) Information should be submitted by e-mail by typing complete information into the form (PDF), saving it on the registrant's computer, and sending it by e-mail to *menulawregistration@fda.hhs*.

(vii) If e-mail is not available, the registrant can either fill in the form (PDF) and print it out (or print out the blank PDF and fill in the information by hand or typewriter), and either fax the completed form to 301–436–2804 or mail it to FDA White Oak Building 22, Room 0209, 10903 New Hampshire Ave., Silver Spring, MD 20993.

(4) *How to register?* Authorized officials of restaurants and similar retail food establishments who elect to be subject to requirements in section 403(q)(5)(H) of the Federal Food, Drug and Cosmetic Act can register by visiting *http://www.fda.gov/menulabeling*. FDA has created a form that contains fields requesting the information in § 101.11(c)(3) and made the form available at this Web site. Registrants must use this form to ensure that complete information is submitted.

(5) *When to renew registration?* To keep the establishment's registration active, the authorized official of the restaurant or similar retail food establishment must register every other year within 60 days prior to the expiration of the establishment's current registration with FDA. Registration will automatically expire if not renewed.

(e) *Signatures.* Signatures obtained under paragraph (d) of this section that meet the definition of electronic signatures in § 11.3(b)(7) of this chapter are exempt from the requirements of part 11 of this chapter.

(f) *Misbranding.* A standard menu item offered for sale in a covered establishment shall be deemed misbranded under sections 201(n), 403(a), and/or 403(q) of the Federal Food, Drug, and Cosmetic Act if its label or labeling is not in conformity with paragraph (b) or (c) of this section.

Dated: March 28, 2011.

Margaret A. Hamburg,

Commissioner of Food and Drugs.

Kathleen Sebelius,

Secretary of Health and Human Services.

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Part III

Department of Health and Human Services

Food and Drug Administration
21 CFR Parts 11 and 101
Food Labeling; Calorie Labeling of Articles of Food in Vending Machines; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 11 and 101

[Docket No. FDA–2011–F–0171]

RIN 0910–AG56

Food Labeling; Calorie Labeling of Articles of Food in Vending Machines

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: To implement the vending machine labeling provisions of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), the Food and Drug Administration (FDA) is proposing requirements for providing calorie information for certain articles of food sold from vending machines. The Affordable Care Act, in part, amended the Federal Food, Drug and Cosmetic Act (FD&C Act) to, among other things, require that for an article of food sold from a vending machine that does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the article, or does not otherwise provide visible nutrition information at the point of purchase, and is operated by a person engaged in the business of owning or operating 20 or more vending machines, the vending machine operator must disclose the number of calories for the article of food. Vending machine operators not subject to the requirements of the Affordable Care Act may elect to be subject to the Federal requirements by registering with FDA. Providing calorie disclosures for food sold from vending machines would assist consumers in making healthier dietary choices.

DATES: Submit either written or electronic comments on the proposed rule by July 5, 2011. Submit comments on the information collection issues under the Paperwork Reduction Act of 1995 by May 6, 2011, (see the "Paperwork Reduction Act of 1995" section of this document).

ADDRESSES: You may submit comments, identified by Docket No. FDA–2011–F–0171 and/or RIN 0910–AG56, by any of the following methods, except that comments on information collection issues under the Paperwork Reduction Act of 1995 must be submitted to the Office of Regulatory Affairs, Office of Management and Budget (OMB) (see the "Paperwork Reduction Act of 1995" section of this document).

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

FAX: 301–827–6870.

Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and docket number and Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Daniel Y. Reese, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2371.

SUPPLEMENTARY INFORMATION:

I. Background

A. Nutrition Labeling Requirements That Currently Apply to Packaged Foods

The Nutrition Labeling and Education Act of 1990 (NLEA) amended the FD&C Act, in part, by adding section 403(q) (21 U.S.C. 343(q)), which specifies, in pertinent part and with certain exceptions, that a food is considered to be misbranded unless its label or labeling bears nutrition information. See 21 U.S.C. 343(q)(1). When a food is in package form, the required nutrition information generally must appear on the label of the food. FDA's final regulations establishing nutrition labeling requirements were published in 1993 (58 FR 2079, January 6, 1993) and are found at Title 21 of the Code of Federal Regulations (21 CFR) section 101.9. Regulations implementing the NLEA require nutrition information for a food product intended for human consumption and offered for sale unless an exemption is provided for the product (§ 101.9(a)). The declaration of nutrition information on the label and labeling of food generally must include information about the following nutrients: Total calories, calories from fat (unless the product contains less than 0.5 g of fat), total fat, saturated fat, *trans* fat, cholesterol, sodium, total carbohydrate, dietary fiber, sugars, protein, and certain vitamins and minerals (§ 101.9).

The NLEA amendments to the FD&C Act included an exemption from nutrition labeling for food that is served in restaurants or other establishments in which food is served for immediate human consumption or sold for sale or use in such establishments (21 U.S.C. 343 (q)(5)(A)(i)). The NLEA amendments to the FD&C Act also included an exemption from nutrition labeling for food that is processed and prepared primarily in a retail establishment, ready for human consumption, of the type of food described in section 403(q)(5)(A)(i) of the FD&C Act, offered for sale to consumers but not for immediate human consumption in such establishment, and not offered for sale outside such establishment (21 U.S.C. 343(q)(5)(A)(ii)). However, these exemptions were contingent on there being no nutrient content claims or health claims made on the label or labeling, or in the advertising, for the food. In our regulations implementing these exemptions, we included vending machines among the examples of establishments in which food is served for immediate human consumption that generally are exempt from nutrition labeling requirements because like the other examples, vending machines offer food products that are generally consumed immediately where purchased or while the consumer is walking away. See § 101.9(j)(2).

B. Requirements of Section 4205 of the Affordable Care Act

On March 23, 2010, the Affordable Care Act (Pub. L. 111–148) was signed into law. Section 4205 of the Affordable Care Act (section 4205), amends section 403(q) of the FD&C Act, which governs nutrition labeling requirements, and section 403A of the FD&C Act (21 U.S.C. 343–1), which governs Federal preemption of State and local food labeling requirements. The Affordable Care Act requires FDA to issue proposed regulations to carry out section 403(q)(5)(H) of the FD&C Act no later

than one year from the date of enactment. As amended, section 403(q)(5)(H)(viii) of the FD&C Act requires that if an article of food is sold from a vending machine that does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the food or does not otherwise provide visible nutrition information at the point of purchase and the vending machine is operated by a person who is engaged in the business of owning or operating 20 or more vending machines, the vending machine operator must provide calorie information for the food. Specifically, the vending machine operator must "provide a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article."

Section 403(q)(5)(H)(ix) of the FD&C Act allows vending machine operators not subject to the requirements of section 4205 of the Affordable Care Act to voluntarily register with FDA to become subject to the Federal requirements. In the **Federal Register** of July 23, 2010, (75 FR 43182), FDA published a notice in the **Federal Register** specifying the terms and conditions for implementation of voluntary registration, pending promulgation of final regulations. See 75 FR 43182.

C. FDA Activities Related to Implementation of Section 4205 of the Affordable Care Act

Section 4205 of the Affordable Care Act also requires certain restaurants and similar retail food establishments to provide calorie and other nutrition information for standard menu items, including food on display and self-service food. Elsewhere in this issue of the **Federal Register**, FDA is proposing requirements to implement the menu labeling provisions of section 4205. As discussed in that proposal, FDA has published in the **Federal Register** a number of documents concerning section 4205. On July 7, 2010, FDA published a notice entitled "Disclosure of Nutrient Content Information for Standard Menu Items Offered for Sale at Chain Restaurants or Similar Retail Food Establishments and for Articles of Food Sold from Vending Machines" ("docket notice") (75 FR 39026, July 7, 2010) to solicit comments and suggestions on the new law. In response to this notice, FDA received approximately 875 letters and e-mails. Of those, approximately 60 contained one or more comments pertaining to vending machine calorie labeling. Many of these comments were general comments on the law itself and either supported or opposed the requirement in section 403(q)(5)(H)(viii) of the FD&C Act that calorie information be provided for foods sold from vending machines. Comments in opposition stated that providing calorie information for foods sold from vending machines would be overly burdensome to the industry. FDA describes these comments in more detail and responds to those comments in this proposal.

On July 23, 2010, FDA published the **Federal Register** notice entitled "Voluntary Registration by Authorized Officials of Non-Covered Retail Food Establishments and Vending Machine Operators Electing to be Subject to the Menu and Vending Machine Labeling Requirements Established by Section 4205 of the Patient Protection and Affordable Care Act of 2010" ("registration notice") (75 FR 43182). FDA issued this registration notice to provide assistance for voluntary registration for restaurants, similar retail establishments, and vending machine operators that are not subject to the nutrition labeling requirements of section 4205 (*e.g.,* restaurants and similar retail food establishments with fewer than 20 locations, and vending machine operators with fewer than 20 machines). In the registration notice, FDA specified the terms and conditions for implementation of voluntary registration, pending promulgation of regulations. In response to the notice, FDA received 7 comments, none of which addressed registration.

On August 25, 2010, FDA published a "Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws" ("preemption guidance") (75 FR 52427, August 25, 2010). The preemption guidance discusses the preemptive effect of section 4205 and identifies the provisions of amended section 403(q) of the FD&C Act that became requirements upon enactment. Our current thinking on the preemptive effect of section 4205 is set out in section VII of this document.

Also on August 25, 2010, FDA published a "Draft Guidance for Industry: Questions and Answers Regarding the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010; Availability" ("draft implementation guidance") (75 FR 52426, August 25, 2010). This draft guidance addressed only the menu labeling provisions of section 4205. It did not address the calorie labeling requirements for vending machine operators in section 4205. FDA subsequently withdrew the draft implementation guidance (76 FR 4360, January 25, 2011).

II. Legal Authority

As stated in section I.C. of this document, on March 23, 2010, the Affordable Care Act was signed into law. Section 4205 of the Affordable Care Act amended 403(q)(5) of the FD&C Act (21 U.S.C. 343(q)(5)) by amending section 403(q)(5)(A) and by creating new clause (H) to require, in relevant part, that vending machine operators provide calorie information for certain articles of food sold from vending machines. Under section 403(a)(1), such information must be truthful and nonmisleading. Food to which these requirements apply is deemed misbranded if these requirements are not met. In addition, under section 201(n) of the FD&C Act (21 U.S.C. 321(n)), the labeling of food is misleading if it fails to reveal facts that are material in light of representations actually made in the labeling. Section 403(q)(5)(H)(x) requires the Secretary of Health and Human Services (Secretary) to issue proposed regulations no later than 1 year after enactment . Thus, FDA has the authority to issue this proposed rule under sections 201(n), 403(a)(1), and 403(q)(5)(H), as well as under section 701(a) of the FD&C Act (21 U.S.C. 371(a)), which vests the Secretary with the authority to issue regulations for the efficient enforcement of the FD&C Act.

FDA is proposing requirements that vending machine operators provide calorie information for certain articles of food sold from vending machines. FDA is also proposing the terms and conditions for voluntary registration by vending machine operators not subject to the requirements of section 4205 of the Affordable Care Act that elect to become subject the requirements. FDA is proposing to set out these provisions in new § 101.8.

