FEDERAL REGISTER

Vol. 76 Monday,
No. 79 April 25, 2011

Pages 22785–23168

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpo@custhelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

How To Cite This Publication: Use the volume number and the page number. Example: 76 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:	
Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, May 10, 2011
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741-6008

Printed on recycled paper.

Contents

Federal Register

Vol. 76, No. 79

Monday, April 25, 2011

Separate Parts In This Issue

Reader Aids

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

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register

Vol. 76, No. 79

Monday, April 25, 2011

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 12

[Docket No. NRCS–2011–0010]

RIN 0578–AA58

Wetland Conservation

AGENCY: Office of the Secretary, United States Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: The United States Department of Agriculture is removing obsolete provisions from the Code of Federal Regulations. This action removes provisions concerning the Natural Resources Conservation Service's (NRCS) coordination responsibilities.

DATES: *Effective Date:* The rule is effective April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Terrell Erickson, Director, Ecological Sciences Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Room 6819, South Building, P.O. Box 2890, Washington, DC 20013–2890; Phone: (202) 720–5992; Fax: (202) 720–2646; or E-mail: *Terrell.erickson1@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Orders

This document does not meet the criteria for a significant regulatory action as specified by E.O. 12866. This action also has no federalism or tribal implications, and will not impose substantial unreimbursed compliance costs on States, local governments, or Indian tribal governments. Therefore, impact statements are not required under E.O. 13132 or 13175.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because neither the Secretary of Agriculture nor NRCS is required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject matter of this rule.

Environmental Evaluation

This rule will have no significant effect on the human environment and is categorically exempt under 7 CFR 1b.3(a)(6); therefore, neither an environmental assessment nor an environmental impact statement is required.

Paperwork Reduction Act

This rule does not contain reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

Background

Existing wetland conservation provisions in 7 CFR part 12 require that NRCS' certification of a wetland determination be completed according to procedures agreed to by the Army Corps of Engineers (COE), the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service. In 1994, the Departments of Agriculture and the Interior, the Army, and the Environmental Protection Agency entered into a Memorandum of Agreement (MOA) concerning the delineation of wetlands for purposes of Section 404 of the Clean Water Act (CWA) and Title XII of the Food Security Act of 1985 (FSA). The MOA was developed to streamline the wetland delineation process on agricultural lands, to promote consistency between the CWA and the FSA, and to provide predictability and simplification for USDA program participants. However, subsequent amendments to FSA and court decisions made the MOA and parts of 7 CFR 12.30 no longer applicable, and USDA and COE withdrew from the MOA in January 2005.

1996 amendments to FSA eliminated the concept of "abandonment" for prior converted (PC) cropland. As a result, land may be considered non-wetland for FSA compliance purposes, but considered wetland for CWA purposes. 2002 amendments to FSA prohibit NRCS from sharing confidential producer information, including geospatial information, to agencies outside USDA. This prohibits NRCS from providing wetland delineations and determinations to the COE and EPA for CWA permitting and enforcement. Finally, as a result of U.S. Supreme Court decisions, a wetland may be subject to FSA Compliance, but no longer regulated by the COE for CWA purposes. These inconsistencies in jurisdiction do not allow the two agencies to have consistent wetland determinations.

List of Subjects in 7 CFR Part 12

Administrative practices and procedures, Soil conservation, Wetlands.

For the reasons stated in the preamble, USDA amends part 12 of Title 7 of the Code of Federal Regulations as set forth below:

PART 12—HIGHLY ERODIBLE AND WETLAND CONSERVATION

■ 1. The authority citation for part 12 continues to read as follows:

Authority: 16 U.S.C. 3801 *et seq.*

Subpart C—Wetland Conservation

§ 12.30 [Amended]

■ 2. In § 12.30, remove paragraph (a)(8) and remove the second sentence from paragraph (c)(1).

Signed in Washington, DC, on April 5, 2011.

Thomas J. Vilsack,

Secretary.

[FR Doc. 2011–9870 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220, 225, 226 and 245

[FNS–2008–0001]

RIN 0584–AD60

Direct Certification and Certification of Homeless, Migrant and Runaway Children for Free School Meals

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the regulations affecting the determination of children's eligibility for free meals under the National School Lunch Program and the School Breakfast Program by direct certification and categorical eligibility. Conforming changes and miscellaneous technical changes are also made, as appropriate, for the Special Milk Program for Children, the Child and Adult Care Food Program and the Summer Food Service Program. The Child Nutrition and WIC Reauthorization Act of 2004 (Reauthorization Act) amended the Richard B. Russell National School Lunch Act to require local educational agencies to conduct direct certification in conjunction with the Food Stamp Program, which is now called the Supplemental Nutrition Assistance Program (SNAP). Under the direct certification process, a local educational agency obtains documentation of a child's receipt of SNAP benefits from the State or local SNAP office. This rule also incorporates provisions from the Reauthorization Act concerning the certification of certain children who are homeless, runaway, or migratory.

This rule affects State agencies administering SNAP and the Child Nutrition Programs; local offices administering SNAP; local program operators that administer the School Nutrition Programs; and low income households with school age children. The rule is intended to improve school meal program access for low-income children, reduce paperwork for households and program administrators, and improve the integrity of the free and reduced price meal certification process.

DATES: *Effective date:* This rule is effective June 24, 2011. *Comment dates:* Comments on rule provisions: Mailed comments on the provisions in this rule must be postmarked on or before October 24, 2011; e-mailed or faxed comments must be submitted by 11:59 p.m. on October 24, 2011; and hand-delivered comments must be received by 5 p.m. October 24, 2011 to be assured of consideration.

Comments on Paperwork Reduction Act requirements: Comments on the information collection requirements associated with this rule must be received by June 24, 2011.

ADDRESSES: The Food and Nutrition Service (FNS) invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (703) 305–2879, attention Julie Brewer.
- *Mail:* Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594.
- *Hand Delivery or Courier:* Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594, during normal business hours of 8:30 a.m.–5 p.m.

All submissions received in response to this interim rule will be included in the record and will be available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting comments will be subject to public disclosure. FNS may also make the comments publicly available by posting a copy of all comments on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Address any questions to Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302 or by telephone at 703–305–2590. A regulatory cost-benefit analysis was completed for this rule. It will be available at *http://www.regulations.gov* as part of the docket history for this interim rule.

SUPPLEMENTARY INFORMATION: The Reauthorization Act (Pub. L. 108–265; June 30, 2004) phased-in mandatory direct certification provisions with the Food Stamp Program [1] and made children participating in certain other programs categorically eligible for free school meals. In order to provide readers with a chronological account of direct certification, this preamble begins with a history of direct certification which includes a discussion of the relevant changes made in the Reauthorization Act. These amendments are intended to streamline the certification and verification processes by reducing paperwork for both program administrators and households by eliminating the need for submission of free and reduced priced meal applications by these households.

This rule is being issued as an interim rule as authorized by section 501(b) of the Reauthorization Act and because of the specific implementation dates therein. The Reauthorization Act also required that regulations be promulgated within two years of enactment which was 2006. In order to accommodate the statutory deadlines imposed for fully phasing-in direct certification with SNAP and to provide access to free meals to children newly added as categorically eligible, the Department implemented the non-discretionary provisions in the Reauthorization Act through guidance as discussed below. In addition, by issuing the guidance, the Department complied with the implementation requirements established in 501(a) of the Reauthorization Act. The delay in issuing this interim rule enabled the Department to develop it using data from the direct certification reports to Congress as well as address issues raised by State and local agencies about the direct certification process as implemented. The Department strongly supports providing any opportunity for public comment from interested parties, which is afforded through the interim rule process. Changes resulting from comments and from experience based on the interim rule would be implemented through a future final rule.

I. History

Eligibility Determinations

Until 1981 to receive free and reduced price meals or free milk for their children, households were required by statute to complete an application for free or reduced price meals or for free milk, providing income and household size information. The Omnibus Budget Reconciliation Act of 1981, Public Law 97–35, amended the Richard B. Russell National School Lunch Act (NSLA) [2] to include a number of changes to the free and reduced price meal eligibility process. One of those changes allowed submission of documentation showing participation in the Food Stamp Program. This was implemented by permitting households certified to receive benefits under the Food Stamp Program to provide their case number to schools in lieu of completing income information on the free and reduced price meal application. Thus, children who are members of households certified to receive food stamp benefits are "categorically eligible" for free school meals.

The School Lunch and Child Nutrition Amendments of 1986, Public Law 99–661, made further amendments to the NSLA to mandate categorical eligibility for free meals and a simplified verification of eligibility

[1] While the Food, Conservation and Energy Security Act of 2008, Public Law 110–234, renamed the Food Stamp Program as the Supplemental Nutrition Assistance Program, historical references are to the Food Stamp Program, reflecting the Reauthorization Act's language.

[2] The NSLA was renamed in 1999.

process for children in food stamp households and children in Aid to Families with Dependent Children (AFDC)[3] assistance units. Since the regulations had already been amended to allow simplified application and verification procedures for food stamp households, the regulations were revised to extend these provisions to AFDC households.

The Child Nutrition and WIC Reauthorization Act of 1989, Public Law 101–147, again amended the NSLA to respond to concerns expressed by program operators regarding the volume of paperwork associated with the Child Nutrition Programs. The NSLA authorized school officials to certify children eligible for free meals, without further application, based on documentation obtained directly from the appropriate State or local agency that the children are part of households receiving assistance under the Food Stamp Program or AFDC Program. This certification process is commonly referred to as "direct certification."

Because the Food Distribution Program on Indian Reservations (FDPIR) is authorized by section 4 of the Food and Nutrition Act of 2008, 7 U.S.C. 2013, the same law authorizing SNAP, formerly the Food Stamp Program, and because eligible households on and near reservations have the option of participating in either SNAP or FDPIR, the Department extended the provisions on categorical eligibility and direct certification to include FDPIR households.

Reauthorization Act 2004 Changes

In 2004, the Reauthorization Act made several amendments to the NSLA to improve the integrity of the free and reduced price meal certification and verification processes, without hindering access of low-income children. Section 104 of the Reauthorization Act added section 9(b)(4) to the NSLA, 42 U.S.C. 1758(b)(4) to require local educational agencies to directly certify, without further application, any child who is a member of a household receiving benefits under SNAP. To facilitate this requirement, an agreement between the State agency administering SNAP and the State agency or agencies administering the school meals programs is required. The required direct certification with SNAP is in addition to the previous and still existing optional authority for direct certification with TANF and FDPIR.

In accordance with the Reauthorization Act, the requirement to directly certify children receiving benefits under SNAP was phased-in based on the enrollment of the local educational agency as follows—

The provision was effective as follows	For school districts with enrollments of	
	At least	in school year
July 1, 2006	25,000 students*	2005–2006
July 1, 2007	10,000 students*	2006–2007
July 1, 2008	All local educational agencies.	

* From prior year's October data collection as required under 7 CFR 210.8(c)(2).[4]

In addition, the 2004 Reauthorization Act included provisions making children who are homeless, runaway, or migratory, as determined by the homeless coordinator for homeless or runaway children or by officials of the Migrant Education Program (MEP) for migratory children, categorically eligible for free meals, effective July 1, 2004. To ensure that the affected children could access free meal benefits as quickly as possible, the Department issued guidance to implement these statutory provisions. The pertinent memoranda are:

• July 19, 2004—Categorical Eligibility for Free Lunches and Breakfasts of Runaway, Homeless, and Migrant Youth: Reauthorization 2004 Implementation Memo SP 4;

• August 16, 2004—Categorical Eligibility for Free Lunches and Breakfasts for Migrant Children; and

• September 17, 2004—Guidance on Determining Categorical Eligibility for Free Lunches and Breakfasts for Youth Served under the Runaway and Homeless Youth Act.

These can be reviewed on our Web site—*http://www.fns.usda.gov/cnd/Governance/policy.htm.*

II. Direct Certification Implementation and Studies

Because of the benefits of direct certification relating to improving access and reducing paperwork, the Department felt that is was important to determine both the number of local educational agencies that were doing direct certification and what percentage of the total number of children eligible for free and reduced meals they represented. Studies and surveys conducted by FNS have indicated that, prior to School Year 2007–2008, a little more than 60 percent of local educational agencies were using direct certification. Please note that the majority of these studies were conducted prior to mandatory direct certification with SNAP. This data has given FNS a baseline to measure the success of mandatory direct certification with SNAP. Data for School Year 2009–2010 showed that 83 percent of local educational agencies conduct direct certification. Studies and sources include—

"Analysis of Verification Summary Data SY2004–05" (May 2006) which may be found at *http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/CNVerification.pdf;*

"Preliminary Report on the Feasibility of Computer Matching in the National School Lunch Program" (January 2005) which may be found at *http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/NSLPDataMatch.pdf;*

"Direct Certification in the National School Lunch Program—Impacts on Program Access and Integrity Study of Direct Certification in the National School Lunch Program" (October 2003, Economic Research Service, USDA, contracted study) which may be found at *http://www.ers.usda.gov/Publications/EFAN03009;*

"Study of Direct Certification in the National School Lunch Program" (September 2000) which may be found

[3] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, later replaced the AFDC program with the Temporary Assistance for Needy Families (TANF) Program. Please note that categorical eligibility for recipients of TANF is subject to the limitation in section 9(b)(12)(A)(ii) of the NSLA, 42 U.S.C. 1758(b)(1)(A)(ii) concerning eligibility standards that were comparable to or more restrictive than those in effect on June 1, 1995. This qualification will not be repeated in other references to TANF in this preamble.

[4] All other regulatory citations in this preamble shall be considered references to Title 7, Code of Federal Regulations, unless otherwise indicated.

at *http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/directcert.pdf;* and

"Direct Certification in the National School Lunch Program: State Implementation Progress Report to Congress" (December 2008) found at *http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/DirectCert08.pdf.*

"Direct Certification in the National School Lunch Program: State Implementation Progress Report to Congress—October 2009" found at *http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/NSLP DirectCertification2009.pdf.*

"Direct Certification in the National School Lunch Program: State Implementation Progress School Year 2009–2010" found at *http://www.fns.usda.gov/ora/menu/Published/CNP/FILES/DirectCert2010.pdf.*

III. Current Procedures for Direct Certification and Categorical Eligibility

Methods Used for Direct Certification

The studies cited in section II indicated that the methods commonly used for direct certification involve matching and non-matching processes. In the non-matching method, the States' assistance agencies generate lists or databases of TANF and SNAP households with school age children. The assistance agencies use the lists/databases to send households a letter that includes the necessary direct certification documentation. The letter instructs the household to provide the letter to the school if they want free meals or milk for their children. Children in households that provide the letters to the school or local educational agency are certified eligible for free meals or milk based on this documentation. This procedure is considered the "letter method."

In the matching method, the State assistance agency databases/lists of SNAP or TANF households with school age children are matched at the State or local educational agency level against student enrollment databases or lists. Most systems involve a matching of two or three identifiers, such as the children's names and birth dates and/or addresses. Matching at the State level is generally automated, while matching at the local educational agency level may be a manual process, especially in smaller districts or those districts with fewer families receiving benefits from SNAP, TANF or FDPIR. Once eligible children have been identified through direct certification, their parents or guardians are notified, in writing by the local educational agency, that their children are eligible to receive free meals without any additional application. Further, these households are not subject to verification since the local educational agency has already documented that the child is a member of a household receiving other programs' benefits.

Frequency of Direct Certification Efforts

Typically, direct certification is conducted at or around the beginning of the school year. However, a number of States and local educational agencies have the capability of doing direct certification more frequently, on a monthly or even daily basis.

Applications With Case Numbers

Households receiving assistance from SNAP, TANF or FDPIR may also submit an application with their case number(s) for the child(ren) on the free and reduced price meal or free milk application to establish their categorical eligibility for free meals or milk. The only other information needed on the application is each child's name and the signature of an adult household member. Should the application be selected for verification of eligibility, the household must submit proof of participation in SNAP, TANF or FDPIR in order to continue program participation.

IV. Requirements for Direct Certification With SNAP

Scope of Mandatory Direct Certification With SNAP

All participating NSLP and School Breakfast Program (SBP) schools, including public and private non-profit schools and residential child care institutions (RCCIs), must implement the mandatory direct certification provisions for children who are members of households receiving benefits from the SNAP. RCCIs that operate a day school must conduct direct certification for day students. However, RCCIs that only have residential students are exempted from this requirement. Residential students would not receive SNAP benefits since they are residing in an institution. This exemption is found in this interim rule at paragraph 245.6(b)(1)(ii).

The administering entity for the private schools or RCCIs should contact their State agency to work out the logistics for obtaining information from the agency administering SNAP about the children enrolled in their schools. Please note when determining claiming percentages for Provision 2 or Provision 3, which are the special assistance certification and reimbursement alternatives permitted in § 245.9, direct certification is required only in base years. This provision may be found at paragraph 245.6(b)(1)(v).

Frequency of Mandatory Direct Certification With SNAP

As indicated earlier, the NSLA requires that all children in households receiving SNAP benefits be directly certified for free meals and paragraph 245.6(b) is amended by this rule to address mandatory direct certification of children receiving benefits from SNAP.

Because direct certification is a useful tool for schools and reduces paperwork and increases participation, the Department's ultimate goal for direct certification is for State and local educational agencies to have the capability to conduct on-going direct certification with SNAP, TANF and FDPIR through computer matching that provides the most current information about households receiving benefits from those programs. Once an on-going system becomes operational, the local educational agency would be able to promptly determine when children who were not already certified for free meal benefits become eligible, based on membership in a household recently approved for benefits from SNAP, TANF or FDPIR. The eligibility of children previously directly certified is not affected by more frequent direct certification because, once eligibility is established, it is in effect for the entire school year and up to thirty (30) operating days in the following school year.

To this end, this interim rule requires that local educational agencies conduct direct certification with SNAP at least three times during the school year (July 1 to June 30) beginning no later than School Year 2011–2012. This increased number of matching efforts has the potential to facilitate participation of children in the school meals programs. Of course, more frequent direct certification efforts are permissible and encouraged.

The efforts must be made at or around the beginning of the school year; three months after the beginning of the school year; and six months after the beginning of the school year. For example, if the school classes begin on August 15th, the initial direct certification effort would be in July or August; the second would be in October or November and the last in January or February. Direct certification efforts are required for children who were not initially directly certified and who are currently reduced price or paid. If the local educational agency has the capability, the status of any newly enrolled child must be checked for SNAP eligibility at the time of enrollment. If this is not possible, the household must be provided with an application so that the child's benefits are not delayed until the next scheduled direct certification update.

Any newly eligible children identified in matches made subsequent to the beginning of the school year must be certified for free meals and the local educational agency must promptly notify their parents or guardians in writing of the new status. This includes children who had been certified for reduced price meals but who are subsequently identified as receiving SNAP benefits. The requirement for the frequency of direct certification efforts with SNAP is found at paragraph 245.6(b)(3) of this interim rule. Please note direct certification with FDPIR and TANF remains optional. The authority for direct certification with FDPIR or TANF is found at paragraph 245.6(b)(2).

Use of the Letter Method

As discussed earlier, some State and local SNAP or other assistance agencies currently provide letters to households as their method of direct certification. The household takes the letter indicating its receipt of SNAP benefits to the local educational agency in lieu of an application. Studies show that states have been able to improve the effectiveness of their direct certification process by changing from the letter method to an electronic matching approach. Further, since the original availability of direct certification in the early 1990s, sharing information between SNAP and other assistance agencies and State/local educational agencies has become easier and more cost effective.

A 2007 study, *Data Matching in the National School Lunch Program: 2005 Volume 1: Final Report, available at http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/DataMatching-V1.pdf.* discussed the effectiveness of the various direct certification methods. This study showed that States with mandatory statewide State-level matching had the highest rates of direct certification, with 74 percent of categorically certified children directly certified. The letter method resulted in a significantly lower rate of direct certification, with only 52 percent of categorically certified children.

Therefore, this interim rule requires, at paragraph 245.6(b)(1)(iii), that, in School Year 2011–2012, all State agencies phase out the letter method as their method for direct certification with SNAP. And for School Year 2012–2013, the letter method can no longer be used to conduct direct certification. This provision is consistent with the requirement in the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296; December 13, 2010). All State agencies must have a method to exchange eligibility information from SNAP more directly with the local educational agency through some type of automated data-matching process. Currently, there are a range of systems in use. However, State and local agencies may continue to provide letters to families as a secondary method along with use of automated system, especially during the initial use of an automated system. The additional notification to families would help to ensure that they were aware of their children's categorical eligibility.

Please note that the use of the letter method only as a secondary method of identifying categorical eligibility only applies to SNAP. The letter method may continue to be used as the primary method for other sources of categorical eligibility.

Extension of Eligibility to All Children in the Household

Section 9(b)(12) of the NSLA provides for categorical eligibility for children who are members of households receiving assistance from SNAP, FDPIR, and TANF. The implementing regulations required that a child be a member of the household as determined by the assistance program in order to be categorically eligible for free school meals. For direct certification, this has been an individual match. For applications, each child had to have a case number listed in order to be categorically eligible. For consistency, we did not extend categorical eligibility to newly enrolled siblings in the subsequent school year.

We have heard from various program operators and other stakeholders that this interpretation is problematic administratively and unnecessarily omits eligible children from the direct certification process. For direct certification, school-age children from the same household who are not identified through the match are most likely receiving SNAP or other benefits but are not matched because of minor differences in the identifying information used in the match.

Individual eligibility also results in households with some children directly certified and others for whom an application must be submitted. If some of the children in the family are directly certified, the family may not realize until after school starts that an application is needed for their other children. This sometimes requires the family to pay for meals for the uncertified children until the application is submitted and approved.

For local educational agencies, maintaining different types of eligibility for direct certification and application-based records for the same household may be difficult. It also complicates reporting and may result in misleading information for determining verification sample sizes and other purposes.

Therefore, under this interim rule, if one or more children in the household is also a member of a family receiving assistance under SNAP, FDPIR or TANF, all school-aged children in the household are considered categorically eligible for free meals or free milk. This applies for both direct certification and applications with case numbers. The local educational agency must extend eligibility for free meals to all children that can be identified as members of a household on an application for free or reduced price meals or free milk. If the local educational agency does not have a prior application to refer to, school district enrollment records are acceptable to determine if there any additional children in the household who were not directly certified. For households submitting applications with case numbers for some children, the local educational agency must certify all children as categorically eligible for free meals and disregard income information. This requirement is found at § 245.2 (definition of "Documentation"), paragraph 245.6(b)(7) and paragraph 245.6(c)(5).

Agreement Between SNAP State Agency and the State Agency Administering the School Meals Programs

To facilitate mandatory direct certification of children receiving benefits from SNAP, the NSLA requires, at section 9(b)(4)(A), 42 U.S.C. 1758 (b)(4)(A), that the State agency responsible for administering SNAP and the State agency responsible for administering the school meals programs enter into an agreement to facilitate the mandatory direct certification with SNAP. The Reauthorization Act included a parallel conforming amendment in section 11(u) of the Food and Nutrition Act of 2008 (formerly the Food Stamp Act) 7 U.S.C. 2020(u).

As specified in the NSLA, the agreements were to be in place by July 1, 2005. In a memorandum dated April 19, 2005 (SP 14, Agreement Checklist for Direct Certification and Direct Verification of Children in Food Stamp Households; *http://www.fns.usda.gov/cnd/governance/Reauthorization_Policy_04/Reauthorization_04/2005-04-19.pdf*), the Department provided guidance on initial items that the State agencies responsible for administering the school meals programs and the State agencies administering SNAP should include in the agreement. All State administering agencies, including those responsible for non-public schools or residential child care institutions, must have an agreement with the State agency administering SNAP. In order to fully support effective direct certification efforts, this interim rule requires that the agreement address how direct certification will be conducted, including frequency; what notification method(s) will be used; how use of the letter method will be phased-out as the primary method and what system will replace it; how the system and procedures will identify additional children in the household who are categorically eligible based on one household members' receipt of benefits; and other specifics needed to ensure efficient operation of direct certification.

The methods used to conduct direct certification can always be improved and expanded and should not be considered static. The more children who are identified as eligible through direct certification assists both families and local educational agencies by simplifying the certification process and by more accurately targeting free meal benefits.

As a result of this interim rule, the State agencies administering the school meals programs may need to amend their existing agreements with the State agencies responsible for SNAP to set up procedures to conduct more frequent direct certification. Because the addenda to the agreement would depend on the system used, State agencies must determine what amendments are needed. The requirement for the agreement is found at paragraph 245.6(b)(1)(iv) of this interim rule.

V. Requirements for Certification of Certain Homeless, Migrant, Runaway and Head Start Children

The Reauthorization Act also extended categorical eligibility and direct certification to additional programs for homeless, migrant and runaway children.[5] In most cases, we expect that these children will be certified through direct contact with official sources as discussed below. However, it is also possible that the families of some of these children might identify themselves through the free/reduced price application as categorically eligible. Paragraph 245.6(b)(5) of this interim rule specifies what documentation is needed to substantiate certification with appropriate officials. Officials responsible for free meal or free milk eligibility determinations are not responsible for making the determination that a child is homeless, migrant or a runaway. Rather, they are to coordinate with and accept the documentation from a person or agency authorized to make those determinations.

Homeless Children

Section 107 of the Reauthorization Act amended the NSLA to extend categorical eligibility for free school meals to children who are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act 42 U.S.C. 11434a(2). The McKinney-Vento Homeless Assistance Act defines as homeless individuals those lacking a fixed, regular and adequate nighttime residence.

In accordance with requirements of the McKinney-Vento Homeless Assistance Act, each local educational agency must designate a local educational liaison for homeless children and youth. The local liaison serves as one of the primary contacts between homeless families and school staff and district personnel, shelter workers and other service providers. The shelter director or local educational liaison for homeless children and youth provides the necessary documentation for direct certification to be used by local educational agencies. A memorandum dated July 19, 2004, "SP 4 Categorical Eligibility for Free Lunches and Breakfasts of Runaway, Homeless and Migrant Youth (*http://www.fns.usda.gov/cnd/Governance/policy.htm*) advised State agencies of categorical free meal or free milk eligibility provisions relating to homeless children and youth mandated by the Reauthorization Act.

School officials must accept documentation which meets regulatory requirements and confirms that identified children are homeless from the local educational agency's liaison for homeless children. School officials also must accept a letter or other document from the director of the homeless shelter where the child resides. This provision is found at paragraph 245.6(b)(6)(ii). In addition, this interim rule provides at paragraph 245.6(b)(5) that documentation to substantiate free meal or milk eligibility includes the child's name or a list of names, a statement that certifying that the children are eligible for that program and the signature of the local educational liaison or the director of the homeless shelter and the date of the signature. This rule provides that documentation is acceptable in lieu of a free and reduced price meal or free milk application. We continue to encourage local educational agencies to identify and work with the local educational agency liaison for homeless children and with directors of homeless shelters where children may reside to expedite benefits to homeless children.

Runaway Children

Section 107 of the Reauthorization Act made children served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*) categorically eligible for free school meals. A child who is a runaway must be participating in a runaway and homeless youth grant program under the Runaway and Homeless Youth Act to be categorically eligible for free meal benefits and for direct certification. The Family and Youth Services Bureau (FYSB), part of the Administration on Children and Families of the United States Department of Health and Human Services, awards funding to local community agencies to offer services to young people and their families. There are three grant programs for runaways under that title—Basic Center Program, Transitional Living Program and the Street Outreach Program. The agencies receiving grants under these three programs are referred to as either FYSB grantees, or Runaway and Homeless Youth (RHY) service providers.

Additionally, the 2003 Reauthorization of the RHY Program directed FYSB to coordinate with local educational agency liaisons under the McKinney-Vento Homeless Assistance Act to assure that RHY are provided information about the educational services available to them and to ensure they receive support services guaranteed under the law. Therefore, the first source for documentation for these children is the local educational agency's homeless liaison.

This interim rule provides in paragraph 245.6(b)(5)(iii) that documentation to substantiate free meal or milk eligibility must consist, at a minimum, of the youth's name, or a list of names, a statement certifying that the children are eligible for that program, the signature of the McKinney-Vento local educational agency's liaison or the RHY service provider(s) and the date signed. Documentation which meets the regulatory requirements must be

[5] Please note that the Healthy, Hunger-Free Kids Act of 2010 extended categorical eligibility to foster children. This provision was implemented through a policy memorandum, SP 17–2011, CACFP 08–2011, SFSP 05–2011–Revised, Categorical Eligibility of Foster Children, dated March 11, 2011. This new requirement will be incorporated into the regulations in a separate rulemaking.

accepted in lieu of a free meal or milk application. It is important that schools/ local educational agencies become familiar with their local RHY service providers and their McKinney-Vento local educational agency's liaison in order to facilitate the service of free school meals or milk for youth in the programs administered by the FYSB.

Migrant Children

The Reauthorization Act extended categorical eligibility to migratory children as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (ESEA). In general, a migrant child is one who has moved across local educational agency boundaries, within the last three years, to accompany or join a parent or guardian who has moved to seek or obtain temporary or seasonal work in agriculture or fishing. Please note, however, that it is not necessary for local educational agency personnel to apply the ESEA definition because there are State educational agency and local MEP staff who are responsible for identifying (and maintaining supporting documentation) for each eligible migrant child under ESEA.

As recognized in paragraph 245.6(b)(6)(ii) of this interim rule, local educational agencies will benefit from working directly with MEP coordinators or, where appropriate, the State MEP director, to identify migrant children and to document their eligibility for free school meals. Pursuant to paragraph 245.6(b)(5)(iii), local educational agencies must accept documentation that the children are migrant children from the MEP coordinator. Such documentation of migrant status to substantiate free meal eligibility may be a list that includes each child's name, a statement certifying that the children are eligible for that program, and the signature of the MEP coordinator or the State MEP director and the date of the signature. This list serves as documentation of categorical eligibility for or migrant children.

Newly Enrolled Homeless, Runaway or Migrant Students

It is important that newly enrolled homeless, runaway and migrant children in the local educational agency be identified and certified for free meals or milk as promptly as possible. The *Eligibility Guidance for School Meals Manual* (*http://www.fns.usda.gov/cnd/Guidance/default.htm*) indicates that, to the extent possible, applications should be processed immediately. This includes determination of eligibility through sources such as the homeless liaison. Local educational agencies need to establish procedures with the coordinators/liaisons to assure they are notified when the coordinators/liaisons identify a new homeless, runaway or migrant child so these children may be promptly certified at any time during the school year. Children also may be determined eligible through the standard application process. If the child is not indentified through coordinators/liaisons and an application is not submitted, paragraph 245.6(d) of the existing regulations allows school officials to complete an application on the child's behalf noting the child is homeless, etc. and giving the source for his/her knowledge. This must be done only on a case-by-case basis.

Children Enrolled in Head Start Programs

This interim rule also adds as categorically eligible children who are enrolled as participants in Head Start programs authorized under the Head Start Act. Until enactment of the Improving Head Start for School Readiness Act of 2007 (Pub. L. 110–134), only children enrolled in Head Start who met that program's prescribed low-income criteria were categorically eligible for free school meals. However, section 29(c) of Public Law 110–134 amended section (9)(b)(12)(A)(iii) and section 17(c)(5) of the NSLA to extend categorical eligibility for free meals and free milk to all Head Start enrollees. The original policy on limited categorical eligibility was issued in a memorandum dated April 14, 1995 and the most recent policy was issued in a memorandum dated May 16, 2008, "SP–23–2008, CACFP 07–2008, SFSP 06–2008, Automatic Eligibility for Free Meal Benefits Extended to All Children Enrolled in Head Start" (*http://www.fns.usda.gov/cnd/Governance/policy.htm*). We are now incorporating the most recent statutory requirement into the regulations. Therefore, a definition of a Head Start child is added to § 245.2 and a definition of categorically eligible is added which states that children enrolled in Head Start are categorically eligible for free school meals.

VI. Other Provisions and Technical Amendments

Confidentiality and Prevention of Overt Identification

Paragraph 245.6(b)(9) of this interim rule addresses the confidentiality of information obtained through the direct certification process and the prevention of overt identification of children eligible for free or reduced-price meals or free milk. This paragraph incorporates the provisions found in paragraph 245.6(b)(1) prior to the effective date of this rule. However, the wording has been revised to improve readability and to clarify that information obtained about the child's participation in SNAP, FDPIR or TANF must be used for direct certification purposes only and information regarding a child's eligibility status in the Child Nutrition Programs may be used or disclosed solely in accordance with the disclosure provisions in section 9(b)(6) of the NSLA.

Providing Application Materials

The existing provision that schools are not required to provide application materials to children who were approved for free meals through the direct certification process was moved in this interim rule from paragraph 245.6(b)(2) to paragraph 245.6(b)(10).

Notice of Approval

The existing provision concerning the notification of households in writing of children determined eligible for free meals or free milk through the direct certification process was moved from paragraph 245.6(b)(2) to paragraph 245.6(c)(6)(ii). The current provision also requires that households have an opportunity to decline school meals benefits for their children. A written notice to the household is not required if the direct certification documentation is provided to the school by the household, such as a letter indicating receipt of benefits from SNAP. By providing the school with documentation, the household is indicating that they want free meals or milk for their children. Paragraph 245.6(c)(5) is also being revised in this interim rule to include the new categories of children (homeless, Head Start, runaways and migrants) who may be directly certified.

Definitions

The following outlines changes, made by Public Law 108–265 and Public Law 110–134, which are addressed in § 245.2, Definitions, to reflect statutory amendments and for clarification purposes.

Categorically eligible—This rule adds a new definition, "Categorically eligible," in § 245.2. "Categorically eligible" means that children are eligible for free meals or free milk, as applicable, based on the child's status as—

- A member of a household receiving assistance under SNAP or FDPIR or a member of a family receiving benefits under the TANF program;
- An enrollee in the Head Start Program;

- A runaway child served by grant programs established under the Runaway and Homeless Youth Act;
- A homeless child as defined under the McKinney-Vento Homeless Assistance Act; or
- A migratory child as specified under the Migrant Education Program.

This definition also clarifies that categorical eligibility and automatic eligibility may be used synonymously.

Direct certification—This rule adds a new definition of "Direct certification" in § 245.2. Although the regulations have not previously included a definition for this term, it has generally been understood to mean the process of determining eligibility for certain categories of children by obtaining information directly from the State or local agency authorized to certify children's status as being members of households receiving assistance from SNAP, TANF or FDPIR. A child is directly certified in lieu of completion of an application. Children who are homeless, migrant, or runaway or enrolled in a Head Start Program are directly certified by obtaining information from an individual or agency to certify that the child is participating in one of these programs.

Documentation—Paragraph (2) of the definition of "Documentation" in § 245.2 defines documentation for direct certification purposes as the name of the child; a statement certifying that the child is receiving assistance from SNAP, FDPIR or TANF program; information in sufficient detail to match the child attending school in the local educational agency; the signature of the appropriate SNAP, FDPIR, or TANF official; and the date. The definition also clarifies that when the signature is impracticable to obtain, such as in computerized operations providing an electronic signature, other arrangements may be accepted if the local educational agency has a method to ensure that a responsible official from the assistance program can attest to the accuracy of the information provided. This interim rule revises the definition of "Documentation" to address acceptable documentation from SNAP, FDPIR or TANF Program; acceptable documentation for children in a family with at least one member receiving benefits from SNAP, FDPIR or TANF; acceptable documentation for Head Start children, homeless and migrant children and runaway children who participate in the respective Federal program.

Head Start child, Homeless child, Migrant child and Runaway child—Definitions for each of these are added consistent with the intent of Section 107 of the Reauthorization Act.

Technical Amendments

Pursuant to section 12(a) of the NSLA and current regulations, local educational agencies agree to maintain files of currently approved and denied applications and documentation for direct certification as part of their agreement to administer the program at the school district level. Paragraph 210.9(b) is being revised by this rule to include the new categories of children who may be directly certified (i.e., homeless, certain runaway and migrant children and Head Start enrollees). The review requirements in paragraph 210.18(g) are also amended to add the new categories of children who may be directly certified. Paragraph 210.18(g)(1)(B) is also being amended to conform with changes made in the November 13, 2007, interim regulation (72 FR 63785) that established year-long eligibility for free and reduced price meals.

We are also using this opportunity to clarify the relationship between delayed implementation of Provision 2 as permitted in paragraph 245.9(b)(6)(ii) and use of a child's prior year's eligibility status for the first 30 operating days in the new school year ("carryover") in paragraph 245.6(c)(2). Delayed implementation permits schools establishing claiming percentages for Provision 2 to charge participating students for meals in the first claiming period of the base year. This exception is permitted to assist schools in securing completed free and reduced price applications from households which might not otherwise submit an application if there is no charge for meals. With the State agency's approval, schools may delay implementing Provision 2 for a period not to exceed the first claiming period of the base year. When the carryover provision was added in the interim rulemaking dated November 13, 2007, (72 FR 63793), we did not address how it applied to delayed implementation. Therefore, we are revising paragraph 245.6(c)(2) to indicate that carryover is not required when schools are approved to use the delayed implementation in relation to Provision 2.

We are also making technical amendments to paragraph 210.18(g)(1)(i)(A)(3) to reflect the recent changes to the carryover provision that no longer permit the State agency to establish a different timeframe. Other technical changes are to correct an omission in the introductory text of paragraph 210.19(c) by adding a reference to paragraph 210.19(c)(iii), which was inadvertently left out, and to correct a citation in the definition of "School in severe need" in § 220.2 that should refer to paragraph 220.9(d), not paragraph 220.9(e).

We are also using this interim rule to correct a number of obsolete names, addresses, terms of usage, and spelling errors that may appear in parts 210, 215, 220, 225, 226, and 245.

As mandated by the Food, Conservation and Energy Act of 2008, effective October 1, 2008, the Food Stamp Program was renamed as the Supplemental Nutrition Assistance Program or SNAP. This interim rule amends parts 210, 215, 225, 226, and 245 to reflect this change.

The new name of the General Accounting Office, the Government Accountability Office (GAO), is made to paragraphs 225.6(h)(vii) and 226.10(d). This interim rule also replaces the term "handicap" with the term "disability" in paragraphs 225.8(g)(i), 225.15(e), 226.23(c)(5), 226.23(e)(2)(iv), and 226.23(h). Other corrections are a reference to CACFP in paragraph 226.23(e)(1)(iii)(E) and the spelling of "labeled" in paragraph 225.15(e).

Paragraph 245.3(b) is also revised to improve the readability of regulations and to delete a procedure applicable only to single child applications, which may no longer be used by local educational agencies.

VII. Procedural Matters

Executive Order 12866 and Executive Order 13563

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 interim rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Impact Analysis

Need for Action

The 2004 Reauthorization Act requires local educational agencies to establish systems to directly certify SNAP participant children for free school meals no later than School Year 2008–2009. The Reauthorization Act also extends categorical eligibility and provides for the direct certification of certain homeless, migrant, or runaway children. This interim rule makes necessary changes to implement these statutory requirements.

Benefits

The rule is expected to enhance access to the school meals and milk programs by needy children, decrease duplicative paperwork for households, decrease the administrative costs of processing and reviewing applications, and improve program integrity. Mandatory direct certification based on SNAP participation increased certifications for free school meals by an estimated 190,000 children in School Year 2008–2009. The interim rule's requirement that local educational agencies conduct direct certification at least three times per year beginning in School Year 2011–2012 may increase the number of children certified for free meals (for at least part of the school year) by an additional 270,000.

Costs

Direct certification increases the number of children certified to receive free school meals, which raises the cost of federal meal reimbursements to participating schools. State and local education, SNAP, and child welfare agencies also incur administrative costs associated with direct certification. Total meal reimbursement and administrative costs are estimated to have increased by more than $114 million over the five fiscal years from 2005 through 2009. (State SNAP and Child Nutrition Agencies begin to incur administrative costs in fiscal year 2005, the year prior to the mandatory implementation of direct certification by large LEAs under the terms of the 2004 Reauthorization Act.) The estimated ten-year cost of the rule, through FY 2014, is nearly $760 million. More than $730 million of this amount is the cost of Federal reimbursement to schools for free meals served to newly certified children.

Regulatory Flexibility Act

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act. It is certified that this interim rule will not have a significant economic impact on a substantial number of small entities. Determining children eligible for free meals or free milk by obtaining eligibility information directly from another agency will reduce duplicative paperwork for households who have already established their need for assistance to certain programs which serve low-income children and adults, and will streamline the free and reduced price application and certification process for schools. The provisions of this rule will enhance access to these programs by needy children. Although there may be some initial burdens associated with implementation of this rule, the burdens will not be significant and will be outweighed by the long-term benefits of direct certification and expanded categorical eligibility.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes a requirement 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, the Department generally must prepare a written statement, including a cost-benefit analysis. This is done for proposed and final rules that have Federal mandates which may result in expenditures of $100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates of $100 million or more in any one year (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this interim rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The National School Lunch Program, Special Milk Program, School Breakfast Program Summer Food Service Program, and Child and Adult Care Food Program are listed in the Catalog of Federal Domestic Assistance under Nos. 10.555, 10.556, 10.553, 10.559 and 10.558, respectively. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and final rule related notice at 48 FR 29114, June 24, 1983, these programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

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 regulation describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation With State Officials

Prior to drafting this rule, we received input from State and local agencies at various times. The Child Nutrition Programs (CNP) are State administered, federally funded programs. Staff from FNS' headquarters and regional offices had informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. This arrangement allows State and local agencies to provide feedback that helps form the basis for any discretionary decisions in this and other CNP rules. Additionally, we convened a meeting of representative Federal and State administrators of SNAP and CNP State directors to discuss their current direct certification procedures. Department officials have also provided overviews of the changes made in the certification process at meetings attended by local educational agency representatives, advocacy groups and other interested parties. These sessions provided FNS officials with insights into areas of concerns from these groups and allowed us to obtain background into how local and State administrators are currently doing certification and direct certification and how the statutory changes will affect these procedures.

Nature of Concerns and the Need To Issue This Rule

State and local agencies are generally concerned about improving the integrity of the free and reduced price meal eligibility process without hindering access to the programs. They also are concerned about the paperwork and financial burdens placed on food service to determine free and reduced price meal eligibility and the initial cost of implementing direct certification.

The issuance of this regulation is required by amendments made to the Richard B. Russell National School Lunch Act by the Reauthorization Act. Prior to those amendments, program officials were permitted to directly certify children in households receiving benefits from SNAP, TANF and FDPIR. This rule now requires local educational agencies to directly certify children in households receiving benefits from SNAP and permits the direct certification of children in households receiving TANF or FDPIR benefits, as well as homeless, some runaway children and migrant children.

Extent to Which We Meet These Concerns

By extending categorical eligibility to all children in a family based on one (or more) children's receipt of SNAP, FDPIR or TANF benefits, access to free meals is improved and the application process streamlined for both families and local educational agencies. Integrity is also addressed in this provision because the large majority of these other children are otherwise income eligible for free meals or are actually receiving assistance from these programs but were not readily identified. Additionally, children whose eligibility is determined through the direct certification process are exempt from the verification of eligibility process which reduces the burden placed on households. The inclusion of all children in the family as categorically eligible if other children are identified through direct certification eliminates the need for an application and further reduces the number of applications subject to verification. Local educational agencies can reduce the number of applications/households that are subject to verification by using direct certification as much as possible. These amendments will reduce paperwork and financial burdens placed on local educational agencies.

This rule is intended to have a preemptive effect on any State law that conflicts with its provisions or that would otherwise impede its full implementation. To the extent the rule includes discretionary changes, the Department has established compliance timeframes which give due consideration to State agency processes for notification of customers and stakeholders for the implementation of the new procedures in local offices.

Executive Order 12988

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. It 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 impede its full implementation. This rule is not intended to have retroactive effect unless that is specified in the Effective Date section of the preamble of the rule. Before any judicial challenge to the provisions of this rule or the application of its provisions, all administrative procedures that apply must be followed. The only administrative appeal procedures relevant to this interim rule are the hearings that local educational agencies must provide for decisions relating to eligibility for free and reduced price meals and free milk (§ 245.7 for the NSLP, SBP, and SMP in schools).

Civil Rights Impact Analysis

FNS has reviewed this interim rule in accordance with the Department Regulations 4300–4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability. After a careful review of the rule's intent and provisions, FNS has determined that this interim rule facilitates the participation of all eligible participants and does not establish any new burdens.

Executive Order 13175

USDA will undertake, within six months after this rule becomes effective, a series of Tribal consultation sessions to gain input from elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

The policies contained in this rule would not have Tribal implications that preempt Tribal law.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This is a new collection. The new provisions in this rule, which do increase burden hours, affect the information collection requirements that will be merged into the National School Lunch Program, OMB Control Number #0584–0006, expiration date March 31, 2012, and the Determining Eligibility for Free and Reduced Price Meals, OMB Control #0584–0026, expiration date March 31, 2013. The current collection burden inventory for the National School Lunch Program (7 CFR 210) is 11,846,904; and the current collection burden inventory for Determining Eligibility for Free and Reduced Price Meals (7 CFR part 245) is 1,073,432. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

Comments on the information collection in this interim rule must be received by June 24, 2011. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Lynn Rodgers-Kuperman, Chief, Program Analysis and Monitoring Branch, Child Nutrition Division, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection requirements, please contact Lynn Rodgers-Kuperman at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, 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 use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: Direct Certification and Certification of Homeless, Migrant and Runaway Children for Free School Meals.

OMB Number: 0584–NEW.

Expiration Date: Not Yet Determined.

Type of Request: New Collection.

Abstract: Under the mandatory direct certification process, the local educational agency (note: this term replaces the term school food authority for the purposes of determining eligibility for free or reduced price school meals) must directly certify, as eligible for free school meals, children who are members of a household that is receiving benefits from the Supplemental Nutrition Assistance Program (SNAP). In addition, they will continue to have the option of directly certifying children who are members of households receiving assistance under the Food Distribution Program on Indian Reservations (FDPIR), or Temporary Assistance for Needy Families (TANF) program. The local educational agency obtains documentation from the State or local agency administering SNAP, FDPIR or TANF. The documentation establishes children's automatic eligibility for free meals because of receipt of benefits from the SNAP, FDPIR or TANF. Direct certification is done in lieu of a family filing a free and reduced price application.

This interim rule also establishes categorical eligibility for free meals for children in other programs. These are—children enrolled in a Head Start program; children identified as homeless under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a (2)); children identified as migratory under section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399); and children identified as runaways receiving assistance under a program under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*). These children are identified by officials responsible for administering these programs or by school officials responsible for identifying these children who are enrolled in their school districts. For example, each school district must have a local liaison who identifies homeless, runaway or migratory children. In addition, Head Start officials or representatives of the local Migrant Education Program may provide the names of eligible children.

For mandatory direct certification with SNAP, optional direct certification with FDPIR or TANF and eligibility determinations made for children who are categorically eligible based on Head Start participation and the other programs discussed above, the paperwork burden for the local educational agency is due to the requirement to obtain documentation and retain it for review purposes.

This interim rule will increase the recordkeeping burden on the current collection burden inventory for the National School Lunch Program, OMB Control Number #0584–0006, because local educational agencies will be required to retain additional records containing the names of children directly certified for National School Lunch Program. This interim rule will increase the recordkeeping burden and decrease the reporting burden on the current collection burden inventory for Determining Eligibility for Free and Reduced Price Meals, OMB Control #0584–0026, because State agencies must maintain additional agreements and fewer households will be required to complete an application form. The interim rule will not change the recordkeeping nor the reporting burden on the current collection burden inventory for School Breakfast Program, OMB Control #0584–0012, as those respondents participating in the School Breakfast Program also participate in the National School Lunch Program; thus the burden associated with the School Breakfast Program will be carried in the National School Lunch Program. The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Estimated Annual Burden for 0584–NEW, National School Lunch Program, 7 CFR 210

Respondents for this Interim Rule: Local Educational Agencies.

Estimated Number of Respondents for this Interim Rule: 20,948.

Estimated Number of Responses per Respondent for this Interim Rule: 4.

Estimated Total Annual Responses: 83,792.

Estimated Total Annual Burden on Respondents for this Interim Rule: 52,370.

ESTIMATED ANNUAL BURDEN FOR 0584—NEW, NATIONAL SCHOOL LUNCH PROGRAM, 7 CFR 210

	Section	Estimated number of respondents	Frequency of responses	Average annual responses	Average burden per response	Annual burden hours
Recordkeeping (Local Educational Agencies)						
Names of children approved for meals based on documentation certifying that the child is included in a household currently approved to receive benefits under SNAP.	7 CFR 210.9 (b)(19) and 7 CFR 210.15 (b)(4).	20,948	3	62,844	0.5	31,422
Names of children approved for meals based on documentation certifying that the child is included in a household currently approved to receive benefits under FDPIR, TANF, or is a homeless child, migrant child, Head Start child, or a runaway child.	7 CFR 210.9 (b)(19) and 7 CFR 210.15 (b)(4).	20,948	1	20,948	1	20,948
Total Recordkeeping for Interim Rule	....	20,948	4	83,792	0.625	* 52,370
Total Existing Recordkeeping Burden for Part 210.	....	....	....	....	....	8,903,547
Total Burden Increase for Part 210 ...	....	....	....	....	....	51,620
Total Recordkeeping Burden for Part 210 with Interim Rule.	....	....	....	....	....	8,955,167

* Includes 750 hours already in existing rule for this purpose, so net change is 51,620.

Estimated Annual Burden for 0584—NEW, Determining Eligibility for Free and Reduced Price Meals, 7 CFR 245

Respondents for this Interim Rule: Households (8,262,043) and State Education Agencies (54).

Estimated Number of Respondents for this Interim Rule: 8,262,097.

Estimated Number of Responses per Respondent for this Interim Rule: 1.0232267.

Estimated Total Annual Responses: 8,453,997.

Estimated Total Annual Burden on Respondents for this Interim Rule: 673,665.710.

ESTIMATED ANNUAL BURDEN FOR 0584—NEW, DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS, 7 CFR 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Reporting (Households)						
Households complete application form.	7 CFR 245.6(a)	8,262,043	1	8,262,043	0.07	578,343.01
Households assemble written evidence and send to local educational agency.	7 CFR 245.6a (a)(7)(i).	190,000	1	167,441	0.5	95,000.00
Households cooperate by providing collateral contacts.	7 CFR 245.6a (a)(7)(ii).	1,900	1	1,900	0.167	317.30
Total Reporting for Interim Rule		8,262,043	1	8,453,943	0.079686	*673,660.31
Total Existing Reporting Burden for Part 245.						1,067,387.132
Total Burden Decrease for Part 245.						(113,070.55)
Total Reporting Burden for Part 245 with Interim Rule.						954,316.582

* Represents reduction of 113,070.55 from existing burden.

ESTIMATED ANNUAL BURDEN FOR 0584—NEW, DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS, 7 CFR 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Recordkeeping						
State agency must maintain agreements with local educational agencies conducting eligibility determinations for SNAP.	7 CFR 245.6(b) (1)(iv)	54	1	54	0.1	5.40
Total Recordkeeping for Interim Rule		54	1	54	0.1	5.40
Total Existing Recordkeeping Burden for Part 245.						6,045.000
Total Recordkeeping Burden for Part 245 with Interim Rule.						6,050.400

SUMMARY OF BURDEN (OMB #0584—NEW) 7 CFR 210

TOTAL NUMBER of RESPONDENTS	20,948
AVERAGE NUMBER of RESPONSES PER RESPONDENT	4
TOTAL ANNUAL RESPONSES	83,792
AVERAGE HOURS PER RESPONSE	.625
TOTAL BURDEN HOURS FOR PART 210 WITH INTERIM RULE	11,898,524
CURRENT OMB INVENTORY FOR PART 210	11,846,904
DIFFERENCE (NEW BURDEN REQUESTED WITH INTERIM RULE)	51,620

SUMMARY OF BURDEN (OMB #0584—NEW) 7 CFR 245

TOTAL NUMBER of RESPONDENTS	8,262,097
AVERAGE NUMBER OF RESPONSES PER RESPONDENT	1.0232266
TOTAL ANNUAL RESPONSES	8,453,997
AVERAGE HOURS PER RESPONSE	0.079686
NEW TOTAL REPORTING AND RECORDKEEPING BURDEN HOURS FOR PART 245 WITH INTERIM RULE	960,366.98
PROPOSED OMB INVENTORY FOR PART 245	1,073,432.000
DIFFERENCE (NEW BURDEN REDUCTION REQUESTED WITH INTERIM RULE)	(113,065.10)

E-Government Act Compliance

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

Public Participation

This action is being issued without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). In recognition of the need to implement the provisions on direct certification and expanded categorical eligibility in order to facilitate participation of needy students and to reduce the burden on local educational agencies, section 501(b) of the Reauthorization Act allows the Department to issue interim rules on these and other provisions in that law. Thus, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and an opportunity for prior public comment is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment. However, as noted earlier in this preamble, the Department recognizes that there are some discretionary areas inherent in these provisions and has concluded that it is important to provide an opportunity for public comment to facilitate policy development through the rulemaking process. In addition, several of the discretionary provisions have long implementation timeframes.

List of Subjects

7 CFR Part 210

Children, Commodity School Program, Food assistance programs, Grants programs—social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs—education, Grant programs-health, Infants and children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

7 CFR Part 225

Food assistance programs, Grant programs—health, Infants and children, Labeling, Reporting and recordkeeping requirements.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 245

Civil rights, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210, 215, 220, 225, 226 and 245 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.9:
■ a. Revise paragraph (b)(18);
■ b. Redesignate paragraphs (b)(19) and (b)(20) as paragraphs (b)(20) and (b)(21), respectively; and
■ c. Add a new paragraph (b)(19).

The revision and addition read as follows:

§ 210.9 Agreement with State agency.

* * * * *

(b) * * *

(18) Maintain files of currently approved and denied free and reduced price applications which must be readily retrievable by school.

(19) Maintain files of the names of children currently approved for free meals through direct certification with the supporting documentation, as specified in § 245.6(b)(5) of this chapter, which must be readily retrievable by school. Documentation for direct certification must include information obtained directly from the appropriate State or local agency, or other appropriate individual, as specified by FNS, that:

(i) A child in the *Family,* as defined in § 245.2 of this chapter, is receiving benefits from *SNAP, FDPIR* or *TANF,* as defined in § 245.2 of this chapter; if one child is receiving such benefits, all children in that family are considered to be directly certified;

(ii) The child is a homeless child as defined in § 245.2 of this chapter;

(iii) The child is a runaway child as defined in § 245.2 of this chapter;

(iv) The child is a migrant child as defined in § 245.2 of this chapter; or

(v) The child is a Head Start child as defined in § 245.2 of this chapter.

* * * * *

■ 3. Section 210.18 is amended by revising paragraph (g)(1)(i)(A)*(3)*; paragraph (g)(1)(i)(A)(*4*); and the second sentence of paragraph (g)(1)(i)(B) to read as follows:

§ 210.18 Administrative reviews.

* * * * *

(g) * * *

(1) * * *

(i) * * *

(A) * * *

(3) Evaluate if the previous year's eligibility determinations were used as required in § 245.6(c)(2) of this chapter.

(4) In the case where children are determined eligible for free lunches through direct certification, as specified in § 245.6 of this chapter, establish that the documentation for direct certification of children is official and from the appropriate State or local agency or another appropriate individual, as approved by FNS; establish that all information required under § 245.6 of this chapter is complete and the children were enrolled in the school under review during the review period.

(B) * * * The State agency shall determine whether the system for issuing benefits and updating children's eligibility status is adequate and, within the timeframes established in § 210.7(c)(1)(ii)(B), reflects changes due to verification findings, transfers, or a household's decision to decline benefits.

* * * * *

§ 210.19 [Amended]

■ 4. Section 210.19 is amended in paragraph (c)(6) introductory text by removing the phrase "paragraphs (c)(6)(i) and (ii)" and adding in its place "paragraphs (c)(6)(i) through (c)(6)(iii)"; and paragraph (c)(6)(ii) by removing the term "food stamp" and adding in its place "SNAP".

§ 210.23 [Amended]

■ 5. Section 210.23 is amended in paragraph (b), last sentence, by removing the words "FNS Instruction 113–6" and adding in their place the words "FNS Instruction 113–1".

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

■ 6. The authority citation for part 215 continues to read as follows:

Authority: 42 U.S.C. 1772 and 1779.

§ 215.13a [Amended]

■ 7. Section 215.13a is amended in paragraph (f) by removing the term "Food Stamp" and adding in its place "SNAP".

PART 220—SCHOOL BREAKFAST PROGRAM

■ 8. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

§ 220.2 [Amended]

■ 9. Section 220.2, the definition of "School in severe need" is amended by removing "§ 220.9(e)" and adding in its place "§ 220.9(d)".

■ 10. Section 220.7 is amended by revising paragraph (e)(14) to read as follows:

§ 220.7 Requirements for participation.

* * * * *

(e) * * *

(14) Retain documentation of free or reduced price eligibility as follows:

(i) Maintain files of currently approved and denied free and reduced price applications which must be readily retrievable by school for a period of three years after the end of the fiscal year to which they pertain; or

(ii) Maintain files with the names of children currently approved for free meals through direct certification with the supporting documentation, as specified in § 245.6(b)(4) of this chapter, which must be readily retrievable by school. Documentation for direct certification must include information obtained directly from the appropriate State or local agency, or other appropriate individual, as specified by FNS, that:

(A) A child in the *Family,* as defined in § 245.2 of this chapter, is receiving benefits from *SNAP, FDPIR* or *TANF,* as defined in § 245.2 of this chapter; if one child is receiving such benefits, all children in that family are considered to be directly certified;

(B) The child is a homeless child as defined in § 245.2 of this chapter;

(C) The child is a runaway child as defined in § 245.2 of this chapter;

(D) The child is a migrant child as defined in § 245.2 of this chapter; or

(E) The child is a Head Start child, as defined in § 245.2 of this chapter.

* * * * *

PART 225—SUMMER FOOD SERVICE PROGRAM

■ 11. The authority citation for part 225 continues to read as follows:

Authority: Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a)

■ 12. In § 225.2:

■ a. The introductory text of paragraph (b) and paragraph (b)(1) of the definition of "Documentation" are amended by removing the term "food stamp," and adding in its place "SNAP,";

■ b. Remove the definition of "Food stamp household"; and

■ c. Add a definition of "SNAP household" in alphabetical order to read as follows:

§ 225.2 Definitions.

* * * * *

SNAP household means any individual or group of individuals which is currently certified to receive assistance as a household from SNAP, the Supplemental Nutrition Assistance Program, as defined in § 245.2 of this chapter.

* * * * *

§ 225.6 [Amended]

■ 13. In § 225.6:

■ a. In paragraph (c)(2)(i)(L), the second sentence is amended by removing the term "food stamps," and adding in its place "SNAP benefits," ;

■ b. The last sentence of paragraph (c)(4)(ii)(B) is amended by removing the term "food stamp," and adding in its place "SNAP," and

■ c. Paragraph (h)(2)(vii) is amended by removing the words "General Accounting Office" and adding in their place the words "Government Accountability Office".

§ 225.7 [Amended]

■ 14. Section 225.7 is amended in paragraph (g)(1) by removing the word "handicap" and adding in its place the word "disability";

■ 15. Section 225.15 is amended by:

■ a. Removing the term "food stamp" and adding in its place "SNAP" wherever it appears in the following paragraphs:

■ i. The third sentence of paragraph (e);

■ ii. The heading of the introductory text of paragraph (f)(3);

■ iii. Paragraph (f)(3)(i);

■ iv. Paragraph (f)(4)(ii);

■ v. Paragraph (f)(4)(iv);

■ vi. Paragraph (f)(4)(viii);

■ vii. Paragraph (f)(5)(i); and

■ viii. Paragraph (f)(5)(vi).

■ b. In paragraph (e) by removing the word "labelled" and adding in its place the word "labeled" and by removing the word "handicap" and adding in its place the word "disability".

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 16. The authority citation for part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 17. In § 226.2:

■ a. Amend the definition *Documentation* by removing the term "food stamp" and adding in its place "SNAP" in paragraph (b) introductory text, paragraph (b)(1), paragraph (d) introductory text, and paragraph (d)(1);

■ b. Amend the definition *Free meal* by removing the term "food stamp" and adding in its place "SNAP," each time it appears;

■ c. Amend the definition *Verification* by removing the term "food stamp" and adding in its place "SNAP," each time it appears;

■ d. Remove the definition of "Food Stamp household", and add a definition of *SNAP household* in alphabetical order to read as follows:

§ 226.2 Definitions.

* * * * *

SNAP household means any individual or group of individuals which is currently certified to receive assistances as a household from *SNAP,* the Supplemental Nutrition Assistance Program, as defined in § 245.2 of this chapter.

* * * * *

§ 226.6 [Amended]

■ 18. In § 226.6, paragraph (f)(1)(viii)(E) is amended by removing the term "Food Stamp Program" and adding in its place "SNAP" each time it appears.

§ 226.10 [Amended]

■ 19. Section 226.10 is amended in paragraph (d) by removing the words "General Accounting Office" and adding in their place the words "Government Accountability Office";

§ 226.23 [Amended]

■ 20. Section 226.23 is amended by:

■ a. Removing the term "food stamp" and adding in its place "SNAP" each time it appears in the following paragraphs:

■ i. Paragraph (c)(2);

■ ii. Paragraph (d);

■ iii. Paragraph (e)(1)(i);

■ iv. Paragraph (e)(1)(iii)(E), first and seventh sentence;

■ v. Paragraph (e)(1)(iv) introductory text;

■ vi. Paragraph (e)(1)(iv)(B);
■ vii. Paragraph (e)(1)(v) introductory text;
■ viii. Paragraph (e)(1)(v)(A);
■ ix. Paragraph (e)(1)(v)(B);
■ x. Paragraph (e)(2)(vii)(A);
■ xi. Paragraph (h)(2)(i)(A);
■ xii. Paragraph (h)(2)(i)(B);
■ xiii. Paragraph (h)(2)(iii)(A);
■ xiv. Paragraph (h)(2)(iv) introductory text;
■ xv. Paragraph (h)(2)(iv)(A);
■ xvi. Paragraph (h)(2)(v)(C), second sentence.
■ b. Removing the term "Food stamp" and adding in its place "SNAP" each time it appears in the following paragraphs:
■ i. Paragraph (e)(1)(ii)(F);
■ ii. Paragraph (e)(1)(iv)(A);
■ iii. Paragraph (h)(2)(v)(A).
■ c. In paragraph (e)(1)(iii)(E), and in paragraph (h)(2)(vi), by removing the words "food stamps" and adding in their place the word "SNAP".
■ d. In paragraphs (d), (e)(2)(iv) and (h) by removing the word "handicap" and adding in its place the word "disability";
■ e. In paragraph (e)(1)(iii)(E) by removing the term "CCFP" and adding in its place the term "CACFP";
■ f. In paragraph (h)(2)(iv) introductory text, first sentence by removing the words "the Food Stamp, FDPIR or TANF program" and adding in their place the words "SNAP, FDPIR or TANF";
■ g. In paragraph (h)(2)(iv) introductory text, second sentence by removing the words " Food Stamp, FDPIR or TANF program" and adding in their place the words "SNAP, FDPIR or TANF" and by removing the words at the end of the sentence "in the Food Stamp, FDPIR or TANF Programs" and adding in their place the words" in SNAP, FDPIR or TANF" ;
■ h. In paragraph (h)(2)(iv) introductory text, fourth sentence by removing the words "in the Food Stamp Program" and adding in their place the word "SNAP";
■ i. In paragraph (h)(2)(iv)(A), first sentence by removing the words "Food Stamp" and adding in their place the word "SNAP".

PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

■ 21. The authority citation for part 245 continues to read as follows:

Authority: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 22. In § 245.2:
■ a. Remove the definitions of "Food Stamp Program", and "Food Stamp Household";
■ b. In the definition *Documentation*, paragraphs (1)(ii) and (2) are revised;
■ c. In the definition *Verification*, the fourth sentence is amended by removing the term "Food Stamp Program" and adding in its place "SNAP"; and removing the term "food stamps" and adding in its place "SNAP";
■ d. Add definitions of "Categorically eligible", "Direct certification", "Head Start child", "Homeless child", "Migrant child", "Runaway child", "SNAP", and "SNAP household" in alphabetical order.

The additions and revision read as follows:

§ 245.2 Definitions.

* * * * *

Categorically eligible means considered income eligible for free meals or free milk, as applicable, based on documentation that a child is a member of a *Family*, as defined in this section, and one or more children in that family are receiving assistance under *SNAP, FDPIR* or the *TANF* program, as defined in this section. A *Homeless child*, a *Migrant child*, a *Head Start child* and a *Runaway child*, as defined in this section, are also categorically eligible. Categorical eligibility and automatic eligibility may be used synonymously.

* * * * *

Direct certification means determining a child is eligible for free meals or free milk, as applicable, based on documentation obtained directly from the appropriate State or local agency or individuals authorized to certify that the child is a member of a household receiving assistance under *SNAP*, as defined in this section; is a member of a household receiving assistance under *FDPIR* or under the *TANF* program, as defined in this section; a *Homeless child*, a *Migrant child,* a *Head Start child* and a *Runaway child*, as defined in this section.

* * * * *

Documentation means:

(1) * * *

(ii) For a child who is receiving assistance under *SNAP, FDPIR* or *TANF*, as defined in this section, the child's name and appropriate SNAP or TANF case number or FDPIR case number or other FDPIR identifier and signature of an adult household member.

(2) In lieu of completion of the free and reduced price meal application:

(i) Information obtained from the State or local agency responsible for administering *SNAP, FDPIR* or *TANF*, as defined in this section. Documentation for these programs includes the name of the child; a statement certifying that the child is a member of a household receiving assistance under *SNAP, FDPIR* or *TANF*, as defined in this section; information in sufficient detail to match the child attending school in the local educational agency with the name of a child who is a member of one of the applicable programs as defined in this section; the signature of the official from the applicable program who is authorized to provide such documentation on behalf of that program and the date that the official signed the certification statement;

(ii) (A) A letter or other document provided to the household by the agency administering *FDPIR* or the *TANF* program, as defined in this section or by the entity or official authorized to administer an eligible program for a *Migrant child, Homeless child, Runaway child,* or *Head Start child,* as defined in this section; or

(B) A letter or document from the agency administering the *SNAP* program that was voluntarily submitted by the household to the local educational agency;

(iii) Information from the local educational agency, such as enrollment information or information from applications submitted for free or reduced price meals, or from SNAP, FDPIR or TANF program officials that indicate there are children in a *Family,* as defined in this section, who were not documented as receiving assistance under SNAP, FDPIR or TANF, in order to extend categorical eligibility to such children as found in § 245.6(b)(7). Documentation for these purposes is the information discussed in paragraph (2)(i) of this definition, plus a written statement by a local educational agency official briefly explaining how the presence of additional children in the family was determined.

(iv) Information obtained from an official responsible for determining if a child is a *Homeless child,* a *Migrant child,* a *Head Start child* and a *Runaway child,* as defined in this section. Documentation for these children includes the name of the child; a statement certifying that the child has been determined eligible for that program or is enrolled in the Head Start Program; information in sufficient detail to match the child attending school in the local educational agency with the name of a child who has been determined eligible for that program or is enrolled in an eligible Head Start Program; the signature of the official from the program who is authorized to provide such documentation on behalf of that program and the date that the official signed the certification statement. Documentation may also be a list of children or a computer match that includes this information.

(v) When a signature is impracticable to obtain, such as in a computer match, the local educational agency shall have a method to ensure that a responsible official can attest to the accuracy of the information provided.

* * * * *

Head Start child means a child enrolled as a participant in a Head Start program authorized under the Head Start Act (42 U.S.C. 9831 *et seq.*)

Homeless child means a child identified as lacking a fixed, regular and adequate nighttime residence, as specified under section 725(a) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)) by the local educational agency liaison, director of a homeless shelter or other individual identified by FNS.

* * * * *

Migrant child means a child identified as meeting the definition of migrant in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399) by the State or local Migrant Education Program coordinator or the local educational liaison, or other individual identified by FNS.

* * * * *

Runaway child means a child identified as a runaway receiving assistance under a program under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*) by the local educational liaison, or other individual in accordance with guidance issued by FNS.

* * * * *

SNAP means the Supplemental Nutrition Assistance Program established under the Food and Nutrition Act of 2008 (7 U.S.C. 2011 *et. seq.*) and operated under parts 271 and 283 of this chapter.

SNAP household means any individual or group of individuals currently certified to receive assistance as a household from *SNAP.*

* * * * *

■ 23. Section 245.3(b) is revised to read as follows:

§ 245.3 Eligibility standards and criteria.

* * * * *

(b) Each participating local educational agency and all participating schools under its jurisdiction must adhere to the eligibility criteria specified in this part. Local educational agencies must include these eligibility criteria in their policy statement as required under § 245.10 and it must be publicly announced in accordance with the provisions of § 245.5. Additionally, each State agency, or FNSRO where applicable, must require that local educational agencies accept as income eligible for free meals and free milk, children who are categorically eligible for those benefits based on documentation of eligibility, as specified in § 245.6 (b).

* * * * *

■ 24. Section 245.5 is amended as follows:

■ a. In paragraph (a)(1)(iv) remove the term "food stamp" and add in its place "SNAP";

■ b. Redesignate paragraphs (a)(1)(x) and (a)(1)(xi) as paragraphs (a)(1)(xi) and (a)(1)(xii), respectively, and add a new paragraph (a)(1)(x) to read as follows:

§ 245.5 Public announcement of the eligibility criteria.

(a) * * *

(1) * * *

(x) An explanation that Head Start enrollees and certain migrant, homeless, and runaway children are categorically eligible for free meals and free milk and their families should contact the school for more information.

* * * * *

■ 25. Section 245.6 is amended as follows:

■ a. Paragraph (a)(6) is amended by removing the term "Food Stamp Program" and adding in its place "SNAP" and by removing the term "food stamp" and adding in its place "SNAP";

■ b. Paragraph (a)(8)(i) is amended by removing the term "Food Stamp" and adding in its place "Supplemental Nutrition Assistance Program (SNAP)";

■ c. Amend paragraph (a)(8)(ii) by adding two new sentences at the end;

■ d. Revise paragraph (b);

■ e. Amend paragraph (c)(2) by adding two sentences at the end;

■ f. Revise paragraph (c)(5);

■ g. In paragraph (c)(6)(ii), the first sentence is amended by removing "Food Stamp Program, FDPIR or TANF Program" and adding in its place "SNAP, FDPIR or TANF"; and

■ h. In paragraph (c)(6)(ii), the last sentence is amended by removing the term "food stamp" and adding in its place "SNAP";

■ i. Amend paragraph (c)(6)(ii) by adding a new sentence at the end.

The addition and revisions read as follows:

§ 245.6 Application, eligibility and certification of children for free and reduced price meals and free milk.

(a) * * *

(8) * * *

(ii) * * * Also, certain migrant, homeless, and runaway children and children enrolled in a Head Start program are categorically eligible for free meals and free milk. If you are completing an application for these children, contact the school for more information.

* * * * *

(b) *Direct certification.* In lieu of requiring a household to complete the free and reduced price meal or free milk application, as specified in paragraph (a) of this section, the local educational agency must certify children as eligible for free meals or free milk in accordance with paragraph (b)(1)(i) of this section or may certify children as eligible for free meals or free milk in accordance with paragraph (b)(2) of this section. If a household also submits an application for directly certified children, the direct certification eligibility determination will take precedence.

(1) *Mandatory direct certification of children in SNAP households.* (i) All local educational agencies conducting eligibility determinations must directly certify children who are members of a household receiving assistance under *SNAP,* as defined in § 245.2, in School Year 2008–2009, which begins on July 1, 2008, and each subsequent school year.

(ii) Schools participating only in the Special Milk Program authorized under part 215 of this chapter may directly certify children for that program but are not required to conduct direct certification with SNAP. In addition, residential child care institutions, as defined in paragraph (c) of the definition of *School* in § 210.2 of this chapter, that do not have non-residential children are also not required to conduct direct certification with SNAP.

(iii) Beginning in School Year 2012–2013, direct certification shall be conducted using a data matching technique only and letters to household for direct certification may be used only as an additional means to notify households of children's eligibility based on receipt of SNAP benefits. The last period that letters to households may be used as the primary method for direct certification is School Year 2011–12.

(iv) Each State agency must enter into an agreement with the State agency conducting eligibility determinations for *SNAP.* The agreement must specify the procedures that will be used to facilitate the direct certification of children who are members of a household receiving assistance under *SNAP,* as defined in § 245.2. The agreement must address procedures to comply with the requirements of paragraphs (b)(3) through (b)(9) of this section. Direct certification must allow for notifying parents that their children have been determined eligible for free meals or free milk, as applicable, and that no further application is required. Such agreements must address how phase-out of non-electronic matches as the primary method for conducting direct certification for SNAP will be completed by School Year 2012–2013. The agreement shall be maintained by the State agency.

(v) Schools applying to use Provision 2 or Provision 3, as permitted under § 245.9, are required to conduct direct certification only in base years. However, schools may elect to conduct direct certification at other times, such as streamlined base years, when eligibility determinations are made.

(2) *Children who may be directly certified.* The local educational agency may directly certify children for free meals or free milk based on documentation received from the appropriate State or local agency that administers *FDPIR* or *TANF,* as defined in § 245.2, when that agency indicates that the children are members of a household receiving assistance under one of these programs. In addition, the local educational agency may directly certify children for free meals or free milk based on documentation from the appropriate State or local agency or other appropriate individual, as specified by FNS, that the child is a *Migrant child,* a *Homeless child,* a *Runaway child,* or a *Head Start child,* as defined in § 245.2.

(3) *Frequency of direct certification contacts with SNAP.* (i) Until School Year 2011–2012, local educational agencies must conduct direct certification activities with *SNAP* at least at the beginning of the school year.

(ii) (A) Beginning in School Year 2011–2012, at a minimum, all local educational agencies must conduct direct certification as follows:

(*1*) At or around the beginning of the school year;

(*2*) Three months after the initial effort; and

(*3*) Six months after the initial effort.

(B) The information used shall be the most recent available.

(iii) The names of all newly enrolled children and all children not certified for free meals shall be submitted for the direct certification required in paragraph (b)(3)(ii)(B) and paragraph (b)(3)(ii)(C) of this section. Newly enrolled children must be provided with application materials in order to alleviate a delay in receipt of free meals or free milk if direct certification for these children cannot be completed promptly upon enrollment.

(iv) State agencies are encouraged to conduct direct certification more frequently to obtain information about newly enrolled children or children who may be newly certified for that program's benefits.

(4) *Frequency of direct certification with other programs.* Local educational agencies opting to conduct direct certification activities with FDPIR or TANF should conduct such activities at or around the beginning of the school year. Obtaining information about homeless, migrant, runaway children or Head Start enrollees should be done, at a minimum, at or around the beginning of the school year and when newly enrolled children or children newly eligible for those programs are being certified.

(5) *Direct certification documentation.* (i) The required documentation for direct certification is provided in paragraph (2) of the definition of *Documentation* in § 245.2.

(ii) (A) Beginning in School Year 2012–2013, direct certification with *SNAP* shall be conducted using a data matching technique only. Letters to households for direct certification may be used only as an additional means to notify households of children's eligibility based on receipt of SNAP benefits. The last period that letters to households may be used as the primary method for direct certification is School Year 2011–2012. While such notices cannot be the primary method used by a state to document receipt of *SNAP,* the local educational agency shall accept such a letter if presented by a household.

(B) Letters or other documents may be used as the primary method for direct certification to document receipt of *FDPIR* or *TANF* benefits.

(iii) Individual notices from officials of eligible programs for a *Migrant child, Homeless child* or *Runaway child,* as defined in § 245.2, or for a *Head Start child,* as defined in § 245.2 may continue to be used. These notices are provided to school officials who must certify these children as eligible for free meals or free milk, as applicable, without further application, upon receipt of such notice.

(6) *Officials who can provide documentation for direct certification.* (i) The local educational agency must accept documentation from officials of the State or local agency that administers SNAP, certifying that a child is a member of a household receiving assistance under *SNAP* as defined in § 245.2, or officials of the State or local agency that administers *FDPIR* or *TANF,* as defined in § 245.2, certifying that a child is a member of a household receiving assistance under one of those programs.

(ii) In the case of a child who is a *Homeless child,* as defined in § 245.2, the director of a homeless shelter or the local educational liaison for homeless children and youth may provide the appropriate documentation. The Migrant Education Program coordinator or the local educational liaison, as applicable, may provide the supporting documentation for a *Migrant child,* as defined in § 245.2. For a *Head Start child,* as defined in § 245.2, an official from that program may supply the documentation indicating enrollment in the Head Start program. Once the appropriate official has provided the direct certification documentation to the local educational agency, the child must have free benefits made available as soon as possible but no later than three operating days after the date the local educational agency receives the direct certification documentation.

(7) *Extension of eligibility to all children in a family.* If any child is identified as a member of a household receiving assistance under SNAP, FDPIR, or TANF, all children in the *Family,* as defined in § 245.2, shall be categorically eligible for free meals or free milk. This applies to children identified through direct certification or through a free and reduced price application.

(8) *Migrant, Runaway, Homeless or Head Start Children.* To be categorically eligible as a Migrant child, Runaway child, Homeless child or a Head Start child, the child's individual eligibility or participation for these programs shall be established. Categorical eligibility based on these programs shall not be extended to other children in the household.

(9) *Confidential nature of direct certification information.* Information about children or their households obtained through the direct certification process must be kept confidential and is subject to the limitations on disclosure of information in section 9 of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1758. Therefore, information that a household is receiving benefits from SNAP, FDPIR or TANF or that a child is participating in another program which makes children categorically eligible for free school meals or free milk must be used solely for the purposes of direct certification for determining children's eligibility for free school meals or free milk and as otherwise permitted under § 245.6(f).

(10) *Notification to families.* For children who are directly certified, local educational agencies are not required to provide application materials and notice

to parents informing them of the availability of free and reduced price meal benefits, as specified in § 245.5(a), when that information is distributed by mail, individualized student packets, or other method which prevents overt identification of children eligible for direct certification.

(c) * * *

(2) * * * Schools conducting an initial base year for Provision 2 that are approved to delay implementation as permitted under § 245.9(b)(6)(ii) are not required to carryover children's prior year eligibility status as outlined in this paragraph (c). Carryover cannot be used when returning to standard meal counting and claiming under § 245.9(c)(2)(i), when establishing a new base year under § 245.9(c)(2)(ii) or establishing a streamlined base year under § 245.9(c)(2)(iii).

* * * * *

(5) *Categorical eligibility.* (i) *SNAP, FDPIR, TANF* When a household submits an application containing the required SNAP, FDPIR or TANF documentation, as defined under *Documentation* in § 245.2, all children in that household shall be categorically eligible for free meals or free milk. Additionally, when the local educational agency obtains confirmation of eligibility for these programs through direct certification, all children who are identified as members of a *Family,* as defined in § 245.2, shall be categorically eligible for free meals or milk.

(ii) *Homeless, migrant, runaway children and Head Start enrollees.* Upon receipt of *Documentation,* as defined in paragraph (2)(ii) and (2)(iv) of the definition in § 245.2, the local educational agency must approve such children for free benefits without further application.

(6) * * *

(ii) * * * The local educational agency must notify, in writing, households with children who are approved on the basis of documentation that they are *Categorically eligible,* as defined in § 245.2, that their children are eligible for free meals or free milk, and that no application is required.

* * * * *

■ 26. Section 245.6a(a)(1)(i) is revised to read as follows:

§ 245.6a Verification requirements.

(a) * * *

(1) * * *

(i) *SNAP,* as defined in 245.2;

* * * * *

§ 245.9 [Amended]

■ 27. Section 245.9 is amended by removing the term "Food Stamp Program" and adding in its place "SNAP" paragraphs (c)(1)(i) and (e)(1)(i).

■ 28. Section 245.10 is amended by revising the last two sentences of paragraph (a)(3) to read as follows:

§ 245.10 Action by local educational agencies.

(a) * * *

(3) * * * Additionally, the local educational agency must include the specific procedures it will use for obtaining documentation for determining children's eligibility through direct certification, in lieu of an application. Local educational agencies shall also provide households that are directly certified with a notice of eligibility, as specified in § 245.6(c)(2) and shall include in their policy statement a copy of such notice.

* * * * *

■ 29. Section 245.11 is amended by removing the term "Food Stamp" and adding in its place "SNAP" in paragraph (h)(4)(iv).

Dated: April 13, 2011.

Kevin W. Concannon,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 2011–9457 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–30–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

[NRC–2011–0084]

RIN 3150–AI94

Interim Enforcement Policy for Minimum Days Off Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement; revision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is revising its Enforcement Policy to include a provision allowing licensees enforcement discretion if they implement an alternative approach to meet the NRC's requirements for managing worker fatigue at operating nuclear power plants. This interim policy affects licensees subject to the minimum days off (MDO) requirements of the NRC's fitness for duty regulations and will remain in place until the NRC publishes a revised rule associated with the MDO requirements for managing fatigue.

DATES: This revision is effective April 25, 2011. The NRC is not requesting comments on this revision to its Enforcement Policy at this time.

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

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. The Enforcement Policy is also accessible via ADAMS accession number ML093480037. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*
- *Federal Rulemaking Web site:* This revision to the NRC's Enforcement Policy can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0084. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668, e-mail: *Carol.Gallagher@nrc.gov.*

The NRC also maintains the Enforcement Policy on its Web site at *http://www.nrc.gov;* select Public Meetings and Involvement, then Enforcement, and then Enforcement Policy.

FOR FURTHER INFORMATION CONTACT: Gerry Gulla, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2872; e-mail: *Gerald.Gulla@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On March 31, 2008 (73 FR 17176), the NRC published a final rule in the **Federal Register** amending Title 10 of the Code of Federal Regulations, Part 26, "Fitness for Duty Programs." The Commission updated the requirements in 10 CFR part 26 by reorganizing the rule and adding Subpart I, "Managing Fatigue." Subpart I establishes requirements for managing worker fatigue at operating nuclear power plants, which was in response to a need for clear and enforceable requirements for the management of worker fatigue. Although the rule was effective on April 30, 2008, the NRC permitted an

18-month implementation period for Subpart I.

On September 3, 2010, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM–26–5) (ML102590440). The NEI stated that "the new rule has resulted in consequences not originally envisioned when the rule was developed and that these consequences have diminished the safety benefits of the rule." The NEI has stated that the unintended consequences stem from the minimum days off requirements, specifically § 26.205(d)(3) through § 26.205(d)(6), which create an undue level of complexity and inflexibility in managing worker fatigue. The NEI requested, among other changes, that 10 CFR part 26, Subpart I, be amended to replace the MDO requirements in § 26.205(d) with a performance-based objective, consisting of an average of 54 hours worked per week, averaged over a calendar quarter rather than over each shift cycle. The NEI also proposed changing the annual assessment in § 26.205(e)(1) to a quarterly assessment to provide a more frequent review of hours worked. The NEI proposed to eliminate the MDO requirements addressed at § 26.205(d)(3) through § 26.205(d)(6), while the work hour limits and break requirements (§ 26.205(d)(1)(i), § 26.205(d)(1)(ii), § 26.205(d)(1)(iii), § 26.205(d)(2)(i), and § 26.205(d)(2)(ii)), would remain unchanged and apply during on-line and outage periods.

Separate from PRM–26–5, on September 23, 2010, the NEI submitted a request for enforcement discretion regarding the MDO provisions of 10 CFR part 26 (ML102710208). The request reiterates the NEI's opinion that the regulations that govern fatigue management impede "many safety-beneficial practices at plant sites, adversely [impact] the quality of life of covered workers, and [result] in conflicts between rule requirements and represented bargaining unit agreements." The letter requests that the NRC "exercise enforcement discretion from the [MDO] provisions of the rule" until the final disposition of PRM–26–5.

The NRC held three public meetings (November 18, 2010, January 6, 2011, and January 25, 2011), during which the staff and stakeholders discussed alternatives to the MDO requirements. Although some of the stakeholders were comfortable with the MDO requirements, most focused their discussion on the unintended consequences, which they claim have diminished the safety benefits of the rule, along with the need for an alternative that is simpler and would provide greater scheduling flexibility. The staff's goal was to develop an alternative approach that was responsive to the needs of stakeholders, would maintain clear and enforceable requirements, and would ensure that the effects of cumulative fatigue are appropriately managed by licensees.

Discussion

Cumulative fatigue is caused by consecutive days of restricted or poor quality sleep caused by such things as shift-work, extended work days, and extended work weeks. Currently, Subpart I requires licensees to manage cumulative fatigue primarily by providing workers with a minimum number of days off over the course of a period not to exceed 6 weeks. The distribution of the days off during the 6-week period act to either prevent or mitigate fatigue. An alternative method for managing cumulative fatigue is to establish a requirement to limit actual hours worked. A limit on actual hours worked, when applied to schedules that require regular shift coverage, limits the number of work hours that can contribute to cumulative fatigue and provides indirect assurance of periodic days off for recovery rest. A schedule resulting in a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks, is such a schedule. In general, most individuals that work their normal shift duration and receive only the minimum number of days off required under the current MDO requirements could average up to 54 hours per week. However, the NEI has indicated that implementation of the MDO requirements has reduced licensee scheduling flexibility and imposed a substantial administrative burden. By comparison, limiting work hours to an average of not more than 54 hours per week by using a rolling window of up to 6 weeks limits the number of consecutive weeks of extended work hours that an individual can work by using a comparable but simpler and more flexible requirement. In addition, this alternative eliminates the burden of tracking the number of days off that an individual receives in each shift cycle.

In summary, the maximum hours that can be worked under the alternative approach is comparable to the maximum hours worked under the current 10 CFR part 26 MDO requirements, except that the alternative approach provides for greater simplicity and flexibility. This alternative is only applicable to § 26.205(d)(3) and covered workers described in § 26.4(a). Neither the NEI's PRM–26–5 nor its enforcement discretion request offered any comparably effective alternatives for § 26.205(d)(4), § 26.205(d)(5), and § 26.205(d)(6), nor were any identified during the public meetings; therefore, the staff is taking no action in regard to those regulations.

The staff determined that replacing the current MDO requirements and requiring all licensees to adopt this interim alternative approach has the potential for introducing adverse consequences if those licensees satisfied with MDO requirements were forced to change. As a result, the interim enforcement policy would allow licensees to choose whether or not to implement this alternative approach. Licensees who properly implement this alternative approach will receive enforcement discretion for failing to meet the requirements of 10 CFR 26.205(d)(3).

Although the rolling schedule required under the alternative approach limits the number of consecutive extended work weeks and thereby limits the potential for cumulative fatigue, there are unusual potential circumstances where the average can be met and the schedule may be fatiguing; however, the industry has stated that these unusual schedules are improbable. Such schedules include having only one in every nine days off or consistently working the maximum allowable hours, which would likely result in cumulative fatigue. Nevertheless, the staff believes that this alternative approach, together with other aspects of the rule that will remain unchanged, will provide reasonable assurance that licensees manage cumulative fatigue consistent with the protection of public health, safety, and security. The staff will engage licensees during regularly scheduled public meetings in the coming months to identify problems and lessons learned from implementation of the alternative approach.

Licensees must inform the NRC of their intent to adopt the alternative approach, and must comply with all requirements of Subpart I, as applicable. The interim policy will remain in place until the NRC publishes a new final rule associated with the MDO requirements in 10 CFR part 26, subpart I.

The NRC is not requesting public comment on this alternative approach at this time; instead, the NRC will seek public comment on the effectiveness of this approach during the comment period for a proposed rule associated with the MDO requirements in 10 CFR part 26, subpart I.

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150–0136.

Public Protection Notification

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

Congressional Review Act

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

Accordingly, the NRC Enforcement Policy is revised to read as follows:

NRC Enforcement Policy

* * * * *

9.2 Enforcement Discretion for the Minimum Days Off Requirements of § 26.205(d)(3)

This section sets forth the interim policy that the NRC will follow to exercise enforcement discretion for licensees who pursue the alternative approach to the minimum days off (MDO) requirements of § 26.205(d)(3). This alternative approach is consistent with the bases and objectives of 10 CFR part 26, specifically managing cumulative fatigue, and provides licensees improved simplicity and flexibility for work scheduling.

This interim policy is only applicable to licensees who inform the NRC of their intent to adopt the alternative approach. Licensees shall comply with all requirements of Subpart I, as applicable, unless explicitly replaced or amended in this interim policy. The alternative approach to the MDO requirements applies to the work hours of covered individuals [1] during normal (*e.g.,* non-outage/emergency) plant operations. This interim policy will remain in place until the implementation date of a revised final rule associated with the MDO requirements in 10 CFR part 26, subpart I.

A licensee who informs the NRC of its intent to transition to the alternative approach will receive enforcement discretion, and no enforcement action will be taken for the violation of § 26.205(d)(3). If at any time while the licensee is implementing this alternate approach it does not meet the requirements, as stated in this interim policy, the licensee may be in violation of § 26.205(d)(3) and subject to enforcement action. Once a licensee has transitioned to the alternate approach, it has the option to revert back to the requirement of § 26.205(d)(3); however, the licensee is only allowed one opportunity to do so.

A. Actions and Requirements for Transition

A licensee must inform the NRC of its intent to transition to the alternative approach. Notification shall be made via a letter to the respective Regional Administrator and shall identify the implementation date which will be set by the licensee. The hours worked prior to the implementation date, must meet the requirement of § 26.205(d)(3), or enforcement action may be taken. Once the NRC has been notified of the implementation date, the licensee can commence its transition to the alternate approach.

In order to receive continuous enforcement discretion once the alternate approach is implemented, each covered worker is limited to a weekly average of 54 hours worked, calculated using a rolling window of up to 6 weeks. This alternative is not applicable to unit outages or security system outages. Any instance of an individual's average weekly work hours exceeding the requirements for enforcement discretion may result in a violation of the MDO requirements. Typically, an instance of an isolated occurrence or occurrences with limited duration would generally be considered either a minor violation or a non-cited violation.

B. Required Actions for Transition Back to the MDO Requirement

At any time prior to the implementation date of a revised final rule associated with the MDO requirements in 10 CFR part 26, subpart I, "Managing Fatigue," the licensee has the option to transition back to the MDO requirements. However, the licensee has this option only once. The licensee must submit a written notification to the respective Regional Administrator stating that it is reverting back to compliance with the MDO requirements as specified under § 26.205(d)(3), and shall give the NRC advance notice of its transition date. There will be no enforcement action taken on any MDO violations that occurred while the licensee was implementing the alternate approach, unless the licensee failed to meet the requirements as stated in Section 9.2.A of this policy.

Dated at Rockville, Maryland, this 19th day of April 2011.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2011–9916 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

[1] The term "covered workers" refers to those individuals indentified in § 26.4(a) who are subject to the requirements in § 26.205.

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR part 101

[CBP Dec. 11–08]

Technical Amendment to List of CBP Preclearance Offices in Foreign Countries: Addition of Dublin, Ireland

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations to reflect that U.S. Customs and Border Protection (CBP) has added a preclearance station in Dublin, Ireland. CBP officers at preclearance stations conduct inspections and examinations to ensure compliance with U.S. customs, immigration, and agriculture laws, as well as other laws enforced by CBP at the U.S. border. Such inspections and examinations prior to arrival in the United States generally enable travelers to exit the domestic terminal or connect directly to a U.S. domestic flight without undergoing further CBP processing.

DATES: *Effective Date:* April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Kathleen Conway, Office of Field Operations, Preclearance Operations, (202) 344–1759.

SUPPLEMENTARY INFORMATION:

Background

CBP preclearance operations have been in existence since 1952. Preclearance facilities are established through the cooperative efforts of CBP, foreign government representatives, and the local facility authorities and are evidenced with signed preclearance agreements. Each facility is staffed with CBP officers responsible for conducting inspections and examinations in connection with preclearing passengers, crew, and their goods bound for the United States. Generally, travelers who are inspected at a preclearance facility are permitted to arrive at a U.S. domestic facility and exit the U.S. domestic terminal upon arrival or connect directly to a U.S. domestic flight without further CBP processing. Preclearance facilities primarily serve to facilitate low risk travelers, relieve passenger congestion at federal inspection facilities in the United States, and enhance security in the air environment through the screening and inspection of travelers prior to their arrival in the United States. In Fiscal Year 2010, over 14 million aircraft travelers were processed at preclearance locations. This figure represents more than 16 percent of all commercial aircraft travelers cleared by CBP in FY 2010.

The Agreement Between the Government of the United States of America and the Government of Ireland on Air Transport Preclearance was signed on November 17, 2008. Preclearance operations began in Dublin, Ireland on January 19, 2011. The Dublin preclearance station is open for use by commercial flights.

Section 101.5 of the CBP regulations (19 CFR 101.5) sets forth a list of CBP preclearance offices in foreign countries. This document amends this section to add Dublin, Ireland to the list of preclearance offices.

Inapplicability of Public Notice and Delayed Effective Date Requirements

This amendment reflects the addition of a new CBP preclearance office that was established through a signed agreement between the United States and the Government of Ireland. Accordingly, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary. For the same reason, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a).

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Foreign trade statistics, Imports, Organization and functions (Government agencies), Shipments, Vessels.

Amendments to Regulations

For the reasons set forth above, Part 101 of the Code of Federal Regulations (19 CFR part 101), is amended as set forth below.

PART 101—GENERAL PROVISIONS

■ 1. The general authority citation for part 101 and the specific authority citation for section 101.5 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * *

Section 101.5 also issued under 19 U.S.C. 1629.

* * * * *

■ 2. Revise § 101.5 to read as follows:

§ 101.5 CBP preclearance offices in foreign countries.

Listed below are the preclearance offices in foreign countries where CBP officers are located. A Director, Preclearance, located in the Office of Field Operations at CBP Headquarters, is the responsible CBP officer exercising supervisory control over all preclearance offices.

Country	CBP office
Aruba	Orangestad.
The Bahamas	Freeport.
	Nassau.
Bermuda	Kindley Field.
Canada	Calgary, Alberta.
	Edmonton, Alberta.
	Halifax, Nova Scotia.
	Montreal, Quebec.
	Ottawa, Ontario.
	Toronto, Ontario.
	Vancouver, British Columbia.
	Winnipeg, Manitoba.
Ireland	Dublin.
	Shannon.

Dated: February 11, 2011.

Alan D. Bersin,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2011–9883 Filed 4–22–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2006–N–0045] (Formerly Docket No. 2006N–0109)

Medical Devices; Reclassification of the Topical Oxygen Chamber for Extremities

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is reclassifying the topical oxygen chamber for extremities (TOCE) from class III to class II. This device is intended to surround a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers, such as bedsores. This reclassification is on the Secretary of Health and Human Services's own initiative based on new information. This action is being taken under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) as amended by the Medical Device Amendments of 1976 (the 1976 Amendments), the Safe Medical Devices Act of 1990 (the SMDA), and the Food and Drug Administration Modernization Act of 1997 (FDAMA). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities," which will serve as the special control for this device.

DATES: This rule is effective May 25, 2011.

FOR FURTHER INFORMATION CONTACT: Charles N. Durfor, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3555.

SUPPLEMENTARY INFORMATION:

I. Background

The FD&C Act (21 U.S.C. 301 *et seq.*), as amended by the 1976 Amendments (Pub. L. 94–295), the SMDA (Pub. L. 101–629), and the FDAMA (Pub. L. 105–115), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the FD&C Act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 Amendments), generally referred to as preamendments devices, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the FD&C Act (21 U.S.C. 360c(f)) into class III without any FDA rulemaking process. Postamendment devices remain in class III and require premarket approval, unless the device is reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act (21 U.S.C. 360c(i)), to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 of the regulations (21 CFR part 807).

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

Section 513(e) of the FD&C Act (21 U.S.C. 360c(e)) governs reclassification of classified preamendments devices. This section provides that FDA may, by rulemaking, reclassify a device based upon "new information." FDA can initiate a reclassification under section 513(e) of the FD&C Act or an interested person may petition FDA to reclassify a preamendments device. The term "new information," as used in section 513(e) of the FD&C Act, includes information developed as a result of a reevaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (*See, e.g., Holland Rantos* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (DC Cir. 1978); *Upjohn* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard,* 366 F.2d 177 (7th Cir. 1966)).

Reevaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of newly available regulatory authority (see *Bell* v. *Goddard,* supra, 366 F.2d at 181; *Ethicon, Inc.* v. *FDA,* 762 F. Supp. 382, 389–91 (D.D.C. 1991)), or in light of changes in "medical science." (See *Upjohn* v. *Finch,* supra, 422 F.2d at 951). Regardless of whether data before the agency are past or new data, the "new information" to support reclassification under section 513(e)(1) of the FD&C Act must be "valid scientific evidence," as defined in section 513(a)(3) of the FD&C Act (21 U.S.C. 360c(a)(3)) and 21 CFR 860.7(c)(2). (*See, e.g., General Medical Co.* v. *FDA,* 770 F.2d 214 (DC Cir. 1985); *Contact Lens Assoc.* v. *FDA,* 766 F.2d 592 (DC Cir.), cert. denied, 474 U.S. 1062 (1985)). FDA relies upon "valid scientific evidence" in the classification process to determine the level of regulation for devices. For the purpose of reclassification, the valid scientific evidence upon which the agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, *e.g.,* the contents of a pending PMA. (See section 520(c) of the FD&C Act (21 U.S.C. 360j(c)).

In accordance with section 513(e) of the FD&C Act and 21 CFR 860.130(b)(1), based on new information with respect to the device, FDA, on its own initiative, is reclassifying this device from class III to class II.

II. Regulatory History of the Device

As discussed in the proposed rule, the agency issued a final rule classifying this device into class III (53 FR 23856, June 24, 1988). In August 1997, in response to FDA's order for the submission of information on the TOCE, two manufacturers submitted 515(i) summaries of safety and effectiveness information to the agency for the TOCE. FDA referred the 515(i) submissions to the General and Plastic Surgery Devices Panel (GPS Panel) for their recommendation on the requested reclassification. At a public meeting on November 17, 1998, the GPS Panel recommended that the device be retained in class III.

Since the 1998 GPS Panel meeting, three studies (two prospective and one retrospective) reported safe use and adequate healing of wounds using the TOCE. In addition, FDA has evaluated more than 20 years of clinical experience with the device and the agency's Medical Device Reports, and has found sufficient information to determine the risks to health associated with the use of this device and develop appropriate special controls.

As a result, in the **Federal Register** of April 6, 2006 (71 FR 17390), FDA proposed to reclassify the TOCE device from class III to class II. The device is intended to surround a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers such as bedsores. Elsewhere in the **Federal Register** of April 6, 2006 (71 FR 17476), FDA announced the availability of the draft guidance document entitled "Class II Special Controls Draft Guidance Document: Topical Oxygen Chamber for Extremities," which FDA intended to serve as the special control for this device type following the effective date of the final reclassification rule.

Interested persons were invited to comment until July 5, 2006, on the proposed regulation and special controls draft guidance document.

III. Analysis of Comments and FDA's Response

FDA received 11 comments on the proposed rule. The comments received discussed academic literature, clinical experiences, and patient outcomes that support the proposed reclassification's determinations of the safety and effectiveness of the TOCE device. The comments did not recommend any changes to the proposed regulation.

IV. Summary of Final Rule

Based on the information discussed in the preamble to the proposed rule, the comments on the proposed rule, a review of the Manufacturer and User Facility Device Experience (MAUDE) database, and a review of current scientific literature, FDA concludes that special controls, in conjunction with general controls, will provide reasonable assurance of the safety and effectiveness of TOCE. The agency is, therefore, reclassifying TOCE from class III (premarket approval) into class II (special controls) and issuing a final rule that revises 21 CFR 878.5650. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities," which will serve as the special control for this device. Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for a TOCE will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

Section 510(m) of the FD&C Act (21 U.S.C. 360(m)) provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the TOCE and, therefore, this device type is not exempt from premarket notification requirements.

V. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this reclassification 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.

VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule reclassifying this device from class III to class II will relieve all manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the FD&C Act, it will impose no significant economic impact on any small entities, and it may permit small potential competitors to enter the marketplace by lowering their costs, and the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

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 final rule to result in any 1-year expenditure that would meet or exceed this amount.

VII. Federalism

FDA has analyzed this final 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 law conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts certain State requirements "different from or in addition to" certain Federal requirements applicable to devices. (See section 521 of the FD&C Act (21 U.S.C. 360k); *Medtronic Inc.,* v. *Lohr,* 518 U.S. 470 (1996); *Riegel* v. *Medtronic Inc.,* 128 S. Ct. 999 (2008)). The special controls established by this final rule create "requirements" for specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. See *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–742 (9th Cir. 1997).

VIII. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520) is not required. FDA concludes that the special controls guidance document identified by this rule contains information collection provisions that are subject to review and clearance by OMB under the PRA.

Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice announcing the availability of the guidance document entitled, "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities." The notice contains an analysis of the paperwork burden for the guidance.

List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Section 878.5650 is revised to read as follows:

§ 878.5650 Topical oxygen chamber for extremities.

(a) *Identification.* A topical oxygen chamber for extremities is a device that is intended to surround a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers such as bedsores.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's "Class II Special Controls Guidance: Topical Oxygen Chamber for Extremities." See § 878.1(e) for the availability of this guidance document.

Dated: April 19, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–9899 Filed 4–22–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0008]

32 CFR Part 321

Privacy Act of 1974; Implementation

AGENCY: Defense Security Service, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: The Defense Security Service is deleting an exemption rule for V5–05 entitled "Joint Personnel Adjudication System (JPAS)" in its entirety. The system has been transferred to the Office of the Secretary of Defense.