III. The Proposal

A. Definitions

We are proposing in the introductory paragraph of § 101.8(a) that the terms defined in section 201 of the FD&C Act are applicable when these terms are used. Additional terms are defined alphabetically in the proposed codified and are discussed in alphabetical order in this section. "Act" is defined as the Federal Food, Drug, and Cosmetic Act.

1. Authorized Official of a Vending Machine Operator

We are proposing in § 101.8(a) that the term "authorized official of a vending machine operator" means the owner, operator, or agent in charge of a vending machine, or any other person authorized by a vending machine operator not subject to the requirements of section 4205 of the Affordable Care Act to voluntarily register the vending machine operator with FDA to become subject to the requirements. For the purposes of this definition, the agent in charge would not be the person who is only in charge or in control of the location where the vending machine is located.

2. Vending Machine Operator

We are proposing in § 101.8(a) that the term "vending machine operator" means a person that controls or directs the function of the vending machine, including deciding which articles of food are sold from the vending machine or the placement of the articles of food within the vending machine, and is compensated for the control or direction of the function of the vending machine. Section 201(e) of the FD&C Act defines "person" to include an individual, partnership, corporation, and association. For example, a vending machine operator could be a corporation that manufacturers beverages and sells these products in its machines. A vending machine operator also could be an individual or a business that only operates and stocks vending machines, such as a private company with onsite vending machines.

3. Vending Machine

Section 403(q)(5)(H)(viii) of the FD&C Act sets forth labeling requirements for certain vending machine food but does not define the term "vending machine." We are proposing in § 101.8(a) that the term "vending machine" means a self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by optional manual operation, dispenses servings of food in bulk, in packages, or prepared by the machine, without the necessity of replenishing the device between each vending operation. This definition is almost identical to the definition of "vending machine" in the FDA Food Code 2009.[1] Examples of food dispensed from vending machines may include prepackaged foods (*e.g.,* candy, snacks, gum, bottled or canned soft drinks), unpackaged bulk foods (*e.g.,* handful of gum, candy, or mixed nuts), prepared foods (*e.g.,* sandwiches or fresh fruit), multi-serving foods (*e.g.,* gallon of milk), or foods prepared in the machine and dispensed in bulk (*e.g.,* coffee, soup, or popcorn).

B. Who Must Comply With This Rule

Section 4205 of the Affordable Care Act provides that "in the case of an article of food sold from a vending machine that does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the article, or does not otherwise provide visible nutrition information at the point of purchase, and is operated by a person engaged in the business of owning or operating 20 or more vending machines, the vending machine operator shall provide a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article of food." Consistent with the requirements of section 4205, all vending machine operators with 20 or more vending machines, as defined in section III.A.3. of this document, will be subject to these requirements. Therefore, FDA is proposing in § 101.8(c)(1)(i)(A) and (B) that the labeling requirements of this proposed rule apply to vending machine operators that own or operate 20 or more vending machines that do not allow a prospective purchaser to examine the Nutrition Facts Panel prior to purchase or do not otherwise provide visible nutrition information at the point of purchase. As discussed in below in section III.D. of this document, vending machine operators that are not subject to the requirements of the law may elect to be subject to the Federal requirements by voluntarily registering with FDA.

Several comments requested that FDA apply the small business nutrition labeling exemption (§ 101.9(j)(1)) to vending machine operators. The comments said that: (1) 90–95 percent of vending machine operators have 20 or more machines, and therefore, would be covered by section 403(q)(5)(H) of the FD&C Act and (2) 70 percent of vending machine operators have three or fewer employees, and would likely be generating sales less than $500,000.

FDA is not proposing an exemption from the vending machine nutrition labeling requirements for small businesses. FDA notes that section 403(q)(5)(H) of the FD&C Act does not include an exemption from the vending machine nutrition labeling requirements for small businesses. Section 403(q)(5)(D) includes an exemption from the nutrition labeling requirements in sections 403(q)(1) through (q)(4) for small businesses. The requirement that vending machine operators disclose calories for covered vending machine food is not found in sections 403(q)(1) through (q)(4); instead, it is found in section 403(q)(5)(H)(viii). Therefore, the small business exemption in 403(q)(5)(D) does not apply. We believe that the proposed rule provides adequate flexibility to allow these small businesses to comply with the proposed requirements in a cost-effective and equitable way. For example, the proposed requirements allow vending machine operators to choose from various approaches for compliance, including adopting less expensive measures as discussed below in section III.E. and section IV. of this document. We request comment on additional ways that FDA can make the requirements of this rule less burdensome on small businesses, while still meeting the requirements of section 403(q)(5)(H).

The Agency also received comments regarding operators of vending machines who are blind and operate vending machines through the Vending Facility Program operated by the U.S. Department of Education under the Randolph-Sheppard Act of 1936, 20 U.S.C. 107 *et seq.* These comments suggested that regardless of the number of machines that were operated by an operator, all operators of vending machines under the Randolph-Sheppard Act would be covered.

The Agency wishes to clarify its interpretation of the applicability of section 4205 of the Affordable Care Act to vending machine operators who fall under the Randolph-Sheppard Act. Section 403(q)(5)(H)(viii) of the FD&C Act sets forth requirements for vending machine operators based on the number of machines that they operate. Thus, as with other operators, Randolph-Sheppard Act operators would only be covered by the disclosure requirements if they operate 20 or more vending

[1] FDA regularly publishes the Food Code, which provides guidance on food safety, sanitation, and fair dealing that can be uniformly adopted by State and local governments for the retail segment of the food industry. The Food Code provisions are not Federal requirements; however, they are designed to be consistent with Federal food laws and regulations. The 2009 Food Code defined the term "vending machine" to mean a "self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by optional manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation." (U.S. Public Health Service, FDA, 2009 Food Code, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, College Park, MD 20740, chapter 1, section 1–201.) *http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/ucm186464.htm.*

machines that dispense food or if they voluntarily register to be covered.

These comments also stated that operators of vending machines who are blind "may place different products in the same row due to limited visual recognition and the similarity of product packaging." These comments requested flexibility for posting calorie information. Specifically, the comments requested that the calorie disclosure requirements permit the "stacking of multiple products in the same coil."

FDA is proposing requirements that provide flexibility for vending machine operators to comply with the labeling requirements for covered vending machine food. As discussed later in this document, the required calorie information may be posted on a sign adjacent to the vending machine, so long as the sign is visible to the prospective purchaser at the same time as the food, its description, or its selection button is visible.

C. Who Is Not Required to Comply With This Rule

FDA is aware that many vending machine operators operate machines that dispense a variety of articles other than articles of food. For example, some vending machines may dispense detergent, compact discs, gift cards or toiletries. If a vending machine operator operated a total of 50 vending machines, only 15 of which sell articles of food, the vending machine operator would not be subject to the requirements of 403(q)(5)(H)(viii) of the FD&C Act because the vending machine operator operates fewer than 20 vending machines that sell articles of food.

Further, FDA tentatively concludes that vending machines that may dispense food as part of a game or other non-food related activity are not covered by 403(q)(5)(H) of the FD&C Act. For example, a vending machine may contain a variety of items ranging from small toys, coins, or individually wrapped candies that can be picked up by maneuvering a large claw arm. In this instance, the vending machine does not sell articles of food, even though in the course of maneuvering the arm, candies could be dispensed. The vending machine is selling the opportunity to play the game. FDA seeks comment on this tentative conclusion.

Bulk vending machines dispense unpackaged articles of food in preselected amounts (*e.g.* gumball machines, mixed nut machines). FDA received a few comments suggesting that bulk vending machines are different from "more modern types of vending machines," and therefore should be exempt from these disclosure requirements. The comments argued that bulk vending machines should be distinguished from other vending machines for three reasons. First, they noted that these machines do not have selection buttons, and as a result a vending machine operator could not place a sign "in close proximity to * * * the selection button" that includes the calorie information required by section 403(a)(5)(H)(viii)(I) of the FD&C Act. Second, they argued that food sold from bulk vending machines represents only a small fraction of overall market sales of the vending machine industry. Finally, the comments stated that there is no reported association between foods sold from bulk vending machines and obesity.

FDA notes that section 403(q)(5)(H)(viii) of the FD&C Act does not limit its applicability to vending machines for which there has been a reported association between the food vended by the machine and obesity. However, section 403(q)(5)(H)(viii) provides that for covered vending machine food, the vending machine operator must provide a sign disclosing the number of calories contained in the food "in close proximity to each article of food or the selection button." FDA tentatively concludes that the reference to "selection button" in the statute can be read to mean that the types of vending machines subject to requirements in section 403(q)(5)(H)(viii) are those with selection buttons. FDA is not aware of vending machines without selection buttons other than bulk vending machines that dispense, by use of a crank, single types of unpackaged articles of food in preselected amounts (*e.g.,* a single piece of gum or a handful of candy or nuts). FDA tentatively concludes that vending machines, including bulk vending machines, without any type of selection button are not covered by section 403(q)(5)(H)(viii). However, FDA tentatively concludes that a bulk vending machine that has a selection button, regardless of the type of food it dispenses, *e.g.,* unpackaged articles of food such as soup, popcorn, or hot or cold beverages, is covered under section 403(q)(5)(H)(viii), if it meets the other statutory criteria. FDA is proposing in § 101.8(c)(1)(i)(C) that the nutrition labeling requirements of § 101.8 apply to an article of food sold from a vending machine that, among other things, has a selection button. FDA seeks comment on these tentative conclusions. FDA is also interested in comments demonstrating any unintended adverse effect resulting from the exclusion of vending machines without selection buttons from the calorie labeling requirements.

D. Voluntary Registration by a Vending Machine Operator That Is Not Subject to the Requirements of Section 4205 of the Affordable Care Act That Elects To Be Subject to the Requirements

Section 4205 *of the Affordable Care Act* provides that vending machine operators not subject to the requirements of section 403(q)(5)(H)(viii)[2] of the FD&C Act may elect to become subject to the requirements by registering "biannually" with FDA (21 U.S.C. 343(q)(5)(H)(ix)). As discussed below, operators that choose to be subject to the Federal requirements would not be subject to non-identical state or local nutrition labeling laws for food sold from vending machines. In the proposed rule entitled: Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, published elsewhere in this issue of the **Federal Register,** FDA explains that "biannual" can be defined as occurring twice every year or as occurring every other year. (Ref. 1). FDA tentatively concludes that registration every other year is a more reasonable interpretation, because it does not seem warranted or necessary for a vending machine operator to tell FDA every 6 months that the operator wants to be subject to Federal requirements. FDA began accepting registrations on July 21, 2010, and will continue to accept them on a continuous basis. FDA is proposing in § 101.8(d) that an authorized official for a vending machine operator that is not subject to the Federal requirements may register with FDA every other year by providing FDA the following information:

- The contact information (including name, address, phone number, e-mail address), for the vending machine operator;
- The address of the location of each vending machine owned or operated by the vending machine operator that is being registered;
- Preferred mailing address (if different from the vending machine operator address), for purposes of receiving correspondence; and
- Certification that the information submitted is true and accurate, that the person or firm submitting it is authorized to do so, and that each registered vending machine will be subject to the requirements of § 101.8.

[2] As discussed in section I.B. of this document, vending machine operators that own or operate fewer than 20 vending machines could elect to be subject to the requirements of 403(q)(5)(H)(viii) of the FD&C Act by voluntarily registering with FDA.

An authorized official of a vending machine operator who elects to be subject to the Federal requirements can register by visiting *http://www.fda.gov/menulabeling.* FDA has created a form that contains fields requesting the information in § 101.8(d) and made the form available at this Web site. Registrants must use this form to ensure that complete information is submitted.