This direct final rule makes nonsubstantive changes to the Defense

Security Service Privacy Program rules. These changes will allow the Department to transfer this system to another organization within the Department. This will improve the efficiency and effectiveness of DoD's program by preserving the exempt status of the records when the purposes underlying the exemption are valid and necessary to protect the contents of the records.

This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on July 5, 2011 unless comments are received that would result in a contrary determination. Comments will be accepted on or before June 24, 2011.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, Room 3C843, 1160 Defense Pentagon, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Mr. Leslie Blake at (703) 325–9450.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves nonsubstantive changes dealing with DoD's management of its Privacy Progams. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive orders.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

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

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

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

It has been determined that Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism"

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 321

Privacy.

Accordingly, 32 CFR 321 is amended as follows:

PART 321—DEFENSE SECURITY SERVICE PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR part 321 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. In § 321.13, remove and reserve paragraph (h) to read as follows:

§ 321.13 Exemptions.

* * * * *

(h) [Reserved].

Dated: April 8, 2011.

Patricia Topping,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9747 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0009]

32 CFR Part 323

Privacy Act of 1974; Implementation

AGENCY: Defense Logistics Agency, DoD.

ACTION: Direct final rule with request for comments.

SUMMARY: The Department of Defense is updating the Defense Logistics Agency Privacy Act Program Rules, by adding the exemption rules (j)(2), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7) for S510.30, Freedom of Information Act/Privacy Act Requests and Administrative Appeal Records to accurately describe the basis for exempting the records. The S510.30 system of records notice was printed on January 22, 2009 in the **Federal Register**.

This direct final rule makes nonsubstantive changes to the Defense Logistics Agency Privacy Program rules. These changes will allow the Department to exempt records from certain portions of the Privacy Act. This will improve the efficiency and effectiveness of DoD's program by preserving the exempt status of the

records when the purposes underlying the exemption are valid and necessary to protect the contents of the records.

This rule is being published as a direct final rule as the Department of Defense does not expect to receive any adverse comments, and so a proposed rule is unnecessary.

DATES: The rule will be effective on July 5, 2011 unless comments are received that would result in a contrary determination. Comments will be accepted on or before June 24, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler at (703) 767–5045.

SUPPLEMENTARY INFORMATION:

Direct Final Rule and Significant Adverse Comments

DoD has determined this rulemaking meets the criteria for a direct final rule because it involves nonsubstantive changes dealing with DoD's management of its Privacy Progams. DoD expects no opposition to the changes and no significant adverse comments. However, if DoD receives a significant adverse comment, the Department will withdraw this direct final rule by publishing a notice in the Federal Register. A significant adverse comment is one that explains: (1) Why the direct final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, DoD will consider whether it warrants a substantive response in a notice and comment process.

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive orders.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

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

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

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

It has been determined that Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism"

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do 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.

List of Subjects in 32 CFR Part 323

Privacy.

Accordingly, 32 CFR part 323 is amended as follows:

PART 323—DEFENSE LOGISTICS AGENCY PRIVACY PROGRAM

■ 1. The authority citation for 32 CFR part 323 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

■ 2. In Appendix H to part 323, add paragraph (g) to read as follows:

Appendix H to Part 323—DLA Exemption Rules

* * * * *

g. ID: S510.30

1. *System name:* Freedom of Information Act/Privacy Act Requests and Administrative Appeal Records.

2. *Exemption:* During the processing of a Freedom of Information Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those "other" systems of records are entered into this system, the Defense Logistics Agency claims the same exemptions for the records from those "other" systems that are entered into this system, as claimed for the original primary system of which they are a part.

3. *Authority:* 5 U.S.C. 552a(j)(2), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

4. *Reasons:* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

Dated: April 8, 2011.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9748 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0196]

RIN 1625–AA00

Safety Zone; Bay Ferry II Maritime Security Exercise; San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the San Francisco Bay in support of the Bay Ferry II Maritime Security Exercise, a multi-agency exercise that tests the proficiency of teams called upon in real

life emergency situations onboard ferries or other vessels in the San Francisco Bay. The temporary safety zone is necessary to provide for the safety of the public and those participating in the exercise, many of whom will be traveling at high speeds while interfacing with law enforcement responders. Persons and vessels are prohibited from entering into, transiting through, or anchoring within the temporary safety zone unless authorized by the Captain of the Port or the Captain of the Port's designated representative.

DATES: This rule is effective from 5:50 a.m. until 12:10 p.m. on April 28, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0196 and are available online by going to *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2011–0196 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Lieutenant Junior Grade Allison A. Natcher, Waterways Management, U.S. Coast Guard Sector San Francisco, Coast Guard; telephone 415–399–7442, e-mail *D11-PF-MarineEvents@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it was impracticable since the logistical details of the operations were not presented to the Coast Guard in enough time to draft and publish an NPRM.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this rule would expose the public to the dangers posed when conducting a live practical exercise with a multi-agency underway response by United States Coast Guard, regional law enforcement, including SWAT and special tactics units, and fire department marine units.

Background and Purpose

The California Maritime Academy has requested that the Coast Guard enforce a temporary safety zone for operations during the Bay Ferry II Maritime Security Exercise from 5:50 a.m. until 12:10 p.m. on April 28, 2011. The Bay Ferry II Maritime Security Exercise is a multi-agency exercise that tests the proficiency of teams called upon in real life emergency situations onboard ferries or other vessels in the San Francisco Bay. The temporary safety zone will encompass General Anchorage 5 between the North and South Shipping Channels to the west and Southampton Shoal Channel to the east in San Francisco Bay. The temporary safety zone is needed to protect exercise participants and provide for the safety of the passenger ferry operators, first responders, their crews, and the public during the full scale security exercise from accidents or other causes of a similar nature.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone that will be enforced on April 28, 2011 from 5:50 a.m. until 12:10 p.m. The limits of the safety zone include the navigable waters of General Anchorage 5 between the North and South Shipping Channels to the west and Southampton Shoals Channel to the east in San Francisco Bay. The safety zone will be located at approximately 37°54′ N and 122°26′10″ W; 37°54′ N and 122°25′30″ W; 37°56′30″ N and 122°26′30″ W; and 37°56′30″ N and 122°25′50″ W (NAD 83).

The temporary safety zone is necessary to protect the public from exercise participants and provide for the safety of the United States Coast Guard, passenger ferry operators, first responders, and their crews during the full scale security exercise from accidents or other causes of a similar nature. Persons and vessels will be prohibited from entering into, transiting through, or anchoring within the temporary safety zone unless authorized by the Captain of the Port, or the Captain of the Port's designated representative.

The temporary safety zone will be enforced by Coast Guard patrol craft and San Francisco Harbor Police as authorized by the Captain of the Port. See 33 CFR 6.04–11, Assistance of Other Agencies.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will restrict access to the area, the effect of this rule will not be significant because: (1) The safety zone will be in effect for a limited period of time; (2) the Coast Guard will give advance notification via maritime advisories so mariners can adjust their plans accordingly, and (3) the size of the zone is at the minimum necessary to provide adequate protection for the United States Coast Guard, passenger ferry operators, first responders, their crews, and the public.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in General Anchorage 5 in the San Francisco Bay between 5:50 a.m. and 12:10 p.m. on April 28, 2011.

The temporary safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic can pass safely around the zone. Before the effective period, the Coast Guard will issue local notice to mariners (LNM) and broadcast notice to mariners (BNM) alerts via VHF–FM marine channel 16 before the safety zone is enforced.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a temporary safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–407 to read as follows:

§ 165.T11–407 Safety Zone; Bay Ferry II Maritime Security Exercise; San Francisco Bay, San Francisco, CA.

(a) *Location.* The limits of this safety zone include the navigable waters within General Anchorage 5 at positions: 37°54′ N and 122°26′10″ W; 37°54′ N and 122°25′30″ W; 37°56′30″ N and 122°26′30″ W; and 37°56′30″ N and 122°25′50″ W (NAD 83).

(b) *Enforcement Period.* This section will be enforced from 5:50 a.m. through 12:10 p.m. on April 28, 2011. If the operation concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of the safety zones and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to these sections: *designated representative* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and Federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) In accordance with 33 CFR Part 165 Subpart C, entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Francisco or the Captain of the Port's designated on-scene representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: April 11, 2011.

Cynthia L. Stowe,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. 2011–9891 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0201]

RIN 1625–AA00

Safety Zone; Sea World Fireworks; Mission Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the specified navigable waters of Mission Bay in support of the Sea World Fireworks. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective in the CFR from April 25, 2011 through 10:15 p.m. on December 31, 2011. This rule is effective with actual notice for the purposes of enforcement from 8:45 p.m. on April 2, 2011 through 10:15 p.m. on December 31, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0201 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0201 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Cody McLaughlin, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7233, e-mail *Cody.C.McLaughlin@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because standard notice procedures are impracticable. Immediate action is necessary to ensure the safety of vessels, spectators, participants, and others in the vicinity of the marine event on the dates and times this rule will be in effect.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Delaying the effective date would be impracticable, because immediate action is needed to ensure the public's safety.

Basis and Purpose

Sea World is sponsoring the Sea World Fireworks, which will include a fireworks presentation from a barge in Mission Bay. Fireworks displays are scheduled to occur on various dates between April 2 and December 31, 2011. This temporary safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone in support of Sea World Fireworks. It will be enforced from 8:45 p.m. to 10:15 p.m. on evenings with a fireworks show. Fireworks shows are currently scheduled for the following dates in 2011: April 2, 9, 16 and 23; May 28, 29 and 30; June 4 and 5, 11 and 12; June 16 through August 21; August 26, 27, and 28; September 3, 4, and 5; November 18; and December 9 and 31. If this schedule changes the Coast Guard will announce the changes via Broadcast Notice to Mariners no less than 24 hours before the event. The safety zone will cover a 600 foot radius surrounding the fireworks barge in approximate position 32°46′03″ N, 117°13′11″ W. The safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway. When this temporary safety zone is being enforced, persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the size and location of the temporary safety zone. Because of the location, commercial vessels will not be hindered by the safety zone. Recreational vessels will not be allowed to transit through the designated safety zone during the specified times, but the zone will only be enforced for approximately ninety minutes a night.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners and operators of vessels wishing to transit through or anchor in the impacted portion of Mission Bay on the nights with Sea World fireworks shows.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic can pass safely around the safety zone. Before the effective period, the Coast Guard will publish a local notice to mariners (LNM) and will issue broadcast notice to mariners (BNM) alerts via marine channel 16 VHF before the safety zone is enforced.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishment of a temporary safety zone. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–405 to read as follows:

§ 165.T11–405 Safety zone; Sea World Fireworks; Mission Bay, San Diego, CA.

(a) *Location.* The safety zone will include the area within 600 feet of the fireworks barge in approximate position 32°46′03″ N, 117°13′11″ W.

(b) *Enforcement Period.* This section will only be enforced from 8:45 p.m. to 10:15 p.m. on evenings with a fireworks show. Fireworks shows are currently scheduled for the following dates in 2011: April 2, 9, 16 and 23, May 28, 29 and 30, June 4 and 5, 11 and 12, nightly from June 16 through August 21, August 26, 27, and 28, September 3, 4, and 5, November 18, December 9 and 31. If this schedule changes the Coast Guard will announce that fact via Broadcast Notice to Mariners no less than 24 hours before the event. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to this section: *designated representative* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, local, state, or federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) In accordance with general regulations in 33 CFR Part 165, Subpart C, entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Sector San Diego Command Center. The Command Center may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: April 1, 2011.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2011–9893 Filed 4–22–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0882; FRL–9298–1]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. The revisions add the primary and secondary lead standards of 0.15 micrograms per cubic meter (μg/m³), related reference conditions, and update the list of appendices under "Documents Incorporated by Reference." Virginia's SIP revisions for the National Ambient Air Quality Standards (NAAQS) for lead are consistent with the Federal lead standards. This action is being taken under the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on May 25, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2010–0882. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

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

SUPPLEMENTARY INFORMATION:

I. Background

On January 26, 2011 (76 FR 4579), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of Virginia's SIP revision pertaining to the NAAQS for lead and related reference conditions. The CAA specifies that EPA must re-evaluate the appropriateness of the NAAQS every five years. As part of the process, EPA reviewed the latest research and determined that revised standards for lead were necessary to protect public health and welfare. EPA revised the level of the primary lead standard to a level of 0.15 μg/m³ to provide increased protection for children and other "at risk" populations. The secondary standard was also revised to a level of 0.15 μg/m³ to afford increased protection for the environment. EPA promulgated the more stringent primary and secondary NAAQS for lead on November 12, 2008 (73 FR 66964). One adverse comment was submitted on EPA's January 26, 2011 NPR (76 FR 4579). A summary of the comment and EPA's response is provided in section IV of this document.

II. Summary of SIP Revision

On September 27, 2010, the Commonwealth of Virginia submitted a formal revision to its SIP. The SIP revision consists of an amendment which includes the revised primary and secondary NAAQS for lead and related reference conditions. Virginia's revision incorporates the Federal lead standards into the Code of Virginia (9VAC5 Chapter 30). In addition, the list of appendices to 40 CFR Part 51 was updated under "Documents Incorporated by Reference" (9VAC5–20–21).

The following are the specific sections that are being modified or amended:

- 9VAC5–20–21: Documents Incorporated by Reference (modified)
- 9VAC5–30–15: Reference Conditions (modified)
- 9VAC5–30–80: Lead (amended)

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) That are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts * * *." The opinion concludes that "[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity." Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law. Other specific requirements and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. As noted below, EPA received one comment on the NPR and it was not germane.

IV. Summary of Public Comments and EPA Responses

Comment: A small business owner expressed concern about having additional costs imposed upon individuals who work on lead paint-containing homes built before 1978. The commenter stated that the business climate cannot support another regulation and expressed concern about being able to remain in business with the adoption of this rule.

Response: This comment is not relevant to this rulemaking action. The commenter discusses lead as it relates to lead-containing paints and the requirement for its removal in homes built prior to 1978. This action imposes no requirements with respect to the removal of lead-containing paint from homes built prior to 1978. This action is concerned with the adoption of the 2008 lead NAAQS by the Commonwealth of Virginia into the Commonwealth's SIP.

V. Final Action

EPA is approving Virginia's SIP revision for the lead NAAQS and related reference conditions, as well as the updated list of appendices to 40 CFR part 51 under documents incorporated by reference.

VI. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 24, 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 pertaining to Virginia's adoption of the revised lead standards of 0.15 $\mu g/m^3$ and related reference conditions 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, Lead, Reporting and recordkeeping requirements.

Dated: April 6, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5–30–15 and 5–30–80. The table in paragraph (e) is amended by adding an entry for "Documents Incorporated by Reference" after the ninth existing entry for "Documents Incorporated by Reference." The amendments read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* *	* *	*	*	*
9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]				
* *	* *	*	*	*
5–30–15	Reference conditions	6/24/09	4/25/11 [Insert page number where the document begins].	Revised section.
* *	* *	*	*	*
5–30–80	Lead	6/24/09	4/25/11 [Insert page number where the document begins].	Amended paragraphs A. and B.; added paragraph C.
* *	* *	*	*	*

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * *	*	*	*	*
Documents Incorporated by Reference (9 VAC 5–20–21, Sections E.1.a.(1)(q) and E.1.a.(1)(r)).	Statewide	9/27/10	4/25/11 [Insert page number where the document begins].	Revised sections.
* * *	*	*	*	*

* * * * *

[FR Doc. 2011–9697 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[SC–200906; FRL–9286–2]

Approval and Promulgation of Air Quality Implementation Plans; South Carolina; Update to Materials Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is publishing this action to provide the public with notice of the update to the South Carolina State Implementation Plan (SIP) compilation. In particular, materials submitted by South Carolina that are incorporated by reference (IBR) into the South Carolina SIP are being updated to reflect EPA-approved revisions to South Carolina's SIP that have occurred since the last update. In this action, EPA is also notifying the public of the correction of certain typographical errors.

DATES: This action is effective April 25, 2011.

ADDRESSES: SIP materials which are incorporated by reference into 40 Code of Federal Regulations (CFR) part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303; the Air and Radiation Docket and Information Center, EPA Headquarters Library, Infoterra Room (Room Number 3334), EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20460, and the National Archives and Records Administration. If you wish to obtain materials from a docket in the EPA Headquarters Library, please call the Office of Air and Radiation (OAR) Docket/Telephone number: (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

FOR FURTHER INFORMATION CONTACT: Ms. Nacosta C. Ward at the above Region 4 address or at (404) 562–9140. Ms. Ward may also be contacted via electronic mail at: *ward.nacosta@epa.gov*.

SUPPLEMENTARY INFORMATION: Each state has a SIP containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS). The SIP is extensive, containing such elements as air pollution control regulations, emission inventories, monitoring networks, attainment demonstrations, and enforcement mechanisms.

Each state must formally adopt the control measures and strategies in the SIP after the public has had an opportunity to comment on them and then submit the SIP to EPA. Once these control measures and strategies are approved by EPA, after notice and comment, they are incorporated into the federally approved SIP and are identified in part 52 "Approval and Promulgation of Implementation Plans," Title 40 of the CFR (40 CFR part 52). The full text of the state regulation approved by EPA is not reproduced in its entirety in 40 CFR part 52, but is "incorporated by reference." This means that EPA has approved a given state regulation with a specific effective date. The public is referred to the location of the full text version should they want to know which measures are contained in a given SIP. The information provided allows EPA and the public to monitor the extent to which a state implements a SIP to attain and maintain the NAAQS and to take enforcement action if necessary.

The SIP is a living document which the state can revise as necessary to address the unique air pollution problems in the state. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations as being part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference, into the CFR, materials submitted by states in their EPA-approved SIP revisions. These changes revised the format for the identification of the SIP in 40 CFR part 52, streamlined the mechanisms for announcing EPA approval of revisions to a SIP, and streamlined the mechanisms for EPA's updating of the IBR information contained for each SIP in 40 CFR part 52. The revised procedures also called for EPA to maintain "SIP Compilations" that contain the federally approved regulations and source specific permits submitted by each state agency. These SIP Compilations are contained in 3-ring binders and are updated primarily on an annual basis. Under the revised procedures, EPA is to periodically publish an informational document in the rules section of the **Federal Register** when updates are made to a SIP Compilation for a particular state. EPA's 1997 revised procedures were formally applied to South Carolina on July 1, 1997 (62 FR 35441).

This action represents EPA's publication of the South Carolina SIP Compilation update, appearing in 40 CFR part 52. In addition, notice is provided for the following typographical corrections to Tables (c), (d), and (e) of paragraph 52.2120, as described below:

1. Correcting typographical errors listed in paragraphs 52.2120(c), (d), and (e) removing all periods after the **Federal Register** notice citation.

2. Revising the date format listed in paragraphs 52.2120(c), (d), and (e). Revise the date format in the "state effective date," and "EPA approval date," columns for consistency. Dates are numerical month/day/year without additional zeros.

3. Restoring all missing entries in table (e).

4. In paragraph (c), the following revisions:

a. Capitalizing the word "subject" in the column header "Title/Subject;"

b. Underlining the words "*Federal*" and "*Register*" and capitalizing the letter "r" in the word "register" in the column entitled "**Federal Register** notice" for consistency within the paragraph and the **Federal Register** rulemakings.

c. Revising the format of paragraph (c) by removing the second entry of "Regulation No. 62.1 Definitions and General Requirements" and creating rows for all Parts contained in Regulation 62.5, Standard No. 5, Volatile Organic Compounds, "Section I—General Provisions" and "Section II—Provisions for Specific Sources."

d. Inserting the "State effective date," "EPA approval date," and "**Federal Register** notice" citation to read in the correct columns for Regulation No. 62.2 "Prohibition of Open Burning."

e. Correcting the "Title/Subject" under Regulation 62.5 for:

i. Standard No. 1, "Section II—Particulate Matter Emissions;"

ii. Standard No. 5, "Section II—Provisions for Specific Sources"

1. Part C—Surface Coating of Paper, Vinyl, and Fabric

2. Part D—Surface Coating of Metal Furniture, and Large Appliances

3. Part F—Surface Coating of Miscellaneous Metal Parts and Products;"

f. correcting the "State effective date" for:

i. Regulation 62.3 "Section II—Emission Reduction Requirements;"

ii. Regulation 62.5, Standard No. 1—Emissions from Fuel Burning Operations

1. "Section II—Particulate Matter Emissions"

2. "Section IV—Opacity Monitoring Requirements"

3. "Section V—Exemptions;"

iii. Regulation 62.5, Standard No. 4—Emissions from Process Industries

1. "Section I—General"

2. "Section II—Sulfuric Acid Manufacturing"

3. "Section III—Kraft Pulp and Paper Manufacturing Plants''

4. "Section IV—Portland Cement Manufacturing"

5. "Section VI—Hot Mix Asphalt Manufacturing"

6. "Section VII—Metal Refining;"

iv. Regulation No. 62.6, "Control of Fugitive Particulate Matter;"

g. Correcting the EPA approval date for Regulation 62.1, "Section V—Credible Evidence."

h. correcting the **Federal Register** notice citation for:

i. Regulation 62.1 "Section II—Permit Requirements;"

ii. Regulation 62.3 "Section I—Episode Criteria;"

iii. Regulation 62.3 "Section II—Emission Reduction Requirements;"

iv. Regulation 62.5, Standard No. 1—Emissions from Fuel Burning Operations

1. "Section I—Visible Emissions"

2. "Section II—Particulate Matter Emissions;"

v. Regulation 62.5, Standard No. 4—Emissions from Process Industries

1. "Section III—Kraft Pulp and Paper Manufacturing Plants"

2. "Section VI—Hot Mix Asphalt Manufacturing;"

vi. Regulation 62.5, Standard No. 2—Ambient Air Quality Standards;

vii. Regulation 62.5, Standard No. 4—Emissions From Process Industries

1. "Section V—Cotton Gins"

2. "Section VIII—Other Manufacturing"

3. "Section XI—Total Reduced Sulfur Emissions of Kraft Pulp Mills;"

viii. Regulation 62.5, Standard No. 5—Volatile Organic Compounds

1. "Section I—General Provisions"

2. "Section II—Part A—Surface Coating of Cans"

3. "Section II—Part E—Surface Coating of Magnet Wire"

4. "Section II—Part F—Surface Coating of Miscellaneous Metal Parts and Products"

5. "Section II—Part N—Solvent Metal Cleaning;"

ix. Regulation 62.5, Standard No. 6—Alternative Emission Limitation Options ("Bubble") "Section II—Conditions for Approval;"

x. Regulation No. 62.6, "Control of Fugitive Particulate Matter;"

xi. Regulation 62.99, "Nitrogen Oxides (NO_X) Budget Program Requirements for Stationary Sources Not in the Trading Program;"

i. Moving "Standard No. 5.2—Control of Oxides of Nitrogen (NO_X)" after "Standard No. 5—Volatile Organic Compounds" to restore correct numerical order.

j. Removing duplicate entries of Regulation 62.5, Standard No. 4 "Section V—Cotton Gins" and "Section VIII—Other Manufacturing."

EPA has determined that today's action falls under the "good cause" exemption in the section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation and section 553(d)(3) which allows an agency to make an action effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's administrative action simply codifies provisions which are already in effect as a matter of law in Federal and approved state programs and corrects typographical errors appearing the **Federal Register**. Under section 553 of the APA, an agency may find good cause where procedures are "impractical, unnecessary, or contrary to the public interest." Public comment for this administrative action is "unnecessary" and "contrary to the public interest" since the codification (and typographical corrections) only reflect existing law. Immediate notice of this action in the **Federal Register** benefits the public by providing the public notice of the updated South Carolina SIP Compilation and notice of typographical corrections to the South Carolina "Identification of Plan" portion of the **Federal Register**.

Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this administrative action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. This action 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. Because the Agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the APA or any other statute as indicated in the **SUPPLEMENTARY INFORMATION** section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA.

This administrative action also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

This administrative action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. This administrative action does not involve technical standards; 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. The administrative action also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). This administrative action does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). EPA's compliance with these Statutes and Executive Orders for the underlying rules are discussed in previous actions taken on the State's rules.

B. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA) (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. Today's administrative action simply codifies (and corrects) provisions which are already in effect as a matter of law in Federal and approved state programs. 5 U.S.C. 808(2). These announced actions were effective when EPA approved them through previous rulemaking actions. 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 this action in the **Federal Register**. This update to South Carolina's SIP Compilation and correction of typographical errors is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

EPA has also determined that the provisions of section 307(b)(1) of the Clean Air Act pertaining to petitions for judicial review are not applicable to this action. This action is simply an announcement of prior rulemakings that have previously undergone notice and comment rulemaking. Prior EPA rulemaking actions for each individual component of the South Carolina SIP compilation previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action.

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 7, 2011.

A. Stanley Meiburg,

Regional Administrator, Region 4.

40 CFR part 52, is amended as follows:

PART 52—[AMENDED]

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

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

Subpart PP—South Carolina

■ 2. Section 52.2120 paragraphs (b), (c), (d), and (e) are revised to read as follows:

§ 52.2120 Identification of plan.

* * * * *

(b) *Incorporation by reference.*

(1) Material listed in paragraphs (c) and (d) of this section with an EPA approval date prior to July 31, 2009, for South Carolina was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register**. Entries in paragraphs (c) and (d) of this section with EPA approval dates after July 31, 2009, for South Carolina will be incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 4 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules/regulations which have been approved as part of the State Implementation Plan as of the dates referenced in paragraph (b)(1).

(3) Copies of the materials incorporated by reference may be inspected at the Region 4 EPA Office at 61 Forsyth Street, SW., Atlanta, GA 30303 the Air and Radiation Docket and Information Center, EPA Headquarters Library, Infoterra Room (Room Number 3334), EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20460, and the National Archives and Records Administration. If you wish to obtain materials from a docket in the EPA Headquarters Library, please call the Office of Air and Radiation (OAR) Docket/Telephone number: (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(c) *EPA approved regulations.*

AIR POLLUTION CONTROL REGULATIONS FOR SOUTH CAROLINA

State citation	Title/subject	State effective date	EPA approval date	Federal Register notice
Regulation No. 62.1	Definitions and General Requirements.	6/26/1998	8/10/2004	69 FR 48395
Section I	Definitions	8/26/2005	12/7/2006	71 FR 70880
Section II	Permit Requirements	6/24/2005	6/2/2008	73 FR 31368
Section III	Emissions Inventory	2/25/2005	12/7/2006	71 FR 70880
Section IV	Source Tests	6/27/2003	8/10/2004	69 FR 48395
Section V	Credible Evidence	7/27/2001	11/13/2003	67 FR 68767
Regulation No. 62.2	Prohibition of Open Burning	6/25/2004	8/26/2005	70 FR 50195
Regulation No. 62.3	Air Pollution Episodes			
Section I	Episode Criteria	10/26/2001	5/7/2002	67 FR 30594
Section II	Emission Reduction Requirements	4/22/1988	10/3/1989	54 FR 40659
Regulation No. 62.4	Hazardous Air Pollution Conditions	12/20/1978	1/29/1980	45 FR 6572
Regulation No. 62.5	Air Pollution Control Standards			
Standard No. 1	Emissions from Fuel Burning Operations.			
Section I	Visible Emissions	10/26/2001	5/7/2002	67 FR 30594
Section II	Particulate Matter Emissions	4/22/1988	10/3/1989	54 FR 40659
Section III	Sulfur Dioxide Emissions	3/3/1983	10/29/1984	49 FR 43469
Section IV	Opacity Monitoring Requirements	4/22/1988	7/2/1990	55 FR 27226
Section V	Exemptions	5/24/1985	10/3/1989	54 FR 40659
Section VI	Periodic Testing	6/26/1998	8/10/2004	69 FR 48395
Section VII	[Reserved]			
Standard No. 2	Ambient Air Quality Standards	9/24/2004	8/22/2007	72 FR 46903
Standard No. 4	Emissions From Process Industries			
Section I	General	2/28/1986	2/17/1987	52 FR 4772
Section II	Sulfuric Acid Manufacturing	2/28/1986	2/17/1987	52 FR 4772
Section III	Kraft Pulp and Paper Manufacturing Plants.	4/22/1988	10/3/1989	54 FR 40659
Section IV	Portland Cement Manufacturing	2/28/1986	2/17/1987	52 FR 4772
Section V	Cotton Gins	10/26/2001	5/7/2002	67 FR 30594
Section VI	Hot Mix Asphalt Manufacturing	5/24/1985	10/3/1989	54 FR 40659
Section VII	Metal Refining	2/28/1986	2/17/1987	52 FR 4772
Section VIII	Other Manufacturing	10/26/2001	5/7/2002	67 FR 30594
Section IX	Visible Emissions	3/16/1989	7/2/1990	55 FR 27226
Section X	Non-Enclosed Operations	3/16/1989	7/2/1990	55 FR 27226
Section XI	Total Reduced Sulfur Emissions of Kraft Pulp Mills.	10/26/2001	5/7/2002	67 FR 30594

AIR POLLUTION CONTROL REGULATIONS FOR SOUTH CAROLINA—Continued

State citation	Title/subject	State effective date	EPA approval date	Federal Register notice
Section XII	Periodic Testing	6/26/1998	8/10/2004	69 FR 48395
Section XIII	[Reserved]			
Standard No. 5	Volatile Organic Compounds			
Section I	General Provisions	10/26/2001	5/7/2002	67 FR 30594
Part A	Definitions	10/26/2001	5/7/2002	67 FR 30594
Part B	General Applicability	10/26/2001	5/7/2002	67 FR 30594
Part C	Alternatives and Exceptions to Control Requirements.	10/26/2001	5/7/2002	67 FR 30594
Part D	Compliance Schedules	10/26/2001	5/7/2002	67 FR 30594
Part E	Volatile Organic Compound Compliance Testing.	6/26/1998	8/10/2004	69 FR 48395
Part F	Recordkeeping, Reporting, Monitoring	10/26/2001	5/7/2002	67 FR 30594
Part G	Equivalency Calculations	10/26/2001	5/7/2002	67 FR 30594
Section II	Provisions for Specific Sources			
Part A	Surface Coating of Cans	10/26/2001	5/7/2002	67 FR 30594
Part B	Surface Coating of Coils	9/18/1990	2/4/1992	57 FR 4158
Part C	Surface Coating of Paper, Vinyl, and Fabric.	9/18/1990	2/4/1992	57 FR 4158
Part D	Surface Coating of Metal Furniture and Large Appliances.	9/18/1990	2/4/1992	57 FR 4158
Part E	Surface Coating of Magnet Wire	10/26/2001	5/7/2002	67 FR 30594
Part F	Surface Coating of Miscellaneous Metal Parts and Products.	10/26/2001	5/7/2002	67 FR 30594
Part G	Surface Coating of Flat Wood Paneling.	5/5/1983	10/31/1983	48 FR 50078
Part H	Graphic Arts—Rotogravure Flexography.	5/5/1983	10/31/1983	48 FR 50078
Part I	[Reserved]			
Part J	[Reserved]			
Part K	[Reserved]			
Part L	[Reserved]			
Part M	[Reserved]			
Part N	Solvent Metal Cleaning	10/26/2001	5/7/2002	67 FR 30594
Part O	Petroleum Liquid Storage in Fixed Roof Tanks.	5/5/1983	10/31/1983	48 FR 50078
Part P	Petroleum Liquid Storage in External Floating Roof Tanks.	5/5/1983	10/31/1983	48 FR 50078
Part Q	Manufacture of Synthesized Pharmaceutical Products.	5/5/1983	10/31/1983	48 FR 50078
Part R	Manufacture of Pneumatic Rubber Tires.	5/5/1983	10/31/1983	48 FR 50078
Part S	Cutback Asphalt	6/13/1979	12/16/1981	46 FR 61268
Part T	Bulk Gasoline Terminals and Vapor Collection Systems.	5/5/1983	10/31/1983	48 FR 50078
Standard No. 5.2	Control of Oxides of Nitrogen (NO_X)	6/25/2004	8/26/2005	70 FR 50195
Standard No. 6	Alternative Emission Limitation Options (“Bubble”).	10/26/2001	5/7/2002	67 FR 30594
Section I	General			
Section II	Conditions for Approval			
Part A	Emissions of Total Suspended Particulate or Sulfur Dioxide.	10/26/2001	5/7/2002	67 FR 30594
Part B	Emissions of Volatile Organic Compounds.	10/26/2001	5/7/2002	67 FR 30594
Part C	Emissions of Nitrogen Dioxide, Carbon Monoxide, or Lead.	10/26/2001	5/7/2002	67 FR 30594
Part D	Designated Pollutants	10/26/2001	5/7/2002	67 FR 30594
Part E	De Minimis Cases	10/26/2001	5/7/2002	67 FR 30594
Section III	Enforceability			
Standard No. 7	Prevention of Significant Deterioration [1].	6/24/2005	6/2/2008	73 FR 31371
Section I	Definitions	6/24/2005	6/2/2008	73 FR 31368
Section II	Ambient Air Limits	6/24/2005	6/2/2008	73 FR 31368
Section III	Review of Major Plants and Major Modifications—Applicability and Exemptions.	6/24/2005	6/2/2008	73 FR 31368
Section IV	Review Requirements—Supplement C.	4/26/1996	8/20/1997	62 FR 44218
Regulation No. 62.6	Control of Fugitive Particulate Matter	5/24/1985	10/3/1989	54 FR 40659
Section I	Control of Fugitive Particulate Matter in Non-Attainment Areas.	5/24/1985	10/3/1989	54 FR 40659

AIR POLLUTION CONTROL REGULATIONS FOR SOUTH CAROLINA—Continued

State citation	Title/subject	State effective date	EPA approval date	**Federal Register** notice
Section II	Control of Fugitive Particulate Matter in Problem Areas.	5/24/1985	10/3/1989	54 FR 40659
Section III	Control of Fugitive Particulate Matter Statewide.	5/24/1985	10/3/1989	54 FR 40659
Section IV	Effective Date	5/24/1985	10/3/1989	54 FR 40659
Regulation No. 62.7	Good Engineering Practice Stack Height.	6/11/1986	5/28/1987	52 FR 19858
Section I	General	6/11/1986	5/28/1987	52 FR 19858
Section II	Applicability	6/11/1986	5/28/1987	52 FR 19858
Section III	Definitions and Conditions	6/11/1986	5/28/1987	52 FR 19858
Section IV	Public Participation	6/11/1986	5/28/1987	52 FR 19858
Regulation No. 62.96	Nitrogen Oxides (NO_X) and Sulfur Dioxide (SO_2) Budget Trading Program General Provisions.	10/24/2009	10/16/2009	74 FR 53167
Regulation No. 62.99	Nitrogen Oxides (NO_X) Budget Program Requirements for Stationary Sources Not in the Trading Program.	5/24/2002	6/28/2002	67 FR 43546

[1] This regulation (submitted on July 1, 2005) includes two portions of EPA's 2002 NSR Reform Rules that were vacated by the DC Circuit Court—Pollution Control Projects (PCPs) and clean units. As a result, EPA is disapproving all rules and/or rule sections in the South Carolina PSD rules referencing clean units or PCPs. Specifically, the following South Carolina rules are being disapproved: (a)(2)(iv)(e); (a)(2)(iv)(f) (second sentence only); (a)(2)(vi); (b)(12); (b)(30)(iii)(h); (b)(34)(iii)(b); (b)(34)(vi)(d); (b)(35); (r)(6) (only the reference to the term "clean unit" is being disapproved. The remainder of this regulatory provision is being approved); (r)(7) (only the reference to the term "clean unit" is being disapproved. The remainder of this regulatory provision is being approved); (x); (y) and (z).

(d) *EPA-approved State Source specific requirements.*

EPA-APPROVED SOUTH CAROLINA SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit No.	State effective date	EPA approval date	Comments
Transcontinental Gas Pipeline Corporation Station 140.	2060–0179–CD	4/27/2004	4/23/2009, 74 FR 18471	This permit is incorporated in fulfillment of the NO_X SIP Call Phase II requirements for South Carolina.

(e) *EPA-approved South Carolina non-regulatory provisions.*

Provision	State effective date	EPA approval date	Explanation
Cherokee County Ozone Attainment Demonstration and Ten-year Maintenance Plan	6/26/1998	12/18/1998, 63 FR 70022	
Cherokee County Ozone Ten Year Maintenance Plan	1/31/2002	4/26/2002, 67 FR 20647	
Transportation Conformity	10/24/2003	1/29/2004, 69 FR 4245	
Attainment Demonstration for the Appalachian, Catawba, Pee Dee, Waccamaw, Santee Lynches, Berkeley-Charleston-Dorchester, Low Country, Lower Savannah, Central Midlands, and Upper Savannah Early Action Compact Areas	12/29/2004	8/26/2005, 70 FR 50195	
South Carolina Transportation Conformity Air Quality Implementation Plan	11/28/2008	7/28/2009, 74 FR 37168	
Cherokee County 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard	12/13/2007	7/31/2009, 74 FR 26099	

[FR Doc. 2011–9689 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2010–0840(a); FRL–9298–9]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Florida; Jefferson County, KY; Forsyth, Mecklenburg, and Buncombe Counties, NC; and SC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is notifying the public that it has received negative declarations for Other Solid Waste Incinerator (OSWI) units from the State of Florida; Large Municipal Waste Combustor (LMWC), Small Municipal Waste Combustor (SMWC), and OSWI units from Jefferson County, Kentucky; LMWC, SMWC, and OSWI units from Forsyth County, North Carolina; LMWC, SMWC, and OSWI units from Mecklenburg County, North Carolina; LMWC, SMWC, Hospital/Medical/Infectious Waste Incinerator (HMIWI), and OSWI units from Buncombe County, North Carolina; and LMWC and HMIWI units from the State of South Carolina. These negative declarations certify that LMWC, SMWC, HMIWI, and OSWI units, as indicated above, subject to the requirements of Sections 111(d) and 129 of the Clean Air Act (CAA), do not exist in areas covered by the following air pollution control programs: Florida Department of Environmental Protection; Louisville, Kentucky, Air Pollution Control District; Forsyth County Environmental Affairs Department; Mecklenburg County Land Use and Environmental Services Agency; Western North Carolina Regional Air Quality Agency; and South Carolina Department of Health and Environmental Control.

DATES: This direct final rule is effective June 24, 2011 without further notice, unless EPA receives adverse comment by *May 25, 2011.* If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2010–0840 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: garver.daniel@epa.gov.*
3. *Fax:* (404) 562–9095.
4. *Mail:* EPA–R04 OAR–2010–0840, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303.
5. *Hand Delivery or Courier:* Mr. Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID Number EPA–R04–OAR–2010–0840. 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 electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring 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 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Sections 111(d) and 129 of the CAA require submittal of plans to control certain pollutants (designated pollutants) at existing solid waste combustion facilities (designated facilities) whenever standards of performance have been established under section 111(d) for new sources of the same type, and EPA has established emission guidelines for such existing sources. A designated pollutant is any pollutant for which no air quality criteria have been issued, and which is not included on a list published under section 108(a) or section 112(b)(1)(A) of the CAA, but emissions of which are subject to a standard of performance for new stationary sources.

Standards of performance for new LMWC units and emission guidelines for all existing LMWC units (designated facilities) constructed on or before September 20, 1994, have been established by EPA. The emission guidelines were promulgated on December 19, 1995 (60 FR 65415), and amended most recently on May 10, 2006 (71 FR 27324). The emission guidelines are codified at 40 CFR part 60, subpart Cb.

Standards of performance for new SMWC units and emission guidelines for all existing SMWC units (designated facilities) constructed on or before August 30, 1999, have been established by EPA. The emission guidelines were promulgated on December 6, 2000 (65 FR 76384). The emission guidelines are codified at 40 CFR part 60, subpart BBBB.

Standards of performance for new HMIWI units and emission guidelines for all existing HMIWI units (designated facilities) constructed on or before June 20, 1996, have been established by EPA. The emission guidelines were promulgated on September 15, 1997 (62 FR 48348), and amended most recently on October 6, 2009 (74 FR 51366). The emission guidelines are codified at 40 CFR part 60, subpart Ce.

Standards of performance for new OSWI units and emission guidelines for all existing OSWI units (designated facilities) constructed on or before December 9, 2004, have been established by EPA. The emission guidelines were promulgated on December 16, 2005 (70 FR 74870), and amended most recently on January 22, 2007 (72 FR 2620). The emission guidelines are codified at 40 CFR part 60, subpart FFFF.

Federal regulations found in subpart B of 40 CFR part 60 establish procedures to be followed and requirements to be met in the development and submission of state plans for controlling designated pollutants at designated facilities. Federal regulations found in subpart A of 40 CFR part 62 provide the procedural framework for the submission of these plans. When designated facilities are located under the jurisdiction of a state, or local agency, the state or local agency must then develop and submit a plan for their respective jurisdiction for the control of the designated pollutants. However, the federal regulations found at 40 CFR 62.06 provide that if there are no existing sources of the designated pollutants within the state or local agency jurisdiction, the state or local agency may submit a letter of certification to that effect, or negative declaration, in lieu of a plan. The negative declaration exempts the state or local agency from the requirements to submit a plan for that designated pollutant.

II. Final Action

EPA has received several negative declaration letters for Sections 111(d) and 129 source categories from state and local air pollution agencies. The Florida Department of Environmental Protection has determined that there are no existing OSWI units in its jurisdiction. The Louisville, Kentucky, Air Pollution Control District has determined that there are no existing LMWC, SMWC or OSWI units within its jurisdiction, Jefferson County, Kentucky. The South Carolina Department of Health and Environmental Control has determined that there are no existing LMWC or HMIWI units within its jurisdiction. The Forsyth County Environmental Affairs Department has determined that there are no existing LMWC, SMWC or OSWI units within its jurisdiction, Forsyth County, North Carolina. The Mecklenburg County Land Use and Environmental Services Agency has determined that there are no existing LMWC, SMWC or OSWI units within its jurisdiction, Mecklenburg County, North Carolina. The Western North Carolina Regional Air Quality Agency has determined that there are no existing LMWC, SMWC, HMIWI or OSWI units within its jurisdiction, Buncombe County, North Carolina. Pursuant to 40 CFR part 60, EPA is providing the public with notice of these negative declarations. Notice of these negative declarations will appear at 40 CFR part 62.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a 111(d)/129 plan 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 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the 111(d)/129 plan 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 24, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 62

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

Dated: January 13, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart K—Florida

■ 2. Add a new undesignated center heading to subpart K and a new § 62.2400 to read as follows:

Air Emissions From Existing Other Solid Waste Incinerators (OSWI)—Section 111(d)/129 Plan

§ 62.2400 Identification of plan—negative declaration.

Letter from Florida Department of Environmental Protection submitted on January 18, 2007, certifying that there are no Other Solid Waste Incinerator units subject to 40 CFR part 60, subpart FFFF in its jurisdiction.

Subpart S—Kentucky

■ 3. Section 62.4370 is amended by designating the existing text as paragraph (a) and adding by paragraph (b) to read as follows:

§ 62.4370 Identification of plan—negative declaration.

* * * * *

(b) Letter from Louisville, Kentucky, Air Pollution Control District submitted on February 11, 2010, certifying that there are no Large Municipal Waste Combustor units subject to 40 CFR part 60, subpart Cb in its jurisdiction.

■ 4. Section 62.4371 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

§ 62.4371 Identification of plan—negative declaration.

* * * * *

(b) Letter from Louisville, Kentucky, Air Pollution Control District submitted on February 11, 2010, certifying that there are no Small Municipal Waste Combustion units subject to 40 CFR part 60, subpart BBBB in its jurisdiction.

■ 5. Add a new undesignated center heading to subpart S and a new § 62.4375 to read as follows:

Air Emissions From Existing Other Solid Waste Incinerators (OSWI)—Section 111(d)/129 Plan

§ 62.4375 Identification of plan—negative declaration.

Letter from Louisville, Kentucky, Air Pollution Control District submitted on February 11, 2010, certifying that there are no Other Solid Waste Incinerator units subject to 40 CFR part 60, subpart FFFF in its jurisdiction.

Subpart II—North Carolina

■ 6. Section 62.8356 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

§ 62.8356 Identification of plan—negative declaration.

* * * * *

(b) Letter from Western North Carolina Regional Air Quality Agency submitted on October 5, 2007, certifying that there are no Hospital/Medical/Infectious Waste Incinerator units subject to 40 CFR part 60, subpart Ce in its jurisdiction.

■ 7. Add a new undesignated center heading to subpart II and a new § 62.8357 to read as follows:

Air Emissions From Existing Large Municipal Waste Combustors (LMWC)—Section 111(d)/129 Plan

§ 62.8357 Identification of plan—negative declaration.

Letters from Forsyth County Environmental Affairs Department, Mecklenburg County Land Use and Environmental Services Agency, and Western North Carolina Regional Air Quality Agency submitted on February 17, 2010, August 19, 2009, and October 5, 2007, respectively, certifying that there are no Large Municipal Waste Combustor units subject to 40 CFR part 60, subpart Cb in their respective jurisdictions.

■ 8. Add a new undesignated center heading to subpart II and a new § 62.8359 to read as follows:

Air Emissions From Existing Small Municipal Waste Combustors (SMWC)—Section 111(d)/129 Plan

§ 62.8359 Identification of plan—negative declaration.

Letters from Forsyth County Environmental Affairs Department, Mecklenburg County Land Use and Environmental Services Agency, and Western North Carolina Regional Air Quality Agency submitted on February 17, 2010, January 22, 2003, and October 5, 2007, respectively, certifying that there are no Small Municipal Waste Combustor units subject to 40 CFR part 60, subpart BBBB in their respective jurisdictions.

■ 9. Add a new undesignated center heading to subpart II and a new § 62.8361 to read as follows:

Air Emissions From Existing Other Solid Waste Incinerators (OSWI)—Section 111(d)/129 Plan

§ 62.8361 Identification of plan—negative declaration.

Letters from Forsyth County Environmental Affairs Department, Mecklenburg County Land Use and Environmental Services Agency, and Western North Carolina Regional Air Quality Agency submitted on February 17, 2010, August 19, 2009, and October 5, 2007, respectively, certifying that there are no Other Solid Waste Incinerator units subject to 40 CFR part 60, subpart FFFF in their respective jurisdictions.

Subpart PP—South Carolina

■ 10. Revise § 62.10150 to read as follows:

§ 62.10150 Identification of plan—negative declaration.

Letter from South Carolina Department of Health and Environmental Control submitted on July 8, 2010, certifying that there are no Large Municipal Waste Combustor units subject to 40 CFR part 60, subpart Cb in its jurisdiction.

■ 11. Add a new undesignated center heading to subpart PP and a new § 62.10200 to read as follows:

Air Emissions From Existing Hospital/Medical/Infectious Waste Incinerators (HMIWI)—Section 111(d)/129 Plan

§ 62.10200 Identification of plan—negative declaration.

Letter from South Carolina Department of Health and Environmental Control submitted on December 14, 2009, certifying that there are no Hospital/Medical/Infectious Waste Incinerator units subject to 40 CFR part 60, subpart Ce in its jurisdiction.

[FR Doc. 2011–9844 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 98

[EPA–HQ–OAR–2009–0923; FRL–9299–1]

Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; Grant of reconsideration.

SUMMARY: On November 30, 2010 EPA promulgated Subpart W: Petroleum and Natural Gas Systems of the Greenhouse Gas Reporting Rule. As part of the provisions outlined in this rule, the EPA stated that the Agency would allow certain owners or operators to use best available monitoring methods (BAMM) in lieu of specified parameters outlined for calculating greenhouse gas emissions for the petroleum and natural gas systems source category of the greenhouse gas reporting rule. EPA is giving notice that the Agency has initiated the reconsideration process in response to requests for reconsideration of certain provisions in the regulations. First, EPA has been asked to reconsider the requirement to submit requests to use best available monitoring methods during the 2011 calendar year by April 30, 2011 and pursuant to its authority under CAA section 307(d)(7)(B) consequently is extending the deadline contained in those provisions until July 31, 2011. Second, EPA has also been asked to reconsider the time period during which owners and operators of certain specific sources could automatically use BAMM without having to request approval by the Administrator. As a result of this second request, pursuant to its authority under CAA section 307(d)(7)(B) EPA is also extending the date by which owners and operators of certain specific sources would not be required to request approval by the Administrator for the use of BAMM from June 30, 2011 until September 30, 2011.

DATES: This rule is effective on April 30, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number (202) 343–9236; fax (202) 343–2342; e-mail address: *GHGReportingRule@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background Information

The EPA published Subpart W: Petroleum and Natural Gas Systems of the Greenhouse Gas Reporting Rule on November 30, 2011, 40 CFR Part 98, Subpart W (75 FR 74458)(Subpart W). Included in the final rule were new provisions allowing owners or operators the option of using best available monitoring methods for specified parameters in 40 CFR 98.233. Subpart W provides that owners or operators wishing to use BAMM during 2011 for emissions sources listed in 40 CFR 98.234(f)(4)or 98.234(f)(5)(iv) must submit BAMM applications by April 30, 2011. In addition, subpart W provides that owners or operators with emissions sources listed in 40 CFR 98.234(f)(2) or 40 CFR 98.234(f)(3) have the option of using BAMM from January 1, 2011 to June 30, 2011 without submitting a request to the Administrator for approval to use BAMM; however to extend use of BAMM beyond June 30, 2011, those owners or operators must submit a request to the Administrator by April 30, 2011.

Following the publication of Subpart W in the **Federal Register**, several industry groups sought reconsideration of several provisions in the final rule, including the provisions requiring submittal of BAMM requests for use or extension of BAMM in calendar year 2011 by April 30, 2011, and the time period for which owners or operators of sources in 40 CFR 98.234(f)(2) or 40 CFR 98.234(f)(3) would not be required to submit a BAMM request to the Administrator for approval, i.e., January 1 through June 30, 2011.

By letter dated January 31, 2011, the American Petroleum Institute (API) stated that "[a]ggressive deadlines for BAMM are problematic for reporters who are attempting to monitor GHG emissions for the first time. In particular, the April 30, 2011 deadline for BAMM requests does not provide reporters sufficient time to identify the sources for which BAMM should be requested and gather the data that EPA requires be submitted with a BAMM request." API, along with the Gas Processors Association (GPA), Interstate Natural Gas Association of America (INGAA), Chesapeake Energy Corporation (CEC)/American Exploration & Production Council (AXPC), stated that they would not be able to complete an initial assessment of their facilities to determine whether they would need BAMM by the deadline of April 30, 2011. Further, a subset of these petitioners further noted that the time period for which owners and operators were granted the optional use of BAMM without being required to submit a request to the Administrator for approval was insufficient for them to make the necessary assessment of their facilities to determine compliance with the rule.