E. Requirements for Vending Machine Operators Subject to This Rule and Operators That Elect To Be Subject to the Rule When Calorie Declarations Are Required

Calorie Declaration for a Covered Vending Machine Food

a. *Calorie declaration.* Section 403(q)(5)(H)(viii) of the FD&C Act provides that, for a covered vending machine food, the vending machine operator must "provide a sign in close proximity to the article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article." FDA is proposing in § 101.8(c)(2)(i)(A) to require that for a covered vending machine food, the statement of the number of calories in the food must be expressed to the nearest 5-calorie increment up to and including 50 calories, and 10-calorie increment above 50 calories. For a covered vending machine food that has fewer than 5 calories, the calorie declaration may be expressed as zero. These rounding rules are consistent with the declaration of calories for packaged foods as provided in § 101.9(c)(1).

In addition, FDA tentatively concludes that the number of calories must be accompanied by a term, *e.g.,* "calories," to make clear what that number refers to. Consequently, FDA is proposing in § 101.8(c)(2)(i)(B) that the term "Calories" or "Cal" must appear adjacent to the number of calories for the covered vending machine food. This is the "calorie declaration." We tentatively conclude that permitting the use of the abbreviation "Cal" will provide flexibility for vending machine operators, especially those that have limited space on their machines, in meeting the proposed requirements.

Because section 403(q)(5)(H)(viii) of the FD&C Act refers to "an article of food sold from a vending machine," FDA tentatively concludes that calorie information must include the total calories present in the covered vending machine food as it is vended. For example, if a covered vending machine food, such as a sandwich, is dispensed with a single serving unit of a condiment, such as mayonnaise, the calorie declaration must include the number of calories contained in the sandwich and the package of mayonnaise. FDA also tentatively concludes that the number of calories declared for the article of food must be identical to the number of calories that are declared in the Nutrition Facts, if present. If the food contains multiple servings and bears a Nutrition Facts Panel, FDA tentatively concludes that the number of calories declared must be equal to the total number of calories contained in the food item as dispensed. The total number of calories can be determined by multiplying the number of calories per serving by the number of servings in the package. For example, if the Nutrition Facts states 80 calories per serving and 3 servings per container, the total number of calories in the entire package would be 240 calories. FDA tentatively concludes that for a covered vending machine food that contains multiple servings, a vending machine operator may voluntarily disclose calories per serving in addition to total calories for the food.

Several comments requested that FDA permit the use of calorie ranges, similar to those provided for restaurants and similar retail food establishments under section 403(q)(5)(H)(v) of the FD&C Act, in declaring calorie information for covered vending machine foods that come in different flavors and varieties, *e.g.,* coffee which comes in different flavors, brew strength, serving size, sweeteners or different types of sandwiches or fruit. The comments discussed the need for flexibility to provide calorie ranges for such items.

FDA acknowledges that some articles of food sold from vending machines come in varieties, such as different flavors and types of hot beverages (*e.g.,* coffee or hot chocolate). For some of these varieties, there could be a large range for calories. For example, calories for coffee could range from zero calories for a plain brewed coffee to over 400 calories for a large mocha coffee with whole milk and whipped cream. We point out, however, that a vending machine operator could post a calorie declaration in close proximity to the selection button for a food that comes in different varieties and flavors that is sold in a vending machine that has selection buttons corresponding to the different options. For example, if there is a button to select cream for a coffee, a vending machine operator would be able to post a calorie declaration for that cream item in close proximity to the selection button. FDA has considered vending machines that typically dispense fresh sandwiches and fruit (often these machines are turnstile type). FDA believes that such machines do not present a unique situation where the proposed options for declaring calorie information would not be appropriate. FDA tentatively concludes, therefore, that calorie ranges are not necessary within the context of vending machines because a vending machine operator would be able to disclose calorie information under other options, as explained below (*e.g.,* use of signs including posters).

b. *Determination of calorie content.* If a covered vending machine food does not bear Nutrition Facts, FDA anticipates that the manufacturer or supplier of the food may provide the number of total calories for the food to the vending machine operator so that the operator has the necessary calorie information to meet the calorie disclosure requirements of section 403(q)(5)(H)(viii) of the FD&C Act. FDA notes that covered vending machine operators must ensure that the calorie declaration is truthful and not misleading in accordance with section 403(a)(1) of the FD&C Act. In the event the calorie information is not available from the manufacturer of the food, FDA seeks comments on whether a vending machine operator may use nutrient databases, cookbooks, laboratory analyses, and other reasonable means. FDA notes that such flexibility is provided in § 101.10 and section 403(q)(5)(H)(iv). Further, FDA seeks comment on whether vending machine operators should be required to provide FDA the information on which they relied to determine the total calories posted for the vending machine food.

c. *Placement and prominence of calorie declarations.* Section 403(q)(5)(H)(viii) of the FD&C Act provides that for a covered vending machine food, the vending machine operator must provide a sign in close proximity to the article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the food. FDA is interpreting the requirement that a sign be placed in close proximity to the article to mean that the sign is placed either in or on the vending machine itself or adjacent to the vending machine and near the food, its price, its selection number, or its selection button.

Section 403(q)(5)(H)(viii) also requires that the calorie declaration be clear and conspicuous. FDA notes that to be clear and conspicuous the calorie declaration must be in a font size large enough to be seen and easily readable. However, FDA recognizes that vending machines come in a variety of sizes, shapes, and

styles. We also understand that vending machines will often have limited space. We think that it is important to provide businesses with flexibility while, at the same time, fulfilling the requirements of the statute. Therefore, we think it would not be appropriate to require one specific type size and font for calorie declarations for all covered vending machine food. Generally, if a calorie declaration is in a similar color as and a type size no smaller than the name [3] of the food, price of the food, or the selection number (*e.g.,* A9 or E4), consumers should be able to read the calories in the same manner as they read the name and price of the food item. Therefore, FDA is proposing in § 101.8(c)(2)(i)(C) that if the calorie declaration is in or on the vending machine itself, the calorie declaration for a covered vending machine food must be in a type size no smaller than the name, selection number, or price of the food as displayed on the vending machine, whichever is smallest. In addition, to help ensure that the calorie declaration is clear and conspicuous, FDA is proposing in § 101.8(c)(2)(i)(B) and § 101.8(c)(2)(i)(C) that the calorie declaration be made in the same color, or in a color at least as conspicuous, as the color of the name, price, or selection number of the food. Further, FDA proposes that the calorie declaration on the machine must have the same contrasting background as the name or price or selection number it is in closest proximity to. FDA notes that if a calorie declaration is presented in a color that is not sufficiently contrasted with its background or the declaration is in a type size that is too small to be read by a prospective purchaser, FDA tentatively concludes that the calorie declaration for a covered vending machine food is not disclosed in a clear and conspicuous manner, and the declaration would not be in compliance with the requirements of section 403(q)(5)(H)(viii)(I). FDA requests comment on whether these requirements meet the conditions for "clear and conspicuous" or whether the requirements should be more or less prescriptive.

A number of comments suggested that calorie information be provided on a poster or sign near the machine, such as for a bank of several vending machines that may use a common singular payment acceptor. However, several comments noted a concern that calorie information would not be read by the consumer unless the calorie information were posted immediately next to each food item. The comments stated that "vending menus" (such as a menu poster for a bank of vending machines) would not provide the buyer with easy access to the calorie information.

FDA agrees with the comments that a sign that is a poster may be an appropriate medium to convey the required calorie declarations, so long as the sign is in close proximity to the covered vending machine food or selection button. The Agency tentatively concludes that "close proximity" could mean adjacent to the vending machine, but not necessarily attached, so long as the sign adjacent to the machine is clear and conspicuous at the same time as the food, its name, or its selection button or selection number is visible. The Agency requests comments on this tentative conclusion. FDA is also proposing in § 101.8(c)(2)(ii)(B) that if the sign required by section 403(q)(5)(H)(viii) of the FD&C Act is placed adjacent to the vending machine, the calorie declaration must be in type that is all black or one color printed on a white or other neutral background that contrasts with the type color. The Agency is not proposing a minimum type size for the calorie declaration, but we request comment on this tentative decision. Comments should provide a rationale supporting their position and any supporting data, including consumer research. Where the vending machine only displays a vignette (*i.e.,* picture of the food) or name of the food item, FDA is proposing in § 101.8(c)(2)(ii)(D) that the calorie disclosure sign must be in close proximity to the vignette or name or in close proximity to the selection button.

For electronic vending machines (*e.g.,* machines with digital or electronic or liquid crystal display (LCD) displays), FDA tentatively concludes that the calorie disclosure sign required by the statute may be displayed when the selection numbers are entered but before the selection is confirmed, as proposed in § 101.8(c)(2)(ii)(E).

FDA tentatively concludes, that for certain types of vending machines with a limited number of selections, (*e.g.,* popcorn with or without added butter), the sign with the statement of calories may appear anywhere on the front (or face) of the vending machine. A sign may consist of a handwritten sticker in permanent marking that is affixed to the machine, provided that the statement is prominent, not crowded by other labeling on the machine and in a type size reasonably related to the largest print on the vending machine.

F. When Calorie Declaration Is Not Required

1. Examination of the Nutrition Facts Panel

If the Nutrition Facts Panel of an article of food sold from a vending machine may be examined by a prospective purchaser before purchasing the article, the vending machine operator is not required to provide the calorie information. FDA is interpreting the term "Nutrition Facts Panel" to mean the nutrition information in the format required in § 101.9(c) and (d) on the label of the food. FDA tentatively concludes in order for the Nutrition Facts Panel to be examined, it must be visible in full, without obstruction, before purchase. For example, a vending machine's automatic dispensing coil that holds the food in place or the placement of the package in the machine must not obscure, cover, or cause to be covered any portion of the Nutrition Facts Panel. To enable the prospective buyer to obtain the total number of calories of the article of food, the information that would be required to be made available on a sign by the vending machine operator if the provisions of section 403(q)(5)(H)(viii)(I)(aa) are not met, the agency notes that, in most cases, the prospective purchaser must use several parts of the panel to determine the total number of calories for the article of food. This is one reason that it is critical that no portion of the Nutrition Facts Panel be obscured.

In addition, the Nutrition Facts Panel must be in a size that permits the prospective purchaser to easily read the nutrition information while the food is in the vending machine. FDA regulations allow certain foods to bear Nutrition Facts in a modified or smaller format based on the composition of the food, the size of the food package or other factors (see § 101.9(d), (e), (f), (h) and (j)). Where the Nutrition Facts Panel is in a smaller format consistent with the regulations, a prospective purchaser is unlikely to be able to easily read it on the label of the article of food in the vending machine prior to purchase. In such cases, the Agency tentatively concludes that the prospective purchaser is not able to examine the Nutrition Facts Panel prior to purchase. FDA requests comment on these tentative conclusions.

FDA recognizes that ordinarily the vending machine operator is not responsible for the printing of the Nutrition Facts Panel. Nor is the vending machine operator required by section 403(q)(5)(H)(viii)(I) to make examination of the Nutrition Facts

[3] Here the discussion of "name" refers to the name of the food on or in the vending machine and not the name of the food on the label of the food package.

possible by the prospective purchaser prior to purchase. However, food manufacturers may have an incentive to work with vending machine operators to find ways to have their packaged food displayed with the Nutrition Facts easily readable in the vending machine. In this way, potential purchasers would have more information about the manufacturers' food than just calories.