EPA believes that pursuant to CAA section 307(d)(7)(B) it is appropriate to extend the deadlines in 40 CFR 98.234(f)(5)(iii)(A), 98.234(f)(5)(iv)(A), 98.234(f)(6)(i), and 98.234(f)(7)(i) by three months, to allow owners and operators additional time to assess which of their facilities would need to take advantage of the BAMM provisions of Subpart W for calendar year 2011. EPA also believes that pursuant to CAA section 307(d)(7)(B) it is appropriate to extend the deadlines, by three months, by which owners and operators of emission sources listed in 40 CFR 98.234(f)(2) or 40 CFR 98.234(f)(3), would have the option to use BAMM without submitting a request for approval from the Administrator to allow additional time to asses applicability of the rule provisions to their facilities. EPA is taking no action at this time on other issues raised by petitioners in their respective Petitions for Reconsideration and reserves the right to further consider those issues at a later time.

Pursuant to Clean Air Act (CAA) section 307(d)(7)(B), EPA is extending the deadlines in 40 CFR 98.234(f)(5)(iii)(A), 98.234(f)(5)(iv)(A), 98.234(f)(6)(i), and 98.234(f)(7)(i) for three months, *i.e.,* until July 31, 2011.

Further, pursuant to CAA section 307(d)(7)(B) EPA is also extending the deadlines contained in 40 CFR 98.234(f)(2), 40 CFR 98.234(f)(3), 40 CFR 98.234(f)(5)(i), 40 CFR 98.234(f)(5)(ii), 40 CFR 98.234(f)(6), 40 CFR 98.234(f)(6)(ii)(D), 40 CFR 98.234(f)(6)(iii), 40 CFR 98.234(f)(7), and 40 CFR 98.234(f)(7)(iii) for three months, i.e., until September 30, 2011.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment. We are acting pursuant to CAA section 307(d)(7)(B) to extend these deadlines in part because both the affected universe of facilities subject to the rule and the substantive requirements associated with the BAMM provisions in the rule could change as a result of this reconsideration process. In addition, we are extending these provisions to allow owners and operators of affected facilities additional time to appropriately assess their facilities to determine if it will be necessary for them to apply for BAMM during calendar year 2011. Because we cannot predict the resulting outcome of the reconsideration process with respect to BAMM, we think a limited extension during the duration of the administrative reconsideration process is appropriate so that owners and operators of affected facilities would not incur additional costs associated with applying for BAMM in advance of our final decision on this issue. It would be impracticable to go through notice and comment rulemaking to extend an imminent deadline and it is also unnecessary because section 307(d)(7)(B) does not require notice and comment for a three-month extension pending reconsideration. Thus, notice and public procedure are impracticable and unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

II. Statutory and Executive Order Reviews

A. General Requirements

This action is not a "significant regulatory action," under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). In addition, because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute (See Section I. *Background Information* of this preamble) it is not subject to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not impose any enforceable duty or contain any unfunded mandates as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), or require prior consultation with State officials, as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues, as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Further, because the agency has made a "good cause" (See Section I. *Background Information* of this preamble) finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This action also does not have Tribal implications because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). 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. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the November 30, 2010 **Federal Register** document.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of April 30, 2011. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

III. How Can I Get Copies of This Document and Other Related Information?

This **Federal Register** notice is available in the docket for the final rule titled "Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems," published on November 30, 2010 at 98 FR 74458, under Docket ID No. EPA–HQ–OAR–2009–0923.

All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA's Docket Center, Docket ID No. EPA–HQ–OAR–2009–0923, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC 20004. This 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 Air Docket Center is (202) 566–1741.

In addition to being available in the docket, an electronic copy of this **Federal Register** notice is also available on the World Wide Web at *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html*.

List of Subjects in 40 CFR Part 98

Environmental Protection, Administrative practice and procedures, Air pollution control, Monitoring, Reporting and recordkeeping.

Dated: April 20, 2011.

Lisa P. Jackson,

Administrator.

For the reasons discussed in the preamble, the EPA amends 40 CFR parts 98 as follows:

PART 98—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 98.234 is amended as follows:

■ a. By revising paragraph (f)(2) introductory text.

■ b. By revising paragraph (f)(3) introductory text.

■ c. By revising paragraphs (f)(5)(i), (f)(5)(ii), (f)(5)(iii)(A), (f)(5)(iv)(A).

■ d. By revising paragraphs (f)(6) introductory text, (f)(6)(i), (f)(6)(ii)(D), (f)(6)(iii).

■ e. By revising paragraphs (f)(7) introductory text, (f)(7)(i), and (f)(7)(iii)

The revisions read as follows:

§ 98.234 Monitoring and QA/QC Requirements.

* * * * *

(f) * * *

(2) *Best available monitoring methods for well-related emissions.* During January 1, 2011 through September 30, 2011, owners and operators may use best available monitoring methods for any well-related data that cannot reasonably be measured according to the monitoring and QA/QC requirements of this subpart, and only where required measurements cannot be duplicated due to technical limitations after September 30, 2011. These well-related sources are:

* * * * *

(3) *Best available monitoring methods for specified activity data.* During January 1, 2011 through September 30, 2011, owners or operators may use best available monitoring methods for activity data as listed below that cannot reasonably be obtained according to the monitoring and QA/QC requirements of this subpart, specifically for events that generate data that can be collected only between January 1, 2011 and September 30, 2011 and cannot be duplicated after September 30, 2011. These sources are:

* * * * *

(5) * * *

(i) No request or approval by the Administrator is necessary to use best available monitoring methods between January 1, 2011 and September 30, 2011 for the sources specified in paragraph (f)(2) of this section.

(ii) No request or approval by the Administrator is necessary to use best available monitoring methods between January 1, 2011 and September 30, 2011 for sources specified in paragraph (f)(3) of this section.

(iii) * * *

(A) *Timing of Request.* The request to use best available monitoring methods for paragraph (f)(4) of this section must be submitted to EPA no later than July 31, 2011.

* * * * *

(iv) * * *

(A) *Timing of Request.* The request to use best available monitoring methods for sources not listed in paragraph (f)(2), (f)(3), and (f)(4) of this section must be submitted to EPA no later than July 31, 2011.

* * * * *

(6) *Requests for extension of the use of best available monitoring methods through December 31, 2011 for sources in paragraph (f)(2) of this section.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods described in paragraph (f)(2) of this section beyond September 30, 2011.

(i) *Timing of Request.* The extension request must be submitted to EPA no later than July 31, 2011.

* * * * *

(ii) * * *

(D) If the reason for the extension is that the owner or operator cannot collect data from a service provider or relevant organization in order for the owner or operator to meet requirements of this subpart for the 2011 calendar year, the owner or operator must demonstrate a good faith effort that it is not possible to obtain the necessary information, service or hardware which may include providing correspondence from specific service providers or other relevant entities to the owner or operator, whereby the service provider states that it is unable to provide the necessary data or services requested by the owner or operator that would enable the owner or operator to comply with subpart W reporting requirements by September 30, 2011.

* * * * *

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that it is not reasonably feasible to obtain the data necessary to meet the requirements of this subpart for the sources specified in paragraph (f)(2) of this section by September 30, 2011.

(7) *Requests for extension of the use of best available monitoring methods through December 31, 2011 for sources in paragraph (f)(3) of this section.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods described in paragraph (f)(3) of this section beyond September 30, 2011.

(i) *Timing of request.* The extension request must be submitted to EPA no later than July 31, 2011.

* * * * *

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that is not reasonably feasible to implement the data collection for the sources described in paragraph (f)(3) of this section for the methods required in this subpart by September 30, 2011.

* * * * *

[FR Doc. 2011–10026 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 76, No. 79
Monday, April 25, 2011

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0384; Directorate Identifier 2010–NM–058–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 737–700 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 certain Model 737–700 series airplanes. This proposed AD would require, for certain airplanes, replacing the seat track pivot link assemblies, seat track sections, and floor panels. For certain airplanes, this proposed AD would also require moving certain rows of passenger seats. For certain other airplanes, this proposed AD would require inspecting certain areas of the seat tracks for damage and corrective actions if necessary, and moving certain rows of passenger seats. This proposed AD results from reports that the aft seat leg fittings span the station (STA) 521.45 stay-out zone. We are proposing this AD to prevent failure of the seat attachment structure and possible injury to passengers during an emergency landing.

DATES: We must receive comments on this proposed AD by June 9, 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 Boeing Commercial Airplanes, *Attention:* Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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: Patrick Gillespie, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone 425–917–6429; fax 425–917–6590.

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–2011–0384; Directorate Identifier 2010–NM–058–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

We have received a report that the aft seat leg fittings span the station (STA) 521.45 stay-out zone. The STA 521.45 stay-out zone defines the flex area of the airplane while in flight and defines fatigue loading of the airplane structure. On some airplanes, the passenger seat leg shear plunger is installed across the seat track pivot joint at approximately STA 521. The existing passenger seat track and pivot link design was not intended to carry seat leg plunger point loads at this location. This condition, if not corrected, could result in failure of the seat attachment structure and possible injury to passengers during an emergency landing.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletins 737–25–1598, dated December 8, 2009; and 737–25–1599, dated January 20, 2010. Those special attention service bulletins describe procedures for doing a general visual inspection of the seat tracks in the area of STA 521.45 for damage, and corrective actions if necessary, and moving certain rows of seats. The corrective actions include modifying the seat tracks.

We have also reviewed Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009, which describes procedures for:

• Replacing floor panels with new floor panels between STA 500C and STA 540;

• Replacing seat track pivot link assemblies with new assemblies; and

• Replacing seat track sections between STA 500C + 9.25 and STA 520 with new seat track sections.

We have reviewed Boeing Special Attention Service Bulletin 737–25–1596, dated November 20, 2008, which describes procedures for, among other things, moving certain airplane seats to the correct location on the seat tracks.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the Proposed AD and a Service Bulletin."

Difference Between the Proposed AD and a Service Bulletin

Where Boeing Special Attention Service Bulletin 737–25–1596, dated November 20, 2008, specifies the accomplishment of Recaro Service Bulletin 4400–25DC052, this proposed AD would not require that action.

Costs of Compliance

We estimate that this proposed AD would affect 50 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

TABLE—ESTIMATED COSTS

Boeing Service Bulletin	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
737–53–1286	96	$85	Up to $28,258	Up to $36,418	50	Up to $1,820,900.
737–25–1596	4	85	None	340	12	4,080.
737–25–1598	3	85	None	255	1	255.
737–25–1599	3	85	None	255	14	3,570.

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.

You can find our regulatory evaluation and the estimated costs of compliance 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:

The Boeing Company: Docket No. FAA–2011–0384; Directorate Identifier 2010–NM–058–AD.

Comments Due Date

(a) We must receive comments by June 9, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 737–700 series airplanes, certificated in any category; as identified in the service bulletins specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009.

(2) Boeing Special Attention Service Bulletin 737–25–1598, dated December 8, 2009.

(3) Boeing Special Attention Service Bulletin 737–25–1599, dated January 20, 2010.

Subject

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

Unsafe Condition

(e) This AD results from reports that the aft seat leg fittings span the station (STA) 521.45 stay-out zone. The Federal Aviation Administration is issuing this AD to prevent failure of the seat attachment structure and possible injury to passengers during an emergency landing.

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.

Modifying Seat Track Structure

(g) For airplanes identified in Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009: Within 72 months after the effective date of this AD, replace, with new components, certain floor panels, seat track pivot link assemblies, and seat track sections with new components, and modify certain seat tracks, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009.

Moving Seat Rows After Modifying Seat Track Structure

(h) For airplanes identified in Boeing Special Attention Service Bulletin 737–25–1596, dated November 20, 2008: Move certain seat rows in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–25–1596, dated November 20, 2008, at the applicable time required in paragraph (h)(1) or (h)(2) of this AD.

(1) For airplanes identified in Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009: After accomplishing the requirements of paragraph (g) of this AD but within 72 months after the effective date of this AD.

(2) For airplanes not identified in Boeing Special Attention Service Bulletin 737–53–1286, Revision 1, dated December 14, 2009: Within 72 months after the effective date of this AD.

Moving Seat Rows and General Visual Inspection of Seat Tracks

(i) For airplanes identified in Boeing Special Attention Service Bulletin 737–25–1598, dated December 8, 2009: Within 72 months after the effective date of this AD, do a general visual inspection of certain areas of the seat tracks for damage, all applicable corrective actions, and move certain seat rows, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–25–1598, dated December 8, 2009. Do all applicable corrective actions before further flight.

(j) For airplanes identified in Boeing Special Attention Service Bulletin 737–25–1599, dated January 20, 2010: Within 72 months after the effective date of this AD, do a general visual inspection of certain areas of the seat tracks for damage, do all applicable corrective actions, and move certain seat rows, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–25–1599, dated January 20, 2010. Do all applicable corrective actions before further flight.

Alternative Methods of Compliance (AMOCs)

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

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

Related Information

(l) For more information about this AD, contact Patrick Gillespie, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone 425–917–6429; fax 425–917–6590; e-mail *patrick.gillespie@faa.gov.*

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

Issued in Renton, Washington, on April 15, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–9894 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0040; Directorate Identifier 2008–NM–203–AD]

RIN 2120–AA64

Airworthiness Directives; Sicma Aero Seat 88xx, 89xx, 90xx, 91xx, 92xx, 93xx, 95xx, and 96xx Series Passenger Seat Assemblies, Installed on Various Transport Category 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:

> Cracks have been found on seats [with] backrest links P/N (part number) 90–000200–104–1 and 90–000200–104–2. These cracks can significantly affect the structural integrity of seat backrests.

Failure of the backrest links could result in injury to an occupant during emergency landing conditions. 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 June 9, 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 Sicma Aero Seat, 7, Rue Lucien Coupet, 36100 ISSOUDUN, France; telephone 33 (0) 2 54 03 39 39; fax 33 (0) 2 54 03 39 00; e-mail: *customerservices@sicma.zodiac.com;* Internet *http://www.sicma.zodiac.com/en/.* 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: Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7161; fax (781) 238–7170.

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–2010–0040; Directorate Identifier 2008–NM–203–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 January 19, 2010 (75 FR 2826). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products specified above.

Since that NPRM was issued, we have determined that the series 91C3 seat was not included in that NPRM because it was originally included in the wrong service bulletin. Sicma Aero Seat issued revised service information that includes that seat model with the other seat models affected by that NPRM, as discussed in the comment responses that follow. You may obtain further information by examining the MCAI in the AD docket.

Comments

We have considered the following comments received on the earlier NPRM.

Request To Revise Service Bulletin Reference

Boeing requested that we update all references to Sicma Aero Seat Service Bulletin 90–25–013, Issue 3, dated December 19, 2001, to Issue 4, dated March 19, 2004, including Annex 1, Issue 2, dated March 19, 2004. The commenter justified the request by stating that seat model 91C3 (installed on Boeing Model 737 airplanes) was inadvertently excluded in Issue 3 of that service bulletin, and that Issue 4 of that service bulletin corrects the applicability to those seats installed that are affected. The commenter also requested that we revise the "Relevant Service Information" section of the NPRM to refer to Issue 4 of that service bulletin.

We agree to update the service information in the supplemental NPRM for the reason given. We have revised paragraphs (c), (f)(1) through (f)(3), (f)(5), and (h) of this supplemental NPRM to refer to Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004, including Annex 1, Issue 2, dated March 19, 2004. We also have added new paragraph (f)(6) to this supplemental NPRM to give credit for actions done according to Issue 3 of that service bulletin. We also have removed the specific reference to series 91C3 seats, in paragraph (c) of this supplemental NPRM, from the list of those series to which this supplemental NPRM does not apply, because this AD, as now proposed, does apply to series 91C3 seats. We have not changed the "Relevant Service Information" section of the NPRM because that section does not appear in this supplemental NPRM.

Request To Remove Boeing Model 777 Airplanes From Applicability Table 1

Boeing requested that we revise table 1 of the NPRM to remove Model 777 airplanes, because those airplanes, due to their certification, do not have the affected seat series installed.

We agree to revise table 1 of the supplemental NPRM, for the reason given.

Request To Identify Affected Seats by Main Component Number

Vallejo Investments, Inc. requested that we specify the affected seats by their main component part number rather than the part number of the subassembly. The commenter stated that it could better participate in the rulemaking process with this information.

We do not agree to provide the main component part numbers for the affected seats, because the seat assembly part numbers as listed are consistent with the Technical Standard Order (TSO) part number labels attached to each seat. We have not changed the supplemental NPRM in this regard.

Explanation of Changes Made to This Proposed AD

We have revised this supplemental NPRM to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

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 Change to Costs of Compliance

Since issuance of the NPRM, we have increased the labor rate used in the Costs of Compliance from $80 per work-hour to $85 per work-hour. The Costs of Compliance information, below, reflects this increase in the specified hourly labor rate.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 611 seats on 4 products of U.S. registry. We also estimate that it would take about 1 work-hour 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 $51,935, or $85 per seat.

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:

SICMA Aero Seat: Docket No. FAA–2010–0040; Directorate Identifier 2008–NM–203–AD.

Comments Due Date

(a) We must receive comments by June 9, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Sicma Aero Seat 88xx, 89xx, 90xx, 91xx, 92xx, 93xx, 95xx, and 96xx series passenger seat assemblies identified in Annex 1, Issue 2, dated March 19, 2004, of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004, that have backrest links having part numbers (P/Ns) 90–000200–104–1 and 90–000200–104–2; and that are installed on, but not limited to, the airplanes identified in table 1 of this AD, certificated in any category. This AD does not apply to Sicma Aero Seat series 9140, 9166, 9173, 9174, 9184, 9188, 9196, 91B7, 91B8, 91C0, 91C2, 91C4, 91C5, 9301, and 9501 passenger seat assemblies.

TABLE 1—CERTAIN AFFECTED AIRPLANE MODELS

Manufacturer	Model
Airbus	A300 Airplanes.
Airbus	A310, A318, A319, A320, A321, A330–200 and A330–300 Series Airplanes.
ATR–GIE Avions de Transport Régional	ATR42–200, –300, –320, and –500 Airplanes.
ATR–GIE Avions de Transport Régional	ATR72–101, –201, –102, –202, –211, –212, and –212A Airplanes.
The Boeing Company	727, 727C, 727–100, 727–100C, 727–200, and 727–200F Series Airplanes.
The Boeing Company	737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER Series Airplanes.
The Boeing Company	747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP Series Airplanes.
The Boeing Company	757–200, –200PF, –200CB, and –300 Series Airplanes.
The Boeing Company	767–200, –300, –300F, and –400ER Series Airplanes.
Bombardier, Inc	CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) Airplanes.
Bombardier, Inc	CL–600–2B19 (Regional Jet Series 100 and 440) Airplanes.
Bombardier, Inc	CL–600–2C10 (Regional Jet Series 700, 701, and 702) Airplanes.
Bombardier, Inc	CL–600–2D15 (Regional Jet Series 705) Airplanes.
Bombardier, Inc	CL–600–2D24 (Regional Jet Series 900) Airplanes.
Bombardier, Inc	DHC–8–100, DHC–8–200, DHC–8–300, and DHC–8–400 Airplanes.
Fokker Services B.V	F.27 Mark 050, 100, 200, 300, 400, 500, 600, and 700 Airplanes.
Fokker Services B.V	F.28 Mark 0070, 0100, 1000, 2000, 3000, and 4000 Airplanes.
The Boeing Company	DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8–51, DC–8–52, DC–8–53, DC–8–55, DC–8F–54, DC–8F–55, DC–8–61, DC–8–62, DC–8–63, DC–8–61F, DC–8–62F, DC–8–63F, DC–8–71, DC–8–72, DC–8–73, DC–8–71F, DC–8–72F, and DC–8–73F Airplanes.
The Boeing Company	DC–9–11, DC–9–12, DC–9–13, DC–9–14, DC–9–15, DC–9–15F, DC–9–21, DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–33F, DC–9–34, DC–9–34F, DC–9–32F (C–9A, C–9B), DC–9–41, DC–9–51, DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) Airplanes.
The Boeing Company	DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, and DC–10–40F Airplanes.
The Boeing Company	MD–11 and MD–11F Airplanes.

Note 1: This AD applies to Sicma Aero Seat passenger seat assemblies as installed on any airplane, regardless of whether the airplane has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance according to paragraph (g)(1) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Subject

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

Reason

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

Cracks have been found on seats [with] backrest links P/N (part number) 90–000200–104–1 and 90–000200–104–2. These cracks can significantly affect the structural integrity of seat backrests.

Failure of the backrest links could result in injury to an occupant during emergency landing conditions. The required actions include a general visual inspection for cracking of the backrest links; replacement with new, improved links if cracking is found; and eventual replacement of all links with new, improved links.

Actions and Compliance

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

(1) At the later of the compliance times specified in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD, do a general visual inspection of the backrest links having P/Ns 90–000200–104–1 and 90–000200–104–2, in accordance with Part One of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004:

(i) Before 6,000 flight hours on the backrest link since new.

(ii) Within 900 flight hours or 5 months after the effective date of this AD, whichever occurs later.

(2) If, during the inspection required by paragraph (f)(1) of this AD, cracking is found between the side of the backrest link and the lock-out pin hole but the cracking does not pass this lock-out pin hole (refer to Figure 2 of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004): Within 600 flight hours or 3 months after doing the inspection, whichever occurs first, replace both backrest links of the affected seat with new, improved backrest links having P/Ns 90–100200–104–1 and 90–100200–104–2, in accordance with Part Two of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004.

(3) If, during the inspection required by paragraph (f)(1) of this AD, cracking is found that passes beyond the lock-out pin hole (refer to Figure 2 of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004): Before further flight, replace both backrest links of the affected seat with new, improved backrest links having P/Ns 90–100200–104–1 and 90–100200–104–2, in accordance with Part Two of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004.

(4) If no cracking is found during the inspection required by paragraph (f)(1) of this AD: Do the replacement required by paragraph (f)(5) of this AD at the compliance time specified in paragraph (f)(5) of this AD.

(5) At the later of the compliance times specified in paragraphs (f)(5)(i) and (f)(5)(ii) of this AD, replace the links, P/Ns 90–000200–104–1 and 90–000200–104–2, with new improved links, P/Ns 90–100200–104–1 and 90–100200–104–2, in accordance with Part Two of Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004. Doing this replacement for an affected passenger seat assembly terminates the inspection requirements of paragraph (f)(1) of this AD for that passenger seat assembly.

(i) Before 12,000 flight hours on the backrest links, P/Ns 90–000200–104–1 and 90–000200–104–2, since new.

(ii) Within 900 flight hours or 5 months after the effective date of this AD, whichever occurs later.

Credit for Actions Done in Accordance With Previous Service Information

(6) Actions done before the effective date of this AD in accordance with Sicma Aero Seat Service Bulletin 90–25–013, Issue 3, dated December 19, 2001, including Annex 1, Issue 2, dated March 19, 2004, are acceptable for compliance with the corresponding actions of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: The MCAI specifies doing repetitive inspections for cracking of links having over 12,000 flight hours since new until the replacement of the link is done. This AD does not include those repetitive inspections because we have reduced the compliance time for replacing those links. This AD requires replacing the link before 12,000 flight hours since new or within 900 flight hours or 5 months of the effective date of this AD, whichever occurs later.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Boston Aircraft 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 ACO, send it to ATTN: Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7161; fax (781) 238–7170. 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

(h) Refer to MCAI French Airworthiness Directive 2001–613(AB), dated December 12, 2001; and Sicma Aero Seat Service Bulletin 90–25–013, Issue 4, dated March 19, 2004, including Annex 1, Issue 2, dated March 19, 2004; for related information.

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

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–9942 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 46

[3038–AD48]

Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing rules to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Dodd-Frank Act amends the Commodity Exchange Act ("CEA" or "Act") directing that rules adopted by the Commission shall provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act, the terms of which have not expired as of the date of enactment of that Act ("pre-enactment swaps") and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the compliance date specified in the Commission's final swap data reporting rules ("transition swaps"). This proposal would establish recordkeeping and reporting requirements for pre-enactment swaps and transition swaps.

DATES: Comments must be received by June 9, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD48, by any of the following methods:

- *Agency Web site, via its Comments Online process: http:// comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All comments must be submitted in English, or must be accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, you may submit a petition for confidential treatment according to the procedures established in CFTC Regulation 145.9.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: David Taylor, Branch Chief, Market Continuity, Division of Market Oversight, 202–418–5488, *dtaylor@cftc.gov;* or Irina Leonova, Financial Economist, Division of Market Oversight, 202–418–5646, *ileonova@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: The Commission is proposing rules under its part 46 regulations relating to recordkeeping and reporting requirements applicable to both pre-enactment and transition swaps, and is soliciting comment on all aspects of the proposed rules. These rules, when adopted, will supersede interim final rules previously adopted by the Commission in part 44 of its regulations.

Table of Contents

I. Background

A. Swap Data Provisions of the Dodd-Frank Act

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[2] Title VII of the Dodd-Frank Act[3] amended the CEA[4] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivatives products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To enhance transparency, promote standardization, and reduce systemic risk, Section 728 of the Dodd-Frank Act establishes a newly-created registered entity—the swap data repository ("SDR")[5]—to collect and maintain data related to swap transactions as prescribed by the Commission, and to make such data electronically available to regulators.[6]

Section 728 directs the Commission to prescribe standards for swap data recordkeeping and reporting. Specifically, Section 728 provides that:

> The Commission shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.[7]

These standards are to apply to both registered entities and counterparties involved with swaps:

> In carrying out [the duty to prescribe data element standards], the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.[8]

Section 727 of the Dodd-Frank Act requires that each swap, either cleared or uncleared, shall be reported to a registered SDR. That Section also amends Section 1(a) of the CEA to add the definition of swap data repository:

> The term 'swap data repository' means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.[9]

Section 728 also directs the Commission to regulate data collection and maintenance by SDRs.

> The Commission shall prescribe data collection and data maintenance standards for swap data repositories.[10]

Section 729 of the Dodd-Frank Act added to the CEA new Section 4r, which addresses reporting and recordkeeping requirements for uncleared swaps. Pursuant to this section, each swap not accepted for clearing by any derivatives clearing organization ("DCO") must be reported to an SDR (or to the Commission if no SDR will accept the swap).

Section 729 ensures that at least one counterparty to a swap has an obligation to report data concerning that swap. The determination of this reporting counterparty depends on the status of the counterparties involved. If only one counterparty is a swap dealer ("SD"), the SD is required to report the swap. If one counterparty is a major swap participant ("MSP"), and the other counterparty is neither an SD nor an MSP ("non-SD/MSP counterparty"), the MSP must report. Where the counterparties have the same status—two SDs, two MSPs, or two non-SD/MSP counterparties—the counterparties must select a counterparty to report the swap.[11]

Section 729 also provides for reporting to the Commission of uncleared swaps that are not accepted by any SDR. Under this provision, counterparties to such swaps must maintain books and records pertaining to their swaps in the manner and for the time required by the Commission, and must make these books and records available for inspection by the Commission or other specified

[1] Commission regulations referred to herein are found at 17 CFR Ch. 1.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[4] 7 U.S.C. 1 *et seq.*

[5] *See also* CEA § 1a(40)(E).

[6] Regulations governing core principles and registration requirements for, and the duties of, SDRs are the subject of a separate notice of proposed rulemaking under part 49 of the Commission's regulations. *See* CFTC Swap Data Repositories: Proposed Rule, 75 FR 80898 (Dec. 23, 2010).

[7] CEA § 21(b)(1)(A).

[8] CEA § 21(b)(1)(B).

[9] CEA § 1a(48).

[10] CEA § 21(b)(2).

[11] *See* CEA § 4r(a)(3).

regulators if requested to do so.[12] It also requires counterparties to such swaps to provide reports concerning such swaps to the Commission upon its request, in the form and manner specified by the Commission.[13] Such reports must be as comprehensive as the data required to be collected by SDRs.[14]

Section 729 establishes in new CEA Section 4r(a)(2)(A) a transitional rule applicable to pre-enactment swaps. Section 4r(a)(2)(A) provides for the reporting of pre-enactment swaps the terms of which have not expired as of the enactment of the Dodd-Frank Act to an SDR or the Commission, by a date that the Commission determines to be appropriate.[15] Section 4r(a)(2)(B) directed the Commission to promulgate an interim final rule within 90 days of the date of enactment of the Dodd-Frank Act providing for the reporting of such pre-enactment swaps.[16]

Section 723 of the Dodd-Frank Act, which adds to the CEA new Section 2(h)(5), addresses the reporting of swap data for both swaps executed before the enactment of the Dodd-Frank Act[17] and swaps executed on or after the date of that enactment but before the compliance date specified in the Commission's final swap data recordkeeping and reporting rules.[18] In a July 15, 2010 floor statement concerning swap data reporting as well as other aspects of the Dodd-Frank Act, Senator Blanche Lincoln emphasized that the provisions of new CEA Section 4r (added by Section 729 of the Dodd-Frank Act) and new CEA Section 2(h)(5) (added by Section 723 of the Dodd-Frank Act) "should be interpreted as complementary to one another to assure consistency between them. This is particularly true with respect to issues such as the effective dates of these reporting requirements * * *"[19]

This proposed rule refers to the two types of swaps addressed in CEA Section 2(h)(5) as follows. "Pre-enactment swap" means a swap executed before date of enactment of the Dodd-Frank Act (i.e., before July 21, 2010) the terms of which have not expired as of the date of enactment of that Act.[20] "Transition swap" means a swap executed on or after the date of enactment of the Dodd-Frank Act (i.e., July 21, 2010) and before the compliance date specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.[21] Collectively, the proposed rule refers to pre-enactment swaps and transition swaps as "historical swaps."

B. The Commission's Proposed Rule on Swap Data Recordkeeping and Reporting Requirements

On December 8, 2010, the Commission published for comment a notice of proposed rulemaking concerning swap data (the "Swap Data NPRM") that would establish swap data recordkeeping and reporting requirements applicable to registered SDRs, derivatives clearing organizations ("DCOs"), designated contract markets ("DCMs"), swap execution facilities ("SEFs"), SDs, major swap participants MSPs, and non-SD/MSP counterparties.[22] The latter category of swap counterparties would include but not be limited to counterparties who qualify for the statutory end user exception with respect to particular swaps.[23] Consistent with the purposes of the Dodd-Frank Act, the Swap Data NPRM would require generally that all DCOs, DCMs, SEFs, and swap counterparties keep full, complete and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entities or persons with respect to swaps. The proposed rules contemplate that swap data reporting should include data from each of two important stages in the existence of a swap: the creation of the swap, and the continuation of the swap over its existence until its final termination or expiration. The proposed rules call for reporting of two sets of data generated in connection with the creation of the swap: primary economic terms data and confirmation data.[24] Reporting of swap continuation data can follow either of two conceptual approaches described in the Swap Data NPRM: The life cycle or event flow approach, or the state or snapshot approach.[25]

The Swap Data NPRM did not address CEA Section 2(h)(5)'s mandate that the Commission adopt recordkeeping and reporting rules applicable to pre-enactment swaps or transition swaps, but instead noted that a separate rulemaking to establish requirements for these historical swaps would address the records, information and data required to be maintained and the timeframe for reporting such information to a registered SDR or to the Commission.[26] This proposal would establish recordkeeping and reporting standards applicable to pre-enactment and transition swaps.

C. The Interim Final Rules for Pre-Enactment and Transition Swaps

Interim Final Rule for Pre-Enactment Swaps. As described above, Title VII of the Dodd-Frank Act added new Section 4r(a)(2) to the CEA, which provided for the reporting of pre-enactment swaps and directed that the Commission promulgate, within 90 days of enactment of the Dodd-Frank Act, an interim final rule ("IFR") providing for the reporting of such swaps. On October 14, 2010, pursuant to the mandate of CEA Section 4r(a)(2)(B), the Commission published in new part 44 of its regulations an IFR instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by

[12] CEA § 4r(c)(2) requires individuals or entities that enter into an uncleared swap transaction that is not accepted by an SDR to make required books and records open to inspection by any representative of the Commission; an appropriate prudential regulator; the Securities and Exchange Commission; the Financial Stability Oversight Council; and the Department of Justice.

[13] CEA § 4r(c).

[14] CEA § 4r(d).

[15] Subsection (A) of CEA Section 4r(a)(2) provides that "Each swap entered into before the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the terms of which have not expired as of the date of enactment of that Act, shall be reported to a registered swap data repository or the Commission by a date that is not later than—(i) 30 days after issuance of the interim final rule; or (ii) such other period as the Commission determines to be appropriate."

[16] Pursuant to Section 4r(a)(2)(B), the Commission on October 14, 2010 published in part 44 of its regulations an interim final rule instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by a compliance date to be established in reporting rules to be promulgated under Section 2(h)(5)(A) of the CEA and advising counterparties of the necessity, inherent in the reporting requirement, to retain information pertaining to the terms of such swaps until reporting can be effectuated under permanent rules. *See* Pre-Enactment Swaps IFR, *supra,* note 17.

[17] *See* CFTC Interim Final Rule for Reporting Pre-Enactment Swap Transactions ("Pre-Enactment Swaps IFR"), 75 FR 63080 (Oct. 14, 2010).

[18] *See* CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions ("Post-Enactment Swaps IFR" or "Transition Swaps IFR"), 75 FR 78892 (Dec. 17, 2010).

[19] Senator Blanche Lincoln, "Wall Street Transparency and Accountability Act," *Congressional Record,* July 15, 2010, at S5923.

[20] Subsection (A) of CEA Section 2(h)(5) *Reporting Transition Rules* provides that "Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection."

[21] Subsection (B) of CEA Section 2(h)(5) *Reporting Transition Rules* provides that "Swaps entered into on or after [the] date of enactment [of the Dodd-Frank Act] shall be reported to a registered swap data repository or the Commission no later than the later of (i) 90 days after [the] effective date [of Section 2(h)(5)] or (ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation."

[22] 75 FR 76574 (Dec. 8, 2010) ("Swap Data NPRM").

[23] CEA Section 2(h)(7).

[24] *See* Swap Data NPRM, *supra,* note 22 at 76580–76582.

[25] *Id.* at 76583–76584.

[26] *Id.* at 76580 note 37.

a compliance date to be established in reporting rules to be promulgated under CEA Section 2(h)(5), and advising such counterparties of the necessity, inherent in the reporting requirement, to preserve information pertaining to the terms of such swaps until reporting was effectuated under permanent rules.[27] This Pre-Enactment Swaps IFR stated that the reporting and recordkeeping provisions established by Section 4r and §§ 44.00–44.02 of the Commission's regulations would remain in effect until the effective date of the permanent reporting rules to be adopted by the Commission pursuant to Section 2(h)(5) of the CEA.[28] A principal purpose of this IFR was to advise counterparties of the need to retain data related to swap transactions so that reporting could be effectuated under permanent rules subsequently to be adopted.

With respect to the scope and coverage of the Pre-Enactment Swaps IFR, the Commission acknowledged inconsistencies between the two Dodd-Frank provisions governing the Commission's rulemaking. Specifically, new CEA Section 4r(a)(2) limits reportable pre-enactment swaps to those whose terms have not expired on the date of enactment of the Dodd-Frank Act; Section 2(h)(5) does not contain the same qualifying language. As discussed in the Pre-Enactment Swaps IFR, the Commission believes that failure to limit the term "pre-enactment swap" to unexpired swaps would require reporting of every swap that has ever been entered into; accordingly, the Commission concluded that reportable pre-enactment swaps should be limited to those whose terms had not expired at the time of enactment.[29]

Interim Final Rule for Transition Swaps. Section 4r of the CEA did not mandate an IFR establishing reporting provisions for transition swaps. The Commission nonetheless believed that such a rule would provide clarity and guidance with respect to such swaps, by establishing that transition swaps will be subject to Section 2(h)(5)(B)'s reporting requirements and to Commission regulations to be promulgated thereunder. The Commission also believed it was prudent to advise potential counterparties to such swaps that implicit in this prospective reporting requirement is the need to retain relevant data until such time as reporting can be effected. Accordingly, on December 17, 2010 the Commission published under Part 44 of its regulations interim final rules establishing that counterparties to transition swaps will be subject to permanent recordkeeping and reporting requirements to be adopted by the Commission pursuant to Section 2(h)(5)(B) of the CEA.[30]

The Commission intended both the Pre-Enactment Swaps IFR and the Transition Swaps IFR to put counterparties on notice that swap data should be retained pending the adoption of permanent rules for pre-enactment and transition swaps under proposed part 46 of this chapter. With respect to both pre-enactment and transition swaps, the Commission stated that counterparties to these transactions should retain material information about such transactions. The Commission emphasized, however, that in the context of the interim rules, no counterparty was being required to create new records with respect to transactions that occurred in the past; instead, records relating to the terms of such transactions could be retained in their existing format to the extent and in such form as they presently exist.[31]

Comments Received. The Commission received a number of comments in response to each of the IFRs. Comments generally fell into one or more of several broad categories and in a number of instances were common to both IFRs. Some commenters observed that issuance of IFRs in advance of regulations further defining the term "swap" (or defining other key terms in the Dodd-Frank Act) creates legal and regulatory uncertainty and increases compliance risk; most of these commenters urged the Commission to further detail the record retention aspects of the interim final rules.[32] In this connection, commenters requested that the Commission issue guidance clarifying and limiting the information that must be retained,[33] or create a safe harbor for good faith compliance efforts.[34] Energy interests suggested that the Commission should ensure that end users need only report basic data in a simplified reporting scheme, or should outline categories of information that need not be retained by persons who anticipate becoming eligible for the end user exemption under the Dodd-Frank Act.[35] One commenter urged greater specificity with respect to the Pre-Enactment IFR's requirements, as well as consistency with the standards adopted by the Securities and Exchange Commission ("SEC") and international regulators, and proposed alternatives to the requirements adopted in the IFR for pre-enactment swaps, particularly with respect to reporting protocols, record retention, and confidentiality issues (notably, those confidentiality issues arising in the context of cross-border transactions).[36] Another commenter urged that U.S. swap data reporting requirements should not apply with respect to foreign swaps transactions, where counterparties are non-U.S. entities.[37]

The Commission is mindful of these concerns and expects to consider and address them, as well as all comments received in response to this proposed rule, in formulating permanent rules applicable to pre-enactment and transition swaps.

II. Proposed New Regulations, Part 46

As provided in the Commission's Swap Data NPRM,[38] Pre-Enactment Swaps IFR,[39] and Transition Swaps IFR,[40] this proposed rule addresses the records, information, and data that must be retained for historical swaps, the timeframe for reporting data to an SDR or the Commission concerning such swaps, and the specific data to be reported.

Recordkeeping. For historical swaps in existence on or after the date of publication of the proposed rule, the rule would impose limited, specific recordkeeping obligations. Counterparties to such swaps would be required to keep records of an asset class-specific set of specified, minimum primary economic terms. The Commission believes that counterparties to historical swaps will possess this limited set of asset class-specific information as part of their normal

[27] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63083.

[28] *See* Pre-Enactment Swaps IFR, *supra* note 17.

[29] *Id.* at 63082.

[30] *See* Transition Swaps IFR, *supra* note 18.

[31] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63086, and Transition Swaps IFR, *supra* note 18, at 78894.

[32] *See,* e.g., letters dated November 15, 2010 and January 18, 2011 from the Working Group of Commercial Energy Firms ("Working Group letters"); letter dated November 15, 2010 from Hess Corporation ("Hess Corporation letter"); letter dated November 15, 2010 from the Edison Electric Institute ("EEI letter"); letters dated November 15, 2010 and January 18, 2011 from the Not-for-Profit Electric End User Coalition ("Coalition letters"); letter dated January 18, 2011 from the American Gas Association ("AGA letter").

[33] EEI letter.

[34] Working Group letters; EEI letter; Hess Corporation letter.

[35] AGA letter; Coalition letters.

[36] Letter dated November 12, 2010, from the International Swaps and Derivatives Association, Inc. and the Futures Industry Association.

[37] Letter dated January 11, 2011, from Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale and UBS AG.

[38] *See* Swap Data NPRM, *supra* note 20, at fn. 37.

[39] *See* Pre-Enactment Swaps IFR, *supra* note 17.

[40] *See* Transition Swaps IFR, *supra* note 18.

business practices.[41] Commission staff have consulted with industry representatives, including buy-side counterparties, concerning information routinely kept in this connection for swaps in different asset classes. Counterparties to historical swaps in existence on or after the date of publication of this proposed rule would also be required to keep records of a confirmation of their swaps if they have that information in their possession on or after the publication date (the date from which public notice of this specific proposed recordkeeping requirement is available). The Commission requests comment concerning the appropriateness of these limited recordkeeping requirements, and specifically requests comment concerning whether all counterparties to historical swaps will possess the limited set of asset class-specific information called for by the proposed rule as part of their normal business practices. If there are any counterparties to historical swaps who do not possess the limited set of asset class-specific information called for by the proposed rule, the Commission requests comment from such counterparties concerning what information concerning historical swaps such counterparties do possess, and concerning what information such counterparties retain concerning their swaps in order to meet the requirements of other applicable law, such as hedge accounting requirements or the requirements of applicable state law.

For historical swaps that were in existence as of the date of enactment of the Dodd-Frank Act but have expired or been terminated prior to the publication date of this proposed rule, a counterparty would only be required to keep records as provided in the Commission's IFRs concerning pre-enactment and transition swaps: namely, the information and documents relating to the terms of the swap that the counterparty possessed when the applicable IFR was published, in whatever format that information is kept by the counterparty.[42]

The Commission understands that the minimum primary economic terms for a swap can vary widely depending on the asset class of the underlying products or on the nature of a particular product within an asset class. Consequently, the Commission encourages the industry to reach an internal consensus about the appropriate, asset class-specific, minimum primary economic terms to be reported for pre-enactment and transition swaps. The Commission welcomes comments from industry and market participants in this regard, and will consider them in determining the minimum primary economic terms to be specified in the final swap data recordkeeping and reporting rules.

Reporting timeframe. The proposed rule provides that swap data reporting for historical swaps would commence on the compliance date specified in the Commission's final swap data recordkeeping and reporting regulations in part 45 of this chapter.[43] The Commission believes that the purposes of the Dodd-Frank Act can be best served by establishing a single date for the commencement of all swap data reporting pursuant to that Act. It also believes that the compliance date for the final swap data reporting regulations in part 45—the date on which reporting must commence—is the most practicable and appropriate date for this purpose. The effective date will be set by the Commission in its final swap data reporting regulations.[44] In the Swap Data NPRM, the Commission requested comments concerning the time needed to prepare automated systems for swap data recordkeeping and reporting prior to implementation of the regulations, and it will carefully consider the comments received in response to that request. The Commission similarly requests comment concerning the proposal to specify the same compliance date as the date for initial data reporting concerning pre-enactment and transition swaps, and the time needed in this connection for preparation of necessary automated systems prior to the specified compliance date.

Data to be reported. The proposed rule specifies data to be reported for historical swaps. For pre-enactment and transition swaps in existence on or after the date of publication of this proposed rule, the rule specifies the data elements to be reported. For historical swaps in existence as of enactment of the Dodd-Frank Act which expired or were terminated prior to publication of this proposed rule, the rule provides for reporting of the information relating to the terms of the transaction that was in the possession of a reporting counterparty as of publication of the applicable Commission IFR regarding pre-enactment or transition swaps, in such format as it is kept by the reporting counterparty.

As noted above, the Dodd-Frank Act requires reporting of data concerning all swaps in existence as of the legislation's enactment.[45] Data concerning pre-enactment swaps and transition swaps will assist achievement of the systemic risk mitigation, market transparency, and market supervision purposes for which the Dodd-Frank Act was enacted. Such data will be needed to give regulators the complete picture of the swap market which the comprehensive regulatory framework and reporting requirements of the statute are designed to provide. Data concerning historical swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress regarding the swap market.

The Commission is aware that internal swap data retention policies are not uniform among swap counterparties, and that the current automated systems of market participants vary with respect to their suitability for swap data reporting. The Commission believes it is appropriate to limit the burden placed on swap counterparties in connection with data reporting for historical swaps, to the extent that this can be done in a manner consistent with the requirements of the Dodd-Frank Act and the Commission's need for such data. The Commission has also considered comments received concerning the Pre-Enactment Swaps IFR and Transition Swaps IFR which requested that the Commission specify clearly what data would be required to be reported concerning historical swaps.

Data reporting for historical swaps in existence as of or after publication of this proposed rule. For each pre-enactment or transition swap in existence as of or after publication of this proposed rule, the rule calls (a) for an initial data report on the compliance date for data reporting, and (b), if such a historical swap has not expired or been terminated as of the compliance date specified in the final part 45 swap data reporting regulations, for ongoing reporting of required swap continuation data (as defined in the Commission's final part 45 swap data reporting

[41] The Commission understands that the terminology used to describe the specific terms and conditions of a swap can vary among market participants, and that agreed definitions for certain terms could increase consistency among participants in how historical swaps are described. The Commission therefore requests comment on whether the proposed minimum primary economic terms for each asset class are sufficiently clear in terms of what economic data is expected to be reported, or whether further clarification is needed in this respect.

[42] As used in the IFRs, "format" refers to the method by which the information is organized and stored. It does not refer to a recording format (i.e., a format for electronic encoding of data).

[43] 17 CFR part 45.

[44] As provided in CEA Section 2(h)(5)(B), the effective date must be no sooner than 90 days after the effective date of CEA Section 2(h)(5), but may be a later date set by the Commission.

[45] CEA Section 4r(a)(2)(A).

regulations) during the remaining existence of the swap.

The proposed rule calls for the initial data report for historical swaps in existence as of or after publication of this proposed rule to include the transaction terms included in the swap confirmation if the confirmation was in the reporting counterparty's possession on or after the publication date of this proposed rule,[46] and in any event to include all of the minimum primary economic terms for a pre-enactment or transition swap specified in the appropriate table in the Appendix to the proposed rule.

The Commission understands that industry definitions used in documenting some swap transactions, for instance in some master agreements or confirmations, may not match exactly the asset class definitions included in this proposed rule, which are the same as the asset class definitions in the Commission's part 45 proposed rules regarding swap data recordkeeping and reporting requirements. The Commission requests comment on how the proposed asset class definitions in this proposed rule and the overall swap classification scheme embodied in them might most appropriately be aligned with current swap instrument classifications used by the industry, and with definitions employed by, *e.g.,* the International Swaps and Derivatives Association ("ISDA"), the Edison Electric Institute, the North American Energy Standards Board, and others.

In addition, the Commission anticipates that some swaps subject to its jurisdiction may belong to two other swap categories: mixed swaps, and multi-asset swaps. Generally, a mixed swap is in part a security-based swap subject to the jurisdiction of the SEC and in part a swap belonging to one of the swap asset classes subject to the jurisdiction of the Commission.[47] Multi-asset swaps are those that do not have one easily identifiable primary underlying notional item within the Commission's jurisdiction. The Dodd-Frank Act defines "mixed swap" as follows: "The term 'security-based swap' includes any agreement, contract, or transaction that is as described in section 3(a)(68)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)) and is also based on the value of 1 [sic] or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii)."[48] The Commission requests comment concerning how such swaps should be treated with respect to swap data reporting for historical swaps, and concerning the category or categories under which swap data for such swaps should be reported to SDRs and maintained by SDRs.

The initial data report for historical swaps in existence as of or after publication of this proposed rule would also be required to include the Unique Counterparty Identifier of the reporting counterparty (as defined in part 45),[49] and the reporting counterparty's internal system identifiers for the non-reporting counterparty and the particular swap transaction in question.

The proposed rule would give non-reporting counterparties an additional 180 days after the compliance date specified in the Commission's final part 45 rules for data reporting before they would be required to obtain and use a Unique Counterparty Identifier in connection with pre-enactment and transition swaps. The Commission is proposing this additional time because it understands that the majority of non-reporting counterparties are likely to be non-SD/MSP counterparties. While SDs and MSPs are likely to have infrastructure in place that can incorporate and track Unique Counterparty Identifiers, non-SD–MSP counterparties could need to acquire new automated systems or undertake modifications of existing systems in order to incorporate identifiers. The Commission requests comment concerning the appropriateness of this additional time, concerning the length of the additional time provided, and concerning whether the Commission should differentiate further between SD and MSP counterparties versus non-SD/MSP counterparties with respect to use of Unique Counterparty Identifiers for non-reporting counterparties to pre-enactment and transition swaps.

The proposed rule also requires the reporting counterparty to report the master agreement identifier (if any) used by the reporting counterparty's automated systems to identify the master agreement governing a pre-enactment or transition swap. This information would allow the Commission and other regulators to aggregate transactional data to calculate net or gross exposure of a particular counterparty. The Commission requests comment concerning whether its final swap data recordkeeping and reporting regulations for pre-enactment and transition swaps should require such reporting of a master agreement identifier.

The Commission requests comment concerning the appropriateness and adequacy of these initial data report requirements. Additionally, the Commission requests comment on the appropriate method for identifying the association of an individual swap transaction with a particular master agreement or with a swap portfolio, in order to identify individual swaps that may be subject to close-out netting and other provisions typical in portfolio compression.[50] Identifying this association could be a necessary means of enabling regulators to determine a counterparty's net exposure (current or future) on the basis of transactional data reported to SDRs. In particular, the Commission requests comment on whether reporting of a master agreement identifier as provided in this proposed rule is needed in this connection and would provide a workable means of achieving this goal.

The Commission has chosen to propose limited requirements for recordkeeping and initial data reports concerning pre-enactment and transition swaps because it understands that the current recordkeeping and reporting systems that some counterparties to such swaps have at present might not be able to fulfill, with respect to historical swaps, recordkeeping and reporting requirements as extensive as those proposed in part 45. In these circumstances, the Commission believes it is appropriate to limit the burden imposed on such counterparties, to the extent that this can be done in a way

[46] The Commission understands that counterparties may use either a short-form or a long-form confirmation. Either form can be used to satisfy this requirement.

[47] *See* Swap Data NPRM, *supra* note 20, at 76586.

[48] Dodd-Frank Act § 721(21), CEA § 1a(47)(D).

[49] The Commission intends to take the need for reporting counterparties to obtain Unique Counterparty Identifiers into account in setting the effective date for the data reporting rules in part 45.

[50] The Commission's proposed rule regarding confirmation, portfolio reconciliation and portfolio compression requirements for SDs and MSPs, 17 CFR part 23, defines portfolio compression as a mechanism whereby substantially similar transactions among two or more counterparties are terminated and replaced with a smaller number of transactions of decreased notional value, in an effort to reduce the risk, cost, and inefficiency of maintaining unnecessary transactions on the counterparties' books. *See* CFTC Notice of Proposed Rulemaking: Confirmation, Portfolio Reconciliation and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519 (Dec. 28, 2010).

that is consistent with the requirements of the Dodd-Frank Act and the Commission's need for data concerning historical swaps. The Commission believes, however, that the limited set of minimum primary economic terms data set forth in this proposed rule with respect to historical swaps is the minimum necessary to give regulators a picture of the risk exposures and counterparty participation in such swaps at the minimum level necessary for the Commission and other regulators to fulfill their regulatory responsibilities. The Commission requests comment concerning the appropriateness of this approach to initial data reporting for pre-enactment and transition swaps.

Regarding ongoing reporting of required swap continuation data during the remaining existence of a pre-enactment or transition swap after the compliance date, the proposed rule follows the life cycle approach for credit swaps and equity swaps, and the state or snapshot approach for interest rate swaps, currency swaps, and other commodity swaps. This same distinction is made in the Commission's Swap Data NPRM, which sets forth the Commission's reasons for making this distinction, reasons which also apply with respect to part 46. The Commission believes that this unified approach to swap data reporting rules for pre-enactment, transition, and post-compliance-date swaps will minimize recordkeeping and swap data reporting burdens for industry and provide a coherent and consistent picture of the overall swap market to regulators. Since the proposed part 45 continuation data reporting requirements are aligned with the approach taken in the SEC's proposed rules for security-based credit and equity swaps, this also serves to avoid differing requirements for security-based swaps and swaps. The Commission requests comment concerning whether required reporting of the same swap continuation data for pre-enactment and transition credit swaps and equity swaps, in line with the requirements of proposed part 45 and of the SEC's proposed rules, is appropriate in this connection.

For pre-enactment or transition interest rate swaps, currency swaps, and other commodity swaps, this proposed rule also limits continuation data reporting obligations for non-SD/MSP reporting counterparties. Specifically, the proposal requires that SD or MSP reporting counterparties must meet continuation data reporting requirements for pre-enactment and transition swaps in those asset classes that are the same as the continuation data reporting requirements of proposed part 45 for swaps in those asset classes. While non-SD/MSP reporting counterparties for such swaps are required to report the state data [51] necessary to provide a daily snapshot view of the primary economic terms of the swap, the state data that must be reported by non-SD/MSP reporting counterparties for such swaps is limited to the state data available to the non-SD/MSP reporting counterparty on the compliance date. This may consist of only the data elements contained in the table of minimum primary economic terms for various swap asset classes, as set forth in Appendix 1 to part 46, if that is all that was available to the non-SD/MSP reporting counterparty on that date. This approach is designed to avoid placing undue recordkeeping and reporting burdens on non-SD/MSP counterparties, who are the reporting counterparties least likely to have the automated systems needed for more extensive reporting with respect to pre-enactment or transition swaps. The Commission requests comment concerning the appropriateness of this approach to continuation data reporting for pre-enactment and transition swaps.

Data reporting for historical swaps in existence as of enactment of the Dodd-Frank Act but expired or terminated prior to publication of this proposed rule. For historical swaps in existence as of enactment of the Dodd-Frank Act which expired or were terminated prior to publication of this proposed rule, only an initial data report would be required.[52] For such swaps, the proposed rule would require that the reporting counterparty report such information relating to the terms of the transaction as was in that counterparty's possession as of issuance of the relevant Commission IFR.[53] This information would be permitted to be reported in the format in which it was kept by the reporting counterparty.[54]

Selection of reporting counterparty. This proposed rule provides that determination of which counterparty to a pre-enactment or transition swap is the reporting counterparty for that swap shall be made according to Dodd-Frank Act's hierarchy of counterparty types for reporting obligation purposes, in which SDs outrank MSPs, who outrank non-SD/MSP counterparties. Where both counterparties are at the same hierarchical level, the statute calls for them to select the counterparty obligated to report. The proposed rule establishes a mechanism for counterparties to follow in choosing the counterparty to report in situations where both counterparties have the same hierarchical status. Where both counterparties are SDs, or both are MSPs, or both are non-SD/MSP counterparties, the proposed rule requires the counterparties to agree as on term of their swap transaction which counterparty will fulfill reporting obligations. The proposed rule also provides that, where only one counterparty to a swap is a U.S. person, the U.S. person should be the reporting counterparty. The Commission believes, preliminarily, that this approach may be necessary in order to ensure compliance with reporting requirements in such situations. In these respects, the proposed rule mirrors the provision of the part 45 Swap NPRM regarding selection of the reporting counterparty.

The proposed rule also provides that determination of the reporting counterparty shall be made with respect to the current counterparties to the swap as of the compliance date (for historical swaps in existence as of that date) or as of the prior expiration or termination of the swap (for historical swaps expired or terminated prior to the compliance date), regardless of who the counterparties to the swap were when it was originally executed.

As noted above, where both counterparties have the same hierarchical status, the proposed rule calls for the counterparties to agree as one term of their swap transaction which counterparty will fulfill reporting obligations. In the case of a historical swap executed prior to publication of this proposed rule, for which the agreement to enter into the swap has already been made, agreement by the counterparties on selection of the reporting counterparty would require negotiation occurring after the agreement to enter into the swap was made, and could require amendment of the agreement to enter into the swap in this respect. The Commission requests comment concerning how two SD counterparties, two MSP counterparties, or two non-SD/MSP counterparties should select the reporting counterparty for a pre-enactment or transition swap which was executed prior to the publication date of this proposed rule, and thus does not include an agreement term selecting the reporting counterparty. The Commission also requests comment concerning whether its final data recordkeeping and

[51] For purposes of this proposed rule, "state data" has the meaning defined in part 45 of this chapter. *See* Swaps Data NPRM, *supra* note 20, at 76599.

[52] By its nature, continuation data reporting occurs during the continuation of a swap prior to its expiration or termination.

[53] Pre-Enactment Swaps IFR, *supra* note 15, and Transition Swaps IFR, *supra* note 18.

[54] This could include submission of a PDF file.

reporting rules for historical swaps should prescribe a method for selecting a reporting counterparty in such circumstances. The Commission may include such a method in the final data recordkeeping and reporting rules for historical swaps.

The Commission has received comments regarding the part 45 Swap NPRM suggesting that, where only one counterparty to a swap is a U.S. person, the counterparty designated as the reporting counterparty under the hierarchical approach based on the Dodd-Frank Act and discussed above should be applied in the same way as for a swap where both counterparties are U.S. persons. This would mean, for example, that for a swap between a non-U.S. SD and a U.S. non-SD/MSP counterparty, the non-U.S. SD would be the reporting counterparty. The Commission requests comment concerning how the reporting counterparty for a historical swap should be selected when one counterparty is a non-U.S. person.

Non-duplication of previous reporting. The Commission is aware that in some instances, reporting counterparties may have reported data concerning pre-enactment or transition swaps to a presently-existing trade repository prior to the compliance date. If such a repository is registered with the Commission as an SDR as of the compliance date, the Commission would not require reporting counterparties to report duplicate information to the SDR, although it would require reporting on the compliance date of any information required by this proposed rule that had not already been reported to the SDR.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [55] requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[56] The regulations proposed by the Commission would affect SDs, MSPs, and non-SD/MSP counterparties who are counterparties to one or more pre-enactment or transition swaps. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[57]

The Commission hereby determines that SDs and MSPs should not be considered small entities for purposes of the RFA. SDs and MSPs will play a central role in the national regulatory scheme overseeing the trading of swaps. With respect to SDs, the Commission previously has determined that Futures Commission Merchants ("FCMs") should not be considered to be small entities for purposes of the RFA.[58] Like FCMs, SDs will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms.[59] Similarly, with respect to MSPs, the Commission has previously determined that large traders are not "small entities" for RFA purposes.[60] Like large traders, MSPs will maintain substantial positions, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.

With respect to non-SD/MSP counterparties, the Commission believes that the proposed regulations will not create a significant economic impact on a substantial number of small entities. The proposed rule sets forth recordkeeping and reporting requirements with respect to pre-enactment and transition swaps. The Commission believes that the records the proposed rule would require to be kept are already kept by swap counterparties in their normal course of business. The proposed rule would require limited swap data reporting for pre-enactment or transition swaps, and would require such reporting by non-SD/MSP counterparties only with respect to such swaps in which neither counterparty is an SD or MSP. The considerable majority of swaps involve at least one SD or MSP. In addition, most end users and other non-SD/MSP counterparties who are regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), such as pension funds, which are among the most active participants in the swap market, are prohibited from transacting directly with other ERISA-regulated participants.[61] For these reasons, the Commission does not believe that the regulations would have a significant economic impact on a substantial number of small entities.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule will not have a significant economic impact on a substantial number of small entities. Nonetheless, the Commission specifically requests comment on the impact this proposed rule may have on small entities.

B. Paperwork Reduction Act

Introduction. Provisions of the proposed rule would result in new collection of information requirements within the meaning of the Paperwork Reduction Act ("PRA").[62] The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Regulations 46.2 and 46.3—Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps," OMB control number 3038–NEW. If adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

Information Provided by Reporting Entities/Persons. The proposed rule sets forth recordkeeping and reporting requirements for SDs, MSPs, and non-SD/MSP counterparties.

Recordkeeping Burdens. Under proposed Regulation 46.2, all counterparties to pre-enactment or transition swaps would be required to keep records relating to such swaps. For swaps that are in existence as of or after the enactment of the Dodd-Frank Act, but are expired as of the publication of the proposed rule, the proposed Regulation 46.2 requires that parties simply maintain the swap records already in their possession, in the form in which they are already maintained. For purposes of the PRA, the Commission will not calculate the burden for this requirement; the Commission has previously calculated the burden for this requirement in the

[55] 5 U.S.C. 601 *et seq.*

[56] 5 U.S.C. 601 *et seq.*

[57] 47 FR 18618 (Apr. 30, 1982).

[58] 47 FR 18618 (Apr. 30, 1982).

[59] Additionally, the Commission is required to exempt from designation entities that engage in a de minimis level of swaps. Id. at 18619.

[60] 47 FR at 18620.

[61] 29 U.S.C. 1106.

[62] 44 U.S.C. 3501 *et seq.*

PRA analyses for the interim final rules for pre-enactment and transition swaps.

For pre-enactment or transition swaps that are in existence as of or after the publication of the proposed rule, the proposed Regulation 46.2 would require counterparties to keep records of a minimum set of primary economic data relating to such swaps. The Commission believes that counterparties already would possess this set of primary economic data as part of their normal business practices. The proposed regulation provides that counterparties must record certain additional information (*e.g.,* information relating to confirmation) only if the counterparty is in possession of that information on or after the publication date of the proposed rule. After the compliance date specified in the Commission's final swap data rules in Part 45, proposed Regulation 46.2 provides that counterparties must record information required by recordkeeping provisions of those final swap rules only if such information is available to the counterparty on or after the compliance date specified in those rules.

For historical swaps that are in existence as of or after the publication date of the proposed rule, the rule would require the counterparties to keep the records beginning on the publication date of the proposed rule and through the life of the swap, and for a period of at least five years from the final termination of the swap. In calculating the burden of this recordkeeping requirement for purposes of the PRA, the Commission will not include the burdens occurring after the compliance date specified in the Commission's final swap data rules in Part 45; the burden occurring after the compliance date is and will be subsumed by the recordkeeping burdens calculated for those final rules.[63] Therefore, for this proposed rule, the Commission will only calculate a recordkeeping burden for the time period beginning with the publication date of this proposed rule, and ending on the compliance date. The Commission estimates this period of time to be approximately one year. The Commission estimates that 30,300 SDs, MSPs, and non-SD/MSP counterparties will be affected by these recordkeeping burdens during this time.[64] With respect to SDs and MSPs (an estimated 300 entities or persons), which will have higher levels of swap recording activity than non-SD/MSP counterparties, the Commission estimates that the average one-time burden per entity is 40 hours, excluding customary and usual business practices. With respect to non-SD/MSP reporting counterparties (an estimated 30,000 entities or persons), who will have lower levels of swap recording activity, the Commission estimates that the average one-time burden per entity is 10 hours, excluding customary and usual business practices. Therefore, the total aggregate one-time burden is 312,000 hours. The Commission requests comment on this estimate.

Reporting Burdens. The reporting obligations set forth in proposed Regulation 46.3 involve both an initial data report and ongoing reporting of required swap continuation data relating to pre-enactment and transition swaps. For historical swaps that are in existence as of or after the enactment of the Dodd-Frank Act, but expired prior to publication of the proposed rule, the rule would require only an initial data report.

The proposed regulation provides that reporting counterparties for pre-enactment or transition swaps must make an initial data report relating to those swaps. The frequency of the report would be once per swap, and the report would occur on the compliance date of the Commission's final swap data recordkeeping and reporting regulations in Part 45. The report would not be required to be made for historical swaps that are expired as of the enactment of the Dodd-Frank Act. The Commission estimates that there are 1,800 affected entities who will be reporting counterparties for pre-enactment and transition swaps.[65] The Commission estimates that the average one-time reporting burden for each affected entity is 24 hours. Therefore, the total aggregate one-time burden is 43,200 hours. The Commission requests comment on this estimate.

The proposed regulation also provides for an ongoing reporting obligation that must be fulfilled by reporting counterparties to pre-enactment and transition swaps that are in existence as of the compliance date specified in the Commission's final swap data reporting rules in part 45. The burden for this ongoing reporting is and will be subsumed by the reporting burden calculated for the Commission's final swap data recordkeeping and reporting regulations in part 45.[66] Therefore, for this proposed rulemaking, the Commission will not calculate a burden estimate for ongoing reporting.

Information Collection Comments. The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) 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; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision

[63] The recordkeeping burden for those final rules is calculated based on the number of annual counterparties to swaps and therefore implicitly includes counterparties to pre-enactment and transition swaps that are unexpired after the effective date.

[64] As noted, the applicable recordkeeping burden applies during a period estimated by the Commission to be one year. The Commission has previously estimated that there are annually 30,000 non-SD/MSP entities who are counterparties to a swap (see, *e.g.,* the Commission's Paperwork Reduction Act statement for the Swap Data Recordkeeping and Reporting Requirements Proposed Rulemaking). The Commission has also previously estimated that there are 250 SDs and 50 MSPs. Therefore, a total of 30,300 entities would be subject to the recordkeeping burdens of the proposed rule.

[65] The Commission has previously estimated that there are annually 1,500 non-SD/MSP counterparties who are a "reporting counterparty" (see, *e.g.,* the Commission's Paperwork Reduction Act statement for the Swap Data Recordkeeping and Reporting Requirements Proposed Rulemaking). In addition, the Commission has previously estimated that there are 250 SDs and 50 MSPs. The Commission believes that the number of entities who are reporting counterparties to pre-enactment or transition swaps (that are in existence as of or after the enactment of the Dodd-Frank Act) is similar to the number of annual reporting counterparties. The Commission requests comment on this estimate.

[66] The reporting burden for those final rules is calculated based on the number of annual "reporting counterparties" to swaps and therefore implicitly include reporting counterparties to pre-enactment and transition swaps that are unexpired after the effective date.

concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

C. Cost-Benefit Analysis

Introduction. Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of the rulemaking or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) the efficiency, competitiveness and financial integrity of markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions of or accomplish any of the purposes of the Act.

Summary of Proposed Requirements. The proposed rule provides that counterparties to pre-enactment or transition swaps must keep records of, and must report, certain information relating to the swaps. The proposed reporting requirements involve both an initial report and ongoing reporting that continues until the final termination of the swap.

Costs. There are recordkeeping and reporting costs associated with the proposed requirements to record and report certain swap information. The Commission has crafted the rule to be efficient in terms of those costs and has also attempted to minimize the burden on non-SD/MSP counterparties. The proposed rule provides that certain records must be kept by a counterparty only if the counterparty is in possession of that information on or after certain dates as provided in the regulations. The proposed rule would require a counterparty to a pre-enactment or transition swap in existence as of or after publication of this proposed rule to keep, at a minimum, records of a specified set of primary economic terms data; however, the Commission believes that counterparties already would possess this information as part of their normal business practices. For non-SD/MSP reporting counterparties for pre-enactment or transition swaps in the interest rate, currency, or other commodity asset classes, the proposed rule limits the scope of required continuation data reporting to the data elements available to the reporting counterparty on the compliance date specified in the Commission's final swap data rules in Part 45.

Benefits. In addition to being mandated by the Dodd-Frank Act, reporting of data concerning pre-enactment and transition swaps is essential to the fundamental systemic risk mitigation, transparency, and market supervision purposes for which the Dodd-Frank Act was enacted. This reporting is necessary to give regulators complete information regarding the entire swap market. It provides the Commission and other financial regulators with necessary insight concerning the number of transactions and the number and type of participants involved in the swap market, as well as its outstanding notional size. Such information provides both a baseline against which to assess the development of the swap market over time and a first step toward a transparent and well-regulated market for swaps. Data concerning pre-enactment and transition swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress.

Public Comment. For the reasons set forth above, the Commission believes that the benefits of the proposed regulations outweigh their costs, and has decided to issue them. The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

IV. Proposed Compliance Date

The Commission understands that, after the date on which the Commission issues final swap data recordkeeping and reporting regulations, including its final regulations concerning pre-enactment and transition swaps, the industry will need a reasonable period of time to implement the requirements of those regulations. Time may be required for entities to register as SEFs, DCMs, DCOs, or SDRs (or for extant DCMs or DCOs to revise their rules and procedures) pursuant to new Commission regulations concerning such entities. Time may also be needed for registered entities and potential swap counterparties to adapt or create automated systems capable of fulfilling the requirements of Commission regulations concerning swap data recordkeeping and reporting. Accordingly, it may be appropriate for the Commission's final swap data recordkeeping and reporting regulations, including those for pre-enactment and transition swaps, to establish a compliance date that is later than the date the final regulations are issued.

The Commission requests comment concerning the need for a compliance date for its final swap data recordkeeping and reporting regulations, including those for pre-enactment and transition swaps, that is later than the date of their issuance; concerning the benefits or drawbacks of such an approach; concerning the length of time needed for registered entities and potential swap counterparties to prepare for implementation in the ways discussed above, or otherwise; and concerning the compliance date which the Commission should specify in its final regulations concerning swap data recordkeeping and reporting.

V. General Solicitation of Comments

The Commission requests comments concerning all aspects of the proposed regulations, including, without limitation, all of the aspects of the proposed regulations on which comments have been requested specifically herein.

Proposed Rules

List of Subjects in 17 CFR Part 46

Swaps, Data recordkeeping requirements and Data reporting requirements.

For the reasons set forth in the preamble, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 2(h)(5) and 4r(a), the Commission also hereby proposes to amend Chapter 1 of Title 17 of the Code of Federal Regulations by adding Part 46 to read as follows:

PART 46—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS: PRE-ENACTMENT AND TRANSITION SWAPS

Sec.

Authority: Title VII, sections 723 and 729, Pub. L. 111–203, 124 Stat. 1738.

§ 46.1 Definitions.

Terms used in this part are defined as follows:

Asset class means the particular broad category of goods, services or commodities underlying a swap. The asset classes include interest rate, currency, credit, equity, other commodity, and such other asset classes as may be determined by the Commission.

Compliance date means the compliance date specified in the final swap data recordkeeping and reporting regulations in part 45 of this chapter as the date on which those regulations will be implemented, i.e., the date on which registered entities and swap counterparties must begin to comply with those regulations.

Confirmation (confirming) means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

Confirmation data means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.

Credit support agreement means an International Swaps and Derivatives Association, Inc. credit support agreement or equivalent agreement.

Credit swap means any swap that is primarily based on instruments of indebtedness, including, without limitation: any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.

Currency swap means any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates. This category includes foreign exchange swaps as defined in Commodity Exchange Act Section 1a(25).

Electronic reporting or reporting *electronically* means reporting data in compliance with § 46.9 of this part. The obligation to report electronically is not satisfied by electronic transmission of an image of a document.

Equity swap means any swap that is primarily based on equity securities, including, without limitation: any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices.

Interest rate swap means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates.

Major swap participant has the meaning set forth in Commodity Exchange Act, Section 1a(33), and any Commission regulation implementing that Section.

Master agreement means an agreement, signed by the counterparties, providing comprehensive documentation of standard terms and conditions covering one or more swap transactions between such counterparties.

Non-swap dealer/major swap participant counterparty means a swap counterparty that is neither a swap dealer nor a major swap participant.

Other commodity swap means any swap not included in the credit swap, currency swap, equity swap, or interest rate swap categories, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Reporting counterparty means the counterparty required to report swap data pursuant to § 45.5 of this chapter.

Swap data repository has the meaning set forth in Commodity Exchange Act Section 1a(48), and any Commission regulation implementing that Section.

Swap dealer has the meaning set forth in Commodity Exchange Act, Section 1a(49), and any Commission regulation implementing that Section.

Transition swap means any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the compliance date specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.

§ 46.2 Recordkeeping for pre-enactment swaps and transition swaps.

(a) *Recordkeeping for pre-enactment and transition swaps in existence on or after April 25, 2011.* Each counterparty to any pre-enactment swap or transition swap that is in existence on or after April 25, 2011 shall keep the following records concerning each such swap:

(1) *Minimum records required.* The minimum records required to be kept concerning each pre-enactment swap and transition swap shall be as follows:

(i) Each counterparty shall keep records of all of the minimum primary economic terms data specified in the appendix to this part.

(ii) If at any time on or after April 25, 2011 a counterparty is in possession of a confirmation of the swap executed by the counterparties, the counterparty shall keep records of all terms of that confirmation.

(2) *Additional records required to be kept if possessed by a counterparty.* In addition to the minimum records required pursuant to paragraph (a)(1) of this part, a counterparty that is in possession at any time on or after April 25, 2011 of any of the following documentation shall keep copies thereof:

(i) Any master agreement governing the swap, and any modification or amendment thereof.

(ii) Any credit support agreement or equivalent documentation relating to the swap, and any modification or amendment thereof.

(3) *Records created or available after the compliance date.* In addition to the records required to be kept pursuant to paragraphs (a)(1) and (2) of this section, each counterparty to any pre-enactment swap or transition swap that remains in existence on the compliance date shall keep for each such swap, from the compliance date forward, all of the records required to be kept by § 45.2 of this chapter, to the extent that any such records are created by or become available to the counterparty on or after the compliance date.

(b) *Recordkeeping for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* Each counterparty to any pre-enactment swap or transition swap that is expired or terminated prior to April 25, 2011 shall keep the following records concerning each such swap:

(1) *Pre-enactment swaps expired prior to April 25, 2011.* Each counterparty to any pre-enactment swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14,

2010 (17 CFR 44.00 through 44.02). Such information may be retained in the format in which it existed on or after October 14, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(1) does not require the counterparty to create or retain records of information not in its possession on or after October 14, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(2) *Transition swaps expired prior to April 25, 2011.* Each counterparty to any transition swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after December 17, 2010 (17 CFR 44.03). Such information may be retained in the format in which it existed on or after December 17, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(2) does not require the counterparty to create or retain records of information not in its possession on or after December 17, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(c) *Retention period.* All records required to be kept by this § 46.2 shall be kept from the applicable dates specified in paragraph (b) of this section through the life of the swap, and for a period of at least five years from the final termination of the swap, in a form and manner acceptable to the Commission.

(d) *Retrieval.* Records required to be kept pursuant to this § 46.2 shall be retrievable as follows:

(1) Each record required to be kept by a counterparty that is a swap dealer or major swap participant shall be readily accessible via real time electronic access by the counterparty throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant or its affiliates within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.

(2) Each record required to be kept by a non-swap dealer/major swap participant counterparty shall be retrievable by the counterparty within three business days through the period during which it is required to be kept.

(e) *Inspection.* All records required to be kept pursuant to this section shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

§ 46.3 Swap data reporting for pre-enactment swaps and transition swaps.

(a) *Reporting for pre-enactment and transition swaps in existence on or after April 25, 2011.* (1) *Initial data report.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, the reporting counterparty shall report electronically to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, the following:

(i) All of the terms of the confirmation that are recorded in the automated systems of the reporting counterparty, if the terms so reported include all of the minimum primary economic terms data specified in the appendix to this part; or all of the minimum primary economic terms data specified in the appendix to this part;

(ii) The Unique Counterparty Identifier required pursuant to § 46.4 of this part; and

(iii) The following additional identifiers:

(A) The internal counterparty identifier used by the automated systems of the reporting counterparty to identify the non-reporting counterparty;

(B) The internal transaction identifier used by the automated systems of the reporting counterparty to identify the swap; and

(C) The internal master agreement identifier (if any) used by the automated systems of the reporting counterparty to identify the master agreement governing the swap.

(2) *Non-duplication of previous reporting.* If the reporting counterparty for a pre-enactment or transition swap has reported any of the information required as part of the initial data report by paragraph (a) of this section to a trade repository prior to the compliance date, and if as of the compliance date that repository has registered with the Commission as a swap data repository, then:

(i) The counterparty shall not be required to report such previously reported information to the swap data repository again;

(ii) The counterparty shall be required to report to the swap data repository on the compliance date any information required as part of the initial data report by § 46.3(a) of this part that has not been reported prior to the compliance date; and

(iii) The initial data report required by paragraph (b)(2) of this section and all subsequent data reporting concerning the swap shall be made to the same swap data repository to which data concerning the swap was reported prior to the compliance date (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

(3) *Reporting of required swap continuation data for a credit swap or equity swap.* For each pre-enactment or transition swap in either the credit swap or equity swap asset class, that is in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty, as defined in part 45 of this chapter, shall report all required swap continuation data required to be reported for credit swaps or equity swaps under part 45 of this chapter.

(4) *Reporting of required swap continuation data for an interest rate swap, other commodity swap, or currency swap.* For each pre-enactment or transition swap in the interest rate, other commodity, or currency asset class, that is in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty as defined in part 45 shall report required swap continuation data as follows:

(i) *Swaps for which the reporting counterparty is a swap dealer or major swap participant.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, for which the reporting counterparty as defined in part 45 is a swap dealer or major swap participant, the reporting counterparty shall report to a swap data repository electronically all required swap continuation data concerning the swap as provided in part 45.

(ii) *Swaps for which the reporting counterparty is a non-swap dealer/major swap participant counterparty.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, for which the reporting counterparty as defined in part 45 is a non-swap dealer/major swap participant counterparty, the reporting counterparty shall report to a swap data repository electronically all required swap continuation data concerning the swap as provided in part 45. However, notwithstanding any other provision of part 45, the state data reported to provide a snapshot view, on a daily basis, of the primary economic terms of the swap shall be the greater of the following which is in the possession of the reporting counterparty on the compliance date:

(A) The state data, or any part thereof, for the swap as defined in part 45 of this chapter; or

(B) All of the data elements contained in the table of minimum primary economic terms for pre-enactment or transition swaps in the asset class of the swap in question that is included in the appendix to this part.

(b) *Reporting for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* (1) *Pre-enactment swaps expired or terminated prior to April 25, 2011.* For each pre-enactment swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after October 14, 2010 (17 CFR 44.00 through 44.02). This information can be reported via any method selected by the reporting counterparty.

(2) *Transition swaps expired or terminated prior to April 25, 2011.* For each transition swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after December 17, 2010 (17 CFR 44.03). This information can be reported via any method selected by the reporting counterparty.

§ 46.4 Unique identifiers.

The unique identifier requirements for swap data reporting with respect to pre-enactment or transition swaps shall be as follows:

(a) By the compliance date, the reporting counterparty (as defined by part 45 of this chapter) for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain a Unique Counterparty Identifier, as provided in part 45, for itself, and shall include its own Unique Counterparty Identifier in the initial data report concerning the swap. With respect to that Unique Counterparty Identifier, the reporting counterparty and the swap data repository to which the swap is reported shall comply thereafter with all unique identifier requirements of part 45 respecting Unique Counterparty Identifiers.

(b) Within 180 days after the compliance date, the non-reporting counterparty for each pre-enactment or transition swap in existence on or after April 25, 2011 for which an initial data report is required by this part 46, shall obtain a Unique Counterparty Identifier, as provided in part 45, for itself, and shall provide that Unique Counterparty Identifier to the reporting counterparty. Upon receipt of the non-reporting counterparty's Unique Counterparty Identifier, the reporting counterparty shall provide that Unique Counterparty Identifier to the swap data repository to which swap data for the swap was reported. Thereafter, with respect to the Unique Counterparty Identifier of the non-reporting counterparty the counterparties to the swap and the swap data repository to which it is reported shall comply with all requirements of part 45 respecting Unique Counterparty Identifiers.

(c) The Unique Counterparty Identifier requirements of parts 46 and 45 of this chapter shall not apply to pre-enactment or transition swaps expired or terminated prior to April 25, 2011.

(d) The Unique Swap Identifier and Unique Product Identifier requirements of part 45 of this chapter shall not apply to pre-enactment or transition swaps.

§ 46.5 Determination of which counterparty must report.

(a) Determination of which counterparty must report swap data concerning each pre-enactment or transition swap shall be made as follows:

(1) If only one counterparty is an SD, the SD shall fulfill all counterparty reporting obligations.

(2) If neither party is an SD, and only one counterparty is an MSP, the MSP shall fulfill all counterparty reporting obligations.

(3) For each pre-enactment swap or transition swap for which both counterparties are SDs, or both counterparties are MSPs, or both counterparties are non-SD/MSP counterparties, the counterparties shall agree as one term of their swap transaction which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

(4) Notwithstanding the provisions of paragraphs (a)(1) through (3) of this section, if only one counterparty to a pre-enactment swap or transition swap is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(5) If a reporting counterparty selected pursuant to paragraphs (a)(1) through (4) of this section ceases to be a counterparty to a swap due to an assignment or novation, and the new counterparty is a U.S. person, the new counterparty shall be the reporting counterparty and fulfill all reporting counterparty obligations following such assignment or novation. If a new counterparty to a swap due to an assignment or novation is not a U.S. person, the counterparty that is a U.S. person shall be the reporting counterparty and fulfill all reporting counterparty obligations following such assignment or novation.

(b) For pre-enactment and transition swaps in existence as of the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section with respect to the current counterparties to the swap as of the compliance date, regardless of whether either or both were original counterparties to the swap when it was first executed.

(c) For pre-enactment and transition swaps for which reporting is required, but which have expired or been terminated prior to the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section to the counterparties to the swap as of the date of its expiration or termination, regardless of whether either or both were original counterparties to the swap when it was first executed.

§ 46.6 Third-party facilitation of data reporting.

Counterparties required by this part 46 to report swap data for any pre-enactment or transition swap, while remaining fully responsible for reporting as required by this part 46, may contract with third-party service providers to facilitate reporting.

§ 46.7 Reporting to a single swap data repository.

All data reported for each pre-enactment or transition swap pursuant to this part 46, and all corrections of errors and omissions in previously reported data for the swap, by any registered entity or counterparty, shall be reported to the same swap data repository to which the initial data report concerning the swap is made (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.

Should there be a swap asset class for which no swap data repository currently accepts swap data, each counterparty required by this part 46 to report swap data with respect to a pre-enactment or transition swap in that asset class must report that same data at a time and in a form and manner determined by the Commission.

§ 46.9 Required data standards.

In reporting swap data to a swap data repository as required by this part 46, each reporting counterparty shall use the facilities, methods, or data standards provided or required by the swap data repository to which counterparty reports the data.

§ 46.10 Reporting of errors and omissions in previously reported data.

(a) Each swap counterparty required by this part 46 to report swap data shall report any errors and omissions in the data so reported. Corrections of errors or omissions shall be reported as soon as technologically practicable after discovery of any such error or omission.

(b) For pre-enactment or transition interest rate swaps, currency swaps, or other commodity swaps in existence as of the compliance date, reporting counterparties fulfill the requirement to report errors or omissions in state data previously reported as part of required continuation data reporting by making appropriate corrections in their next daily report of state data as required by this part 46 and part 45 of this chapter.

(c) Each counterparty to a pre-enactment or transition swap that is not the reporting counterparty as determined pursuant to part 45, and that discovers any error or omission with respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. Upon receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository, as provided in § 45.10(a) and (b) of this chapter.

(d) Unless otherwise approved by the Commission, or by the Director of Market Oversight pursuant to part 45 of this chapter, each swap counterparty reporting corrections to errors or omissions in data previously reported as required by this part 46 shall report such corrections in the same format as it reported the erroneous or omitted data.

Appendix to Part 46—Tables of Minimum Primary Economic Terms Data for Pre-Enactment and Transition Swaps

MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CREDIT SWAPS AND EQUITY SWAPS

Sample category	Comment
An indication of the counterparty purchasing protection and of the counterparty selling protection.	E.g., option buyer and option seller; buyer and seller.
Information identifying the reference entity	The entity that is the subject of the protection being purchased and sold in the swap.
An indication of whether or not both counterparties are swap dealers.	
An indication of whether or not both counterparties are major swap participants.	
An indication of whether or not either counterparty is a swap dealer or major swap participant.	
The date and time of trade, expressed using Coordinated Universal Time ("CUT").	
The venue where the swap was executed.	
The effective date for the swap.	
The expiration date for the swap.	
The price	E.g., strike, initial price, spread, etc.
The notional amount, the currency in which the notional amount is expressed, and the equivalent notional amount in U.S. dollars.	
The amount and currency or currencies of any up-front payment.	
A description of the payment streams of each counterparty	E.g., coupon.
The title of any master agreement incorporated by reference and the date of any such agreement.	E.g., annex, credit agreement.
If the transaction involved an existing swap, an indication that the transaction did not involve an opportunity to negotiate a material term of the contract, other than the counterparty.	E.g., assignment.
The data elements necessary for a person to determine the market value of the transaction.	
Whether or not the swap will be cleared by a derivatives clearing organization.	
The name of the derivatives clearing organization that will clear the swap, if any.	
If the swap is not cleared, all of the settlement terms, including, without limitation, whether the swap is cash-settled or physically settled, and the method for determining the settlement value.	
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CURRENCY SWAPS

Sample data field	Comments
1 Contract type	E.g., swap, swaption, forwards, options, basis swap, index swap, basket swap, other.
2 Swap transaction date	Date when the swap was entered.

MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CURRENCY SWAPS—Continued

Sample data field	Comments
3 Currency 1	International Organization for Standardization Code.
4 Currency 2	International Organization for Standardization Code.
5 Notional amount 1	For currency one.
6 Notional amount 2	For currency two.
7 Settlement agent of the reporting counterparty	ID of the settlement agent.
8 Settlement agent of the non-reporting counterparty	ID of the settlement agent.
9 Settlement currency	If applicable.
10 Exchange rate 1	At the moment of trade/agreement.
11 Exchange rate 2	At the moment of trade/agreement, if applicable.
12 Swap delivery type	Cash or physical.
13 Expiration date	Expiration date of the contract.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION INTEREST RATE SWAPS

Sample data field	Comment
1 Contract type	E.g., swap, swaption, option, basis swap, index swap, etc.
2 Swap transaction date	Date when the swap was entered.
3 Swap effective date	Effective date of the contract.
4 Swap end-date	Expiration date of the contract.
5 Notional amount one	The current active notional in local currency.
6 Notional currency one	International Organization for Standardization code of the notional currency.
7 Notional amount two	The second notional amount (e.g., receiver leg).
8 Notional currency two	International Organization for Standardization code of the notional currency.
9 Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable.
10 Fixed leg payment frequency	How often will the payments on fixed leg be made.
11 Direction	For swaps—if the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps, it is unspecified. For non-swap instruments and swaptions, the instrument that was bought or sold.
12 Option type	E.g., put, call, straddle.
13 Fixed rate.	
14 Fixed rate day count fraction.	
15 Floating rate payment frequency.	
16 Floating rate reset frequency.	
17 Floating rate index name/rate period.	
18 Leg 1	If two floating legs, report what is paid.
19 Leg 2	If two floating legs, report what is received.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION OTHER COMMODITY SWAPS

Sample data field	Comment
1 Contract type	E.g., swap, swaption, option, etc.
2 Swap transaction date	Date when the swap was entered.
3 Quantity	The unit of measure applicable for the quantity on the swap.
4 Start date	Predetermined start date from which payments will be exchanged.
5 End-date	Predetermined end date from which payments will be exchanged.
6 Buyer pay index	The published price as paid by the buyer.
7 Seller pay index	The published price as paid by the seller.
8 Buyer	Party purchasing product, e.g. payer of the fixed price (for swaps), or payer of the floating price (for put swaption), or payer of the fixed price (for call swaption).
9 Seller	Party offering product, e.g. payer of the floating price (for swaps), payer of the fixed price (for put swaption), or payer of the floating price (for call swaption).
10 Price	E.g., fixed price, the heat rate value, etc.
11 Price unit	The unit of measure applicable for the price on the transaction.
12 Grade	E.g., the grade of oil or refined product being delivered.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

Issued in Washington, DC, on April 6, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–9446 Filed 4–22–11; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 83

[Docket ID DOD–2010–OS–0108]

RIN 0790–AI63

Alternative Dispute Resolution (ADR) and Conflict Management

AGENCY: Defense Legal Services Agency, DoD.

ACTION: Proposed rule.

SUMMARY: This part establishes policy and assigns responsibilities. It establishes a framework for encouraging the expanded use of alternative means of dispute resolution and conflict management practices as an integral part of normal business practices within the Department of Defense.

DATES: Comments must be received by June 24, 2011.

ADDRESSES: You may submit comments, identified by docket number and or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Room 3C843, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Christine M. Kopocis, 703–696–1809.

SUPPLEMENTARY INFORMATION:

Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been certified that 32 CFR part 83 does not:

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

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

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

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

Sec. 202, Public Law 104–4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 83 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

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

It has been certified that 32 CFR part 83 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it [would or would not], if promulgated, have a significant economic impact on a substantial number of small entities.

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

It has been certified that 32 CFR part 83 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 83 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

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

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

List of Subjects in 32 CFR Part 83

Personnel, Dispute resolution.

Accordingly, 32 CFR Part 83 is proposed to be added to read as follows:

PART 83—ALTERNATIVE DISPUTE RESOLUTION (ADR) AND CONFLICT MANAGEMENT

Sec.

Authority: 5 U.S.C. 571–584; Executive Order 12988.

§ 83.1 Purpose.

This part:

(a) Establishes policy pursuant to title 5, United States Code (U.S.C.) 571–584 and Executive Order 12988.

(b) Assigns responsibilities, and

(c) Establishes a framework for encouraging the expanded use of alternative means of dispute resolution and conflict management practices as an integral part of normal business practices within the Department of Defense.

§ 83.2 Applicability.

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

§ 83.3 Definitions.

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

Alternative dispute resolution (ADR). Any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombuds, or any combination thereof.

ADR coordinating committee. The group consisting of the dispute resolution specialists designated under title 5 U.S.C. 571–584 or their representatives from the DoD Components and other officials appointed by the Deputy General Counsel (Legal Counsel) (DGC(LC)). The purpose of the ADR Coordinating Committee is to promote among the DoD Components the exchange of information on ADR and conflict management design and implementation.

Conflict management. A systemic process used to proactively identify and manage, at the earliest stage possible, conflict that can lead to one or more disputes, for the purpose of reducing the incidence of disputes and increasing the likelihood that disputes that do arise may be resolved efficiently, effectively, and expeditiously. Techniques used in the process include, but are not limited to, structured unassisted negotiation (e.g., use of interest-based negotiation techniques), joint or collaborative problem-solving, coaching, and the design of an integrated conflict management system.

§ 83.4 Policy.

It is DoD policy that:

(a) The Department of Defense shall foster and advance collaboration and coordination among the DoD Components on the use of ADR and conflict management practices.

(b) Each DoD Component shall establish and implement ADR program(s) to resolve disputes at the earliest possible stage of the dispute and at the lowest possible organizational level. Any dispute, regardless of subject matter, is a potential candidate for ADR.

(c) DoD personnel are encouraged to identify and address underlying conflict in order to prevent and avoid disputes.

(d) All personally identifiable information (PII) collected during the course of the ADR process shall be maintained and protected in accordance with title 32, Code of Federal Regulations (CFR) part 310.

§ 83.5 Responsibilities.

(a) The General Counsel, Department of Defense (GC, DoD) shall develop policy and provide guidance on the administration of ADR.

(b) The DGC(LC), under the authority, direction, and control of the GC, DoD, shall:

(1) Monitor the implementation of policies and procedures pertaining to the use of ADR and conflict management practices within the Department of Defense.

(2) Establish a data collection and reporting system to evaluate the use of ADR and conflict management practices, as determined necessary, within the Department of Defense.

(3) Provide reports, as determined necessary, to the Secretary of Defense on the use of ADR within the Department of Defense.

(4) Chair the ADR Coordinating Committee.

(5) Ensure that the ADR Coordinating Committee:

(i) Shares information among the DoD Components on ADR and conflict management policies and practices.

(ii) Collaborates, as needed, in the design and implementation of ADR and conflict management practices.

(iii) Collaborates with other programs in the Department of Defense (e.g., Equal Employment Opportunity (EEO)) as needed to integrate ADR and conflict management into the normal business practices of the Department of Defense.

(iv) Establishes DoD-wide working groups and takes other steps to coordinate and facilitate ADR and conflict management practices within the Department of Defense.

(6) Ensure that the Associate Director, Center for Alternative Dispute Resolution, Defense Office of Hearings and Appeals:

(i) Provides support to the DGC(LC) in fulfilling the duties under this part.

(ii) Provides facilitation, administrative, and substantive support for the activities of the ADR Coordinating Committee.

(iii) Represents the Department of Defense as a member of the Interagency ADR Working Group Steering Committee.

(iv) Upon request of a DoD Component, provides consulting, education, and referral services for the design, implementation, training, and evaluation of ADR and conflict management practices.

(v) Upon request of a DoD Component, designates and makes available third-party neutrals qualified to conduct ADR and conflict management processes specified by the DGC(LC).

(c) The Director, Washington Headquarters Services (WHS), under the authority, direction, and control of the Director of Administration and Management, shall offer ADR services to WHS serviced customers in accordance with Administrative Instruction 106 (*see http://www.dtic.mil/whs/directives/corres/pdf/a106p.pdf*).

(d) The Heads of DoD Components shall:

(1) Appoint a dispute resolution specialist as the term is used in title 5 U.S.C. 571–584 and inform the Associate Director, Center for Alternative Dispute Resolution, of the appointment.

(2) Establish, implement, and operate programs to expand the use of ADR and conflict management practices that are appropriate to their Component and in accordance with public law and DoD policy.

(3) Review and revise, where appropriate, existing ADR and conflict management practices to promote increased awareness and use of ADR and conflict management consistent with DoD policy.

(4) Consistent with accomplishing their assigned missions, actively promote the use of ADR and conflict management practices.

(5) Identify and eliminate barriers to the use of ADR and conflict management practices.

(6) Provide copies of Component ADR policies and implementing procedures to the Associate Director, Center for Alternative Dispute Resolution.

(7) Provide representatives and information to the ADR Coordinating Committee and working groups, as requested.

(8) Provide training to employees involved in implementing and maintaining the Component's ADR policy and program.

(9) Collaborate with other DoD Components and other offices (e.g., Equal Employment Office) as appropriate when designing and implementing ADR and conflict management policies and procedures.

(10) Establish a data collection system to monitor ADR and conflict management practices as determined necessary and in compliance with the information requirement in § 83.6 of this part.

(11) Link the Component's ADR Web site, if one is established, to the ADR Web sites of other DoD Components as well as to the Interagency ADR Working Group Steering Committee Web site at *http://www.adr.gov.*

(12) Use existing Government resources, to the extent possible, to avoid unnecessary expenditure of time and money when designing and implementing dispute resolution and conflict management programs.

(13) Provide sufficient resources, including dedicated personnel resources, as necessary, to fulfill the responsibilities listed in this part.

(14) Ensure the collection, use, and release of PII complies with title 5 U.S.C. 552a as implemented by title 32 CFR part 310.

Dated: March 2, 2011.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9750 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 223

[Docket ID: DOD–2010–OS–0108]

RIN 0790–AI64

DoD Unclassified Controlled Nuclear Information (UCNI)

AGENCY: Department of Defense

ACTION: Proposed rule.

SUMMARY: This rule updates policies and responsibilities for controlling Department of Defense (DoD) Unclassified Controlled Nuclear Information (UCNI) in accordance with the provisions of current U.S. Code. This revision streamlines and reflects current practices within the Department of Defense.

DATES: Comments must be received by June 24, 2011.

ADDRESSES: You may submit comments, identified by docket number and or RIN number and title, by any of the following methods:

• *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Linda B. Jones, (757) 229–3866.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been certified that 32 CFR part 223 does not:

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

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

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

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

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

It has been certified that 32 CFR part 223 does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

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

It has been certified that 32 CFR part 223 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

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

It has been certified that 32 CFR part 223 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 223 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

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

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

List of Subjects in 32 CFR Part 223

National defense, Nuclear energy, Reporting and recordkeeping requirements, Security measures.

Accordingly, 32 CFR part 223 is proposed to be revised as follows.

PART 223—DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION (UCNI)

Sec.

Authority: 10 U.S.C. 128 and 5 U.S.C. 552(b)(3).

§ 223.1 Purpose.

This part:

(a) Assigns responsibilities and prescribes procedures for the implementation of policy in title 10, United States Code (U.S.C.) 128, which is the statutory basis for controlling unclassified information on the physical protection of DoD special nuclear material (SNM), SNM equipment, and SNM facilities. Such information is referred to as DoD UCNI, to distinguish it from a similar Department of Energy (DOE) program.

(b) Identifies the authority to be used for denying disclosure of DoD UCNI under title 5 U.S.C. 552.

(c) Supplements security classification guidance contained in DoD Instruction 5210.67,[1] DOE classification guide CG–SS–4 [2] and DoD/DOE joint classification guides by establishing procedures for identifying, controlling, and limiting the dissemination of unclassified information on the physical protection of DoD SNM.

§ 223.2 Applicability.

This part applies to:

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

(b) All SNM, regardless of form, whether in reactor cores or other items (including nuclear weapons) under the direct control of the DoD Components.

(c) Nuclear weapons containing SNM that are in DoD custody (hereafter referred to as "nuclear weapons in DoD custody").

(d) Contractors, consultants, and grantees of the Department of Defense.

§ 223.3 Definitions.

These terms and their definitions are for the purposes of this part:

(a) Atomic Energy Defense Programs. Activities, equipment, and facilities of the Department of Defense that are capable of the following:

(1) Development, production, testing, sampling, maintenance, repair, modification, assembly, utilization, transportation, or retirement of nuclear weapons or nuclear weapon components.

(2) Production, utilization, or transportation of DoD SNM for military applications.

(3) Safeguarding of activities, equipment, or facilities that support the functions in paragraphs (a)(1) and (a)(2) of this section, including the protection

[1] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/521067p.pdf.*

[2] Copies available to authorized recipients from the Director of Classification, Department of Energy.

of nuclear weapons, nuclear weapon components, or DoD SNM for military applications at a fixed facility or in transit.

(b) Document or material. The physical medium on or in which information is recorded, or a product or substance that contains or reveals information, regardless or its physical form or characteristics.

(c) DoD UCNI. Unclassified information on the physical protection of DoD special nuclear material, equipment, and facilities.

(d) Information. Any fact or concept, regardless of the physical form or characteristics of the medium on or in which it is recorded, contained, or revealed.

(e) Reviewing official. An individual appointed by the Assistant Secretary of Defense for Nuclear, Chemical and Biological Defense Programs who may make a determination that a document or material contains, does not contain, or no longer contains DoD UCNI.

(f) Safeguards. An integrated system of physical protection, material accounting, and material control measures designed to deter, prevent, detect, and respond to unauthorized possession, use, or sabotage of DoD SNM, SNM equipment or SNM facilities.

(g) SNM. Defined in 42 U.S.C. 2014.

(h) SNM equipment. Equipment, systems, or components whose failure or destruction would cause an impact on safeguarding DoD SNM resulting in an unacceptable interruption to a national security program or an unacceptable impact on the health and safety of the public.

(i) SNM facility. A DoD facility that performs a function in support of Atomic Energy Defense Programs whose disruption could reasonably be expected to have a significant adverse effect on safeguarding DoD SNM, the health and safety of the public or the common defense and security.

(j) Unauthorized dissemination. The intentional or negligent transfer, in any manner and by any person, of information contained in a document or material determined by a reviewing official to contain DoD UCNI, and so marked in accordance with the procedures in § 223.6 of this part, to any person or entity other than an individual or entity authorized access to DoD UCNI in accordance with title 10 U.S.C. 128 and this part.

§ 223.4 Policy.

It is DoD policy that:

(a) Unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment, for the physical protection of DoD SNM, equipment, or facilities is prohibited.

(b) Unclassified information shall be protected as DoD UCNI based on a determination that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of DoD SNM, SNM equipment, or SNM facilities.

(c) Information regarding physical protection of DoD SNM shall be made publicly available to the fullest extent possible by applying the minimum restrictions, consistent with the requirements of title 10 U.S.C. 128, necessary to protect the health and safety of the public or the common defense and security.

(d) This part and part 1017 of title 10 of the Code of Federal Regulations shall be used as guidance for handling DOE UCNI that is under DoD control.

(e) This part does not prevent a determination that information previously determined to be DoD UCNI is classified information in accordance with DoD 5200.1–R [3] and other applicable standards of classification.

§ 223.5 Responsibilities.

(a) The Under Secretary of Defense for Intelligence (USD(I)) shall oversee the DoD program for controlling DoD UCNI and coordinate DoD compliance with the DOE program for controlling DOE UCNI.

(b) The Assistant Secretary of Defense for Nuclear, Chemical and Biological Defense Programs (ASD(NCB)), under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology and Logistics, shall:

(1) Identify information regarding nuclear weapons security and the protection of SNM at DoD nuclear reactor facilities as DoD UCNI and protect it from unauthorized dissemination, consistent with the requirements of title 10 U.S.C. 128 and this part.

(2) Advise the USD(I) on implementation of the DoD UCNI program.

(3) Designate a DoD UCNI reviewing official, who shall be authorized to determine that materials or documents contain, do not contain, or no longer contain DoD UCNI.

[3] Available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf.*

(c) The Director, Administration and Management shall provide guidance, as needed, to the Heads of the DoD Components regarding title 5 U.S.C. 552, as implemented by title 32, Code of Federal Regulations (CFR) 286, as it applies to the DoD UCNI program.

(d) The Heads of the DoD Components shall identify DoD UCNI within their Component and protect it from unauthorized dissemination, consistent with the requirements of title 10 U.S.C. 128 and this part.

§ 223.6 Procedures—identifying and controlling DoD UCNI.

(a) *General.* (1) The decision to protect unclassified information as DoD UCNI shall be based on a determination that the unauthorized dissemination of such information could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by increasing significantly the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of DoD SNM, SNM equipment, SNM facilities or nuclear weapons in DoD custody. This is called the "adverse effects test."

(2) DoD UCNI shall be identified, controlled, marked, transmitted, and safeguarded in the DoD Components and the North Atlantic Treaty Organization (NATO), and among DoD contractors, consultants, and grantees. Within NATO, DoD UCNI shall be marked, controlled, and safeguarded as "NATO RESTRICTED" information.