2. Visible Nutrition Information at the Point of Purchase

The second prong of section 403(q)(5)(H)(viii)(I)(aa) specifies that if a vending machine "otherwise provide[s] visible nutrition information at the point of purchase" for an article of food sold from the machine, the vending machine operator is not required to provide the calorie information. As with the Nutrition Facts Panel this alternative means of satisfying the requirement of section 403(q)(5)(H)(viii) is optional for vending machine operators.

The terms "visible nutrition information" and "point of purchase" in section 403(q)(5)(H)(viii)(I)(aa) are not defined in the statute. FDA sees two possible ways to understand and apply the terms. One approach is to conclude that (1) "nutrition information" in this context means total calories in the article of food, because this is the information that the vending machine operator must provide by sign if the provisions in section 403(q)(5)(H)(viii)(I)(aa) are not met; and (2) "otherwise provide[d] * * * at the point of purchase" suggests, in the context of the provision as a whole, that the information, like the Nutrition Facts Panel, should be on the article of food itself. FDA proposes this approach in proposed § 101.8(b).

FDA received several comments supporting the use of "front of package" nutrition information contained on the food label as a means of "providing visible nutrition information at the point of purchase." For example, some packaged food manufacturers voluntarily place certain nutrition information on the principal display panel that includes calorie and other nutrition information about the product. This type of nutrition information is sometimes referred to as "front of package" by industry, whereas Nutrition Facts typically appear on the information panel of a food label. FDA tentatively concludes that "front of package" nutrition information could be a way to provide visible nutrition information, so long as the criteria for color, font and type size are met and total calories in the article of food are included. If a nutrient content claim or a health claim for the article of food also is included on the front of the package, the claim must comply with relevant FDA regulations authorizing nutrient content claims (a claim on food labeling regarding the level of a nutrient, *e.g.,* low fat) or health claims (a claim on food labeling regarding the relationship between a substance and a disease, *e.g.,* calcium and osteoporosis), as applicable.

FDA also received a few comments stating that the Nutrition Facts Panel and any "front of package" nutrition information may be small and difficult to read in a vending machine. FDA recognizes that a consumer may not be able to easily read some nutrition information in a vending machine and therefore this information may not inform the consumer about the number of total calories in the article of food. Section 101.8(b) of this proposed rule sets out the provisions regarding "visible nutrition information at the point of purchase" discussed above.

Under proposed § 101.8(b), for the nutrition information on the label to be considered "visible," it must be clear and conspicuous. To ensure that it is clear and conspicuous, it must be both (1) in a type size easily readable from the distance between the prospective purchaser and the label and (2) in print with sufficient color and contrasting background to be readily distinguishable from other types of information on the label. FDA tentatively concludes that the visible nutrition information presented on the label of the food at the point of purchase must be in a type size reasonably related to the most prominent printed matter on the label and in a color that sufficiently contrasts with the background, such that a prospective purchaser is able to notice and read the information. Generally, FDA has considered "reasonably related" to mean a type size that is at least 50 percent of the size of the largest print on the label. (Ref. 2).

The alternative approach is to interpret the words "otherwise provide visible nutrition information at the point of purchase" by concluding that (1) "nutrition information" means something more than total calories, and (2) "point of purchase" means something more than on the package of the food itself. Under this interpretation, the non-Nutrition Facts Panel option in the statute would include information in addition to total calories because the broader term "nutrition information" was used instead of "calories." Just as the Nutrition Facts Panel contains more than calorie information, so too, would "visible nutrition information at the point of purchase." This could include, in addition to total calories in the food, information such as serving size information or information on the nutrients that are required to be disclosed in the Nutrition Facts as described in § 101.9 or 21 U.S.C. 343(q)(1)(D) and (E). FDA seeks comment on what other nutrition information, if any, should be required if this alternative interpretation were adopted. FDA also notes that under this alternative interpretation, the vending machine operator could rely on any "visible nutrition information at the point of purchase" that included total calories in addition to other nutrition information regardless of what entity supplied the information.

Likewise, under the alternative approach, "point of purchase" would be read to mean that the "visible nutrition information" could be provided in places other than on the package of the food in the vending machine, such as on the vending machine itself.

In the case of the alternative interpretation, in which the "visible nutrition information at the point of purchase" appears other than on the label of the article of food, there are also the questions of where and through what means the information may be provided. The agency specifically requests comment on whether, under this alternative interpretation, signs (including posters) or booklets would be sufficient in providing "otherwise visible nutrition information at the point of purchase" and we especially request any consumer studies or social scientific data on this issue.

Regardless of the precise location or means of providing the nutrition information, under the alternative interpretation there would also be a question of ensuring that the information is adequately "visible." At a minimum, the nutrition information should be clear and conspicuous and noticeable at the point of purchase, in the context of the surroundings. One way to ensure this visibility if the nutrition information is not on the label of the article of food would be to provide the information in type that is all black or one color, printed on a white or other neutral background that contrasts with the type color. Another way would be to also provide the information using a minimum type size. The agency requests comments on these and other ways to determine if the information is "visible."

Another aspect of whether information that is not on the food itself is visible to the consumer is where the information is placed relative to the "point of purchase." FDA requests comment on the meaning of "the point of purchase" in this context and on all

aspects of the alternative interpretation of "visible nutrition information at the point of purchase."

FDA seeks comment on the alternative approaches to interpreting and applying "otherwise provide visible nutrition information at the point of purchase."

G. Conforming Amendment

FDA is proposing to exempt electronic signatures submitted to satisfy the requirements of this proposed section from the requirement to comply with Part 11—Electronic Records; Electronic Signatures (21 CFR part 11) and proposing to amend part 11 to reflect this exemption. We expect this exemption to facilitate the registration process for those vending machine operators who voluntarily choose to register under section 403(q)(5)(H)(ix) of the FD&C Act.

H. Effective Date

FDA received a few comments regarding the effective date of the final rule that would issue based on this proposal. These comments suggested that vending machine operators would need 2 years to implement the requirements for calorie labeling for vending machines due to the costs of producing posters and driving to each site to post the information.

FDA is proposing that the final rule become effective one year from the date of its publication. Because FDA is proposing flexibility for compliance, *i.e.,* the use of signs in, on, or adjacent to vending machines, vending machine operators would be able to choose among a wide variety of less expensive avenues to achieve compliance, depending on their situation. Many foods sold from vending machines are packaged and have Nutrition Facts. Therefore, vending machine operators have the opportunity of orienting the food in the vending machine such that the prospective customer may examine the Nutrition Facts Panel. In this case, the operators would not need to provide calorie information required by 403(q)(5)(H)(viii)(I) of the FD&C Act. If the operator chooses not to orient the food such that the prospective customer may examine the Nutrition Facts Panel, or if it is not practicable to do so because the vending machine is not of the type where the food is visible, the operator may obtain the calorie information from the Nutrition Facts to place on the signs. Further, the proposed rule, if finalized, does not require any particular manner of obtaining calorie information. As discussed above in this document, FDA anticipates that, if a covered vending machine food does not bear Nutrition Facts because it falls under an exemption, the manufacturer or supplier of the food may provide the number of total calories for the food to the vending machine operator so that the operator has the necessary calorie information to meet the calorie disclosure requirements of section 403(q)(5)(H)(viii)(I). Because of the flexibility provided in this proposed rule, the Agency finds that it is reasonable to make the requirements effective in 1 year. Based on the comments and on what vending machine operators will need to do to come into compliance, the Agency tentatively finds that making the final rule effective 1 year after publication is practicable. The Agency seeks comment on the appropriateness of this timeframe.

IV. Summary Preliminary Regulatory Impact Analysis

The summary analysis of benefits and costs included in this document is drawn from the detailed Preliminary Regulatory Impact Analysis which is available at *http://www.regulations.gov,* Docket No. FDA–2011–F–0171, and is also available on FDA's Web site at *http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm.*

A. Introduction

FDA has examined the impacts of the proposed rule under Executive Orders 13563 and 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). 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 proposed rule has been designated an "economically" significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the proposed rule has been reviewed by the Office of Management and Budget (OMB).

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Using the Small Business Administration (SBA) definition of small vending machine operators as classified by the North American Industry Classification System (NAICS 45421), FDA estimates that a significant number of operators impacted by this proposed rule are small businesses. As directed by statute, the requirements of the proposed rule only apply to vending machine operators that own or operate 20 or more vending machines. However, according to data from the Vending Times Census and from the National Automatic Merchandising Association (NAMA), the average annual revenue per machine is less than $7,000 (Refs. 3 and 4). An operator with only 20 machines may have vending machine revenue of less than $140,000. In order to exceed the SBA's definition of a small vending machine operator, a firm would need at least $10 million in annual revenue (Ref. 5). This suggests that a firm with revenue exclusively from vending machine sales would need more than 1,400 machines to exceed the definition of small business. Based on the latest available U.S. Economic Census data that breaks down establishments by revenue, we project that 97 percent of firms selling covered vending machine food, as that term is used in this document, that identify primarily as vending machine operators that are engaged in the business of owning or operating 20 or more vending machines would be small businesses as defined by SBA. Therefore, the Agency believes that the proposed rule would have a significant economic impact on a substantial number of small entities. This impact is discussed further in section V of this document.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Need for This Regulation

This proposed rule is necessary to implement section 4205 of the Affordable Care Act, which principally amends sections 403 and 403A of the FD&C Act, and requires operators of 20 or more vending machines to disclose calorie information for covered vending machine food. The provision of calorie information for covered vending

machine food may help consumers make better informed dietary choices.

Economic justifications for regulatory interventions in private markets rely on the presence of some market failure. In the case of food sold from a vending machine, the private market is particularly robust and competitive. Thousands of individual firms vie for consumer dollars in millions of vending machines across the United States (Ref. 3). Low entry costs for firms and low switching costs for customers suggest that if a sizable fraction of consumers were willing to pay for—and discriminate based on—the visible calorie information at the point of purchase then the industry would provide it to them. In fact, some vending machine operators are voluntarily providing more healthful choices and additional information on machines (Refs. 4 and 6).

Although many of the usual market failures that justify regulatory action, such as the existence of market power or of ill-defined property rights, do not apply here (Refs. 7 and 8), the primary support for regulatory intervention is that there are systematic biases in how consumers process information and weigh current benefits (from consuming higher calorie foods) against future costs (higher probability of obesity and its comorbidities).

The bias is more directly related to the requirements of this proposed rule: Consumer demand for calorie information does not create incentives for the provision of calorie information at the vending machine. This market failure occurs because at the time of purchase, consumers do not value calorie information as much as they do later, when the effects of excess calorie consumption are evident. Studies have shown that consumers have present-based preferences, meaning that they are continually optimistic about the healthfulness of their future choices (Ref. 9, 10 and 11).

These studies suggest that calorie information often lacks salience, or relevance, for consumers at the time of purchase and consumption, even though they may experience regret about their decisions at a later date. This tendency may explain why consumers have not generally demanded calorie and other nutrition information for food sold from vending machines before, or at, the point of purchase, even if they may, at a later point in time, value that information. Because of competition for consumer time and attention vending machine operators have limited time and space in which to convey information to consumers. These limits mean that there is a substantial opportunity cost to the operator of providing calorie information. That is, just as an operator may have to decide which possible foods to leave out of a vending machine with limited space (thus giving up the opportunity to sell those items), it must choose which pieces of information about its foods it wants to convey. Adding an additional piece of information means that an operator may need to downplay or remove some other piece of information. This opportunity cost of information holds true whether the calorie information is displayed on the machine or, as with an increasing number of packaged foods, on the principal display panel of the package.

The proposed requirements mitigate the apparent market failure in information provision stemming from present-biased preferences, although not necessarily the tendency of consumers to underutilize that information. Specifically, for a covered vending machine food, this proposed rule requires that the vending machine operator provide a sign in close proximity to the food or the selection button, *i.e.* in, on, or adjacent to the vending machine, but not necessarily attached to the vending machine, so long as the sign is visible at the same time as the food, its name, price, or selection number. This information must be presented in a color that is sufficiently contrasted with the background, must be in close proximity to the vignette or name or in close proximity to the selection button when a name or vignette is displayed, and, for electronic vending machines, the calorie information may be displayed when the selection numbers are entered but before the selection is confirmed. These requirements are designed so that the calorie information is made available to consumers before they purchase such food. Providing the information will likely increase consumer awareness regarding the calorie content in covered vending machine food and increase the perceived relevance of that information to their decision making. Providing the information may serve to highlight the potential future costs of additional calorie consumption. This increased attention to the caloric content of covered vending machine food may then result in an increased availability of lower calorie options, and an increased demand for these options.

C. Summary of Costs and Benefits of the Proposed Requirements and Regulatory Options

In this section FDA describes the bases of benefits and costs of the proposed requirements and summarizes the results of the detailed Preliminary Regulatory Impact Analysis (PRIA).

Benefits in response to the proposed requirements Obesity is a major public health concern in the United States and one of the top leading health indicators addressed by the United States Healthy People 2020 goals. Nationally representative data indicate an increase in the prevalence of obesity over the past three decades (Ref. 12). The 2007–2008 National Health and Nutrition Examination Survey (NHANES) data showed that 34 percent of the adult U.S. population is obese and 34 percent are overweight (Ref. 13).

Excess body weight has many health (Ref. 14), social (Refs. 15 and 16), psychological (Refs. 17 and 18), and economic consequences (Ref. 19) for the affected individuals. Lower life expectancy, elevated risk of diabetes, hypertension, stroke and other cardiovascular diseases have been documented to rise simultaneously with the increased prevalence of obesity (Ref. 14). The economic impact is especially evident in health-care costs in terms of greater health-care utilization and higher medical expenditures (Ref. 20). More specifically, medical expenditures attributable to overweight and obesity accounted for more than 9 percent of the total U.S. medical expenditures in 1998, or between $85.7 billion and $147 billion (Ref. 20). Researchers have proposed various factors to explain this dramatic rise in obesity including declining food prices and physical requirements of labor (Refs. 21 and 22), declining time costs of food preparation (Ref. 23), fast-food restaurant density (Ref. 24) and social interactions (Refs. 25).

Although the relationship between obesity and poor dietary choices is multi-faceted, there is a general agreement in the literature that reduction in excess calories is helpful in preventing or delaying the onset of excess weight gain (Ref. 26). Vending machines are a likely source of high-calorie snack or discretionary foods, as well as some high-calorie meal items. Industry data indicate that there is approximately one vending machine for every 40 adults in the United States, and that up to 5 percent of the money consumers spend on food away from home is spent on vending machine food (Ref. 27). This suggests that providing calorie information for covered vending machine food to consumers may have a significant effect on calorie intake, the prevalence of obesity, and thus the cost of health care and lost productivity.

To the extent that the proposed requirements mitigate the increase in the prevalence of obesity and the

prevalence of these costly co-morbidities such as hypertension and diabetes, society gains the opportunity cost of the averted medical expenditures and an increase in productivity from averted debilitation and death. In addition to educating consumers about calorie content, major predicted elements of the consumer and industry response to this proposed rule are:

1. Increased awareness regarding the caloric content in covered vending machine foods, and the perceived relevance of that information to decision making, which may help reduce the present-bias in preferences, and thus encourage the consumption of lower calorie options.

2. Increased consumer interest in lower calorie options, and greater transparency in the caloric content of foods sold in vending machines, which may give manufacturers an incentive to:

a. Reduce the calorie content of foods sold in vending machines through reformulation or by decreasing portion size.

b. Provide additional items with lower calorie formulations.

These changes may reduce consumers' caloric intake from food sold in vending machines. Note that any reduction in calorie intake in these settings may be at least partially offset by increases in calorie intake during other meals or snacks. Because FDA lacks data on how consumers will substitute among caloric sources, the benefit estimations given here may be higher or lower than those that will be realized if the rule is finalized as proposed.

Coverage of the proposed rule and industry overview. The proposed rule covers certain vending machine operators that are engaged in the business of owning or operating 20 or more vending machines and those vending machine operators that voluntarily register with FDA to become subject to the Federal requirements. The proposed rule does not cover vending machines without a selection button, including bulk vending machines that dispense gum, candy and nuts. Vending machines are operated both by food service firms and by firms in other businesses that operate machines for the benefit of their customers or employees and do not identify as vending machine operators. Because this latter group cannot be accurately counted, published estimates of the number of vending machine operators will generally undercount the number of covered operators under the proposed rule. For the purposes of this preliminary regulatory impact analysis, we will use the term "covered operators" or "covered vending machines" to refer to operators or machines that sell covered vending machine foods. According to the NAMA, there are approximately 13,500 companies that operate vending machines in the United States (Ref. 4). Other estimates put the total closer to 10,000 (Ref. 3). This total includes 5,000 firms whose primary business identification is as vending machine operators (NAICS 4542), plus a variety of other firms that operate vending machines, but do not primarily identify as such. These other companies include, for example, beverage manufacturers and food service contractors. Because of the difficulty in determining which firms are covered, and because FDA has no data on the potentially significant number of covered vending machine operators that self-identify as businesses outside the food industry, we take NAMA's higher estimate of 13,500 firms as the number of covered firms.

FDA estimates that 97 percent of firms selling covered vending machine food that identify primarily as vending machine operators that are engaged in the business of owning or operating 20 or more vending machines are small businesses as defined by the SBA. Other estimates indicate that more than 90 percent of the firms covered by the proposed rule are defined as small businesses (Ref. 3). This percentage may be lower for firms that have primary business identification other than as vending machine operators, but the majority of covered businesses will likely still be defined as small businesses. Because very small, informal businesses that are not captured by economic census data might operate 20 or more machines, these figures may underestimate the number of affected small businesses. Conversely, approximately 72 percent of industry revenue—and thus a comparably large fraction of consumption—comes from firms with more than $10 million in annual sales, and 85 percent comes from firms with more than $5 million in revenue (Ref. 3).

Vending machine operators together operate an estimated 5 to 7 million machines (Refs. 3 and 4) in at least 1.5 million locations (Ref. 3). Approximately 70 percent of these machines sell packaged food, including beverages, that are required to bear nutrition labeling under section 403(q)(1) of the FD&C Act and FDA regulations at § 101.9, and thus have Nutrition Facts. This 70 percent is comprised mostly of packaged beverage machines, which account for more than 50 percent of all vending machines, with the remainder—approximately 20 percent of all machines—selling packaged confections or snacks. Ten percent sell a variety of hot and cold cup beverages, frozen or fresh food products and miscellaneous other food products. The final 20 percent of machines are bulk candy, nut or gum machines that are not covered by section 403(q)(5)(H)(viii) and the proposed requirements because they lack selection buttons. While these bulk machines form a large percentage of vending machines, they account for less than 0.5 percent of vending machine sales (Ref. 4).

Summary of costs and benefits of the proposed rule and regulatory options In this section we briefly summarize the costs and benefits of the proposed rule that are analyzed in the detailed PRIA. These estimates are collected in table 1. Costs of complying with the proposed requirements have been estimated for three major areas: Cost of nutrition analysis, cost of new signs, including posters, and labor costs. In the case of the proposed rule, FDA estimates that there would be approximately 10,800 operators under the proposed requirements, controlling between 4 million and 5.6 million machines that sell covered vending machine foods. The initial mean estimated cost of complying with the proposed requirements is $25.8 million, with an estimated mean ongoing cost of $24.0 million. Mean annualized costs are $24.5 million at a 7 percent discount rate, and $24.2 million at 3 percent discount rate. Per operator costs are estimated to be $2,400. FDA estimates that average per machine costs are less than $10 annually.

FDA has not estimated the actual benefits associated with proposed requirements. Food choice and consumption decisions are complex and FDA is unaware of any comprehensive data allowing accurate predictions of the effect of the proposed requirements on consumer choice and vended foods. Therefore, FDA has constructed a plausible individual effect of the proposed rule, and has conducted a break-even analysis in order to determine the proportion of the U.S. obese adult population that would need to attain this minimal response in order for the proposed requirement to yield a positive net benefit. Using a 100 calorie per week reduction in intake as the benchmark effect, FDA estimates that at least 0.02 percent of the adult obese population would need to reach this benchmark in order for the rule to break even on the initial total cost. On an ongoing basis, again, at least 0.02 percent of the adult obese population would need to reach this benchmark in

order for the rule to break even on the recurring annual costs. These effects are summarized in table 1 of this document.

Finally, although registration by firms wishing to register with FDA in order to come under the proposed requirements and the associated preemption from State or local regulations is voluntary, and will only occur to the extent that the costs of registration and compliance with Federal regulation is lower than that of State or local laws, this registration constitutes a collection of information under the Paperwork Reduction Act of 1995. Therefore, FDA has also estimated the burden associated with this collection of information in the detailed analysis.

TABLE 1—ACCOUNTING STATEMENT: ANNUALIZED COST AND BREAK-EVEN BENEFIT POINT FOR THE PROPOSED REQUIREMENTS

	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits						
Annualized Monetized ($millions/year)	Not Quantified					
Annualized Quantified:						
Qualitative: FDA estimates that at least 0.02 percent of the adult obese population would need to reduce caloric intake by at least 100 calories per week in order for benefits from the proposed requirements to reach a break even point on annualized costs (at either 3% or 7%)						
Costs						
Annualized Monetized ($millions/year)	$24.5	$12.5	$39.8	2009	7%	10
	24.2	12.1	39.6	2009	3%	10

Regulatory Options In addition to a baseline, FDA has identified four regulatory options for this proposed rule. The costs and benefits of these options are summarized in table 2 of this document.

(0) Baseline for the purpose of analysis—No new Federal regulatory action.

(1) Option 1, the proposed rule, allowing a sign in close proximity to the article of food or selection button, *i.e.* in, on, or adjacent to the vending machine, but not necessarily attached to the vending machine, so long as the sign is visible at the same time as the food, its name, price, or selection number, and with an effective date of 1 year after publication of the final rule.

(2) Option 2, similar to the proposed rule, but requiring that calorie declarations be immediately adjacent to the article of food or selection button for all calorie disclosures. For this option, FDA estimates the cost of individual signs for each article of food or selection button.

(3) Option 3, Similar to the proposed rule, but with an additional year in compliance period for vendors with less than $500,000 in annual revenue from vending machines.

(4) Option 4, similar to the proposed rule, but with coverage extended to bulk vending machines without selection buttons.