(3) Contracts requiring access to or the preparation of unclassified information that is or could be DoD UCNI shall require compliance with this part and any applicable DoD Component regulations, and shall specify requirements for identifying, marking, handling and safeguarding DoD UCNI.

(b) *Identifying DoD UCNI.* (1) To be designated and protected as DoD UCNI, information must:

(i) Be unclassified.

(ii) Pertain to security measures, including plans, procedures, and equipment, for the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(iii) Meet the adverse effects test.

(2) Information about DoD SNM shall be protected as DoD UCNI if it falls within one or more of the categories listed in § 223.7(c) and meets the criteria in paragraph (b)(1) of this section.

(3) DoD personnel, in making a determination to protect unclassified information as DoD UCNI, shall consider the probability of illegal production of nuclear weapons or of

theft, diversion, or sabotage of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody if the information proposed for protection were made available for public disclosure and dissemination. The cognizant official shall consider how the unauthorized disclosure or dissemination of such information could assist a potential adversary in:

(i) Selecting a target for an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (*e.g.,* relative importance of a facility or the location, form, and quantity of DoD SNM). Information that can be obtained by observation from public areas outside controlled locations should not be considered as DoD UCNI.

(ii) Planning or committing an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (*e.g.,* design of security systems; building plans; methods and procedures for transfer, accountability, and handling of DoD SNM; or security plans, procedures, and capabilities).

(iii) Measuring the success of an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (*e.g.,* actual or hypothetical consequences of the sabotage of specific vital equipment or facilities).

(iv) Illegally producing a nuclear explosive device (*e.g.,* unclassified nuclear weapon design information useful in designing a primitive nuclear device; location of unique DoD SNM needed to fabricate such a device; or location of a nuclear weapon).

(v) Dispersing DoD SNM in the environment (*e.g.,* location, form, and quantity of DoD SNM).

(d) Where questions or disagreements arise on designation or continued protection of information as DoD UCNI, the reviewing official appointed by the ASD(NCB) shall make the final determination. If a determination cannot be made because applicable guidance is unclear or does not exist, the document or material in question shall be referred to the reviewing official for a determination.

(c) *Access to DoD UCNI.* (1) No explicit designation or security clearance is required for access to DoD UCNI; however, a person granted access to DoD UCNI must have a need to know the specific DoD UCNI to which access is granted in the performance of official duties or of DoD-authorized activities.

(2) The individual granting access to DoD UCNI shall notify each person granted such access of applicable regulations, including the physical protection and access requirements, concerning the protection of DoD UCNI as well as any special dissemination limitations that apply to the specific DoD UCNI to which access is being granted, prior to dissemination of the DoD UCNI to the person.

(3) The requirement to notify persons granted access to DoD UCNI of applicable regulations concerning protection and dissemination of DoD UCNI may be met by attachment of an appropriate cover sheet to the front of each document or material containing DoD UCNI prior to its transmittal to the person granted access.

(d) *Marking DoD UCNI.* (1) An unclassified document with DoD UCNI shall be marked "DoD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION" at the bottom on the outside of the front cover, if any; on the outside of the back cover, if any; on the first page; and on each individual page containing DoD UCNI.

(2) Within an unclassified document, an individual page containing DoD UCNI shall be marked to show which of its portions contain DoD UCNI. In marking sections, parts, paragraphs, or similar portions, the parenthetical term "(DoD UCNI)" shall be used and placed at the beginning of the applicable portions.

(3) In a classified document, an individual page that has both DoD UCNI and classified information shall be marked at the top and bottom of the page with the highest security classification of information appearing on that page. In marking sections, parts, paragraphs, or similar portions, the parenthetical term "(DoD UCNI)" shall be used and placed at the beginning of those portions containing DoD UCNI. In a classified document, an individual page that has DoD UCNI, but no classified information, shall be marked "UNCLASSIFIED//DoD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION" at the top and bottom of the page, unless the page is marked with the overall classification of the document. The DoD UCNI marking may be combined with other markings, if all relevant statutory and regulatory citations are included. DoD 5200.1–R provides additional guidance on marking classified documents.

(4) Other material (*e.g.,* electronic media, photographs, films, tapes, or slides) containing DoD UCNI shall be conspicuously marked "DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION," in accordance with paragraphs (d)(1) through (d)(3) of this section, to ensure that a recipient or viewer is aware of the status of the information.

(e) *Dissemination and Transmission.* (1) DoD UCNI may be disseminated among the DoD Components, NATO, and DoD contractors, consultants, and grantees on a need-to-know basis for the conduct of official business for the Department of Defense. Dissemination to NATO or other foreign or international entities requires prior review and approval by the appropriate dissemination entity.

(2) Recipients shall be made aware of the status as DoD UCNI for all such information disseminated to them. Transmission of DoD UCNI shall be by means which preclude unauthorized disclosure or dissemination (*e.g.,* secure phone, encrypted e-mail).

(3) Documents containing DoD UCNI shall be marked as prescribed in paragraph (d) of this section. Transmittal documents shall call attention to the presence of DoD UCNI attachments using an appropriate statement in the text or including at the bottom of the transmittal document a statement similar to: "The attached document contains DoD Unclassified Controlled Nuclear Information (DoD UCNI)."

(4) DoD UCNI transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the DoD UCNI marking. That may be accomplished by adding the transmittal statement "DEPARTMENT OF DEFENSE/UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION/EXEMPT FROM MANDATORY DISCLOSURE UNDER U.S.C. 552(b)(3), AS AUTHORIZED BY 10 U.S.C. 128" to the document cover before transfer.

(5) When not commingled with classified information, DoD UCNI may be sent by first-class mail in a single, opaque envelope or wrapping.

(6) DoD UCNI shall not be discussed or transmitted over an unprotected telephone or telecommunications circuit (to include facsimile transmissions) except in case of an emergency.

(7) Each part of electronically transmitted messages containing DoD UCNI shall be marked appropriately. Unclassified messages, including e-mail, with DoD UCNI shall have the abbreviation "DoD UCNI" at the top of the message, before the beginning of the text, and the parenthetical marking "(DoD UCNI)" preceding each portion of text containing DoD UCNI information.

(8) DoD UCNI processed, stored, or produced on stand-alone or networked computer or other information technology systems shall enforce protection from unauthorized disclosure or dissemination, in accordance with

the procedures in paragraph (f) of this section.

(9) A document marked as having DoD UCNI may be reproduced minimally without permission of the originator and consistent with the need to carry out official business.

(f) *Safeguarding DoD UCNI.* (1) During normal working hours, documents determined to contain DoD UCNI shall be safeguarded and controlled by measures designed to reduce the risk of access to DoD UCNI by unauthorized individuals. Particular attention should be paid to areas where DoD UCNI is used or stored if unescorted access by unauthorized individuals is possible.

(2) At the close of business, DoD UCNI material shall be stored so to preclude disclosure. Storage of such material with other unclassified documents in unlocked receptacles (e.g., desks, bookcases) is adequate if Government or Government-contractor internal building security is provided during non-duty hours. When such internal building security is not provided, locked rooms or buildings normally provide adequate after-hours protection. If such protection is not considered adequate, DoD UCNI material shall be stored in locked receptacles (e.g., locked file cabinet, locked desk drawer, safe).

(3) Non-record copies of DoD UCNI materials shall be destroyed by shredding or burning or, if the sensitivity or volume of the information justifies it, in accordance with the procedures specified by DoD 5200.1–R for classified material. Record copies of DoD UCNI documents shall be disposed of in accordance with the DoD Component's record management regulations. DoD UCNI on magnetic storage media shall be disposed of by overwriting to preclude its reconstruction. DoD UCNI in electronic form shall be deleted and also removed from any desktop trash or recycling files.

(4) Unauthorized disclosure of DoD UCNI justifies investigative and administrative actions to determine cause, assess impact, and fix responsibility. The DoD Component that originated the DoD UCNI information shall be informed of its unauthorized disclosure and the outcome of the investigative and administrative actions. Unauthorized disclosure of DoD UCNI material does not constitute a compromise of classified information.

(g) *Retirement of Document or Material.* (1) Any unclassified document or material that is not marked as containing DoD UCNI but that may contain DoD UCNI shall be marked upon retirement in accordance with the DoD Component's record management regulations.

(2) A document or material marked as containing DoD UCNI is not required to be reviewed upon or subsequent to retirement. Retired documents or materials shall be reviewed in accordance with paragraph (h) of this section upon a request for their release made pursuant to 5 U.S.C. 552.

(h) *Requests for Public Release of UCNI.* (1) Pursuant to 10 U.S.C. 128, information that qualifies as DoD UCNI is exempt from mandatory disclosure pursuant to title 5 U.S.C. 552. Requests for the public release of DoD UCNI shall be denied, in accordance with procedures established in title 32 CFR part 286, pursuant to title 5 U.S.C. 552(b)(3), citing title10 U.S.C. 128 as authority.

(2) Requests for DOE UCNI shall also be denied pursuant to title 5 U.S.C. 552(b)(3), but title 42 U.S.C. 2168 shall be cited, with the concurrence of the DOE, as the basis for invoking the exemption.

(3) The reviewing official designated by the ASD(NCB) shall review any retired DoD UCNI document or material upon a request for its release made pursuant to title 5 U.S.C. 552.

§ 223.7 Procedures-determination of DoD UCNI.

(a) *Use of the Guidelines.* (1) The guidelines in this section are the basis for determining what unclassified information regarding the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody in a given technical or programmatic subject area are to be designated as DoD UCNI.

(2) The decision to protect unclassified information as DoD UCNI shall be based on a determination that the unauthorized dissemination of such information could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(b) *General Guidance.* (1) Unclassified information relating to the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody is to be protected from public disclosure to prevent the adverse effects identified in paragraph (a)(1) of this section. Public availability of information that would not result in such adverse effects is not to be restricted.

(2) In controlling DoD SNM information, only the minimum restrictions needed to protect the health and safety of the public or the common defense and security shall be applied to prohibit the disclosure and dissemination of DoD UCNI.

(3) Any material that has been, or is, widely and irretrievably disseminated in the public domain and whose dissemination was not, or is not, under Government control is exempt from control under these guidelines. However, the fact that information is in the public domain is not a sufficient basis for determining that similar or updated Government-owned and -controlled information in another document or other material is not, or is no longer, DoD UCNI; case-by-case determinations are required.

(c) *Topical Guidance.* DoD Components shall consider the elements of information discussed in this section during the preparation of unclassified information that addresses the physical protection of DoD SNM or nuclear weapons in DoD custody to determine if it qualifies for control as DoD UCNI.

(1) *Vulnerability Assessments.* (i) General vulnerabilities that could be associated with specific DoD SNM, SNM equipment, SNM facility locations, or DoD nuclear weapons storage facilities.

(ii) The fact that DoD SNM or nuclear weapons facility security-related projects or upgrades are planned or in progress, if not observable from a public area.

(iii) Identification and description of security system components intended to mitigate the consequences of an accident or act of sabotage at a DoD SNM or nuclear weapons facility.

(2) *Material Control and Accountability.* (i) Total quantity or categories of DoD SNM at a facility.

(ii) Control and accountability plans or procedures.

(iii) Receipts that, cumulatively, would reveal quantities and categories of DoD SNM of potential interest to an adversary.

(iv) Measured discards, decay losses, or losses due to fission and transmutation for a reporting period.

(v) Frequency and schedule of DoD SNM inventories.

(3) *Facility Description.* (i) Maps, conceptual design, and construction drawings of a DoD SNM or nuclear weapons facility showing construction characteristics of building(s) and associated electrical systems, barriers, and back-up power systems not observable from a public area.

(ii) Maps, plans, photographs, or drawings of man-made or natural features in a DoD SNM facility or nuclear weapons not observable from a public area; i.e., tunnels, storm or waste sewers, water intake and discharge conduits, or other features having the potential for concealing surreptitious movement.

(iii) Communications and computer network configurations and capabilities.

(4) *Intrusion Detection and Security Alarm Systems.* (i) Information on the layout or design of security and alarm systems at a specific DoD SNM or nuclear weapons facility, if the information is not observable from a public area.

(ii) The fact that a particular system make or model has been installed at a specific DoD SNM or nuclear weapons facility, if the information is not observable from a public area.

(iii) Performance characteristics of installed systems.

(5) *Keys, Locks, Combinations, and Tamper-Indicating Devices.* (i) Types and models of keys, locks, and combinations of locks used in DoD SNM or nuclear weapons facilities and during shipment.

(ii) Method of application of tamper-indicating devices.

(iii) Vulnerability information available from unclassified vendor specifications.

(6) *Threat Response Capability and Procedures.* (i) Information about arrangements with local, State, and Federal law enforcement agencies of potential interest to an adversary.

(ii) Information in "non-hostile" contingency plans of potential value to an adversary to defeat a security measure, *e.g.,* fire, safety, nuclear accident, radiological release, or other administrative plans.

(iii) Required response time of security forces.

(7) *Physical Security Evaluations.* (i) Method of evaluating physical security measures not observable from public areas.

(ii) Procedures for inspecting and testing communications and security systems.

(8) *In-Transit Security.* (i) Fact that a shipment is going to take place.

(ii) Specific means of protecting shipments.

(iii) Number and size of packages.

(iv) Mobile operating and communications procedures that an adversary could exploit.

(v) Information on mode, routing, protection, communications, and operations that must be shared with law enforcement or other civil agencies, but not visible to the public.

(vi) Description and specifications of transport vehicle compartments or security systems not visible to the public.

(9) *Information on Nuclear Weapon Stockpile and Storage Requirements, Nuclear Weapon Destruction and Disablement Systems, and Nuclear Weapon Physical Characteristics.* Refer to DOE CG–SS–4 for guidance about the physical protection of information on nuclear weapon stockpile and storage requirements, nuclear weapon destruction and disablement systems, and nuclear weapon physical characteristics that may, under certain circumstances, be unclassified. Such information meeting the adverse effects test shall be protected as DoD UCNI.

Dated: March 25, 2011.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9751 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Chapter I

[Docket No.: PTO–P–2011–0018]

Streamlined Patent Reexamination Proceedings; Notice of Public Meeting

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of public meeting; request for comments.

SUMMARY: This document announces a public meeting to solicit public opinions on a number of changes being considered by the United States Patent and Trademark Office (USPTO) to streamline the procedures governing *ex parte* and *inter partes* reexamination proceedings. These changes are intended to achieve faster, more efficient resolution of the substantial new question of patentability (SNQ) for which reexamination is ordered. The proposed changes in this document are divided into three categories: changes to both *ex parte* and *inter partes* reexaminations, changes specific to *ex parte* reexamination, and changes specific to *inter partes* reexamination. After soliciting public opinions regarding this document, the USPTO may seek to adopt one or more of the proposed changes or a modified version thereof, or other changes suggested by the public, through a rule making or through internal operational changes as appropriate.

DATES: The public meeting will be held on June 1, 2011, beginning at 1:30 p.m.

Persons interested in attending the meeting must register by 5 p.m., Eastern Standard Time (EST), on May 25, 2011.

Written comments must be submitted by June 29, 2011.

ADDRESSES: The public meeting will be held at the USPTO, in the South Auditorium of Madison West, 600 Dulany Street, Alexandria, VA 22314.

Written comments should be sent by electronic mail message over the Internet addressed to *reexam improvementcomments@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 Kenneth M. Schor. Although comments may be submitted by mail, submission via e-mail to the above address is preferable.

The written 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 USPTO Internet Web site (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included.

For Registration to Give a Presentation at the Meeting: If you wish to make an oral presentation at the meeting, you must register by sending an e-mail to *reexamimprovement comments@uspto.gov,* by 5 p.m. EST, on May 11, 2011. See the registration information provided below.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Schor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at 571–272–7710, or by mail addressed to: Mail Stop Comments-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

Inquiries regarding the current reexamination practice may be directed to the Office of Patent Legal Administration, by telephone at (571) 272–7703, or by electronic mail at *PatentPractice@uspto.gov.*

SUPPLEMENTARY INFORMATION: This document announces a public meeting to solicit public opinions on a number of changes being considered by the USPTO to streamline the procedures governing *ex parte* and *inter partes* reexamination proceedings. These changes are intended to achieve faster, more efficient resolution of the SNQ for which reexamination is ordered.

Moreover, the changes proposed in this document are complementary to the post-grant provisions in the pending America Invents Act currently being considered by Congress. In particular, the America Invents Act would not alter *ex parte* reexamination, and it would provide a transition period of several years during which *inter partes* reexamination could still be requested. Therefore, it is important for the USPTO to continue its efforts to improve the existing reexamination system.

On August 5, 2010, the USPTO explained that it is considering a number of short- and long-range initiatives that can be implemented in three phases to reduce pendency and improve efficiency, while maintaining quality, in reexamination proceedings. *See Optional Waiver of Patent Owner's Statement in Ex Parte Reexamination Proceedings,* 75 FR 47269 (Aug. 5, 2010).

Phase I includes a number of streamlined procedures and optional programs in which the Patent Owner and Third Party Requester may elect to participate in order to gain the benefit of shorter pendency. For example, in the above-mentioned notice dated August 5, 2010, the USPTO implemented an optional procedure allowing the Patent Owner in an *ex parte* reexamination to waive the Patent Owner's statement under 35 U.S.C. 304, and thereby enable the USPTO to issue a first Office action on the merits (FAOM), together with or soon after mailing the order granting reexamination. Also as part of phase I, the USPTO had previously implemented a streamlined procedure for appeal brief review in both *ex parte* and *inter partes* reexamination proceedings. *See Streamlined Procedure for Appeal Brief Review in Ex Parte Reexamination Proceedings,* 75 FR 29321 (May 25, 2010); *Streamlined Procedure for Appeal Brief Review in Inter Partes Reexamination Proceedings,* 75 FR 50750 (Aug. 17, 2010). Moreover, in order to process reexaminationt proceedings more efficiently and expeditiously, the USPTO has increased the number of examiners working exclusively on reexamination proceedings, made changes in the handling and scanning of documents, instituted an improved petitions tracking system, and designed new forms for answering certain types of petitions. In addition, the USPTO's Central Reexamination Unit has identified a number of automation and information technology upgrades that will be instituted as part of the USPTO's end-to-end electronic processing system, which will greatly improve the processing and tracking of all stages of reexamination proceedings.

However, the USPTO alone cannot reduce reexamination pendency, particularly under its existing procedures. Streamlining these procedures, including those governing the practices of the Patent Owner and Third Party Requester, will be necessary if a more significant reduction in pendency is to be achieved. Therefore, in phases II and III of the USPTO's three-phase initiative, the USPTO will consider the data gathered from phase I and solicit public opinion on additional procedural changes, rule making proposals, and administrative proposals for statutory changes.

The instant notice seeks public input as the USPTO considers moving into phases II and III. In particular, the instant notice proposes a number of changes intended to reduce pendency while maintaining quality in *ex parte* and *inter partes* reexamination proceedings. The proposed changes in this notice are divided into three categories: (A) Changes to both *ex parte* and *inter partes* reexaminations, (B) changes specific to *ex parte* reexamination, and (C) changes specific to *inter partes* reexamination. After soliciting public opinions regarding this notice, the USPTO may seek to adopt one or more of the proposed changes or a modified version thereof, or other changes as recommended by the public, through rule making or through internal operational changes, as appropriate.

A. Proposed Changes to Both *Ex Parte* and *Inter Partes* Reexaminations

1. Requester Must Separately Explain How Each SNQ Presented in the Request Is "New" Relative to Other Examinations of the Patent Claims

This proposed change is intended to allow the USPTO to more quickly determine whether the request raises an SNQ based on a new, non-cumulative technological teaching. The proposed change also ensures that the Requester adequately explains how each SNQ presented in the request is "new" relative to other examinations of the patent claims (rather than merely stating what the SNQ is believed to be). Current practice does not set forth a consistent format in which the required information should be presented in the request. This lack of consistency results in requests that are denied a filing date and whose noncompliance must be corrected by the Requester, which delays the proceeding.

As explained in the *Manual of Patent Examining Procedure* (MPEP) §§ 2216, 2614:

> It is not sufficient that a request for reexamination merely proposes one or more rejections of a patent claim or claims as a basis for reexamination. It must first be demonstrated that a patent or printed publication that is relied upon in a proposed rejection presents a new, non-cumulative technological teaching that was not previously considered and discussed on the record during the prosecution of the application that resulted in the patent for which reexamination is requested, and during the prosecution of any other prior proceeding involving the patent for which reexamination is requested.

In order to ensure that requests comply with MPEP §§ 2216 and 2614, the USPTO would require, for each SNQ presented in the request, a statement of how the technological teaching in the references that support the SNQ is new and non-cumulative of what had been considered in any previous or pending USPTO examination of the patent claims. For clarity, this statement would be provided in a section of the request dedicated solely to explaining how each SNQ is believed to be new.

2. Requester Must Explain How the References Apply to Every Limitation of Every Claim for Which Reexamination Is Requested

This proposed change is intended to allow the USPTO to more quickly address the requisite "pertinency and manner of applying cited prior art to every claim for which reexamination is requested" (35 U.S.C. 302, 311) presented in the request. It is also intended to allow examiners to more quickly write a First Action on the Merits (FAOM) based on the references cited in the request. Current request practice does not require the use of a consistent format in which the required information must be presented. This inconsistency results in delay and potential re-work because Requesters do not consistently map the prior art teachings to the limitations of the claims.

A statement of how the references apply to every limitation of the claims would be required to be provided in a section of the request dedicated solely to explaining how the references apply. Requests filed by a Third Party Requester must clearly set forth a proposed rejection for each claim for which reexamination is requested, with separate rejections based on anticipation, obviousness, and/or double patenting. Requests filed by a Patent Owner must include an anticipation, obviousness, and/or double patenting analysis for each claim for which reexamination is requested. In all cases, a limitation-by-limitation explanation of the manner of applying the references must be presented in the form of a claim chart or narrative explanation, but not both, as providing both tends to lengthen the request and may result in inconsistencies between the two explanations.

To avoid confusion, the explanation must not combine multiple or alternative proposed rejections or proposed combinations of references. Thus, a proposed rejection of claims 1–5 as being "obvious over references A or B or C, in view of references C or D or E, optionally in view of references F or G," is improper. Likewise a proposed rejection of claims 1–5 being "either anticipated or obvious over references A or B," is improper. Each statutory ground of rejection and each combination of references must be expressed and explained separately.

3. Requester Must Explain How Multiple SNQs Raised in the Same Request Are Non-Cumulative of Each Other; Cumulative SNQs Will Be Deemed to Constitute a Single SNQ

This proposed change is intended to streamline reexamination in cases where a request includes multiple references cited in support of separate SNQs, but which are all directed to the same claims and are all based on the same new technological teaching. The current practice of separately addressing multiple, cumulative SNQs prolongs pendency and is an inefficient means of addressing the question raised by a new technological teaching that is common among multiple, cumulative SNQs.

The instant notice proposes that cumulative SNQs will be deemed to constitute a single SNQ. For example, if a request cites ten prior art references in support of ten proposed SNQs, and all ten references are cited for the same claim limitation found missing in a prior examination, the USPTO will construe the request as raising a single SNQ based on the single, new technological teaching.

Where a Requester asserts multiple SNQs against the same claim, it is the Requester who is in the best position to narrow the dispute by explaining how the SNQs present unique issues of patentability. The Requester will be required to explain, in a separate section of the request, how each SNQ is substantially different from all other SNQs that are being asserted against the same claims in the same request. *Cf. In re Katz Interactive Call Processing Pat. Litig.*, __F.3d__, 2011 WL 607381, at *3–4 (Fed. Cir. Feb. 18, 2011) (holding that it was not an abuse of discretion to require the party that was "in the best position to narrow the dispute" to show how non-selected claims were "substantially different," in terms of validity and/or infringement, from selected claims).

SNQs that are not persuasively explained to be substantially different from each other will be deemed to constitute a single SNQ from which the examiner will select the best proposed rejections based on the best cited references, as discussed below in Part A.4. Any order granting reexamination will identify the SNQs for which reexamination is granted, and will further identify any SNQs that are found to be cumulative of other SNQs. The examiner's designation of an SNQ as "cumulative" is not petitionable; however, the examiner's selection of any "representative" rejections (*see* Part A.4) from among the cumulative SNQs may be challenged by the Third Party Requester in *inter partes* reexamination in the manner set forth in Part C.1 below.

4. The Examiner May Select One or More Representative Rejections From Among a Group of Adopted Rejections.

In the FAOM, for each SNQ for which reexamination is granted, the examiner will identify each of the Requester's proposed rejections as either "adopted" or "not adopted." A proposed rejection is "adopted" if the examiner determines that it establishes a *prima facie* case of unpatentability. A proposed rejection is "not adopted" if the examiner determines that it fails to establish a *prima facie* case of unpatentability.

Where multiple rejections are adopted against a single claim, the examiner may select one or more "representative" rejections from the group of adopted rejections. The examiner's determination that a rejection is "representative" means that the examiner believes that all rejections within the group of adopted rejections will clearly fall if the representative rejection is not sustained. The examiner will clearly identify which rejections, if any, are being treated as a group and which rejection(s) within the group is/are representative of the group. The examiner's reasons in support of each representative rejection will be fully discussed in the Office action. For any rejection within the group which is not designated as a representative rejection, the examiner may simply state, to the extent the examiner agrees with the Requester, that the rejection is adopted for the reasons set forth in the request, and incorporate by reference the Requester's limitation-by-limitation explanation of the manner of applying the references (*see* Part A.2).

In deciding which rejections to designate as representative, the examiner will apply the guidance set forth in MPEP § 706.02(I), quoted below:

> Prior art rejections should ordinarily be confined strictly to the best available art. Exceptions may properly be made, for example, where:
>
> (A) the propriety of a 35 U.S.C. 102 or 103 rejection depends on a particular interpretation of a claim;
>
> (B) a claim is met only in terms by a reference which does not disclose the inventive concept involved; or
>
> (C) the most pertinent reference seems likely to be antedated by a 37 CFR 1.131 affidavit or declaration.
>
> Such rejections should be backed up by the best other art rejections available. Merely cumulative rejections, i.e., those which would clearly fall if the primary rejection were not sustained, should be avoided.

If the Patent Owner subsequently overcomes the representative rejections of a claim, then the examiner will consider whether any other rejection within the group overcomes the deficiency of the representative rejections, and will do so prior to confirming the patentability of that claim. In this way, no claim will be confirmed as patentable without having received due consideration of all rejections within the group. For this reason, it is advisable for the Patent Owner to explain, in its response to the FAOM, why the Patent Owner's arguments against any representative rejection would likewise overcome all other rejections within the group. The Patent Owner may also present any specific argument or evidence directed to any rejection within the group.

If the Patent Owner appeals the final rejection of a claim, then the appeal must be taken from all adopted rejections of that claim, not just from the representative rejections. The Board of Patent Appeals and Interferences (Board) may review any rejection within the group of adopted rejections in order to affirm the examiner as to that claim. The affirmance of a rejection of a claim on any of the grounds specified will constitute a general affirmance of the examiner's rejections of that claim, except as to any ground specifically reversed.

The examiner's designation of a rejection as "representative" is not petitionable; however, this designation may be challenged by the Third Party Requester in *inter partes* reexamination in the manner set forth in Part C.1 below.

5. Requester's Declaration and Other Evidence Will Be Mainly Limited to the Request

This proposed change is intended to encourage compact prosecution by requiring the Requester to submit all necessary evidence in the initial request and thereby reduce the need for later submissions. In *inter partes* reexamination, any further submission of evidence (including declarations, affidavits, and test data) by the Third Party Requester in the proceeding will be limited to rebutting a point made in an examiner's Office action or in a Patent Owner's response. In *ex parte* reexamination, the further submission of evidence by the Third Party Requester will be limited to rebutting a point made in the Patent Owner's statement under 35 U.S.C. 304, if any such statement is filed. In all cases, when submitting new evidence, the Third Party Requester must identify the specific point to be rebutted and explain how the new evidence rebuts it.

6. Patent Owner's Amendments and Evidence Will Be Mainly Limited to the First Action Response

This proposed change is intended to encourage compact prosecution by ensuring that the Patent Owner's amendments and evidence (including declarations, affidavits, and test data) are presented early in reexamination. In *ex parte* reexamination, the Patent Owner's submission of amendments and evidence will be generally limited to the earlier of: (1) The Patent Owner's optional statement under 35 U.S.C. 304, if the Patent Owner does not waive the statement; or (2) if the Patent Owner waives the statement, the Patent Owner's response to an FAOM. In *inter partes* reexamination, the Patent Owner's amendment and declaration evidence will be generally limited to the Patent Owner's response to the FAOM. Any further submission of amendments or declaration evidence, in either *ex parte* or *inter partes* reexamination, will be limited to overcoming a new ground of rejection entered in any non-final Office action.

Amendments filed after a final Office action will only be admitted to (1) cancel claims, (2) rewrite dependent claims into independent form, (3) comply with requirements or suggestions set forth in a final Office action, or (4) respond to any new ground of rejection designated in an examiner's answer or Board decision. For a discussion of what constitutes a "final Office action" in *inter partes* reexamination, see Part C.2 below.

7. Claim Amendments Will Not Be Entered Unless Accompanied by a Statement Explaining How the Proposed New Claim Language Renders the Claims Patentable in Light of an SNQ

Claim amendments that are not germane to any SNQ tend to unnecessarily expand the scope of the proceeding and result in longer reexamination pendency. In such cases, the examiner is often required to conduct an entirely new search of the prior art and to consider issues beyond those raised in the request. All of this detracts from what should otherwise be the central focus of the reexamination—namely, a "resolution of the question" for which reexamination was ordered. 35 U.S.C. 304, 313.

The change proposed herein is intended to allow the USPTO to determine whether a Patent Owner's amendment should be permitted entry, given that "amendment of claims during reexamination is limited to amendment in light of prior art raising a substantial new question of patentability." *In re Freeman,* 30 F.3d 1459, 1468 (Fed. Cir. 1994). In *Freeman,* the Federal Circuit stated:

> [T]he ability of a patentee to amend claims during reexamination must be seen in light of the fundamental purpose of reexamination—the determination of validity in light of a substantial new question of patentability. Thus, *amendment of claims during reexamination is limited to amendment in light of prior art raising a substantial new question of patentability.*

Id. (emphasis added). In *Freeman,* the Patent Owner amended the patent claims during reexamination, not to distinguish the prior art, but to avoid an unfavorable interpretation that a court had given those claims in an earlier litigation. The Board affirmed the examiner's rejection under 35 U.S.C. 305 because the amendments were found to broaden the scope of the claims as interpreted by the court. In appealing the Board's decision, the Patent Owner argued that the court's claim interpretation did not bind the Patent Owner in the reexamination under the doctrine of issue preclusion because, according to the Patent Owner, the reexamination offered the Patent Owner "the opportunity to amend his claims 'in response to a decision adverse to the patentability of a claim of a patent.'" *Id.* (quoting 35 U.S.C. 305). The Federal Circuit disagreed. It held that the Patent Owner "*never had the option* of amending his claims during reexamination" in a manner having "nothing to do with a substantial new question of patentability." *Id.* (emphasis added). The Federal Circuit therefore concluded that the doctrine of issue preclusion applied against the Patent Owner, and thus affirmed the broadening rejection.

In view of the foregoing, and in order to ensure that all proposed claim amendments, including new claims, are directed to resolving the SNQ, the USPTO will require the Patent Owner to submit a statement explaining how the proposed new claim language (apart from the original claim language) renders the claims patentable over the references raising an SNQ. The role of this explanatory statement is to allow the USPTO to determine whether a proposed amendment is being properly submitted "in light of prior art raising a substantial new question of patentability," or whether the amendment should be refused entry because it has "nothing to do with a substantial new question of patentability." *Freeman,* 30 F.3d at 1468. The amendment will not be entered if the necessary statement is either missing or conclusory (*e.g.,* the statement merely says "the amended claims distinguish over the prior art"). Nevertheless, so long as the Patent Owner explains how the proposed new claim language distinguishes the invention over the prior art, the amendment will be entered even if, on the merits, the examiner disagrees with the Patent Owner that the amendment overcomes the rejection. Moreover, the amendment will be entered even if the new or amended claim gives rise to a new ground of rejection. Where the requirement is satisfied as to fewer than all of the proposed new or amended claims, the proposed amendment will be entered in part as to the claims for which the requirement is satisfied.

It is important to note that the submission of an amendment unrelated to any SNQ is not, in itself, a basis for *rejecting* the amended claim; rather it is a basis for *refusing entry* of the amendment. In *Cordis Corp.* v. *Medtronic Ave, Inc.,* 511 F.3d 1157, 1185 (Fed. Cir. 2008), the Federal Circuit stated that the prohibition against enlarging the scope of a claim is the only "substantive limitation" in 35 U.S.C. 305, and is thus the only basis on which to invalidate a claim under section 305 in litigation after the amendment has been entered. In contrast to this "substantive limitation," the court in *Freeman* stated that amending claims during reexamination in a manner having "nothing to do with a substantial new question of patentability" is not a "procedural opportunity available in the [US]PTO." *Freeman,* 30 F.3d at 1468–69 (stating that the Patent Owner "never had the option of amending his claims" in such a manner). It follows that the USPTO should only allow entry of a proposed claim amendment if it is presented to resolve an SNQ; however, once the amendment is entered, a rejection based on broadening is the only substantive ground of rejection available under 35 U.S.C. 305 and 314.

The refusal to enter a proposed amendment is petitionable and not appealable to the Board. *See In re Kline,* 474 F.2d 1325, 1329 (CCPA 1973).

8. Petitions Practice Will Be Clearly Defined

To the extent possible, the USPTO seeks to specify when, how, and by whom any petition under 37 CFR 1.181–1.183, and any opposition thereto, may be filed in reexamination proceedings. By providing clear guidance in this area, the USPTO hopes to reduce the number of improper or duplicative petitions that are currently filed, including multiple concurrent petitions for a single item of requested relief, unjustified multiple iterations of petitions for an item of relief, petitions to resolve issues that are appealable rather than petitionable, and papers improperly opposing another party's petition.

The table below sets forth (1) the various reexamination-related petitions (both proper and improper) that are commonly filed based on the type of relief requested, (2) whether the relief is properly sought by petition (and if so, under what section of 37 CFR), and (3) whether the petition may be opposed by another party.

EXAMPLES OF PETITIONS FILED IN REEXAMINATION PROCEEDINGS

Relief requested	Petitionable?	Opposable?
Review of refusal to grant *ex parte* or *inter partes* reexam (*see* MPEP 2248, 2648)	Yes—1.181	No.
Vacate as *ultra vires* an order granting *ex parte* or *inter partes* reexam (*see* MPEP 2246, 2646).	Yes—1.181	Yes.
Review of a finding of an SNQ in an order granting *ex parte* or *inter partes* reexam (*see* 75 FR 36357).	No (but see 75 FR 36357 in *ex parte* reexam).	No.
Vacate filing date of *ex parte* or *inter partes* reexam based on failure to comply with 37 CFR 1.510 or 1.915.	Yes—1.181	Yes.
Extension of time to respond to an Office action by Patent Owner in *ex parte* reexam.	Yes—1.550(c)	No.
Extension of time to respond to an Office action by Patent Owner in *inter partes* reexam.	Yes—1.956	No.
Extension of time to submit comments by Third Party Requester (*see* 35 USC 314(b)(2)).	No	No.
Extension of time to file a notice of appeal or brief on appeal by Patent Owner in *ex parte* reexam (*see* 37 CFR 41.31, 41.37, 41.43).	Yes—1.550(c)	No.
Extension of time to file a notice of appeal or brief on appeal by any party in *inter partes* reexam (*see* 37 CFR 41.61, 41.66).	Yes—1.183	No.
Striking another party's improper paper (or portion thereof) from the file	Yes—1.181	Yes.
Protection of proprietary information being submitted under seal	Yes—1.59(b)	Yes.
Waiver of page or word limit requirement	Yes—1.183	No.
Review of refusal to enter amendment	Yes—1.181	Yes.
Withdrawal of final Office action	Yes—1.181	Yes.
Revival of terminated proceeding based on Patent Owner's "unavoidable" delay and acceptance of late paper.	Yes—1.137(a)	No.
Revival of terminated proceeding based on Patent Owner's "unintentional" delay and acceptance of late paper.	Yes—1.137(b)	No.
For jurisdiction to be transferred to the Office of Patent Legal Administration	No	No.
Suspend *inter partes* reexam for "good cause" under 35 USC 314(c)	Yes—1.182	Yes.
Terminate *inter partes* reexam based on estoppel under 35 USC 317(b)	Yes—1.182	Yes.

The table above reflects the USPTO's current practice. The USPTO is interested to hear what changes can and should be made to its current practice in order to eliminate undue delays associated with petitions and oppositions.

B. Proposed Changes Specific to *Ex Parte* Reexamination

1. Make Permanent the Pilot That Allows the Patent Owner to Optionally Waive the Patent Owner's Statement

In light of the fact that only about ten percent of Patent Owners elect to file a statement under 35 U.S.C. 304 following an order for *ex parte* reexamination, the USPTO launched a pilot to allow Patent Owners to waive this statement altogether. *See Optional Waiver of Patent Owner's Statement in Ex Parte Reexamination Proceedings,* 75 FR 47269 (Aug. 5, 2010). The goal of this pilot is to eliminate the delay associated with the examiner having to wait two months under 35 U.S.C. 304 before beginning work on the FAOM in the majority of cases where the Patent Owner does not file a statement in response to the order granting reexamination. This delay is unique to *ex parte* reexaminations because *inter partes* reexaminations do not have a two-month statement period between the grant of the order and the mailing of the FAOM. *See* 35 U.S.C. 313 (providing, in relevant part, that "[t]he order may be accompanied by the initial action of the Patent and Trademark Office on the merits of the *inter partes* reexamination"). For this reason, the average time between the filing of the request and the mailing of an FAOM in *inter partes* reexamination has historically been shorter (indeed, nearly half as long) as that in *ex parte* reexamination.[1]

Under the pilot, the USPTO contacts the Patent Owner, via telephone, after the reexamination request is given a filing date but before any decision on the request has been made. The telephone communication is limited to an inquiry regarding whether the Patent Owner wishes to waive the right to file a statement under 35 U.S.C. 304 in the event that the reexamination request is granted. Any discussion of the merits of the proceedings (*e.g.,* the patentability of the claims) is not permitted. The Patent Owner's decision to either waive or not waive the statement is made of

[1] *See* USPTO Reexamination Operational Statistics, *available at http://www.uspto.gov/patents/stats/Reexamination_Information.jsp* (average number of months, per quarter in FY 2010, between the reexam request and the FAOM, for *ex parte:* 7.6, 7.8, 7.4, 7.5; for *inter partes:* 4.4, 4.2, 3.6, 3.3).

record in an interview summary, and a copy of the summary is mailed to both the Patent Owner and any Third Party Requester. If the Patent Owner agrees to waive the statement, then the examiner can mail an order for *ex parte* reexamination together with or soon after mailing the FAOM. The initial results of the pilot are encouraging. In view of these results, the USPTO proposes to make the pilot permanent through a notice of proposed rule making.

2. Where the Patent Owner Does Not Waive the Statement, the Order Granting Reexamination Will Include a Provisional FAOM, Which May Be Made Final in the Next Action

This proposed change is intended to streamline reexamination and reflects the fact that the Patent Owner has a right, under 35 U.S.C. 304, to file a statement, together with evidence and amendments, in order to distinguish the claimed invention from the prior art. If the Patent Owner does not waive this statement when contacted by the USPTO pursuant to the *Optional Waiver of Patent Owner's Statement in Ex Parte Reexamination Proceedings,* 75 FR 47269 (Aug. 5, 2010), and if the examiner determines that the reexamination request raises an SNQ, then the examiner will mail an order granting *ex parte* reexamination together with a provisional FAOM indicating which claims stand provisionally rejected or provisionally confirmed.

If, in response to a provisional FAOM, the Patent Owner either does not file a statement or files a statement that fails to overcome all provisional rejections, then, to the extent the rejections have not been overcome, the examiner will adopt in the next action the pertinent portions of the provisional FAOM which were not overcome. For purposes of determining whether this next action will be made final, the examiner will treat the provisional FAOM as if it were an actual FAOM at the time it was mailed, and will apply the guidance set forth in MPEP § 706.07(a) (Final Rejection, When Proper on Second Action).

C. Proposed Changes Specific to *Inter Partes* Reexamination

1. Third Party Requester May Dispute the Examiner's Designation That a Rejection is "Representative" of Other Rejections in the Group

If an examiner designates a rejection as "representative" of a group of adopted rejections (*see* Part A.4 above), then the Third Party Requester will have an opportunity to dispute this designation to both the examiner and the Board. In particular, after the Patent Owner files a response to the FAOM, then the Third Party Requester may file comments in which the Third Party Requester supports the examiner's reasons for adopting a group of rejections but further argues that one or more rejections within the group of adopted rejections would stand even if the representative rejection is overcome. If the examiner agrees with the Third Party Requester that all rejections within the group do not "stand or fall" with the representative rejection, then the examiner will say so in the next action. This next action may be made final under MPEP § 706.07(a) (Final Rejection, When Proper on Second Action).

Similarly, after the Patent Owner files an appeal of a final rejection, the Third Party Requester may file a respondent's brief in which the Third Party Requester supports the examiner's final rejections but further argues that one or more final rejections in the group would stand even if the representative rejection is reversed. This further argument will ensure that, in the event the representative rejection is reversed, the Board will have the benefit of the Third Party Requester's position as to the other rejections within the group. The Board may review any rejection within the group of adopted rejections in order to affirm the examiner as to that claim. For further discussion of the Third Party Requester's briefing on appeal in *inter partes* reexamination, see Part C.3 below.

2. Final Office Action Closes Prosecution and Triggers Appeal Rights

This proposed change is intended to reduce delays in *inter partes* reexaminations by consolidating the action closing prosecution under 37 CFR 1.949 and the right of appeal notice under 37 CFR 1.953, and replacing them with one final Office action. The final Office action will identify the status of each claim and will explain the reasons for each representative rejection and each decision to confirm a claim. No amendment can be made in response to the final Office action, other than to cancel claims (where cancellation does not change the scope of any pending claim), to rewrite dependent claims into independent form, or to comply with requirements or suggestions set forth in the final Office action. The final Office action will set (1) a time period in which any Patent Owner amendment and appeal must be filed, and/or (2) a time period in which any Third Party Requester appeal must be filed.

To effect this proposed change, the USPTO would amend 37 CFR 1.949–1.953 to create a single, final Office action that closes prosecution and triggers appeal rights.

3. Third Party Requester's Appellant Brief is Limited To Appealing An Examiner's Decision That a Claim is Patentable; Additional Bases To Cancel A Rejected Claim Can Only Be Argued in a Respondent Brief Following Patent Owner's Appellant Brief

This proposed change is intended to reduce the number of duplicative issues and briefs submitted on appeal, particularly where all claims stand finally rejected and the Third Party Requester is challenging the examiner's determination not to make additional proposed rejections. The statute authorizes the Third Party Requester to independently appeal "any final decision favorable to the patentability of any original or proposed amended or new claim of the patent." 35 U.S.C. 315(b)(1). The current rules, however, permit the Third Party Requester to independently appeal "any final decision favorable to the patentability, *including any final determination not to make a proposed rejection,* of any original, proposed amended, or new claim of the patent." 37 CFR 41.67(a)(2) (2010) (emphasis added).

The regulatory language, emphasized above, allows the Third Party Requester to independently appeal an examiner's determination not to adopt a proposed rejection of a claim, even in cases where the same claim stands rejected on other grounds that are being appealed by the Patent Owner. In this scenario, the Third Party Requester's cross-appeal merely raises additional grounds on which to affirm the examiner's final determination that the claim is unpatentable.

Courts do not permit such cross-appeals. As the Federal Circuit has explained in the context of district court litigation, "A cross-appeal may only be filed 'when a party seeks to enlarge its own rights under the judgment or to lessen the rights of its adversary under the judgment.'" *Aventis Pharma S.A.* v. *Hospira, Inc.,* __F.3d__, 2011 WL 1046187, at *1 (Fed. Cir. Mar. 24, 2011) (quoting *Bailey* v. *Dart Container Corp.,* 292 F.3d 1360, 1362 (Fed. Cir. 2002)). By contrast, where "the district court has entered a judgment of invalidity as to all of the asserted claims, there is no basis for a cross-appeal as to either (1) *additional claims for invalidity* or (2) claims of non-infringement." *TypeRight Keyboard Corp.* v. *Microsoft Corp.,* 374 F.3d 1151, 1157 (Fed. Cir. 2004) (emphasis added). An unwarranted cross-appeal "unnecessarily expands the amount of briefing," and also gives "the appellee an unfair opportunity to file the final brief and have the final oral argument." *Bailey,* 292 F.3d at 1362.

Although a cross-appeal is not the appropriate vehicle to present alternative grounds for affirmance, parties are "free to devote as much of their responsive briefing as needed to flesh out additional arguments and alternative grounds for affirming the judgment on appeal." *Aventis,* __F.3d at__, 2011 WL 1046187, at *2. *See United States* v. *Am. Ry. Express Co.,* 265 U.S. 425, 435 (1924) (The "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.").

Consistent with the courts' practice, the USPTO proposes to revise its rules governing appeals by Third Party Requesters to prohibit the filing of appeals by Third Party Requesters as to any claim that is finally rejected on at least one ground. A final rejection of a claim on at least one ground is a "decision adverse to the patentability" of that claim under 35 U.S.C. 315(a)(1), which not only triggers the Patent Owner's appeal, but also allows the Third Party Requester to "be a party to any appeal taken by the patent owner," *id.* § 315(b)(2). As a party to the Patent Owner's appeal, the Third Party Requester may argue in its responsive briefing that the examiner should have made additional rejections against a claim that stands rejected on other grounds. By contrast, a "final decision favorable to the patentability" of a claim under 35 U.S.C. 315(b)(1) is one in which no rejection has been finally adopted against that claim.

To effect this proposed change, the USPTO would amend 37 CFR 41.61, 41.67, 41.68, 41.71, and/or 41.77. A Third Party Requester's appellant brief, if any, would be limited to challenging a final determination in which no rejection has been adopted against a particular claim. However, if a claim stands finally rejected and is appealed by the Patent Owner, then the Third Party Requester may file a respondent's brief addressing the Patent Owner's arguments and further challenging the examiner's non-adoption of additional proposed rejections against that claim. The Patent Owner could then address these arguments in a reply brief.

Comments are invited on the above-proposed changes, as well as to the questions below:

1. Should the USPTO proceed with any efforts to streamline the procedures governing *ex parte* and/or *inter partes* reexamination proceedings?

2. Should the USPTO place word limits on requests for *ex parte* and/or *inter partes* reexamination?

3. Should the USPTO revise its existing page or word limits in *inter partes* reexamination following the request?

4. Should the USPTO place any limitation or criteria on the addition of new claims by a Patent Owner in reexamination? If so, what kind of limitation or criteria?

5. Should the USPTO change its interpretation of "a substantial new question of patentability" to require something more than "a substantial likelihood that a reasonable examiner would consider the prior art patent or printed publication important in deciding whether or not the claim is patentable"? *See* MPEP §§ 2242, 2642. If so, how should it be interpreted?

6. How much time should Patent Owners and Third Party Requesters ordinarily be given to submit a statement, response, or appeal where the time for filing the statement, response, or appeal is set by the USPTO rather than by statute?

7. Under what conditions should the USPTO grant a Patent Owner's request for an extension of time under 37 CFR 1.550(c) or 1.956, both of which provide that extensions of time may only be granted for "sufficient cause and for a reasonable time specified"?

8. Should the USPTO require that any information disclosure statement (IDS) filed by a Patent Owner in a reexamination comply with provisions analogous to 37 CFR 1.97 and 1.98, and further require that any IDS filed after a Notice of Intent to Issue a Reexamination Certificate (NIRC) or notice of appeal be accompanied by: (1) an explanation of why the information submitted could not have been submitted earlier, and (2) an explanation of the relevance of the information with regard to the claimed invention?

9. Under what conditions should a reexamination proceeding be merged with another reexamination or reissue proceeding?

10. What relief can and should be given to a Third Party Requester that shows that it did not receive a Patent Owner's statement or response within a certain number of days after the date listed on the Patent Owner's certificate of service? How many days and what kind of showing should be required?

11. Should the USPTO encourage and/or require that all correspondence in reexamination proceedings be conducted electronically (*e.g.,* e-filing parties' documents, e-mailing notices of Office actions and certificates)?

12. Should reexamination proceedings remain with the Board in cases where the Board has entered a new ground of rejection on appeal and the Patent Owner seeks to introduce new evidence and amendments? In particular, is it more efficient for three administrative patent judges or a single examiner to decide issues involving new evidence and amendments?

13. What other changes can and should the USPTO make in order to streamline reexamination proceedings?

Registration Information: The USPTO plans to make the meeting available via Web cast. Web cast information will be available on the USPTO's Internet Web site before the meeting. The written comments and list of the meeting participants and their associations will be posted on the USPTO's Internet Web site (*http://www.uspto.gov*).

When registering, please provide the following information: (1) Your name, title, and if applicable, company or organization, address, phone number, and e-mail address; and (2) if you wish to make a presentation, the specific topic or issue to be addressed and the approximate desired length of your presentation.

There is no fee to register for the public meeting and registration will be on a first-come, first-serve basis. Early registration is recommended because seating is limited. Registration on the day of the public meeting will be permitted on a space-available basis beginning at 1:30 p.m., Eastern Standard Time, on June 1, 2011.

The USPTO will attempt to accommodate all persons who wish to make a presentation at the meeting. After reviewing the list of speakers, the USPTO will contact each speaker prior to the meeting with the amount of time available and the approximate time that the speaker's presentation is scheduled to begin. Speakers must then send the final electronic copies of their presentations in Microsoft PowerPoint or Microsoft Word to *reexamimprovementcomments@uspto.gov* by May 25, 2011, so that the presentation can be displayed in the Auditorium.

If you need special accommodations due to a disability, please inform the contact person (see **FOR FURTHER INFORMATION CONTACT**) by May 25, 2011.

Dated: April 18, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–9805 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2010–0840(b); FRL–9298–8]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Florida; Jefferson County, KY; Forsyth, Mecklenburg, and Buncombe Counties, NC; and SC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is notifying the public that it has received negative declarations for Other Solid Waste Incinerator (OSWI) units from the State of Florida; Large Municipal Waste Combustor (LMWC), Small Municipal Waste Combustor (SMWC), and OSWI units from Jefferson County, Kentucky; LMWC, SMWC, and OSWI units from Forsyth County, North Carolina; LMWC, SMWC, and OSWI units from Mecklenburg County, North Carolina; LMWC, SMWC, Hospital/Medical/Infectious Waste Incinerator (HMIWI), and OSWI units from Buncombe County, North Carolina; and LMWC and HMIWI units from the State of South Carolina. These negative declarations certify that LMWC, SMWC, HMIWI, and OSWI units, as indicated above, subject to the requirements of Sections 111(d) and 129 of the Clean Air Act do not exist in areas covered by the following air pollution control programs: Florida Department of Environmental Protection; Louisville, Kentucky, Air Pollution Control District; Forsyth County Environmental Affairs Department; Mecklenburg County Land Use and Environmental Services Agency; Western North Carolina Regional Air Quality Agency; and South Carolina Department of Health and Environmental Control. In the Final Rules section of this Federal Register, EPA is publishing these negative declaration submittals as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments.