TABLE 2—SUMMARY OF ESTIMATED ANNUALIZED COMPLIANCE COSTS FOR EACH OPTION

Summary of options	Primary estimate (in millions)	Low estimate (in millions)	High estimate (in millions)	Percent discount rate (10 year horizon)	Proportional cost relative to primary estimate of the proposed requirements	Proportional dollar sales of restaurant food relative to primary estimate of the proposed requirements
(Baseline)	N/A	N/A	N/A	N/A	N/A	
Option 1: the Proposed Rule	$24.2	$12.1	$39.6	3%	0.0%	0.0%
	24.5	12.5	39.8	7%		
Option 2: Individual Signs	81.8	36.1	140.4	3%	+229.2%	0.0%
	82.5	36.6	141.1	7%		
Option 3: Longer Compliance Time for Small Businesses	24.2	12.1	39.6	3%	0.0%	0.0%
	24.5	12.5	39.8	7%		
Option 4: Extended Scope to Include Bulk Machines	30.2	15.1	49.4	3%	+25.6%	+0.5%
	31.0	15.8	50.3	7%		

FDA estimates that Option 2, which would require individual signs or labels for each covered vended food, has a ten-year annualized costs of between $36.1 million per year and $140.4 million per year at a 3 percent discount rate, with a primary estimate of $81.8 million. Averaged over primary, low and high estimates, the costs of Option 2 are 229.2 percent higher than those of the proposed requirements. These changes are discussed more fully in the detailed analysis.

Option 3 which considers a longer compliance time for small businesses represents only a delay in the costs. This delay has a small positive impact on the annualized cost, but one that does not change the (rounded) estimate of costs for Option 3 from the estimate,

of costs for Option 1. Option 4, expands the scope of the requirements to include foods in bulk vending machines without selection buttons, has costs that are 25.6 percent higher than the proposed option, and covers an additional 0.5 percent of sales of vended foods.

For full documentation and discussion of these estimated costs and benefits see the detailed Preliminary Regulatory Impact Analysis, available at *http://www.regulations.gov,* Docket No. FDA–2011–F–0171, and is also available on FDA's Web site at *http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm.*

V. Initial Regulatory Flexibility Analysis

FDA has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities consistent with statutory objectives. FDA tentatively concludes that this proposed rule will have a significant economic impact on a substantial number of small entities.

However, FDA has built flexibility into the proposed rule. The proposed rule does not mandate a particular method for determining calorie disclosure; instead, the proposed rule provides options for how vending machine operators can determine calorie information for covered vending machine food. Further, the proposed rule does not prescribe the materials that may be used by vending machine operators in disclosing calorie information; instead, the proposed rule provides options for how vending machine operators can disclose calorie information for covered vending machine food. Therefore, vending machine operators may choose among a wide variety of less, or more, expensive avenues to achieve compliance, depending on their situation. Because no particular method for compliance is mandated, the proposed rule gives small businesses the leeway to use cheaper solutions that meet the requirements of the proposed rule (*e.g.,* stickers).

A general way to add flexibility for small firms during a rulemaking is to lengthen the time for these firms to comply with the rule. An example of a delayed compliance time for small businesses applied to this proposed rule is the option for vendors with less than $500,000 in annual revenue from vending machine food sales to have an additional year to comply. Generally, FDA uses the SBA's definition of "small business" as it applies to the relevant economic sector, in this case, NAICS 4542. However, as noted in the detailed Preliminary Regulatory Impact Analysis, available at *http://www.regulations.gov,* Docket No. FDA–2011–F–0171, and is also available on FDA's Web site at *http://www.fda.gov/Food/Labeling Nutrition/ucm217762.htm,* SBA defines a small vending machine operator as one with annual revenue less than $10 million, and this definition would cover at least 97 percent of the industry. Adding flexibility—such as a longer time to come into compliance—specifically for small firms would mean that most vending machine operators would be given that added flexibility. Therefore FDA has taken the approach of building substantial flexibility into the proposed rule for most vending machine operators in order to give the entire industry the opportunity to comply in the most cost-effective way.

VI. Paperwork Reduction Act

This proposed rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of these provisions is given in the following paragraphs with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

The information collection provisions for all provisions of this proposed rule have been submitted to OMB for review as revisions of collections approved under OMB control numbers 0910–0664 and 0910–0665. Interested persons are requested to fax comments regarding information collection by May 6, 2011, to the Office of Information and Regulatory Affairs, OMB. To ensure that comments on 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: 202–395–5806.

FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Vending Machine Labeling: Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010—(OMB Control Number 0910–0665)—Revision

Section 4205 of the Affordable Care Act, which amends sections 403(q)(5) and 403A of the FD&C Act, requires disclosure of calorie and other nutrition information by restaurants and vending machine operators. Section 4205 became effective on the date the law was signed, March 23, 2010. Restaurants and vending machine operators not subject to the requirements of section 403(q)(5)(H) may elect to become subject to the requirements of section 403(q)(5)(H) by registering biannually with FDA. Section 4205 required FDA to publish a notice in the **Federal Register** within 120 days of the date of enactment of section 4205, providing information on the terms and conditions for persons who voluntarily elect to be subject to nutrition disclosure requirements specified in the law.

A. Statutory Compliance

To comply with the PRA and with the statutory deadline under the provisions of section 4205 for publication of registration information, FDA initially obtained a 6-month OMB approval of the collection of information requirements under the emergency processing provisions of the PRA. With OMB approval of the collection of information requirements of section 4205, FDA took several actions: (1) Developed an electronic form, "Menu And Vending Machine Labeling Voluntary Registration," Form FDA 3757, (2) as required by section 4205, published a notice in the **Federal Register** of July 23, 2010 (75 FR 43182) (the July 23, 2010, notice) to explain how retail food establishments and vending machine operators not otherwise subject to the provisions of section 4205 may voluntarily elect to become subject to them, and (3) developed and implemented the guidance entitled, "Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling

Laws." This guidance among other things clarified section 4205's effect on State and local menu and vending machine labeling laws, to ensure that industry and State and local government understood the immediate effects of the law. FDA's current thinking on the preemptive effects of section 4205 is set out in the Federalism sections of the preamble to the proposed rule implementing menu labeling and this proposed rule.

FDA has requested a 3-year approval of the information collection requirements under the same assigned OMB Control Nos. 0910–0664 and 0910–0665. In the **Federal Register** of January 31, 2011, FDA published two notices announcing the submission to OMB of the information collection requests for No. 0910–0664 (76 FR 5384) and No. 0910–0665 (76 FR 5380). Elsewhere in this **Federal Register**, FDA published a proposed rule entitled "Food Labeling; Nutrition labeling of standard menu items in restaurants and similar retail food establishments" (the Menu Labeling proposed rule). As noted, the information collection requests previously submitted sought OMB approval of the reporting, recordkeeping, and third party disclosure burdens of section 4205, not the provisions of the Menu Labeling proposed rule. With that proposed rule, FDA submitted a revised information collection request seeking OMB approval of the changes caused by the Menu Labeling proposed rule to the collections approved under *OMB Control Nos. 0910–0664 and 0910–0665.* This proposed rule seeks further revision of those information collections with regard to the recordkeeping and third party disclosure burdens for vending machine operators caused by this proposed rule.

B. Revision of OMB Control No. 0910–0665 by the Proposed Rule

These estimated annual recordkeeping burdens have changed from the burdens estimated for the OMB control number 0910–0665 30 day notice (76 FR 5380, January 31, 2011). Total initial hours have risen by 1,920 due to an increase in the estimated number of recordkeepers from 600 to 915 and an increase in the number of hours per record from 2 hours to 4 hours. The estimated burden of recurring hours increased by 8 hours to 128 hours. This estimate of third party disclosure hours has decreased by approximately 13.2 million hours, from the 14 million hours estimate given in the 30-day notice.

C. Consolidation of OMB Control No. 0910–0664 Under 0910–0665

The Menu Labeling proposed rule contains a revision request in which the burden hours for the information collection request under OMB control number 0910–0664, "Restaurant Menu and Vending Machine Labeling: Registration for Small Chains Under Section 4205 of the Patient Protection and Affordable Care Act of 2010" are being consolidated under the information collection request assigned OMB control number 0910–0665,"Restaurant Menu and Vending Machine Labeling: Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010." In addition, this proposed rule is a revision request in which these two information collection requests will be further revised with regard to the estimated burden of the proposed rule on vending machine operators. The revised information collection request for 0910–0665 will be renamed "Restaurant Menu and Vending Machine Labeling: Registration, Recordkeeping and Mandatory Third Party Disclosure Under Section 4205 of the Patient Protection and Affordable Care Act of 2010." Upon approval of this revision request, the information collection request for OMB control number 0910–0664 will be discontinued.

D. Analysis of Changes in Burden Estimates Caused by the Proposed Rule

Description of Respondents: The likely respondents to this information collection are operators of 20 or more vending machines. The following analysis provides FDA's estimate of the changes caused by this proposed rule to the previously approved recordkeeping and third party disclosure burdens for vending machine operators. The analysis of burden included in this document is drawn from the detailed Preliminary Regulatory Impact Analysis which is available at *http://www.regulations.gov,* Docket No. FDA–2011–F–0171, and is also available on FDA's Web site at *http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm.*

Most food sold from vending machines is subject to nutrition labeling requirements under section 403(q) of the FD&C Act and § 101.9, which means that calorie content is already collected. A likely scenario in response to vending machine labeling is that food manufacturers will include a set of calorie label stickers in each case of product. This would be efficient both because most manufacturers will already have the calorie information available, and because economies of scale exist for the manufacturer. In this case, vending machine operators will not need to keep a record of calorie content. Instead, the burden for most operators will be limited to that of creating records and passing the existing information on to consumers.

FDA estimates that there is an average of 600,000 machines that sell unpackaged products. FDA tentatively estimates that between 5 and 10 percent of all operators of vending machines with covered vending machine food, or an average of 810 operators, will need to acquire nutrition information for at least some covered vending machine food. FDA tentatively estimates that there are between 5 to 10 covered vending machine foods that do not include nutrition information per operator, so that the average number of possible new calorie analyses would be 6,480 (8 items/firm x 810 firms). FDA requests comment on these estimates. Based on data from FDA's Recordkeeping Cost Model (Ref. 28), we estimate approximately 4 hours as the time per covered vending machine food for creating the record of nutritional information. Although the proposed rule does not mandate recordkeeping, vending machine operators will likely need to be able to ensure that calorie disclosures for covered vending machine foods are accurate and consistent without needing to re-analyze these foods. The estimated number of hours required for new calorie analysis in the first year is then 25,920 hours. This number is displayed in the first row of table 3 of this document.

FDA believes that the subgroup of covered vending machine foods sold in these vending machines is approximately constant. If there is 0.5 percent growth or turnover in the number of firms providing these unpackaged foods, then approximately four new firms will become subject to section 4205 of the Affordable Care Act and the proposed requirements in a given year. The burden associated with these firms would be 128 hours (4 firms × 8 items/firm × 4 hours/item). This amount is given in second row of table 7 of this document.

These estimated annual recordkeeping burdens have changed from the burdens estimated for the OMB control number 0910–0665 30-day notice (76 FR 5380, January 31, 2011). Total initial hours have risen by 1,920 due to an increase in the estimated number of recordkeepers from 600 to 915 and an increase in the number of hours per record from 2 hours to 4 hours. The estimated burden of

recurring hours increased by 8 hours to 128 hours. This change is due to an increase in the estimated number of new operators (which stems from the increase in the number of initial recordkeepers), and the increase in the number of hours per record. These changes are due to additional data and analysis that FDA was able to collect in the interim.