DATES: Comments must be received in writing by May 25, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R04–OAR–2010–0840 by one of the following methods:

1. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *E-mail: garver.daniel@epa.gov.*
3. *Fax:* (404) 562–9095.
4. *Mail:* EPA–R04–OAR–2010–0840, Daniel Garver, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303.
5. Hand Delivery or Courier: Mr. Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: January 13, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2011–9848 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 76, No. 79

Monday, April 25, 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 19, 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.

30-Day Federal Register Notice

Forest Service

Title: Aldo Leopold Wilderness Research Institute Wilderness Visitor Study.

OMB Control Number: 0596–NEW.

Summary of Collection: Management of specific parks is directed by laws, policies, and Wilderness Stewardship Plans. The Wilderness Act of 1964 directs the National Wilderness Preservation System be managed to protect natural wilderness conditions and to provide outstanding opportunities for the public to find solitude or primitive and unconfined types of recreational experiences. The Aldo Leopold Wilderness Research Institute will gather, analyze, and report on information from visitors to contribute to wilderness stewardship planning. Visitors will be provided with the option of (1) using postage paid envelope to mail a hard copy of the survey to the Leopold Institute, (2) receive an electronic e-mail form of the survey or (3) access a web-based form of the electronic survey.

Need and Use of the Information: Respondents will only be overnight recreation visitors to the wilderness of Sequoia and Kings Canyon National Parks during the summers of 2011 and 2012. Visitors will be contacted from information they provide in their required overnight wilderness permits. The voluntary survey will ask visitors questions about their recreation visit, personal demographics relevant to education and service provision, and factors that have influenced or are likely to influence their recreational wilderness visits. The National Park Service will use information from this collection to help make the Wilderness Stewardship Plan responsive to legislative and policy guidelines as well as acknowledging a changing client base of American citizens and foreign visitors.

Description of Respondents: Individuals or households.

Number of Respondents: 500.

Frequency of Responses: Reporting: Other (one time).

Total Burden Hours: 167.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–9886 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0040]

Florigene Pty., Ltd.; Availability of Petition and Environmental Assessment for Determination of Nonregulated Status for Altered Color Roses

Correction

In notice document 2011–8775 appearing on pages 20623–20624 in the issue of Wednesday, April 13, 2011 make the following correction:

On page 20623, in the third column, in the fourth paragraph, in the third line from the bottom "IFD–524–1–4 and IFD–529–1–9" should read "IFD–524Ø1–4 and IFD–529Ø1–9".

[FR Doc. C1–2011–8775 Filed 4–22–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF AGRICULTURE

Forest Service

Colville Resource Advisory Committee; Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Colville Resource Advisory Committee will meet in Colville Washington. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is vote on fiscal year 2011 projects.

DATES: The meeting will be held May 10, 2011, 9 a.m.

ADDRESSES: The meeting will be held at 985 South Elm Street, Colville, Washington, Community Colleges of Spokane: Colville Center, Dominion Room. Written comments may be submitted as described under Supplementary Information.

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 Colville National Forest Headquarters, 765 South Main Street, Colville, Washington 99114, Attn: RAC Coordinator. Please call ahead to 509–684–7000 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Franklin Pemberton, Public Affairs Officer, Colville National Forest Headquarters, 509–684–7000, *fpemberton@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. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Discussion, presentation and voting of 2011 Colville Resource Advisory Committee projects. The full agenda may be previewd at: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Colville*

Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by May 09, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Franklin Pemberton, 765 South Main Street, Colville, Washington 99114, or by e-mail to *fpemberton@fs.fed.us,* or via facsimile to 509–684–7280.

Dated: April 18, 2011.

Craig Newman,

Acting Forest Supervisor.

[FR Doc. 2011–9862 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Kern and Tulare Counties Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Kern and Tulare Counties Resource Advisory Committee (RAC) will meet in Porterville and Bakersfield California. 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 purposes of the meetings are to hear presentations regarding proposed projects and vote on projects to recommend to the Forest Superisor for funding under Title II of the Act.

DATES: The meetings will be held May 19, July 21, August 18, and August 25, 2011. All meetings will begin at 5 p.m.

ADDRESSES: The May 19 and August 18, 2011 meetings will be held at the County of Kern Administrative Office, 1115 Truxtun Avenue, Bakersfield, California, third floor conference room. The July 21 and August 25 meetings will be held in Porterville at Sequoia National Forest Headquarters, 1839 South Newcomb Street, Porterville, California. Written comments should be sent to Kern River Ranger District Office, P.O. Box 9, Kernville, CA 93238. Comments may also be sent via e-mail to *pshibley@fs.fed.us,* or via facsimile to 760–376–3795.

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 Kern River Ranger District Office, 105 Whitney Road, Kernville, CA. Visitors are encouraged to call ahead to (760) 376–3781, to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Penelope Shibley, RAC Coordinator, Kern River Ranger District Office, P.O. Box 9, Kernville, CA 93238; (760) 376–3781; or e-mail: *pshibley@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call 559–781–6650 between 8 a.m. and 4:30 p.m., Pacific Daylight Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meetings are open to the public. The following business will be conducted: (1) Introductions of all committee members and Forest Service personnel; (2) review and approve previous meeting minutes; (3) hear updates on progress of past approved projects; (4) hear presentations on proposed projects (May 19 and July 21), and (5) review, assess and vote on projects to recommend for funding approval (August 18 and 25). Agendas and additional information can be found at the following Web site: *http://www.fs.fed.us/r5/sequoia/projects/rural-schools/index.html.*

Persons who wish to provide a presentation on projects to be submitted to the RAC at the May 19 meeting are to contact the Designated Federal Official, Priscilla Summers at the Western Divide Ranger District, at least seven days prior to the meeting to be added to the agenda. Contact information: 559–539–2607, 23588 Highway 190, Springville, California 93265, *psummers@fs.fed.us.* Persons wishing to bring related matters to the attention of the RAC may file written statements with the RAC staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by seven days prior to the meetings will have the opportunity to address the RAC at those sessions.

Dated: April 19, 2011.

Debra L. Whitman,

Acting Forest Supervisor, Sequoia National Forest.

[FR Doc. 2011–9963 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Designation for the Lewiston, ID Area

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of the Washington Department of Agriculture (Washington) to provide official services under the United States Grain Standards Act, as amended (USGSA).

DATES: *Effective Date:* March 1, 2011.

ADDRESSES: Karen W. Guagliardo, Branch Chief, Review Branch, Compliance Division, GIPSA, USDA, STOP 3604, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604.

FOR FURTHER INFORMATION CONTACT: Karen W. Guagliardo, 202–720–8262 or *Karen.W.Guagliardo@usda.gov.*

Read Applications: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

SUPPLEMENTARY INFORMATION: In the January 4, 2011, **Federal Register** (76 FR 317), GIPSA requested applications for designation to provide official services in the geographic area previously serviced by Lewiston Grain Inspection Service, Inc. (Lewiston). Applications were due by February 3, 2011.

Washington was the sole applicant for designation to provide official services in this area. As a result, GIPSA did not ask for additional comments.

GIPSA evaluated all available information regarding the designation criteria in section 7(f)(l) of the USGSA (7 U.S.C. 79(f)) and determined that Washington is qualified to provide official services in the geographic area specified in the January 4, 2011, **Federal Register** for which they applied. This designation action to provide official services in the specified area is effective March 1, 2011 and will terminate on December 31, 2011.

Effective March 1, 2011, Washington's present geographic area is amended to include the following areas in the States of Idaho and Oregon:

- The northern half of the State of Idaho down to the northern boundaries of Adams, Valley, and Lemhi Counties.
- The entire State of Oregon, except those export port locations within the State that are serviced by GIPSA.

Interested persons may obtain official services by contacting this agency at the following telephone number:

Official agency	Headquarters location and telephone	Designation start	Designation end
Washington	Olympia, WA (360) 753–1484 Additional Locations: Colfax, Othello, Pasco, Quincy, Spokane, and Yakima, WA.	3/1/2011	12/31/2011

Section 7(f)(1) of the USGSA authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)(1)).

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for no longer than 3 years unless terminated by the Secretary; however, designations may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Authority: 7 U.S.C. 71–87k.

J. Dudley Butler,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2011–9940 Filed 4–22–11; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Census Employment Inquiry

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before June 24, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Viola Lewis-Willis, Bureau of the Census, 4600 Silver Hill Road, Room 5H043, Washington, DC 20233, and (301) 763–3285.

SUPPLEMENTARY INFORMATION:

I. Abstract

The BC–170, Census Employment Inquiry, is used to collect information such as personal data and work experience from job applicants. The BC–170 is used throughout the census and intercensal periods for surveys, special censuses, decennial census pretests, and dress rehearsals. Applicants completing the form for a census related position are applying for temporary jobs in office and field positions (clerks, enumerators, crew leaders, supervisors). In addition, as an option to the OF–612, Optional Application for Federal Employment, the BC–170 may be used when applying for temporary/permanent office and field positions (clerks, field representatives, supervisors) on a recurring survey in one of the Census Bureau's 12 Regional Offices (ROs) throughout the United States. This form is completed by job applicants at the time they are tested. Selecting officials review the information shown on the form to evaluate an applicant's eligibility for employment. During the decennial census, the BC–170 is intended to expedite hiring and selection in situations requiring large numbers of temporary employees for assignments of a limited duration.

The use of this form is limited to only situations that involve special, one-time or recurring survey operations at one of the ROs and/or which require the establishment of a temporary office. The form has been demonstrated to meet our recruitment needs for field workers and requires significantly less burden than the Office of Personnel Management (OPM) Optional Forms that are available for use by the public when applying for Federal positions. Over the next three years, we expect to recruit approximately 61,500 applicants for census jobs (*i.e.,* one-time censuses, special censuses and decennial pretests and dress rehearsals), which would equate to a significant reduction in the required paperwork and public burden, as compared to other Federal application forms.

The bulk of the proposed changes to the form are related to standardizing the information collected across the three variations of the forms which we currently utilized and to collect additional applicant data to facilitate the processing of the application.

II. Method of Collection

We collect this information at the time of testing for temporary and permanent positions. Potential employees being tested complete a four-page paper application at the time of testing.

III. Data

OMB Control Number: 0607–0139.

Form Number: BC–170A, BC–170B, BC–170D.

Type of Review: Regular submission.

Affected Public: Individuals.

Estimated Number of Respondents: 20,500.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 5,125.

Estimated Total Annual Cost: The only cost to the respondent is his/her time for completing the BC–170A (recurring surveys), BC–170B (special censuses), or BC–170D (decennial censuses).

Respondent's Obligation: Required to obtain a benefit.

Legal Authority: Title 13, U.S.C. Section 23.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 20, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–9908 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Orion Air, S.L. and Syrian Pearl Airlines

In the Matter of:

Orion Air, S.L., Canada Real de Merinas, 7 Edificio 5, 3'A, Eissenhower business center, 28042 Madrid, Spain; and Ad. de las Cortes Valencianas no 37, Esc.A Puerta 45 46015 Valencia, Spain; and Syrian Pearl Airlines, Damascus International Airport, Damascus, Syria, Respondents.

Order Renewing Temporary Denial of Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (2011) ("EAR" or the "Regulations"), I hereby grant the request of the Bureau of Industry and Security ("BIS") to renew for 180 days the Order Temporarily Denying the Export Privileges of Respondents Orion Air, S.L. ("Orion Air") and Syrian Pearl Airlines (collectively, "Respondents"), as I find that renewal of the temporary denial order ("TDO" or the "Order") is necessary in the public interest to prevent an imminent violation of the EAR.

I. Procedural History

On May 7, 2009, then-Acting Assistant Secretary of Commerce for Export Enforcement Kevin Delli-Colli signed an Order Temporarily Denying the Export Privileges of the Respondents for 180 days on the grounds that its issuance was necessary in the public interest to prevent an imminent violation of the Regulations. Pursuant to Section 766.24(a), the TDO was issued *ex parte* and was effective upon issuance. Copies of the TDO were sent to each Respondent in accordance with Section 766.5 of the Regulations and the Order was published in the **Federal Register** on May 26, 2009.[1] Thereafter, Acting Assistant Secretary Delli-Colli issued an Order on November 2, 2009, renewing the TDO for an additional 180 days, and I similarly issued a 180-day renewal Order on April 29, 2010.[2]

Most recently, on October 22, 2010, I renewed the TDO against the Respondents for an additional 180 days. This renewal was effective upon issuance and was published in the **Federal Register** on October 29, 2010.[3] The current Order would expire on April 20, 2011, unless renewed in accordance with Section 766.24 of the Regulations.

On March 28, 2011, BIS, through its Office of Export Enforcement ("OEE"), filed a written request for renewal of the TDO against the Respondents for an additional 180 days. A copy of this request was delivered to the Respondents in accordance with Section 766.5 of the Regulations. No opposition to renewal of the TDO has been received from either Orion Air or Syrian Pearl Airlines.

[1] 74 FR 24,786.

[2] The November 2, 2009 renewal Order was published in the **Federal Register** on November 9, 2009 (74 FR 57,626). The April 29, 2010 renewal Order was published in the **Federal Register** on May 7, 2010 (75 FR 25,002).

[3] 75 FR 66,728 (October 29, 2010).

II. Discussion

A. Legal Standard

Pursuant to section 766.24(d)(3) of the EAR, the sole issue to be considered in determining whether to continue a TDO is whether the TDO should be renewed to prevent an imminent violation of the EAR, as "imminent" violation is defined in Section 766.24. "A violation may be 'imminent' either in time or in degree of likelihood." 15 CFR 766.24(b)(3). BIS may show "either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* As to the likelihood of future violations, BIS may show that "the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical and negligent[.]" *Id.* A "lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

B. Findings

As part of its initial TDO request, BIS presented evidence that on or about May 1, 2009, Orion Air re-exported a BAE 146–300 aircraft (tail number EC–JVO) to Syria, and specifically to Syrian Pearl Airlines, without the U.S. Government authorization required by General Order No. 2 of Supplement 1 to Part 736 of the EAR. The aircraft is subject to the Regulations because it contains greater than a 10-percent de minimis amount of U.S.-origin content. Orion Air engaged in this re-export transaction despite having been directly informed of the export licensing requirements by the U.S. Government. Moreover, Orion Air not only engaged in this conduct after having received actual as well as constructive notice of the applicable license requirements, but then sought to evade the Regulations and U.S. export controls by giving the U.S. Government false assurances that it would put the transaction on hold due to the U.S. Government's concerns.

BIS also produced evidence that the re-exported aircraft bore the livery, colors and logos of Syrian Pearl Airlines, a national of Syria, a Country Group E:1 destination; was flight capable; and under the terms of the lease agreement was to be based in and operated out of Syria during the lease term. The record also shows that the re-exported aircraft currently remains in Syria under the control of Syrian Pearl Airlines.

In addition to the unauthorized re-export described above, Acting Assistant Secretary Delli-Colli also concluded that additional violations were imminent based on statements by Orion Air to the U.S. Government in May 2009 that Orion Air planned to re-export an additional BAE 146–300 aircraft (tail number EC–JVJ) to Syria, and specifically to Syrian Pearl Airlines. This second aircraft was at the time undergoing maintenance in the United Kingdom, and remains located there. Moreover, the agreement between Orion Air and Syrian Pearl Airlines involved both aircraft being re-exported to Syria for Syrian Pearl Airlines' use and benefit.

On December 10, 2010, pursuant to Section 764.3(a)(2) of the Regulations, BIS authorized Orion Air and Syrian Pearl Airlines to enter into a three-way release agreement with a third party that would terminate the original lease agreement between Orion Air and Syrian Pearl Airlines and allow the third party to take legal and physical control of both aircraft. Additionally, BIS authorized the performance of maintenance needed to make both aircraft flight-worthy, and authorized the third party to remove aircraft EC–JVO from Syria to any country not listed in Country Group E:1 [4] of Supplement 1 to Part 740 of the Regulations. Evidence obtained by BIS indicates that in the more than four months since this authorization was granted, aircraft EC–JVO has not been removed from Syria and remains in Syria under Syrian control. Thus, a significant risk remains that absent renewal of the TDO, this aircraft will be operated or disposed of in violation of the Regulations. Moreover, in spite of the authorization, there has been no change regarding aircraft EC–JVJ, which remains in the same status in the United Kingdom. Absent renewal of the TDO, there remains a substantial continued risk that aircraft EC–JVJ will be re-exported contrary to the Regulations, given that, *inter alia,* Orion Air acted with actual knowledge and took deceptive and evasive action, as discussed *supra.*

Based on my review of the record, I find that the facts and circumstances here, including those that led to the issuance of the initial TDO and subsequent renewal Orders, continue to show that renewal of the TDO for an additional 180 days is necessary and in the public interest to prevent an imminent violation of the EAR. Furthermore, renewal of the TDO is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with the Respondents in export transactions involving items subject to the EAR.

It is therefore ordered:

First, that, Orion Air, S.L., Canada Real de Merinas, 7 Edificio 5, 3'A, Eissenhower business center, 28042 Madrid, Spain, and Ad. de las Cortes Valencianas no 37, Esc.A Puerta 4546015 Valencia, Spain, and when acting for or on its behalf, any of its successors, assigns, agents, or employees; and Syrian Pearl Airlines, Damascus International Airport, Damascus, Syria, and when acting on its behalf, any of its successors, assigns, agents, or employees (each a "Denied Person" and collectively the "Denied Persons") may not, directly or indirectly, participate 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 Export Administration Regulations ("EAR"), or in any other activity subject to the EAR 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 EAR, or in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or re-export to or on behalf of any Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by any Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby any Denied 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 any Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from any Denied Person in the United States any item subject to the EAR 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 EAR that has been or will be exported from the United States and which is owned, possessed or controlled by any Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by any Denied Person if such service involves the use of any item subject to the EAR 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 after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to any of the Respondents by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, re-export, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Section 766.24(e) of the EAR, the Respondents may, at any time, appeal 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.

BIS may seek renewal of this Order by filing a written request with the Assistant Secretary of Commerce for Export Enforcement in accordance with the provisions of Section 766.24(d) of the Regulations, which currently provides that such a written renewal request must be submitted not later than 20 days before the expiration date. The Respondents may oppose a request to renew this Order by doing so in accordance with Section 766.24(d), including filing a written submission with the Assistant Secretary for Export Enforcement, supported by appropriate evidence. Any opposition ordinarily must be received not later than seven days before the expiration date of the Order.

Notice of the issuance of this Order shall be given to Respondents in accordance with Sections 766.5(b). This Order also shall be published in the

[4] Group E:1 destinations are currently Syria, Iran, Cuba, Sudan and North Korea. See Supplement No. 1 to 15 CFR part 740 (2011).

Federal Register. This Order is effective upon issuance and shall remain in effect for 180 days.

Issued this 18th day of April 2011.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2011–9932 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–803]

Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 17, 2010, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order on polyethylene terephthalate film (PET Film) from the United Arab Emirates. This review covers two producers/exporters of subject merchandise: JBF RAK LLC (JBF) and FLEX Middle East FZE (FLEX). Based on the results of our analysis of the comments received, we have made changes to the preliminary results, which are discussed below. For the final dumping margins, see the "Final Results of Review" section below.

DATES: *Effective Date:* April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Andrew Huston or Jun Jack Zhao, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 428–4261 or (202) 482–1396, respectively.

SUPPLEMENTARY INFORMATION:

Background

Since the preliminary results, the following events have taken place. *See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 78968 (December 17, 2010) (*Preliminary Results*). A sales verification of JBF was conducted from December 12, 2010, through December 16, 2010. *See* Memorandum to the File, "Verification of the Sales Response of JBF RAK LLC in the Antidumping Review of Polyethylene Terephthalate Film Sheet and Strip (PET Film) from the United Arab Emirates" (February 17, 2011).[1] JBF submitted a timely case brief on February 28, 2011. DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. filed a timely rebuttal brief on March 8, 2011. We did not receive a case brief from FLEX.

Period of Review

The period of review is November 6, 2008, through October 31, 2009.

Scope of the Order

The products covered by the order are all gauges of raw, pre-treated, or primed polyethylene terephthalate film, whether extruded or co-extruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. PET Film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Analysis of Comments Received

The issues raised in the case and rebuttal briefs by parties in this administrative review are addressed in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Issues and Decision Memorandum for the Final Results" (Decision Memorandum), dated concurrently with, and herby adopted by this notice. A list of the issues addressed in the Decision Memorandum is appended to this notice. The Decision Memorandum is on file in the Department's CRU, and can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Decision Memorandum are identical in content.

[1] Public versions of all memoranda referenced in this notice are on file in the Department's Central Records Unit (CRU) in Room 7046 of the main Department of Commerce building.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made adjustments to our margin calculations for JBF. Specifically, we revised coding in our comparison market SAS program to correct an error that resulted in different variable cost of manufacturing figures being used for identical U.S. and home market products.

Final Results of Review

As a result of our review, we determine that the following weighted-average margins exist for the period of November 6, 2008, through October 31, 2009:

Manufacturer/exporter	Weighted-average margin (percent)
FLEX Middle East FZE	3.16
JBF RAK LLC	4.88

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. We will instruct CBP to liquidate entries of merchandise produced and/or exported by Flex and JBF. For assessment purposes, where the respondents reported the entered value for their sales, we calculated importer-specific (or customer-specific) *ad valorem* assessment rates based on the ratio of the total amount of the dumping duties calculated for the examined sales to the total entered value of those same sales. *See* 19 CFR 351.212(b). However, where the respondents did not report the entered value for their sales, we will calculate importer-specific (or customer-specific) per-unit assessment rates. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of these final results of review.

The Department clarified its "automatic assessment" regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by Flex or JBF for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate non-reviewed entries at the all-others rate of 4.80 percent from the investigation if there is no rate for the intermediate company(ies) involved in the transaction. *See Polyethylene*

Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 73 FR 55036 (September 24, 2008) (*Investigation Final Determination*).

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act): (1) For the companies covered by this review, the cash deposit rate will be the rates listed above in the section "Final Results of Review;" (2) for merchandise exported by producers or exporters not covered in this review but covered in a previous segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recent final results in which that producer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the producer is, the cash deposit rate will be that established for the producer of the merchandise in these final results of review or in the most recent final results in which that producer participated; and, (4) if neither the exporter nor the producer is a firm covered in this review or in any previous segment of this proceeding, the cash deposit rate will be 4.80 percent, the all-others rate established in the less than fair value investigation. *See Investigation Final Determination.* These deposit requirements shall remain in effect until further notice.

Notification Regarding Administrative Protective Orders

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

We are issuing and publishing these final results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 18, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix

Issues in the Decision Memorandum

Comment 1: Sample Transactions
Comment 2: Values Reported for Average Cost of Manufacturing
Comment 3: Transactions Outside the Ordinary Course of Trade
Comment 4: Matching Criteria
Comment 5: Zeroing

[FR Doc. 2011–9967 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–351–829]

Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 7, 2010, the Department of Commerce (Department) issued the preliminary results of administrative review of the countervailing duty order on certain hot-rolled flat-rolled carbon-quality steel products (HRS) from Brazil for the period January 1, 2008, through December 31, 2008. Based on the results of our verification and the analysis of the comments received, the Department has made certain revisions to the subsidy rates for the respondent, Usinas Siderurgicas de Minas Gerais (USIMINAS) and its subsidiary, Companhia Siderurgica Paulista (COSIPA). The final subsidy rate for the reviewed company is listed below in the section entitled "Final Results of Review."

DATES: *Effective Date:* April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo, Justin Neuman or Milton Koch, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2371, (202) 482–0486 and (202) 482–2584, respectively.

SUPPLEMENTARY INFORMATION:

Background

Since the issuance of *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Preliminary Results of Countervailing Duty Administrative Review,* 75 FR 64700 (October 20, 2010) (*Preliminary Results*), the following events have occurred. The Department issued its third supplemental questionnaire to the Government of Brazil (GOB) and to USIMINAS/COSIPA on November 9, 2010. On the same day, the Department informed parties of the postponement of the briefing schedule. The GOB and USIMINAS/COSIPA filed their responses on November 23, 2010, and December 3, 2010, respectively. On December 13, 2010, the United States Steel Corporation (USS or petitioner) submitted factual information in rebuttal to information contained in USIMINAS/COSIPA's December 3, 2010 questionnaire response. On January 6, 2011, the Department issued a fourth supplemental questionnaire to USIMINAS/COSIPA and the company submitted its response on January 19, 2011. On January 20, 2011, the Department placed on the record information from the investigation of cold-rolled steel and the prior administrative review of the instant order on HRS. *See* Memorandum to The File from Justin M. Neuman, Analyst, Certain Hot-Rolled Carbon Steel Flat Products from Brazil: Additional Programs Memorandum and Calculation Memorandum, Certain Hot-Rolled Carbon Steel Flat Products from Brazil, dated January 20, 2011.

On December 14, 2010, the Department extended the deadline for the final results from February 17, 2011 to April 18, 2011. *See Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Extension of Time Limit for Final Results of Countervailing Duty Administrative Review,* 75 FR 77828 (December 14, 2010).

On January 21, 2011, USS submitted comments in light of the Department's planned verification. In accordance with section 782(i) of the Tariff Act of 1930, as amended ("the Act") the Department conducted verification in Brazil of the questionnaire responses of USIMINAS/COSIPA from January 24 to January 27, 2011, and of one program of the GOB on January 28, 2011. *See* Memorandum to

The File from Myrna Lobo, International Trade Compliance Analyst, through Dana S. Mermelstein, Program Manager, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Verification of the Questionnaire Responses Submitted by Usinas Siderurgicas de Minas Gerais (USIMINAS) and Companhia Siderurgica Paulista (COSIPA), dated March 7, 2011; *see also* Memorandum to The File from Myrna Lobo, International Trade Compliance Analyst, through Dana S. Mermelstein, Program Manager, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Verification of the Questionnaire Responses Submitted by the Government of Brazil, dated March 7, 2011.

On March 3, 2011, the Department issued a post-preliminary analysis memorandum on the countervailability of the FINEM loan program. *See* Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Post-Preliminary Analysis Regarding the Provision of FINEM Loans, dated March 3, 2011 (Post-Preliminary Decision). On March 9, 2011, the Department notified parties of the briefing schedule, inviting comments on the *Preliminary Results* and the Post-Preliminary Decision. The Department received case briefs and rebuttal briefs from USS, Nucor Corporation (Nucor), a domestic interested party, and USIMINAS/COSIPA.[1] Timely requests for a hearing were submitted by USS and Nucor; however, both parties subsequently withdrew their hearing requests.

Period of Review

The period for which we are measuring subsidies, *i.e.,* the period of review (POR), is January 1, 2008, through December 31, 2008.

Scope of the Order

For purposes of this review, the products covered are certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order.

Specifically included in the scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of the order, regardless of HTSUS definitions, are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.012 percent of boron, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of the order unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of the order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including *e.g.,* ASTM specifications A543, A387, A514, A517, and A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C	Mn (max)	P (max)	S (max)	Si	Cr	Cu	Ni (max)
0.10–0.14	0.90	0.025	0.005	0.30–0.50	0.30–0.50	0.20–0.40	0.20

Width = 44.80 inches maximum; Thickness = 0.063–0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000–88,000 psi.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[1] The Department rejected USIMINAS/COSIPA's case brief received on March 16, 2011, because it contained untimely new factual information. *See* Letter to USIMINAS/COSIPA from the Department, Re: Countervailing Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil (March 17, 2011). Subsequently, the Department allowed USIMINAS/COSIPA to resubmit its case brief without the untimely factual information, which it received on March 18, 2011.

[In percent]

C	Mn	P (max)	S (max)	Si	Cr	Cu (max)	Ni (max)	Mo
0.10–0.16	0.70–0.90	0.025	0.006	0.30–0.50	0.30–0.50	0.25	0.20	0.21

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C	Mn	P (max)	S (max)	Si	Cr	Cu	Ni (max)	V (wt.) (max)	Cb (max)
0.10–0.14	1.30–1.80	0.025	0.005	0.30–0.50	0.50–0.70	0.20–0.40	0.20	0.10	0.08

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

• Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

[In percent]

C (max)	Mn (max)	P (max)	S (max)	Si (max)	Cr (max)	Cu (max)	Ni (max)	Nb (min)	Ca	Al
0.15	1.40	0.025	0.010	0.50	1.00	0.50	0.20	0.005	Treated	0.01–0.07

Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

• Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm2 and 640 N/mm2 and an elongation percentage ≥ 26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm2 and 690 N/mm2 and an elongation percentage ≥ 25 percent for thicknesses of 2 mm and above.

• Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium.

• Grade ASTM A570–50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.

The merchandise subject to the order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00. Certain hot-rolled flat-rolled carbon-quality steel covered by the order, including: vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive.

Analysis of Comments Received

All issues raised in the case briefs and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated concurrently with this notice (Issues and Decision Memorandum), and which is hereby adopted by this notice. The Issues and Decision Memorandum also contains a complete analysis of the programs covered by this review, the methodologies used to calculate the subsidy rates, and discusses any changes since the *Preliminary Results* and Post-Preliminary Decision to the subsidy rates. A list of the comments raised in the briefs and addressed in the Issues and Decision Memorandum is appended to this notice. The Issues and Decision Memorandum is on file in the Central Records Unit (CRU), Room 7046 of the main Department building, and can be accessed directly on the Web at *http://ia.ita.doc.gov/frn.*

Changes Since the Preliminary Results

Based on the results of verification, our consideration of information submitted by USIMINAS/COSIPA and the GOB in supplemental questionnaire responses received subsequent to the issuance of the *Preliminary Results,* and our analysis of comments received, we have made changes to the calculations of the *Preliminary Results* and Post-Preliminary Decision. These changes are discussed in detail in the Issues and Decision Memorandum, and the Memorandum to the File from The Team, Calculations for the Final Results: Usinas Siderurgicas de Minas Gerais S.A. and Companhia Siderugica Paulista (USIMINAS/COSIPA), dated concurrently with this notice, a public version of which is on file in the CRU.

Final Results of Review

In accordance with section 751(a)(1)(A) of the Act and 19 CFR 351.221(b)(5), we calculated a net subsidy for USIMINAS/COSIPA, the only producer/exporter subject to this review, of 0.46 percent *ad valorem.* This rate is *de minimis. See* 19 CFR 351.106(c)(1).

Assessment and Cash Deposit Instructions

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of review. The Department will instruct CBP to liquidate shipments of subject merchandise by USIMINAS/COSIPA entered, or withdrawn from warehouse, for consumption on or after January 1, 2008, through December 31, 2008, without regard to countervailing duties. We will also instruct CBP to collect cash deposits for USIMINAS/COSIPA at the rate of 0.00 percent on all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. The cash deposit rates for all companies not covered by this review are not changed by the results of this review.

Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 18, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

List of Issues Addressed in the Issues and Decision Memorandum

Comment 1: Whether it is Appropriate to Apply Adverse Facts Available to Find the FINEM Loans Countervailable
Comment 2: Selection of an Appropriate Benchmark for BNDES Loans
Comment 3: Calculation of FOB Sales Value

[FR Doc. 2011–9965 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–912]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 19, 2010, the Department of Commerce ("Department") published the preliminary results of the 2008–2009 administrative review of the antidumping duty order on certain new pneumatic off-the-road tires ("OTR tires") from the People's Republic of China ("PRC"). *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 64259 (October 19, 2010) ("*Preliminary Results*"). The period of review ("POR") is February 20, 2008, through August 31, 2009. This review covers six exporters.

We invited interested parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we made certain changes to our margin calculations for the individually examined respondent, Hebei Starbright Tire Co., Ltd. ("Starbright"). The final dumping margins for this review are listed in the "Final Results Margins" section below.

DATES: *Effective Date:* April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Raquel Silva or Andrew Medley, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6475 and (202) 482–4987, respectively.

Background

On October 19, 2010, the Department published its *Preliminary Results* of the antidumping duty administrative review of OTR tires from the PRC. On November 3, 2010, Starbright submitted its response to the Department's post-preliminary supplemental questionnaire regarding its factors of production database. On November 5, 2010, Starbright submitted its response to the Department's post-preliminary supplemental questionnaire regarding its indirect selling expense categories.

Titan Tire Corporation ("Titan"), the petitioner, Bridgestone Americas Holding, Inc. and subsidiary Bridgestone Firestone North America Tire, LLC ("Bridgestone"), the domestic interested party, and Starbright each submitted publicly available information regarding surrogate values on November 8, 2010. On November 18, 2010, both Titan and Bridgestone requested hearings. On December 9, 2010, Starbright submitted its response to the Department's fifth supplemental questionnaire. The Department verified certain aspects of Starbright's questionnaire responses at GPX International Tire Corporation ("GPX"), Starbright's U.S. sales affiliate, on December 13, 2010, through December 15, 2010. On January 31, 2011, the Department issued its verification report.

On February 3, 2011, the Department received Titan's withdrawal of its request for a hearing. On February 7, 2011, the Department received Titan's case brief and published an extension for the issuance of its final results of the review. *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Notice of Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 76 FR 6603 (February 7, 2011). On February 8, 2011, the Department received both Bridgestone's and Starbright's case briefs. Bridgestone's withdrawal of a request for a hearing was submitted on February 9, 2011. On February 14, 2011, all parties submitted their rebuttal case briefs.

On February 22, 2011, the Department sent Starbright a letter regarding alleged new factual information submitted in its case brief. Starbright submitted its response to the Department's letter on

February 24, 2011. On March 18, 2011, the Department published an additional extension for the issuance of the final results of the review. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of the 2008–2009 Administrative Review of the Antidumping Duty Order,* 76 FR 14906 (March 18, 2011).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, regarding, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2008–2009 First Administrative Review of the Antidumping Duty Order," dated concurrently with this notice ("Issues and Decision Memorandum"), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is also accessible on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Period of Review

The POR is February 20, 2008, through August 31, 2009.

Scope of the Order

The products covered by the order are new pneumatic tires designed for off-the-road and off-highway use, subject to exceptions identified below. Certain OTR tires are generally designed, manufactured and offered for sale for use on off-road or off-highway surfaces, including but not limited to, agricultural fields, forests, construction sites, factory and warehouse interiors, airport tarmacs, ports and harbors, mines, quarries, gravel yards, and steel mills. The vehicles and equipment for which certain OTR tires are designed for use include, but are not limited to: (1) Agricultural and forestry vehicles and equipment, including agricultural tractors,[1] combine harvesters,[2] agricultural high clearance sprayers,[3] industrial tractors,[4] log-skidders,[5] agricultural implements, highway-towed implements, agricultural logging, and agricultural, industrial, skid-steers/mini-loaders;[6] (2) construction vehicles and equipment, including earthmover articulated dump products, rigid frame haul trucks,[7] front end loaders,[8] dozers,[9] lift trucks, straddle carriers,[10] graders,[11] mobile cranes,[12] compactors; and (3) industrial vehicles and equipment, including smooth floor, industrial, mining, counterbalanced lift trucks, industrial and mining vehicles other than smooth floor, skid-steers/mini-loaders, and smooth floor off-the-road counterbalanced lift trucks. The foregoing list of vehicles and equipment generally have in common that they are used for hauling, towing, lifting, and/or loading a wide variety of equipment and materials in agricultural, construction and industrial settings. Such vehicles and equipment, and the descriptions contained in the footnotes are illustrative of the types of vehicles and equipment that use certain OTR tires, but are not necessarily all-inclusive. While the physical characteristics of certain OTR tires will vary depending on the specific applications and conditions for which the tires are designed (*e.g.,* tread pattern and depth), all of the tires within the scope have in common that they are designed for off-road and off-highway use. Except as discussed below, OTR tires included in the scope of the order range in size (rim diameter) generally but not exclusively from 8 inches to 54 inches. The tires may be either tube-type[13] or tubeless, radial or non-radial, and intended for sale either to original equipment manufacturers or the replacement market. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Specifically excluded from the scope are new pneumatic tires designed, manufactured and offered for sale primarily for on-highway or on-road use, including passenger cars, race cars, station wagons, sport utility vehicles, minivans, mobile homes, motorcycles, bicycles, on-road or on-highway trailers, light trucks, and trucks and buses. Such tires generally have in common that the symbol "DOT" must appear on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Such excluded tires may also have the following designations that are used by the Tire and Rim Association:

Prefix letter designations:

- P—Identifies a tire intended primarily for service on passenger cars;
- LT—Identifies a tire intended primarily for service on light trucks; and,

[1] Agricultural tractors are dual-axle vehicles that typically are designed to pull farming equipment in the field and that may have front tires of a different size than the rear tires.

[2] Combine harvesters are used to harvest crops such as corn or wheat.

[3] Agricultural sprayers are used to irrigate agricultural fields.

[4] Industrial tractors are dual-axle vehicles that typically are designed to pull industrial equipment and that may have front tires of a different size than the rear tires.

[5] A log-skidder has a grappling lift arm that is used to grasp, lift and move trees that have been cut down to a truck or trailer for transport to a mill or other destination.

[6] Skid-steer loaders are four-wheel drive vehicles with the left-side drive wheels independent of the right-side drive wheels and lift arms that lie alongside the driver with the major pivot points behind the driver's shoulders. Skid-steer loaders are used in agricultural, construction and industrial settings.

[7] Haul trucks, which may be either rigid frame or articulated (*i.e.,* able to bend in the middle) are typically used in mines, quarries and construction sites to haul soil, aggregate, mined ore, or debris.

[8] Front loaders have lift arms in front of the vehicle. They can scrape material from one location to another, carry material in their buckets, or load material into a truck or trailer.

[9] A dozer is a large four-wheeled vehicle with a dozer blade that is used to push large quantities of soil, sand, rubble, *etc.,* typically around construction sites. They can also be used to perform "rough grading" in road construction.

[10] A straddle carrier is a rigid frame, engine-powered machine that is used to load and offload containers from container vessels and load them onto (or off of) tractor trailers.

[11] A grader is a vehicle with a large blade used to create a flat surface. Graders are typically used to perform "finish grading." Graders are commonly used in maintenance of unpaved roads and road construction to prepare the base course on to which asphalt or other paving material will be laid.

[12] A counterbalanced lift truck is a rigid framed, engine-powered machine with lift arms that has additional weight incorporated into the back of the machine to offset or counterbalance the weight of loads that it lifts so as to prevent the vehicle from overturning. An example of a counterbalanced lift truck is a counterbalanced fork lift truck. Counterbalanced lift trucks may be designed for use on smooth floor surfaces, such as a factory or warehouse, or other surfaces, such as construction sites, mines, *etc.*

[13] While tube-type tires are subject to the scope of this proceeding, tubes and flaps are not subject merchandise and therefore are not covered by the scope of this proceeding, regardless of the manner in which they are sold (*e.g.,* sold with or separately from subject merchandise).

• ST—Identifies a special tire for trailers in highway service.

Suffix letter designations:

• TR—Identifies a tire for service on trucks, buses, and other vehicles with rims having specified rim diameter of nominal plus 0.156″ or plus 0.250″;

• MH—Identifies tires for Mobile Homes;

• HC—Identifies a heavy duty tire designated for use on "HC" 15″ tapered rims used on trucks, buses, and other vehicles. This suffix is intended to differentiate among tires for light trucks, and other vehicles or other services, which use a similar designation.

• Example: 8R17.5 LT, 8R17.5 HC;

• LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service; and

• MC—Identifies tires and rims for motorcycles.

The following types of tires are also excluded from the scope: pneumatic tires that are not new, including recycled or retreaded tires and used tires; non-pneumatic tires, including solid rubber tires; tires of a kind designed for use on aircraft, all-terrain vehicles, and vehicles for turf, lawn and garden, golf and trailer applications. Also excluded from the scope are radial and bias tires of a kind designed for use in mining and construction vehicles and equipment that have a rim diameter equal to or exceeding 39 inches. Such tires may be distinguished from other tires of similar size by the number of plies that the construction and mining tires contain (minimum of 16) and the weight of such tires (minimum 1500 pounds).

Separate Rates

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. It is the Department's policy to assign all exporters of merchandise subject to an investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*"), and 19 CFR 351.107(d).

In the *Preliminary Results,* we found that Starbright and the separate-rate respondents, Hangzhou Zhongce Rubber Co., Ltd. ("Hangzhou Zhongce"), KS Holding Limited/KS Resources Limited ("KS Ltd."), Laizhou Xiongying Rubber Industry Co., Ltd. ("Laizhou Xiongying"), Qingdao Taifa Group Co., Ltd. ("Qingdao Taifa"), and Weihai Zhongwei Rubber Co., Ltd. ("Weihai Zhongwei"), demonstrated their eligibility for separate-rate status. *See Preliminary Results,* 75 FR at 64261–62. As stated in the *Preliminary Results,* Starbright and KS Ltd. reported that they are wholly foreign-owned, and therefore, consistent with the Department's practice, a further separate rate analysis was not necessary to determine whether Starbright's and KS Ltd.'s export activities were independent from government control, and we preliminarily granted a separate rate to Starbright and KS Ltd.[14] For the final results, we continue to find that Starbright and KS Ltd. are eligible for separate rate status. For the final results, we also continue to find that the evidence placed on the record of this review by Hangzhou Zhongce, Laizhou Xiongying, Qingdao Taifa, and Weihai Zhongwei demonstrates both a *de jure* and *de facto* absence of government control, with respect to their respective exports of the merchandise under review, and, thus are eligible for separate-rate status. *See Preliminary Results,* 75 FR at 64262.

Margin for the Separate Rate Companies

As discussed above, the Department continues to find that Hangzhou Zhongce, KS Ltd., Laizhou Xiongying, Qingdao Taifa, and Weihai Zhongwei have demonstrated their eligibility for a separate rate. For the exporters subject to a review that are determined to be eligible for separate rate status, but are not selected as individually examined respondents, the Department generally weight-averages the rates calculated for the individually examined respondents, excluding any rates that are zero, *de minimis,* or based entirely on facts available.[15] Consistent with the Department's practice, as the separate rate, we have established a margin for Hangzhou Zhongce, KS Ltd., Laizhou Xiongying, Qingdao Taifa, and Weihai Zhongwei based on the rate we calculated for the individually examined respondent, Starbright.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes to the margin calculations. For the final results, the Department has made the following changes to Starbright's Margin Calculation:

• *Invoices:* Invoice numbers, customer codes and payment terms have been revised for two invoices in the U.S. sales database. *See* Memorandum titled "Analysis Memorandum for the Final Results: Hebei Starbright Tire Co., Ltd. ("Final Analysis Memorandum"), dated concurrently with this notice. *See also* Memorandum titled "First Administrative Review of Certain New Pneumatic Off-the-Road Tires ("OTR Tires") from the People's Republic of China ("PRC")—Verification of the Sales Information of Hebei Starbright Tire Co., Ltd. and its U.S. Affiliate GPX International Tire Corp.," dated January 31, 2011 ("Verification Report").

• *Set Adjustments:* Set adjustments have been applied to multiple sales in the U.S. sales database. *See* Final Analysis Memorandum. *See also* Verification Report.

• *U.S. Inland Freight from Warehouse to Customer:* For the final results, we have revised the adjustment regarding U.S. inland freight from warehouse to customer. *See* Final Analysis Memorandum. *See also* Verification Report.

• *Rebate Adjustments:* Regarding rebate adjustments, we have: eliminated the reliance upon facts available with adverse inference under sections 776(a)(1), 776(a)(2)(B), and 776(b) of the Tariff Act of 1930, as amended (the "Act"), used in the *Preliminary Results* and, in its place, applied a rebate adjustment to the 2009 sales of multiple customers; and modified the rebate adjustment for one customer's 2008 sales. *See* Comment 4 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum and Verification Report.

• *Credit:* Regarding credit adjustments, we have: revised the adjustments to account for revisions to the above-mentioned rebate adjustments; and revised the average interest rate used to calculate credit

[14] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate from the People's Republic of China,* 64 FR 71104, 71104–05 (December 20, 1999) (where the respondent was wholly foreign-owned and, thus, qualified for a separate rate).

[15] *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273, 8279 (February 13, 2008) (unchanged in *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review,* 73 FR 49162 (August 20, 2008)).

adjustments. Regarding the sales for which Starbright was not able to report a payment date, we have used partial facts available in accordance with sections 776(a)(1) and 776(a)(2)(B) of the Act. *See* Comment 4 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum. *See also* Verification Report.

- *Inventory Carrying Costs:* We have modified the average number of days in inventory used to calculate the adjustment for inventory carrying costs. *See* Comment 4 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum and Verification Report.
- *Indirect Selling Expenses:* Regarding indirect selling expenses, we have: included two additional indirect selling accounts; and modified our calculation to more comprehensively capture all of GPX's indirect selling expenses attributable to the sales of subject merchandise. *See* Comments 2 and 3 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum.
- *Indirect Labor:* After the *Preliminary Results,* Starbright submitted data regarding its use of supervisory and quality control labor. For the final results we have added the new supervisory and quality control indirect labor usage to the original indirect labor usage for a new total indirect labor usage. *See* Comment 5 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum.
- *Non-production Electricity:* For the final results, we are removing electricity consumed by Starbright in its energy department and supporting department from our calculations of energy consumed for production. *See* Comment 6 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum.
- *Brokerage and Handling:* For the final results, we are no longer deflating brokerage and handling costs. *See* Comment 9 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum and Memorandum titled "Preliminary Results of the Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Surrogate Value Memorandum," dated October 7, 2010 ("Surrogate Value Memorandum").
- *Adjustments to Surrogate Financial Ratios:* For the final results, in Goodyear India Limited's financial statement we have: excluded a portion of "Liabilities/Provision no longer required written back"; reclassified "Retirement Gratuities" as manufacturing overhead; and corrected two clerical errors. *See* Comments 7 and 11 of the Issues and Decision Memorandum. *See also* Surrogate Value Memorandum.
- *Rubber Softener (RSOFT):* We have applied a daily exchange rate based on the date of sale to the surrogate value for RSOFT. *See* Comment 10 of the Issues and Decision Memorandum. *See also* Final Analysis Memorandum.
- *Export Subsidy Adjustment:* Section 772(c)(1)(C) of the Act unconditionally states that U.S. price "shall be increased by the amount of any countervailing duty imposed on the subject merchandise * * * to offset an export subsidy".[16] The Department determined in its final results of the companion countervailing duty administrative review that Starbright's merchandise benefited from export subsidies.[17] Therefore, we have increased Starbright's U.S. price for countervailing duties imposed attributable to export subsidies, where appropriate. See Final Analysis Memorandum.

Adverse Facts Available

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, *inter alia,* 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.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties.

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. Section 776(b) of the Act also authorizes the Department to use as adverse facts available ("AFA") information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

For the *Preliminary Results,* the Department applied partial AFA to a number of products with unreported factors of production. *See Preliminary Results,* 75 FR at 64265–66. No parties have commented on this issue since that time, and the record regarding the products in question remains the same. For this reason, we determine that, in accordance with sections 776(a)(1), 776(a)(2)(B), 776(a)(2)(C), and 776(b) of the Act, continued use of partial AFA is appropriate for the final results with respect to Starbright. *See* Final Analysis Memo.

Final Results Margins

We determine that the following weighted-average dumping margins exist for the period February 20, 2008, through August 31, 2009:

OTR TIRES FROM THE PRC

Exporter	Weighted-average margin (percent)
Hebei Starbright Tire Co., Ltd	28.97
Hangzhou Zhongce Rubber Co., Ltd	28.97
KS Holding Limited/KS Resources Limited	28.97
Laizhou Xiongying Rubber Industry Co., Ltd	28.97
Qingdao Taifa Group Co., Ltd	28.97
Weihai Zhongwei Rubber Co., Ltd	28.97

[16] *See, e.g., Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review,* 75 FR 38076, 38077 (July 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

[17] *See New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review,* dated concurrently with this notice.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the PRC-wide rate of 210.48 percent. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For Starbright,[18] Hangzhou Zhongce, KS Ltd., Laizhou Xiongying, Qingdao Taifa, and Weihai Zhongwei, the cash deposit rate will be the margins listed above; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 210.48 percent determined in the less-than-fair-value investigation; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until further notice.

[18] While the instant review covered Starbright as the exporter, the draft cash deposit instructions released with the *Preliminary Results* inadvertently identified "Hebei Starbright Co., Ltd./GPX International Co., Ltd." as the exporter. We have corrected the cash deposit instructions to identify only Starbright as the exporter.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing the final results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 18, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

Comment 1: Whether to Treat Certain Inputs as Manufacturing Overhead or FOPs
Comment 2: Treatment of Warehousing-Related Expenses
Comment 3: Calculation of ISE Ratio
Comment 4: Whether to Make Certain Changes Based on Verification Findings
Comment 5: Treatment of Supervisory and Quality Control Labor
Comment 6: Calculation of Starbright's Electricity Consumption
Comment 7: Correction of Alleged Ministerial Errors
Comment 8: Valuation of Wage Rate
Comment 9: Valuation of Brokerage and Handling
Comment 10: Valuation of RSOFT
Comment 11: Selection and Calculation of Financial Ratios
Comment 12: Whether to Grant MOE Treatment
Comment 13: Double Remedies
Comment 14: Zeroing

[FR Doc. 2011–9964 Filed 4–22–11; 8:45 am]
BILLING CODE 3510–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA355

Atlantic Coastal Fisheries Cooperative Management Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that an Exempted Fishing Permit (EFP) application contains all of the required information and warrants further consideration. This EFP application would exempt commercial fishing vessels from the following Federal American lobster regulations: Trap escape vent requirements to allow 12 federally permitted commercial fishing vessels to utilize a maximum of 500 ventless traps to collect scientific information on American lobsters, including juveniles, in Lobster Conservation Management Areas (LCMAs) 3, 4, and 5 from June through

November 2011. This proposed project would be conducted by the New Jersey Division of Fish and Wildlife (NJ DFW) in conjunction with the already present New Jersey At-Sea Lobster Observer Program and New Jersey commercial fishermen.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before May 10, 2011.

ADDRESSES: Comments on this notice may be submitted by e-mail. The mailbox address for providing e-mail comments is *NERO.EFP@noaa.gov.* Include in the subject line "Comments on NJ DFW Lobster EFP." Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelop "Comments on NJ DFW Lobster EFP."