TABLE 3—ESTIMATED ANNUAL RECORDKEEPING BURDEN: CALORIE ANALYSIS AND RECORDING

Type of response	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours	Total capital costs for recordkeeping
Initial hours for vending operators	810	8	6,480	4	25,920	$1.3 million.
Recurring hours for vending operators	4	8	32	4	128	$6,400.
Total					26,048	

[1] There are no operating and maintenance costs associated with this collection of information.

The third party disclosure burden for vending machine operators is the time necessary to install calorie displays on their vending machines. In the PRIA, FDA estimates an average, recurring hourly burden of 0.17 hours per machine per year to install and maintain the displays. FDA estimates an average of 4.8 million machines are serviced by 10,800 operators, for an average number of machines per operator of 444 machines. The estimated recurring hours needed for third party disclosure is then 816,000 hours (10,800 firms × 444 machines/firm × 0.17 hours/display). This amount is recurring in every year, and is given in table 4 of this document.

These estimated annual third party disclosure burdens have changed from the burdens estimated for the OMB Control Number 0910–0665 30-day notice (76 FR 5380, (Jan. 31, 2011)). This estimate of third party disclosure hours has decreased by approximately 13.2 million hours, from the 14 million hours estimate given in the 30-day notice. In addition, we no longer estimate any growth in the number of hours, given that data shows no significant increase in the number of vending machines over the last several years. These changes are due to additional data and analysis that FDA was able to collect in the interim.

TABLE 4—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN: CALORIE CONTENT

Type of respondent	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure (in hours)	Total hours	Total capital costs	Total operating costs
Recurring burden for vending operators.	10,800	444	4,800,000	0.17	816,000	$4.8 million	$19.2 million.

The current total reporting burden for menu labeling and vending machine operator registration as required by section 4205, now under review at OMB under No. 0910–0664, is 820 hours. The estimated reporting burden under the Menu Labeling proposed rule is 2,190 hours, an increase of 1,370 hours. As described in the paperwork analysis in that proposed rule, this increase is due to an increase in the estimated number of respondents. This proposed rule does not further revise those estimates.

In compliance with the PRA, the agency has submitted the information collection provisions of this proposed rule to OMB for review. Interested persons are requested to send comments regarding the information collection to OMB (see **DATES** and **ADDRESSES** sections of this document).

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts "any requirement for nutrition labeling of food that is not identical to the requirement of section [21 U.S.C. 343(q)]" (21 U.S.C. 343–1(a)(4)), except that this provision does not apply "to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under [21 U.S.C. 343(q)(5)(H)(ix)]." (21 U.S.C. 343–1(a)(4)). If this proposed rule is made final, the final rule would create requirements for nutrition labeling of food under 21 U.S.C. 343(q) that would preempt certain non-identical State and local nutrition labeling requirements.

Section 4205 of the Affordable Care Act also included a Rule of Construction providing that "Nothing in the amendments made by [section 4205] shall be construed—(1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)] (as added by subsection(b)) and is expressly preempted under subsection (a)(4) of such section; (2) to apply to any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or

component of the food; or (3) except as provided in section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)(ix)] (as added by subsection (b)), to apply to any restaurant or similar retail food establishment other than a restaurant or similar retail food establishment described in section 403(q)(5)(H)(i) of such Act [21 U.S.C. 343(q)(5)(H)(i)]." (Pub. L. 111–148, § 4205(d), 124 Stat. 119, 576 (2010)0.

FDA interprets the provisions of Section 4205 of the Affordable Care Act related to preemption to mean that States and local governments may not impose nutrition labeling requirements for food sold in vending machines that must comply with the Federal requirements of 21 U.S.C. 343(q)(5)(H), unless the State or local requirements are identical to the Federal requirements. In other words, States and localities cannot have additional or different nutrition labeling requirements for food sold either (1) from vending machines that are operated by a person engaged in the business of owning or operating 20 or more vending machines subject to the requirements of 21 U.S.C. 343(q)(5)(H)(viii) or (2) from vending machines operated by a person not subject to the requirements of 21 U.S.C. 343(q)(5)(H)(viii) who voluntarily elects to be subject to those requirements by registering biannually under 21 U.S.C. 343(q)(5)(H)(ix).

Otherwise, for food sold from vending machines not subject to the nutrition labeling requirements of 21 U.S.C. 343(q)(5)(H)(viiii), States and localities may impose nutrition labeling requirements. Under FDA's interpretation of the Rule of Construction in section 4205(d)(1) of the Affordable Care Act, nutrition labeling for food sold from these vending machines would not be "nutrient content disclosures of the type required under [21 U.S.C. 343(q)(5)(H)]" and, therefore, would not be preempted. Under this interpretation, States and localities would be able to continue to require nutrition labeling for food sold from vending machines which are exempt from nutrition labeling under 21 U.S.C. 343(q)(5). This interpretation is consistent with the fact that Congress included vending machine operators in the voluntary registration provision of 21 U.S.C. 343(q)(5)(H)(ix). There would have been no need to include vending machine operators in the provision that allows opting into the Federal requirements if States and localities could not otherwise require non-identical nutrition labeling for food sold from any vending machines.

An alternative to FDA's interpretation of the provisions of section 4205 of the Affordable Care Act related to preemption could leave less room for States and localities to require nutrition labeling for food sold from vending machines. Under this alternative interpretation, State or local nutrition labeling requirements for food sold from vending machines would be preempted because such nutrition labeling requirements would be "nutrition content disclosures of the type required under [21 U.S.C. 343(q)(5)(H)]" and would not fall within the exception to preemption in 21 U.S.C. 343–1(a)(4) ("except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations * * *").

Under this alternative interpretation, States and localities could not have nutrition labeling requirements for vending machines that were not identical to the Federal requirements, unless they successfully petitioned FDA. The position that no State or locality may have a vending machine nutrition labeling requirement not identical to the Federal requirements, regardless of how many vending machines the operator owns or operates, was the position in the guidance issued by FDA on August 25, 2010 ("Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws" (75 FR 52427)). Federal law provides that, upon petition, FDA may exempt State or local requirements from the express preemption provisions of 21 U.S.C. 343–1(a) under certain conditions. 21 U.S.C. 343–1(b). FDA has promulgated regulations at 21 CFR 100.1 describing the petition process that is available to State and local governments to request such exemptions from preemption. Under the interpretation being proposed by FDA, for food sold from vending machines that is not subject to the nutrition labeling requirements of 21 U.S.C. 343(q)(5)(H), States and localities may establish or continue to impose nutrition labeling requirements. Under the alternative interpretation described above, there would be vending machines for which the Federal government has not required nutrition labeling and for which States and localities would also be precluded from establishing such labeling requirements unless they successfully petitioned FDA and a rulemaking was completed. This approach would risk creating a regulatory gap that would be inconsistent with the purposes of section 4205. It would also impose a restriction and burden on the States and localities that is inconsistent with the Federalism principles expressed in Executive Order 13132, as well as a substantial administrative burden on FDA in the event states petition for exemption.

FDA requests comments on the Agency's interpretation of the provisions of section 4205 of the Affordable Care Act related to preemption, as well as on the alternative interpretation described in the Federalism section. FDA also requests comments on the use of the petition process in the context. In addition, the Agency requests comments on other potential interpretations that interested persons identify as appropriate given both the preemption-related language of section 4205 and the statutory goals.

In addition, the express preemption provisions of 21 U.S.C. 343–1(a)(4) do not preempt any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food. This is clear from both the literal language of 21 U.S.C. 343–1(a)(4) with respect to the scope of preemption and from the Rule of Construction at section 4205(d)(2) of the Affordable Care Act.

VIII. Environmental Impact

The Agency has determined under 21 CFR 25.30(k) 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.

IX. 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.

X. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the

Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

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List of Subjects

21 CFR Part 11

Administrative practice and procedure, Computer technology, Reporting and recordkeeping requirements.

21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 11 and 101 be amended as follows:

PART 11—ELECTRONIC RECORDS; ELECTRONIC SIGNATURES

1. The authority citation for 21 CFR part 11 continues to read as follows:

Authority: 21 U.S.C. 321–393; 42 U.S.C. 262.

2. Section 11.1 is amended by adding paragraph (h) to read as follows:

§ 11.1 Scope.

* * * * *

(h) This part does not apply to electronic signatures obtained under § 101.8(d) of this chapter.

PART 101—FOOD LABELING

3. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

4. Section 101.8 is added to subpart A to read as follows:

§ 101.8 Vending machines.

(a) Definitions. The definitions of terms in section 201 of the Federal Food, Drug, and Cosmetic Act apply to such terms when used in this section. In addition, for the purposes of this section:

Authorized official of a vending machine operator means the owner, operator, or agent in charge or any other person authorized by the vending machine operator to register the vending machine operator, which is not otherwise subject to the requirements of section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)(H)) with FDA for purposes of paragraph (d) of this section.

Vending machine means a self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by optional manual operation, dispenses servings of food in bulk or in packages, or prepared by the machine, without the necessity of replenishing the device between each vending operation.

Vending machine operator means a person(s) or entity that controls or directs the function of the vending machine, including deciding which articles of food are sold from the machine or the placement of the articles of food within the vending machine, and is compensated for the control or direction of the function of the vending machine.

(b) Articles of food not covered. Articles of food dispensed from a vending machine are not covered vending machine food if:

(1) The prospective purchaser can view the entire Nutrition Facts Panel on the label of the vended food without an obstruction. The Nutrition Facts Panel must be the information in the format required in § 101.9(c) and (d). The Nutrition Facts Panel must be in a size that permits the prospective purchaser to be able to easily read the nutrition information contained in the Nutrition Facts Panel on the label of the article of food in the vending machine. Smaller formats allowed for nutrition facts for certain food labeling under FDA regulation at § 101.9 are not considered to be a size that a prospective purchaser is able to easily read.

(2) An article of food sold from a vending machine provides visible nutrition information at the point of purchase. The visible nutrition information at the point of purchase includes the total number of calories for the article of food, as dispensed, at the point of purchase. This visible nutrition information must appear on the food label itself. This visible nutrition information must be clear and conspicuous and easily read on the article of food while in the vending machine, in a type size reasonably related to the largest printed matter on the label and with sufficient color and contrasting background to other print on the label to permit the prospective purchaser to clearly distinguish the information.

(c) *Requirements for calorie labeling for certain food sold from vending machines.*

(1) Applicability; covered vending machine food. For the purposes of this section, the term "covered vending machine food" means an article of food that is:

(i) Sold from a vending machine that:

(A) Does not permit the consumer to examine the Nutrition Facts Panel prior to purchase as provided in paragraph (b) of this section, or otherwise provide visible nutrition information at the point of purchase as provided in paragraph (b);

(B) Is operated by a person engaged in the business of owning or operating 20 or more vending machines; and

(C) Is a vending machine with a selection button; or

(ii) Sold from a vending machine that is operated by a vending machine operator that has voluntarily elected to be subject to the requirements of this section by registering with the FDA under the provisions of paragraph (d) of this section.

(2) *Calorie declaration.* (i) The number of calories must be clear and conspicuous for a covered vending machine food and declared in the following manner:

(A) To the nearest 5-calorie increment up to and including 50 calories and 10-calorie increment above 50 calories, except that amounts less than 5 calories may be expressed as zero.

(B) The term "Calories" or "Cal" must appear adjacent to the caloric content value for each food in the vending machine.

(C) For calorie declarations in or on the vending machine, the declaration of calories must be in a type size no smaller than the name of the food on the machine, not the label, selection number, or price of the food as displayed on the vending machine, whichever is smallest, with the same prominence, *i.e.,* the same color, or in a color at least as conspicuous, as the color of the name, if applicable, or price of the food or selection number, and the same contrasting background, as the item it is in closest proximity to, *i.e.,* name, selection number, or price of the food item as displayed on the machine.

(D) The number of calories for single-serving packaged food declared on the sign must be identical to the number of calories that are declared in the Nutrition Facts, if applicable.

(E) The number of calories for packaged foods that contain multiple servings must include the total calories present in the covered vending machine food. The vending machine operator may voluntarily disclose calories per serving in addition to the total calories for the food.

(ii) Calorie information for covered vending machine food must be placed prominently in the following manner:

(A) This calorie information may be placed on a sign in close proximity to the article of food or selection button, *i.e.,* in, on, or adjacent to the vending machine, but not necessarily attached to the vending machine, so long as the sign is visible at the same time as the food, its name, price, or selection button or selection number is visible.

(B) When the calorie information is in or on the vending machine, the calorie declaration must be in the same color or a color at least as conspicuous as the color of the name or the price of the food or selection number.

(C) When the calorie information is declared on a sign adjacent to the vending machine, the calorie declaration must be in type that is all black or one color printed on a white or other neutral background that contrasts with the type color.

(D) Where the vending machine only displays a vignette or name of the food item, the calorie information must be in close proximity to the vignette or name or in close proximity to the selection button.

(E) For electronic vending machines (*e.g.,* machines with digital or electronic or liquid crystal display (LCD) displays), the calorie information may be displayed when the selection numbers are entered but before the selection is confirmed.

(F) For vending machines with limited choices, *e.g.,* popcorn, the declaration of calories may appear on the face of the machine so long as the declaration is prominent, not crowded by other labeling on the machine, and the type size is reasonably related to the largest print on the vending machine.

(d) *Voluntary provision of calorie labeling for foods sold from vending machines.*

(1) *Applicability.* An authorized official of a vending machine operator that is not subject to the requirements of section 403(q)(5)(H)(viii) of the Federal Food, Drug, and Cosmetic Act may voluntarily register with FDA to be subject to the requirements established in paragraph (c)(2) of this section. An authorized official of a vending machine operator that voluntarily registers cannot be subject to any State or local nutrition labeling requirements that are not identical to the requirements in 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act.

(2) *Who may register?* A vending machine operator that is not otherwise subject to the requirements of section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act may register with FDA.

(3) *What information is required?* The vending machine operator must provide FDA with the following information:

(i) The contact information (including name, address, phone number, e-mail address), for the vending machine operator;

(ii) The address of the location of each vending machine owned or operated by the vending machine operator that is being registered.

(iii) Preferred mailing address (if different from the vending machine operator address), for purposes of receiving correspondence; and

(iv) Certification that the information submitted is true and accurate, that the person or firm submitting it is authorized to do so, and that each registered vending machine will be subject to the requirements of this section.

(v) Information should be submitted by e-mail by typing complete

information into the portable document format (PDF) form, saving it on the registrant's computer, and sending it by e-mail to *menulawregistration@fda.hhs*. If e-mail is not available, the registrant can either fill in the PDF form and print it out (or print out the blank PDF and fill in the information by hand or typewriter), and either fax the completed form to 301–436–2804 or mail it to FDA, White Oak Building 22, Rm. 0209, 10903 New Hampshire Ave., Silver Spring, MD 20993.

(vi) Authorized officials of a vending machine operator who elects to be subject to the Federal requirements can register by visiting *http://www.fda.gov/menulabeling*. FDA has created a form that contains fields requesting the information in paragraph (d) of this section and made the form available at this Web site. Registrants must use this form to ensure that complete information is submitted.

(vii) To keep the establishment's registration active, the authorized official of the vending machine operator must register every other year within 60 days prior to the expiration of the vending machine operator's current registration with FDA. Registration will automatically expire if not renewed.

(e) *Signatures.* Signatures obtained under paragraph (d) of this section that meet the definition of electronic signatures in § 11.3(b)(7) of this chapter are exempt from the requirements of part 11 of this chapter.

Dated: March 28, 2011.

Margaret A. Hamburg,

Commissioner of Food and Drugs.

Kathleen Sebelius,

Secretary of Health and Human Services.

[FR Doc. 2011–8037 Filed 4–1–11; 4:15 pm]

BILLING CODE 4160–01–P

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 66 April 6, 2011

Part IV

The President

Proclamation 8644 —National Cancer Control Month, 2011
Proclamation 8645 —National Child Abuse Prevention Month, 2011
Proclamation 8646 —National Financial Literacy Month, 2011

Federal Register
Vol. 76, No. 66
Wednesday, April 6, 2011

Presidential Documents

Title 3—

The President

Proclamation 8644 of March 31, 2011

National Cancer Control Month, 2011

By the President of the United States of America

A Proclamation

Over the past several decades, our Nation has made significant advances in the fight against cancer. Improvements in early detection and treatment of this disease have led to decreases in the rates of new cases and deaths, and many people who are diagnosed with cancer are living longer, with better quality of life. Despite the breadth of our progress, an estimated 1.5 million people were diagnosed with cancer last year, and more than half a million Americans lost their lives to the disease. During National Cancer Control Month, we renew our commitment to increasing awareness about cancer and reducing the burden of this devastating illness.

There are simple steps all of us can take to protect ourselves and our loved ones from cancer. Americans can help reduce their cancer risk with healthy practices such as avoiding excessive sun exposure, limiting alcohol intake, eating a balanced diet, maintaining a healthy weight, and making physical activity part of each day. Exposure to tobacco smoke, even from occasional smoking or secondhand smoke, is particularly harmful. Americans striving to quit can receive help by calling 1–800–QUIT–NOW or visiting: www.Smokefree.gov.

Screening tests can also help reduce the risk of developing certain cancers and help detect the disease early when it is often easier to treat. Under the Affordable Care Act, new health insurance plans must offer certain screening tests, including Pap tests, mammograms, and colonoscopies, at no extra cost. I encourage every man and woman to talk with a health professional about available testing and when to begin screenings. All Americans can visit www.Cancer.gov for more information about the prevention, diagnosis, and treatment of cancer.

My Administration is committed to continuing the advances made in cancer research, prevention, detection, and treatment. The Healthy People 2020 initiative, which is spearheaded by the Department of Health and Human Services, is tasked with outlining national objectives and benchmarks to measure progress toward improving the health of all Americans. The goals will provide a roadmap for better health and help focus our Nation's attention on trends in cancer rates, mortality, and survival.

Americans of every background have been touched by cancer, either through a personal diagnosis or that of a family member or friend, and too many of us understand the terrible toll of this disease. In memory of loved ones lost to cancer, and in tribute to the survivors and those still fighting this disease, I call on all Americans to recognize what each of us can do to live longer, healthier lives and to reach for a future free from cancer.

The Congress of the United States, by joint resolution approved March 28, 1938 (52 Stat. 148; 36 U.S.C. 103), as amended, has requested the President to issue an annual proclamation declaring April as "Cancer Control Month."

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim April 2011 as National Cancer Control

Month. I encourage citizens, Government agencies, private businesses, nonprofit organizations, and other interested groups to join in activities that will increase awareness of what Americans can do to prevent and control cancer.

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

[FR Doc. 2011–8381
Filed 4–5–11; 11:15 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8645 of March 31, 2011

National Child Abuse Prevention Month, 2011

By the President of the United States of America

A Proclamation

Our Nation's children are our hope for the future, and caring for them is one of our greatest responsibilities. During National Child Abuse Prevention Month, we renew our commitment to preventing child abuse and neglect by promoting healthy families, protecting children, and supporting communities throughout our Nation.

Although a strong family unit is the best deterrent to child abuse, effectively intervening in the lives of children threatened by abuse is a shared responsibility. Strengthening the bonds within families requires community members and leaders to partner with parents. From schools to local social service agencies, we can work together to protect the well-being of our children by recognizing the signs of violence and creating safe, stable, and nurturing environments that safeguard the promise of their futures.

My Administration will continue to reinforce initiatives that enhance the efforts of child protective service agencies to prevent and treat child abuse. Last December, I was pleased to sign into law the CAPTA (Child Abuse Prevention and Treatment) Reauthorization Act of 2010, giving States and local authorities new tools to identify and address abuse and neglect. This Act will also bolster prevention efforts by addressing risk factors for mistreatment like substance abuse, mental illness, and domestic violence. We are also supporting programs that expand coordination of early childhood services in order to improve outcomes for young children.

As a Nation, we must continue our work to ensure all children have the ability to live free from abuse and neglect by advocating for the safety of all young people. For more information about what families and communities can do to overcome this devastating problem, concerned Americans can visit: www.ChildWelfare.gov/Preventing.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 2011 as National Child Abuse Prevention Month. I call upon all Americans to observe this month with programs and activities that help prevent child abuse and provide for children's physical, emotional, and developmental needs.

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

[FR Doc. 2011–8382
Filed 4–5–11; 11:15 am]
Billing code 3195–W1–P

Presidential Documents

Proclamation 8646 of March 31, 2011

National Financial Literacy Month, 2011

By the President of the United States of America

A Proclamation

Americans' ability to build a secure future for themselves and their families requires the navigation of an increasingly complex financial system. As we recover from the worst economic crisis in generations, it is more important than ever to be knowledgeable about the consequences of our financial decisions. During National Financial Literacy Month, we recommit to improving financial literacy and ensuring all Americans have access to trustworthy financial services and products.

The financial crisis was fueled by a lack of responsibility from Wall Street to Washington. It devastated ordinary Americans, many of whom were caught by hidden fees and penalties or saddled with loans they could not afford. Preventing a recurrence will require both better behavior and oversight on Wall Street and more informed decisionmaking on Main Street and in homes across our country. To lay the foundation for continued prosperity, we must expand the availability of financial products and services that are fair, affordable, understandable, and reliable. We must also strive to ensure all Americans have the skills to manage their fiscal resources effectively and avoid deceptive or predatory practices.

Building on the important protections in the Credit Card Accountability, Responsibility, and Disclosure Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which I signed into law last year, will help restore financial stability by enforcing the strongest consumer financial protections in history. This Act created the Consumer Financial Protection Bureau, an agency with one job—to look out for the interests of Americans as they interact with the financial system. My Administration also established the President's Advisory Council on Financial Capability to assist the American people in understanding and addressing financial matters and to identify effective approaches to increase financial capability through education and access. Additionally, the National Strategy for Financial Literacy provides a new framework for strategic coordination and an overarching financial literacy strategy.

While our Government is taking decisive action to promote financial stability, our Nation's prosperity will ultimately depend on our willingness as individuals to empower ourselves and our families with financial knowledge. For more information on improving financial literacy, concerned individuals may visit www.MyMoney.gov or www.ConsumerFinance.gov, or call toll-free 1–888–MyMoney for guidance and resources.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 2011 as National Financial Literacy Month. I call upon all Americans to observe this month with programs and activities to improve their understanding of financial principles and practices.

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

[FR Doc. 2011–8383
Filed 4–5–11; 11:15 am]
Billing code 3195–W1–P

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