- *Fax:* (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Carol Shé, Fishery Policy Analyst, 978–282–8464, *Carol.She@noaa.gov.*

SUPPLEMENTARY INFORMATION: NJ DFW submitted a complete application for an EFP on March 21, 2011, to conduct commercial fishing activities that the regulations would otherwise restrict. This EFP application would exempt commercial fishing vessels from the following Federal regulations: Lobster trap escape vent requirements specified under 50 CFR 697.21(c)(2) and (c)(4). The EFP would authorize 12 federally permitted vessels to be exempted from parts of the Federal lobster regulations to allow the participating vessels to fish modified lobster traps to attain an accurate characterization of abundance for juvenile and adult lobsters in waters off the coast of New Jersey and to determine several variables in the stock dynamics, *e.g.,* whether there has been a significant decline in juvenile and adult abundance, and/or whether this decline is occurring throughout the range of the Southern New England (SNE) stock.

NJ DFW would work in conjunction with the already present New Jersey At-Sea Lobster Observer Program to record: Number of lobsters caught; number of traps hauled; set-over-days; trap and bait type; carapace length (to the nearest millimeter); sex; shell hardness; culls and shell damage; external gross pathology (including shell disease symptoms); mortality; and presence of extruded ova on females through its Ventless Trap Survey. The Ventless Trap Survey project is designed to generate robust estimates of lobster abundance off the coast of New Jersey, from 0–60 nautical miles (0–97 kilometers), offshore, in the northern range of the SNE stock area and would be funded largely by the participating fishers through supply of gear, crew, and vessel time. The scientific personnel would be funded through the New Jersey Atlantic Coastal Cooperative Statistics Program (NJ ACCSP), particularly the NJ ACCSP At-Sea Lobster Observer Program for Fishing Year 2011.

The resulting data would be utilized by NJ DFW staff, Atlantic States Marine Fisheries Commission Technical Committees, and Stock Assessment Sub-Committees. Also, comparisons would be made of results from data collected in LCMAs 1, 2, and 6 with data collected in LCMAs 3, 4, and 5. Finally, an index of lobster stock biomass in waters off New Jersey, in relation to overall commercial landings of lobster in New Jersey, would be made through the use of catch per unit effort of sublegal and legal size lobsters taken during observer trips in New Jersey.

Each vessel would fish approximately 20–50 ventless traps within their strings of existing lobster traps. With exception of the waiver of the trap escape vent requirement, trap gear would be compliant with all Federal lobster regulations, including the Large Whale Take Reduction Plan gear configuration requirements.

This EFP would not authorize the deployment of additional lobster traps in the waters off New Jersey. All traps, including ventless traps, would be included under each vessel's existing maximum LCMA-specific trap allocation as determined by NMFS. Each ventless trap would be placed randomly on already existing strings of vented pots of the same dimensions and be randomly selected throughout the range of the survey area. All scientific ventless sampling gear would be identified with a state issued scientific trap tag provided by NJ DFW, and be affixed with both the proper state scientific tags and Federal trap tags. Records of latitude and longitude of trap/string location would be provided to the NJ DFW Bureau of Law Enforcement upon request. Trap deployment, maintenance, and hauling would be completed by participating commercial lobstermen. The NJ ACCSP staff would record environmental data when present on at-sea observer trips including: Depth; dissolved oxygen; conductivity; salinity; and temperature profile from the surface to bottom.

Sampling would be conducted over five different depth zones from a minimum of 60 ft (18 ms) to a maximum of 220 ft (67 ms) running the length of the New Jersey Mudhole, Glory Hole, and Chicken Canyon, and other historic lobster fishing areas located within LCMAs 3 and 4 and over various lobster grounds such as the 17 Fathom Bank in LCMA 5.

This project would not authorize the deployment of any additional trap gear; therefore, minimal environmental impacts would be anticipated by this EFP above those already occurring as part of a commercial lobster trap trawl deployed under usual industry conditions. Impacts to the lobster resource would be negligible. Any sublegal lobsters caught would briefly be retained on-board only for the purposes of recording their size, sex, and presence of shell disease, before being promptly released back into the ocean, as would those lobsters that do not fall within the minimum and maximum legal gauge sizes. There would be minimal to no impacts to bycatch species, as all bycatch species hauled from modified gear would be returned promptly to the ocean. Additionally, minimal to no impacts would occur on benthic habitat over that which occurs under existing lobster trap fishing activities. Finally, the gear would be compliant with the Atlantic Large Whale Take Reduction Plan, and would be deployed under usual industry conditions; therefore, impacts to protected resources would fall within those impacts already analyzed as part of the October 29, 2010, Biological Opinion for the American lobster fishery.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: April 20, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–9944 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA387

Endangered Species; File No. 15566

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that South Carolina Department of Natural Resources, Marine Resources Division, Charleston, SC 29422–2559 has been issued a permit to take loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

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; and

Southeast Region, NMFS, 263 13th Ave., South, St. Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Kristy Beard or Amy Hapeman, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On November 3, 2010, notice was published in the **Federal Register** (75 FR 67682) that a request for a scientific research permit to take sea turtles had been submitted by the applicant. 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 five-year permit authorizes the capture by trawl of up to 345 loggerhead, 29 Kemp's ridley, 9 green, 1 leatherback, and 1 hawksbill sea turtle in order to assess temporal change in catch rates, size distributions, sex and genetic ratios, and health of sea turtles. Captures would occur annually in coastal waters between Winyah Bay, SC and St. Augustine, FL. Turtles would be handled, blood sampled, measured, flipper and passive integrated transponder tagged, photographed, and released. A subsample of animals would be subject to barnacle, keratin, fecal, and tissue sampling, cloacal swabs, and attachment of satellite and/or VHF transmitters. Up to five loggerhead, one Kemp's ridley, one green, one leatherback, and one hawksbill sea turtle could be accidentally killed over the life of the permit.

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: April 19, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–9945 Filed 4–22–11; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning its proposed renewal of its Office of Strategy and Special Initiatives Training and Technical Assistance Cooperative Agreement Application. This application is used by current and prospective grantees to apply for funds to support training and technical assistance to Corporation grantees funded through AmeriCorps, and Senior Corps, and VISTA Sponsors and NCCC Campuses. Completion of the Grant Application is required to be considered for and obtain a Corporation cooperative agreement to provide training and technical assistance services to Corporation grantees and sub-grantees.

Copies of the information collection request can be obtained by contacting the office listed in the addresses section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by June 24, 2011.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, Strategy Office; Attention Ralph Morales, Associate Director for Administration and Budget, Room 9703; 1201 New York Avenue, NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) By fax to: (202) 606–3477, Attention: Ralph Morales, Associate Director for Budget and Administration.

(4) Electronically through *http://www.regulations.gov* or *rmorales@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Ralph Morales, (202) 606–6829, or by e-mail at *rmorales@cns.gov.*

SUPPLEMENTARY INFORMATION:

The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Background

The Office of Strategy and Special Initiatives Training and Technical Assistance Cooperative Agreement Application is completed by organizations interested in applying to provide training and technical assistance services to Corporation grantees and subgrantees in topic areas related to program quality, compliance, and performance measurement. The application is completed electronically using eGrants, the Corporation's Web-based grants management system.

Current Action

The Corporation seeks to compete and revise the current application to reflect changes in the Web-based user interface for eGrants, give background information on the Corporation's new Strategy Office, and clarify guidance on the cost effectiveness and accountability of services provided.

The information collection will otherwise be used in the same manner as the existing application. The Corporation also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on September 30, 2011.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Application Instructions Training and Technical Assistance Cooperative Agreements.

OMB Number: 3045–0105.

Agency Number: None.

Affected Public: Current/prospective training and technical assistance providers.

Total Respondents: 56.

Frequency: Every three years.

Average Time Per Response: Averages 11.75 hours. Estimated at 16.5 hours for first time respondents; 7 hours for current providers.

Estimated Total Burden Hours: 658 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: April 18, 2011

Gretchen Van der Veer,

Director, Leadership Development and Training.

[FR Doc. 2011–9961 Filed 4–22–11; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0045]

Defense Transportation Regulation, Part IV

AGENCY: United States Transportation Command (USTRANSCOM), DoD.

ACTION: Notice.

SUMMARY: DOD has issued draft business rules for the electronic payment of Nontemporary Storage (NTS) invoices in the Defense Transportation Regulation (DTR) Part IV (DTR 4500.9R). This process proposes mandatory use of the DOD Third Party Payment System (TPPS) as the transaction and payment system for all NTS Transportation Service Providers (TSP). Implementation of electronic payments for NTS at all Military Services and Coast Guard installations is the goal of the Defense Personal Property Program (DP3). The initial rollout of the TPPS and the electronic payment process for NTS is scheduled for August, 2011.

DATES: Comments must be received on or before June 24, 2011.

ADDRESSES: Do not submit comments directly to the point of contact under **FOR FURTHER INFORMATION CONTACT** or mail your comments to any address other that what is shown below. Doing so will delay the posting of the submission. You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Mr. Jim Teague, United States Transportation Command, TCJ5/4–PI, 508 Scott Drive, Scott Air Force Base, IL 62225–5357; (618) 256–9605.

SUPPLEMENTARY INFORMATION: Request comments be submitted in the identified matrix-format posted with the business rules. In furtherance of DOD's goal to develop and implement an efficient personal property program, Electronic Billing and Payment Business Rules were developed by the Military Services, DFAS and SDDC. In addition, the proposed electronic billing processes will compliment the future implementation of the Defense Personal Property Program (DP3) Phase III NTS capabilities within the Defense Personal Property System (DPS). The proposed NTS TPPS business rules are available for review on the USTRANSCOM Web site at *http://www.transcom.mil/dtr/part-iv/nts.cfm.*

Any subsequent modification(s) to the business rules beyond the above stated changes will be published in the **Federal Register** and incorporated into the Defense Transportation Regulation (DTR) Part IV (DTR 4500.9R). These program requirements do not impose a legal requirement, obligation, sanction or penalty on the public sector, and will not have an economic impact of $100 million or more.

Additional Information

A complete version of the DTR is available via the internet on the USTRANSCOM homepage at *http://www.transcom.mil/dtr/part-iv.cfm.*

Dated: April 20, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9949 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Closed Meeting of the Threat Reduction Advisory Committee

AGENCY: Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), DoD.

ACTION: Federal Advisory Committee meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended) and the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) the Department of Defense announces the following Federal advisory committee meeting of the Threat Reduction Advisory Committee (Hereafter referred to as "the Committee").

DATES: Wednesday, May 11, 2011, from 8 a.m. to 4 p.m.

ADDRESSES: ANSER Conference Center, Platt Conference Room, 2900 S. Quincy St., Suite 800, Arlington, VA 22206.

FOR FURTHER INFORMATION CONTACT: Contact Mr. William Hostyn, Defense Threat Reduction Agency/SP–ACP, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201; E-mail: *william.hostyn@dtra.mil;* Phone: (703) 767–4453; Fax: (703) 767–5701.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To obtain, review and evaluate classified information related to the Committee's mission to advise on technology security, combating weapons of mass destruction (WMD), counter terrorism and counter proliferation.

Agenda: Beginning at 8 a.m. through the end of the meeting, the Committee will present Working Group findings at the secret level in the morning and will receive secret level briefings on counterterrorism, counterproliferation and WMD world events in the morning and afternoon.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Department of Defense has determined that the meeting shall be closed to the public. The Undersecretary of Defense (Acquisition, Technology and Logistics), in consultation with the DoD FACA Attorney, has determined in writing that this meeting be closed to the public because the discussions fall under the purview of Title 5, United States Code, Section 552b(c)(1) and are inextricably intertwined with the unclassified material that they cannot reasonably be segregated into separate discussions without disclosing secret or classified material.

Committee's Designated Federal Officer or Point of Contact: Mr. William Hostyn, Defense Threat Reduction Agency/SP/SP, 8725 John J. Kingman Road, MS 6201, Fort Belvoir, VA 22060–6201; E-mail: *william.hostyn@dtra.mil;* Phone: (703) 767–4453; Fax: (703) 767–5701.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the Committee at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Committee's Designated Federal Officer; the Designated Federal Officer's contact information can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to a scheduled meeting of the Committee may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all committee members.

Dated: April 20, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–9950 Filed 4–22–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare an Environmental Impact Statement for Update of the Shoreline Management Plan and Supplement to the Master Plan, Eufaula Lake, OK

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The purpose of the Environmental Impact Statement (EIS) is to address alternatives and environmental impacts associated with an update of the Shoreline Management Plan (SMP) and supplement to the Master Plan (MP), Eufaula Lake, Oklahoma. The EIS would likewise evaluate alternatives and environmental impacts associated with specific proposals for recreational development facilities on Federal lands at Eufaula Lake as identified through the SMP update and MP supplement process.

ADDRESSES: Questions or comments concerning the proposed action should be addressed to Mr. Stephen L. Nolen, Chief, Environmental Analysis and Compliance Branch, Tulsa District, U.S. Army Corps of Engineers, CESWT–PE–E, 1645 S. 101st E. Ave., Tulsa, OK 74128–4629.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen L. Nolen, (918) 669–7660, fax: (918) 669–7546, e-mail: *Stephen.L.Nolen@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The Tulsa District, U.S. Army Corps of Engineers seeks to provide an update to the existing SMP and to supplement portions of the existing MP for Eufaula Lake, OK. Eufaula Lake is a multi-purpose reservoir impounded by Eufaula Dam on the Canadian River at river mile 27.0, about 12 miles east of Eufaula in McIntosh County, OK. Land and water resources at the lake are managed by the Tulsa District in accordance with regulations governing U.S. Army Corps of Engineers civil works projects. At Eufaula Lake, private shoreline uses to include private boat docks and vegetation modification are managed under a permit system dependent upon shoreline allocation classifications specified in the SMP in accordance with Engineer Regulation 1130–2–406. Reviews and updates to SMPs are periodically provided and the last update to the Eufaula Lake SMP occurred in 1998. Similarly, land resources at Eufaula Lake are managed in accordance with MP requirements as described in Engineer Pamphlet 1130–2–550. In the land allocation portion of the MP, all project lands are assigned categories which are used for determination of appropriate uses for these lands. The last update to the Eufaula Lake MP occurred in 1977. Owing to the elapsed time since last updates, changed conditions, and the need to assess lake-wide cumulative effects, the Tulsa District seeks to update the Eufaula Lake SMP and supplement the MP by updating the land allocation portion. Actions appropriate for updating these plans and preparing the EIS for the same will occur concurrently.

As the SMP and MP update processes involve public participation and input, it is possible that specific proposals for recreational or other development features involving project shorelines and/or lands may be received by the Tulsa District. For proposals that have advanced to a planning stage of sufficient detail to allow for proposal-specific alternative and impact analysis, the EIS would include these analyses. For reasonably-foreseeable development proposals that have not advanced to the point where proposal-specific analyses are possible, these will be assessed under cumulative impacts but will require additional analysis under the National Environmental Policy Act (NEPA) prior to their implementation at Eufaula Lake.

Reasonable alternatives to be considered include varying combinations of allocation classifications for both project shorelines and Federal lands at Eufaula Lake to include the no action alternative of retaining allocations in both the SMP and MP as they currently exist. For proposal-specific actions, alternatives would include varying development plans and features as well as the no action alternative.

Issues to be addressed in the EIS include but are not limited to: (1) Socioeconomic impacts associated with allocation classifications and specific development proposals, (2) matters pertaining to shoreline impacts, (3) potential impacts to cultural and ecological resources, (4) public access and safety, (5) impacts to lake use, public parks and recreation, (6) aesthetics, (7) infrastructure, (8) lake water quality, (9) traffic patterns, (10) terrestrial and aquatic fish and wildlife habitat, (11) Federally-listed threatened and endangered species, and (12) cumulative impacts associated with past, current, and reasonably foreseeable future actions at Eufaula Lake.

A public scoping meeting for the action will be conducted in early summer 2011 in Eufaula, OK or the vicinity. In addition, public workshops addressing updates to the SMP and MP may be held at locations near Eufaula Lake. News releases and notices informing the public and local, state, and Federal agencies of the proposed action and date of the public scoping meeting will be published in local newspapers. Comments received as a result of this notice, news releases, and the public scoping meeting will be used to assist the Tulsa District Corps of Engineers in identifying potential impacts to the quality of the human or natural environment. Affected Federal, state, or local agencies, affected Indian tribes, and other interested private organizations and parties are encouraged to participate in the scoping process by forwarding written comments to (see **ADDRESSES**) or attending the scoping meeting.

The draft EIS will be available for public review and comment. While the specific date for release of the draft EIS has yet to be determined, all interested agencies, tribes, organizations and parties expressing an interest in this action will be placed on a mailing list for receipt of the draft EIS. In order to be considered, any comments and suggestions should be forwarded to (see **ADDRESSES**) in accordance with dates specified upon release of the draft EIS.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2011–9902 Filed 4–22–11; 8:45 am]

BILLING CODE 3720–58–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Wednesday, May 11, 2011. The hearing will be part of the Commission's regular business meeting. The conference session and business meeting both are open to the public and will be held at the West Trenton Volunteer Fire Company, located at 40 West Upper Ferry Road, West Trenton, New Jersey.

The conference among the commissioners and staff will begin at 11 a.m. and will consist of two presentations: a report by Deputy Delaware River Master Gary N. Paulachok, P.G. of the U.S. Geological Survey on a one-year extension of the Flexible Flow Management Plan (FFMP); and a report by Dr. Jonathan H. Sharp of the University of Delaware on the Delaware Estuary Boat Run Monitoring Program.

The subjects of the public hearing to be held during the 1:30 p.m. business meeting include the dockets listed below:

1. *U.S. Steel, D–1978–068–3.* An application to renew DRBC approval for the discharge of up to 0.163 million gallons per day (mgd) of treated sanitary wastewater from the applicant's wastewater treatment plant (WWTP) via Outfall No. 203 and 3.75 mgd of treated industrial wastewater and non-contact cooling water (NCCW) from the applicant's industrial wastewater treatment plant (IWTP) via Outfall No. 103 as well as to continue a TDS Determination that allows TDS effluent concentrations of up to 1,100 mg/l as a monthly average; 2,200 mg/l as a daily maximum; and 2,750 mg/l as an instantaneous maximum, via combined Outfall No. 003. Internal Outfalls Nos. 103, 203, and 303 (stormwater only) will continue to discharge to the Delaware River via combined Outfall No. 003. The combined discharge from the applicant's WWTP and IWTP is made via Outfall No. 003 to the tidal region of Water Quality Zone 2 of the Delaware River at River Mile 127.0. The WWTP and IWTP are located in Falls Township, Bucks County, Pennsylvania.

2. *French Creek State Park, D–1980–007 CP–4.* An application to renew DRBC approval to continue to withdraw up to 3.1 million gallons per month (mgm) of groundwater to supply the French Creek State Park from existing Wells in the Hammer Creek Formation. The project is located in the French Creek Watershed in Union Township, Berks County, Pennsylvania, within the Southeastern Pennsylvania Ground Water Protected Area.

3. *GenOn Energy, Inc., D–1987–26–3.* An application to renew DRBC approval of discharges of treated industrial wastewater effluent from the Titus Generating Station (TGS) to the Schuylkill River as follows: the TGS IWTP via Outfall 002; coal-ash leachate from the Beagle Club Ash Disposal (BCAD) site via Outfall 004; and combined NCCW, intake screen backwash, and stormwater via Outfall 001. The applicant has requested that the intermittent discharge from Outfall 004 continue to have an effluent limit of 3,500 mg/l of TDS as a monthly average. Effluent limits for the existing NCCW discharge (Outfall 001), IWTP (Outfall 002) and BCAD site (Outfall 004) will continue to be based on average annual flows of 1.469 mgd, 2.149 mgd and 1.007 mgd, respectively. The IWTP is hydraulically designed for 3.2 mgd. The TGS facilities will continue to discharge to the Schuylkill River. The project is located in Cumru Township, Berks County, Pennsylvania.

4. *Middletown Township, Middletown Country Club, D–1996–032 CP–2.* An application for approval of an existing groundwater withdrawalproject to continue to supply up to 4.13 mgm of water to the applicant's golf course from existing Well No. 1–G. The project is located in the Precambrian Felsic Gneiss in the Neshaminy Creek Watershed in Middletown Township, Bucks County, Pennsylvania within the Southeastern Pennsylvania Ground Water Protected Area.

5. *Concord Township Sewer Authority, D–1997–019 CP–3.* An application for approval to continue discharging 1.8 mgd of treated effluent from the Concord Township WWTP. The WWTP will continue to discharge to the West Branch Chester Creek at River Mile 82.93—8.9—5.4 (Delaware River—Chester Creek—West Branch Chester Creek) in Concord Township, Delaware County, Pennsylvania.

6. *Bedminster Municipal Authority—Pennland Farms, D–2006–010 CP–2.* An application to renew DRBC approval of the existing 0.06 mgd Pennland Farms WWTP. The WWTP discharges to an unnamed tributary of Deep Run Creek at River Mile 157.0—4.7—7.1—0.1 (Delaware River—Tohickon Creek—Deep Run Creek—UNT). It is located in Bedminster Township, Bucks County, Pennsylvania within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

7. *Exelon Generation Company, LLC—Schuylkill Generating Station, D–1964–074 CP–2.* An application for a decrease in the approved surface water withdrawal (SWWD) allocation associated with Intake No. 1 to 5,180 mgm, of which 2,483 mgm would be for use at the Schuylkill Generating Station (SGS). Intake No. 1 supplies water to the Grays Ferry Cogen Facility (GFCF) and the Tri-Gen Corporation Facility (Tri-Gen) as well as to the SGS. The three

facilities are located adjacent to one another on a Schuylkill River site formerly owned and operated by the Philadelphia Energy Company (PECO). The GFCF and Tri-Gen generating stations and subsidiary water allocations were approved on June 28, 1995 by Dockets Nos. D–95–32 and D–95–10, respectively. DRBC staff evaluated the current and 10-year projected uses for all three facilities. The current average and maximum SWWDs are 2,982 mgm and 4,473 mgm, respectively. The 10-year combined maximum SWWD is estimated to be 5,180 mgm, less than the 8,277 mgm formerly approved by DRBC in the facilities' three separate dockets. The SGS is located in the City of Philadelphia, Pennsylvania.

8. *E.I. du Pont de Nemours and Company (DuPont), D–1988–085–3.* An application to renew DRBC approval of discharges from the DuPont Chambers Works IWTP and to approve modifications to the IWTP, including the construction of a new 48" diameter IWTP outfall pipe with a multi-port diffuser and additional modifications to accommodate the new outfall. The proposed outfall will be located approximately 400 feet south of the existing outfall. By supplemental submission filed on July 22, 2010, the docket holder also seeks approval for an alternative mixing zone in accordance with section 4.20.5.A.1.f of the Water Quality Regulations. The IWTP outfall will continue to discharge treated effluent from the IWTP, non-contact cooling water, and stormwater to the Delaware River Estuary in Water Quality Zone 5. The project IWTP is located in Pennsville and Carneys Point Townships, Salem County, New Jersey.

9. *Sunnybrook Golf Club, D–1997–007–2.* An application to approve an existing GWD project of up to 4.6 mgm for irrigation of the applicant's golf course from existing Wells Nos. 1 and 2. The previous Commission approval expired before a renewal application was received. The project is located in the Ledger Dolomite in the Wissahickon Creek Watershed in Whitemarsh Township, Montgomery County, Pennsylvania, within the Southeastern Pennsylvania Ground Water Protected Area.

10. *Portland Borough Authority, D–1997–029 CP–4.* Application for approval of a GWD project to increase the existing allocation from all system wells from 5.7 million gallons per 30 days (mg/30 days) to 12.4 mgm. The increased allocation is requested in order to meet projected increases in service area demand. Docket No. D–1997–029 CP–3 approved the current groundwater allocation of up to 4.32 mgm of water from new Well No. 4 to serve the applicant's public water supply system. The project well is completed in the Martinsburg Formation and is located in the Slateford Creek Watershed in Upper Mount Bethel Township, Northampton County, Pennsylvania. The site is located within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

11. *Johnson Matthey, Inc., D–1999–038–3.* An application for approval of the existing IWTP. The IWTP will continue to treat 0.08 mgd of industrial wastewater generated by its pharmaceutical manufacturing facility. The previous DRBC approval—Docket No. D–1999–038–2 issued on May 10, 2007—expired on April 30, 2010. The IWTP will continue to discharge to the Schuylkill River via the Matsunk Creek culvert. The project is located in Upper Merion Township, Montgomery County, Pennsylvania.

12. *Reading Area Water Authority (RAWA), D–2000–59 CP–2.* An application for approval of the bulk sale interconnection and transfer up to 1.5 mgd of potable water from the RAWA system to the Pennsylvania American Water Company (PAWC) Glen Alsace District water distribution system. Some of the water supply is also needed to serve PAWC's customers in its Douglassville District via an existing interconnection. The application also includes the revision of the RAWA Operating Plan to reflect conservation release modifications from the Lake Ontelaunee Reservoir. The reservoir is located in Ontelaunee Township, Berks County, Pennsylvania and is situated on Maiden Creek in the Schuylkill River Watershed.

13. *Buckingham Township, D–2004–015 CP–2.* An application for approval of the existing Buckingham Village WWTP and Furlong Sewage Treatment Lagoon System (Furlong WWTP). The previous DRBC approval—Docket No. D–2004–015 CP–1 issued October 27, 2004—expired on October 27, 2009. The Buckingham Village WWTP will continue to discharge up to 0.236 mgd of treated sewage effluent to Mill Creek, a tributary of the Neshaminy Creek; however, from April 1 to November 30, the Buckingham Village WWTP will divert the treated sewage effluent for spray irrigation to spray fields associated with the Furlong WWTP. The Furlong WWTP is designed to treat a flow of up to 302,268 gpd and currently permitted by PADEP to treat up to 257,000 gpd. The facility is located in Buckingham Township, Bucks County, Pennsylvania.

14. *Lafarge North America, D–1974–189–2.* An application for approval of a GWD and SWWD project to supply up to 70.68 mgm of water to the applicant's cement manufacturing plant from existing Wells Nos. 1 and 2 and an existing surface water intake on the Lehigh River. The withdrawals are used for processing and non-contact cooling. The project withdrawals were previously approved by Docket No. D–1975–115 issued for the cooling water discharge on August 27, 1975. Consistent with current DRBC practice, a separate withdrawal docket is now required. The project wells and quarry are completed in the Jacksonburg Formation. The project is located in the Coplay Creek and Lehigh River Watersheds in Whitehall Township, Lehigh County, Pennsylvania within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

15. *City of Trenton, D–1998–009 CP–2.*An application for approval of an existing SWWD project to withdraw up to 1,350 mgm of surface water through one existing surface water intake. The application includes a request to retroactively approve the construction of an expansion and upgrade of the existing water filtration plant (WFP) from 45 mgd to 60 mgd. The allocation and expansion and upgrade of the WFP are required in order to meet projected increases in service area demand. The surface water intake withdraws water from the main stem Delaware River. The project is located in the Delaware River Watershed in the City of Trenton, Mercer County, New Jersey, within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

16. *Butter Valley Golf Port, D–2010–013–1.* An application for a new GWD and SWWD project to supply the applicant's golf course irrigation system with up to 5.89 mgm of water as a combined total from all sources. Sources are proposed to include one existing surface water intake (Pond Intake No. 1), one new surface water intake (Pond Intake No. 2), and one new groundwater well (Well B). The project well is located in the Brunswick Group in the West Branch Perkiomen Creek Watershed in Upper Hanover Township, Montgomery County, Pennsylvania within the Southeastern Pennsylvania Ground Water Protected Area.

17. *XTO Energy, Inc., D–2010–022–1.* An application for approval of a SWWD project to supply up to 0.25 mgd or 7.50

mgm of water for the applicant's natural gas exploration and production activities in Broome and Delaware Counties in the State of New York. Surface water will be withdrawn at a site on Oquaga Creek within the Oquaga Creek Watershed in the Town of Sanford, Broome County, New York. Oquaga Creek drains to the West Branch Delaware River. The withdrawal site is located within the drainage area of the section of the non-tidal Delaware River known as the Upper Delaware, which is classified as Special Protection Waters.

18. *Exelon Generation Company, LLC—Schuylkill, D–2010–040 CP–1.* An application for the approval of an existing combined discharge of up to 231.84 mgd of NCCW and traveling screen backwash from the Schuylkill Generating Station (SGS) via Outfall No. 001. Outfall No. 001 discharges to the tidal portion of the Schuylkill River at River Mile 92.47—5.6 (Delaware River—Schuylkill River) in Water Quality Zone 4 in the City of Philadelphia, Pennsylvania.

19. *South Jersey Port Corporation, D–2010–044 CP–1.* An application for approval of the Paulsboro Marine Terminal dredging and wharf construction project. The proposed project includes: The construction of a deep water marine terminal consisting of a 150-foot wide by 2,850-foot long wharf providing for: Four berths for the loading and unloading of a variety of general bulk and break bulk cargo; dredging in the Delaware River of approximately 334,000 cubic yards; the construction of a public, bi-directional access roadway between Paradise Road in the Township of West Deptford and Universal Road in the Borough of Paulsboro; and the construction of a 25-foot high, three span composite steel plate girder bridge across Mantua Creek just upstream of its confluence with the Delaware River. The proposed Paulsboro Marine Terminal site is located at the former 130-acre BP Oil Terminal site and adjacent 60-acre Essex Industrial Chemicals site in the Borough of Paulsboro, Gloucester County, New Jersey, along the Delaware River in Water Quality Zone 4 at approximately River Mile 90.

In addition to the standard business meeting items, consisting of adoption of the Minutes of the Commission's March 2, 2011 business meeting, announcements of upcoming meetings and events, a report on hydrologic conditions, reports by the Executive Director and the Commission's General Counsel, and public dialogue, the business meeting also will include public hearings on: (a) A resolution to increase the maximum daily surface water withdrawal from the Schuylkill River by Exelon's Limerick Generating Station (LGS), without increasing LGS's total monthly allocation; (b) a hearing at which the Lambertville Municipal Utilities Authority is requested to show cause why it should not be assessed a penalty in accordance with the *Delaware River Basin Compact* and DRBC regulations for failing to obtain DRBC review and approval prior to undertaking improvements to its wastewater treatment plant; (c) a resolution authorizing the Executive Director to enter into agreements for information technology upgrades to improve data management and retrieval; and (d) a resolution amending Resolution No. 2010–11 to increase the authorized amount of the Commission's contract for management of comments received on a proposed rulemaking concerning natural gas development. The Commissioners also will consider a Resolution for the Minutes authorizing the Executive Director to award a contract for janitorial services; a resolution to adopt the Delaware River Basin Commission current expense and capital budgets for fiscal year 2012 (on which the Commission held a public hearing on March 2, 2011); and a resolution approving election of the Commission Chair, Vice Chair and Second Vice Chair for fiscal year 2012.

Draft dockets scheduled for public hearing on May 11, 2011 can be accessed through the Notice of Commission Meeting and Public Hearing on the Commission's Web site, drbc.net, ten days prior to the meeting date. Additional public records relating to the dockets may be examined at the Commission's offices. Please contact William Muszynski at 609–883–9500, extension 221, with any docket-related questions.

Note that conference items are subject to change and items scheduled for hearing are occasionally postponed to allow more time for the Commission to consider them. Please check the Commission's Web site, drbc.net, closer to the meeting date for changes that may be made after the deadline for filing this notice.

Individuals who wish to comment for the record on a hearing item or to address the Commissioners informally during the public dialogue portion of the meeting are asked to sign up in advance by contacting Ms. Paula Schmitt of the Commission staff, at *paula.schmitt@drbc.state.nj.us* or by phoning Ms. Schmitt at 609–883–9500 ext. 224.

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at 609–883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how the Commission can accommodate your needs.

Dated: April 19, 2011.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2011–9914 Filed 4–22–11; 8:45 am]

BILLING CODE 6360–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9297–9; EPA–HQ–OW–2010–0782]

Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Regional Offices are proposing for public comment the draft National Pollutant Discharge Elimination System general permit for stormwater discharges from large and small construction activities. This draft construction general permit includes new requirements that implement the technology-based Effluent Limitation Guidelines and New Source Performance Standards, which were issued by EPA for the construction and development industry on December 1, 2009. The draft permit also includes new water quality-based requirements for construction sites discharging stormwater to waters requiring additional pollutant control. EPA proposes to issue this construction general permit for five (5) years, and to provide permit coverage to eligible existing and new construction projects in all areas of the country where EPA is the National Pollutant Discharge Elimination System permitting authority, including Idaho, Massachusetts, New Hampshire, and New Mexico, Indian Country Lands, Puerto Rico, Washington, DC, and U.S. territories and protectorates.

DATES: Comments on the draft general permit must be received on or before June 24, 2011. Comments on the preparation and issuance of the draft/preliminary Environmental Assessment must be received by May 25, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2010–0782, by one of the following methods:

1. *http://www.regulations.gov:* Follow the online instructions for submitting comments.

2. *E-mail: ow-docket@epa.gov*

3. *Mail to:* Water Docket, U.S. Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2010–0782. 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–OW–2010–0782. 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 *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 *www.regulations.gov* or in hard copy at a docket facility. The Office of Water (OW) Docket Center is open from 8:30 until 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket Center telephone number is (202) 566–2426, and the Docket address is OW Docket, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For further information on the draft NPDES general permit, contact the appropriate EPA Regional office listed in Section I.G, or Greg Schaner, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202–564–0721 *or e-mail: schaner.greg@epa.gov,* or Erika Farris, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202–564–7548, or e-mail farris.erika@epa.gov. For further information on the preparation and issuance of the draft/preliminary Environmental Assessment, contact Jessica Trice, EPA Headquarters, Office of Federal Activities, NEPA Compliance Division at tel: 202–564–6646, or e-mail *trice.jessica.@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information is organized as follows:

Table of Contents

I. General Information

A. Does this action apply to me?

The draft construction general permit ("draft CGP") applies to the following construction activities:

TABLE 1—ENTITIES POTENTIALLY REGULATED BY THIS PERMIT

Category	Examples of Affected Entities	North American Industry Classification System (NAICS) Code
Industry	Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities:	
	Building, Developing and General Contracting	233
	Heavy Construction	234

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of activities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is regulated by this action, you should carefully examine the definition of "construction activity" and "small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Eligibility for coverage under the draft CGP is limited to operators of stormwater discharges from "new sources", "existing permitted dischargers", "existing unpermitted dischargers", "new operators of new sources or existing permitted dischargers", and "emergency-related projects". A "new source" is a construction project that commenced or will commence construction activities after February 1, 2010, which is the effective date of the new source performance standards promulgated as part of the Construction and Development (C&D) rule on December 1, 2009. An "existing permitted discharger" is a construction project that is not a new source, because construction activities commenced prior to February 1, 2010 and prior coverage was obtained under either the 2003 CGP, the 2008 CGP, or under another NPDES permit. An "existing unpermitted discharger" is a construction project that is not a new source, because construction activities commenced prior to February 1, 2010, but has never received coverage for its construction discharges under an effective NPDES permit. A "new operator of a new source or existing permitted discharger" is an operator that replaces an existing operator on a construction project through transfer or ownership and/or operation. An "emergency-related project" is one in which earth-disturbing activities need to take place immediately in order to respond to a public emergency (e.g., tornado, hurricane, earthquake, flood), and the related work requires immediate authorization to avoid imminent endangerment to human health or the environment. Coverage under this permit is available to operators of eligible projects located in those areas where EPA is the permitting authority and has opted to make this general permit for use. A list of eligible areas is included in Appendix B of the draft CGP.

B. How can I get copies of these documents and other related information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2010–0782. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, 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 Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the United States government on-line source for Federal regulations at *http://www.regulations.gov.*

Electronic versions of this draft permit and fact sheet are available on EPA's NPDES Web site at *http://www.epa.gov/npdes/stormwater/cgp.*

An electronic version of the public docket is available through the EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified in Section I.B.1.

C. 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 all of the information that you claim to be CBI. For CBI information on computer disks mailed to EPA, mark the surface of the disk as CBI. Also identify electronically the specific information contained in the disk or that you claim is CBI. In addition to one complete version of the specific information claimed as CBI, you must submit a copy that does not contain the information claimed as CBI for inclusion in the public document. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify this permit by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Where possible, respond to specific questions or organize comments by referencing a section or part of this permit.
- Explain why you agree or disagree, suggest alternatives, and suggest 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.
- To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency would prefer that commenters cite, where possible, the paragraph(s) or section in the fact sheet or permit to which each comment refers.

• Make sure to submit your comments by the comment period deadline identified.

D. Will public hearings be held on this action?

EPA has not scheduled any public hearings to receive public comment concerning the draft permit. All persons will continue to have the right to provide written comments during the public comment period. However, interested persons may request a public hearing pursuant to 40 CFR 124.12 concerning the draft permit. Requests for a public hearing must be sent or delivered in writing to the same address as provided above for public comments prior to the close of the comment period. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. Pursuant to 40 CFR 124.12, EPA shall hold a public hearing if it finds, on the basis of requests, a significant degree of public interest in a public hearing on the draft permit. If EPA decides to hold a public hearing, a public notice of the date, time and place of the hearing will be made at least 30 days prior to the hearing. Any person may provide written or oral statements and data pertaining to the draft permit at the public hearing.

E. What process will EPA follow to finalize the permit?

After the close of the public comment period, EPA intends to issue a final permit on or prior to the expiration date of the current 2008 CGP. [Please note that EPA is proposing in another notice today an extension of the 2008 CGP to January 31, 2012 in order to provide the Agency with sufficient time to finalize this permit.] This permit will not be issued until all significant comments have been considered and appropriate changes made to the permit. EPA's responses to public comments received will be included in the docket as part of the final permit issuance. Once the final permit becomes effective, eligible operators of existing and new construction projects may seek authorization under the new CGP. Any construction site operator obtaining permit coverage prior to the expiration date of the 2008 CGP will automatically remain covered under that permit until the earliest of:

• The operator submits a Notice of Termination (NOT); or

• EPA issues an individual permit or denies coverage under an individual permit for the site's stormwater discharges.

F. Who are the EPA regional contacts for this permit?

For EPA Region 1, contact Jessica Hing at tel.: (617) 918–1560 or e-mail at *hing.jessica@epa.gov.*

For EPA Region 2, contact Stephen Venezia at tel.: (212) 637–3856 or e-mail at *venezia.stephen@epa.gov,* or for Puerto Rico, contact Sergio Bosques at tel.: (787) 977–5838 or e-mail at *bosques.sergio@epa.gov.*

For EPA Region 3, contact Chuck Schadel at tel.: (215) 814–5761 or e-mail at *schadel.chuck@epa.gov.*

For EPA Region 4, contact Michael Mitchell at tel.: (404) 562–9303 or e-mail at *mitchell.michael@epa.gov.*

For EPA Region 5, contact Brian Bell at tel.: (312) 886–0981 or e-mail at *bell.brianc@epa.gov.*

For EPA Region 6, contact Suzanna Perea at tel.: (214) 665–7217 or e-mail at: *perea.suzanna@epa.gov.*

For EPA Region 7, contact Mark Matthews at tel.: (913) 551–7635 or e-mail at: *matthews.mark@epa.gov.*

For EPA Region 8, contact Amy Clark at tel.: (303) 312–7014 or e-mail at: *clark.amy@epa.gov.*

For EPA Region 9, contact Eugene Bromley at tel.: (415) 972–3510 or e-mail at *bromley.eugene@epa.gov.*

For EPA Region 10, contact Misha Vakoc at tel.: (206) 553–6650 or e-mail at *vakoc.misha@epa.gov.*

II. Background of Permit

A. Statutory and Regulatory History

The Clean Water Act ("CWA") establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA also includes the objective of attaining "water quality which provides for the protection and propagation of fish, shellfish and wildlife and * * * recreation in and on the water." 33 U.S.C. 1251(a)(2)). To achieve these goals, the CWA requires EPA to control discharges of pollutants from point sources through the issuance of National Pollutant Discharge Elimination System ("NPDES") permits.

The Water Quality Act of 1987 (WQA) added section 402(p) to the Clean Water Act (CWA), which directed EPA to develop a phased approach to regulate stormwater discharges under the NPDES program. 33 U.S.C. 1342(p). EPA published a final regulation in the **Federal Register**, often called the "Phase I Rule", on November 16, 1990, establishing permit application requirements for, among other things, "storm water discharges associated with industrial activity." *See* 55 FR 47990. EPA defines the term "storm water discharge associated with industrial activity" in a comprehensive manner to cover a wide variety of facilities. *See id.* Construction activities, including activities that are part of a larger common plan of development or sale, that ultimately disturb at least five acres of land and have point source discharges to waters of the U.S. were included in the definition of "industrial activity" pursuant to 40 CFR 122.26(b)(14)(x). The second rule implementing section 402(p), often called the Phase II Rule, was published in the **Federal Register** on December 8, 1999. It requires NPDES permits for discharges from construction sites disturbing at least one acre but less than five acres, including sites that are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres, pursuant to 40 CFR 122.26(b)(15)(i). *See* 64 FR 68722. EPA is proposing to issue this draft CGP under the statutory and regulatory authority cited above.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions to meet technology-based effluent limits established under Section 301 and, where applicable, Section 306. Effluent limitations guidelines (ELGs), and New Source Performance Standards (NSPS) are technology-based effluent limitations that are based on the degree of control that can be achieved using various levels of pollutant control technology as defined in Subchapter III of the CWA.

Once a new national standard is established in accordance with these sections, NPDES permits must incorporate limits based on such technology-based standards. *See* CWA section 301 and 306, 33 U.S.C. 1311 and 1316, and 40 CFR 122.44(a)(1). Prior to the issuance of such national standards, permit authorities are required to incorporate technology-based limits on a best professional judgment basis. CWA section 402(a)(1); 40 CFR 125.3(a)(2)(ii)(B). On December 1, 2009, EPA published final regulations establishing technology-based Effluent Limitations Guidelines (ELGs) and New Source Performance Standards (NSPS) for the Construction & Development (C&D) point source category. See 40 CFR Part 450, and 74 FR 62996 (December 1, 2009). The Construction & Development Rule, or "C&D rule", became effective on February 1, 2010; therefore all NPDES construction permits issued by EPA or states after this date must incorporate the C&D rule requirements. Because EPA will be issuing its new CGP after the effective date of the C&D rule, the

Agency is required by the CWA and 40 CFR 122.44(a)(1) to incorporate into its new CGP all applicable C&D rule requirements.

B. Vacature of the C&D Rule Numeric Limit and Implications for This Permit

The C&D rule was finalized on December 1, 2009, and included non-numeric requirements for erosion and sediment control, stabilization, and pollution prevention (*see* 40 CFR 450.21(a) thru (f)), and, for the first time, a numeric limitation on the discharge of turbidity from active construction sites (*see* 40 CFR 450.22). Since its promulgation, EPA discovered that the data used to calculate the numeric limit for turbidity were misinterpreted, and that it was necessary to recalculate the numeric limit.

On August 12, 2010, EPA filed a motion with the U.S. Court of Appeals for the Seventh Circuit, requesting the Court issue an order vacating and remanding to the Agency limited portions of the final C&D rule. To address the specific issues raised by petitioners, the motion also provided that EPA:

- "May address (and if necessary take further regulatory action on) certain impacts of the final rule specific to linear gas and electricity utility projects."
- Will "solicit site specific information regarding the applicability of a numeric limit" to cold weather sites and to small sites that are part of a larger plan of development that is subject to the numeric limit.

On August 24, 2010, the U.S. Court of Appeals for the Seventh Circuit remanded the matter to EPA but did not vacate the numeric limit. On September 9, 2010, the National Association of Home Builders (NAHB) filed a motion for clarification (which EPA did not oppose) asking the Court to (1) vacate the limit and (2) hold the case in abeyance instead of remanding the matter to EPA. On September 20, 2010, the Court granted the motion in part by ruling to hold the matter in abeyance pending EPA consideration of the numeric limit and the other remand issues, but the Court did not vacate the numeric limit. Instead, the Court stated that "EPA may make any changes to the limit it deems appropriate, as authorized by law."

EPA issued a direct final rule staying the current numeric limit and a companion proposed rule proposing a stay, and the stay took effect on January 4, 2011, resulting in an indefinite postponement of the implementation of the 280 NTU limit. The Agency is currently preparing to issue a proposed rule proposing the recalculated limit and a one-year extension to the first phase-in date for complying with the numeric limit. EPA will seek public comment on this recalculated limit and the one-year extension of the first phase-in date, and persons who wish to comment on the recalculated limit and extension should submit comments on that proposal. EPA plans to promulgate the recalculated numeric limit and the one-year extension of the first phase-in date prior to the final issuance of the new CGP. Therefore, if the numeric limit and one-year extension are promulgated and become effective prior to the issuance of the final CGP, EPA must by law incorporate the applicable numeric limit and new first phase-in date from the ELGs and standards into the final CGP. With this in mind, EPA has included a placeholder reference to the final numeric limit, which will be replaced by the recalculated numeric limit in the final permit if it is promulgated prior to permit issuance. With respect to the first phase-in date for complying with the limit (*i.e.,* August 1, 2011), EPA notes in the proposed permit that this date may change depending on the outcome of the proposed extension.

III. Summary of the Draft CGP

As stated above, the draft permit proposed today includes new requirements that implement the effluent limitations guidelines and new source performance standards in the C&D rule. These proposed new requirements would require site operators to install and implement stormwater measures to accomplish erosion and sediment control, pollution prevention, and stabilization, and, for certain larger construction sites, to meet a recalculated numeric turbidity limit and conduct compliance monitoring of their stormwater discharges. For sites that discharge to waters where additional controls are necessary to ensure compliance with applicable water quality standards, the draft permit includes new water quality-based effluent limits. This section summarizes the C&D rule requirements upon which the permit's proposed technology-based requirements are based, and highlights the significant new permit provisions included in the draft permit.

A. Non-Numeric C&D Rule Requirements

The non-numeric effluent limitations in the C&D rule are designed to prevent the mobilization and discharge of sediment and sediment-bound pollutants, such as metals and nutrients, and to prevent or minimize exposure of stormwater to construction materials, debris, and other sources of pollutants on construction sites. In addition, these non-numeric effluent limitations limit the generation of dissolved pollutants. For background, soil on construction sites can contain a variety of pollutants such as nutrients, organics, pesticides, herbicides, and metals. These pollutants may be present naturally in the soil, such as arsenic or selenium, or they may have been contributed by previous activities on the site, such as agriculture or industrial activities. These pollutants, once mobilized by stormwater, can detach from the soil particles and become dissolved pollutants. Once dissolved, these pollutants would not be removed by down-slope sediment controls. Source control through minimization of soil erosion is therefore the most effective way of controlling the discharge of these pollutants.

The non-numeric effluent limits in the C&D rule, upon which certain technology-based requirements in the draft CGP are based, include the following:

- *Erosion and Sediment Controls:* Permittees are required to design, install, and maintain effective erosion and sediment controls to minimize the discharge of pollutants. At a minimum, such controls must be designed, installed, and maintained to:

1. Control stormwater volume and velocity within the site to minimize soil erosion;
2. Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion;
3. Minimize the amount of soil exposed during construction activity;
4. Minimize the disturbance of steep slopes;
5. Minimize sediment discharges from the site. The design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity, and duration of precipitation, the nature of resulting stormwater runoff, and soil characteristics, including the range of soil particle sizes expected to be present on the site;
6. To increase sediment removal and maximize stormwater infiltration, provide and maintain natural buffers around surface waters and direct stormwater to vegetated areas, unless infeasible; and
7. Minimize soil compaction and, unless infeasible, preserve topsoil.

- *Soil Stabilization Requirements:* Permittees are required to, at a minimum, initiate soil stabilization measures immediately whenever any clearing, grading, excavating, or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Stabilization must be completed within a period of time determined by the permitting authority. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, vegetative stabilization measures must be initiated as soon as practicable.

• *Dewatering Requirements:* Permittees are required to minimize the discharge of pollutants from dewatering trenches and excavations. Discharges are prohibited unless managed by appropriate controls.

• *Pollution Prevention Measures:* Permittees are required to design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, such measures must be designed, installed, implemented and maintained to:

1. Minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters. Wash waters must be treated in a sediment basin or an alternative control that provides equivalent or better treatment prior to discharge;

2. Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste, and other materials present on the site to precipitation and to stormwater; and

3. Minimize the discharge of pollutants from spills and leaks and implement chemical spill and leak prevention and response procedures.

• *Prohibited Discharges:* The following discharges from regulated construction sites are prohibited:

1. Wastewater from washout of concrete, unless managed by an appropriate control;

2. Wastewater from washout and cleanout of stucco, paint, form release oils, curing compounds, and other construction materials;

3. Fuels, oils, or other pollutants used in vehicle and equipment operation and maintenance; and

4. Soaps or solvents used in vehicle and equipment washing.

• *Surface Outlets:* When discharging from basins and impoundments, permittees are required to utilize outlet structures that withdraw water from the surface, unless infeasible.

When EPA was writing the C&D rule's final non-numeric effluent limits listed above, it intended to provide discretion to permitting authorities to determine how best to implement these provisions with respect to requiring controls and measures appropriate for the conditions in their permitted areas. For example, in the preamble to the C&D rule, EPA states "* * * in the erosion and sediment control section * * * EPA simply required that permittees 'minimize the disturbance of steep slopes' leaving it up to the permitting authority to determine the specific requirements applicable to owners or operators of C&D sites to minimize disturbance of steep slopes in order to minimize the discharge of pollutants from the site." *See* 74 FR 63016. As the permitting authority responsible for issuing stormwater permits for construction activities in four States, Indian Country lands, Federal facilities, Washington, DC, and U.S. territories/protectorates, EPA believes that it is important in this draft permit to include requirements that more specifically define what is necessary to implement each of the C&D rule's non-numeric limits. Accordingly, in translating the C&D rule requirements into the draft CGP, EPA added specificity to many of the C&D rule provisions that it believed call for further definition, such as the requirements to "Provide and maintain natural buffers", "Minimize steep slopes", and "Minimize soil compaction", among others. In EPA's view, adding specificity to the C&D rule-based requirements in the CGP will assist permittees in understanding the Agency's view of what is required to comply with the permit.

B. Numeric C&D Rule Requirements

The C&D rule at 40 CFR 450.22 requires compliance for certain sites with a numeric turbidity limit. Compliance with the numeric turbidity limit is to be accomplished in two phases and applies to construction activities as follows:

• Any construction activities that will occur on or after August 1, 2011, which disturb 20 or more acres of land at one time, including non-contiguous land disturbances that take place at the same time and are part of a larger common plan of development or sale; and

• Any construction activities that will occur on or after February 2, 2014, and disturb 10 or more acres of land at one time, including non-contiguous land disturbances that take place at the same time and are part of a larger common plan of development or sale.

See 40 CFR 450.22(a). The C&D rule established an exception from the numeric limit for sites that receive an amount of precipitation that in any day is larger than the local 2-year, 24-hour storm. *See* 40 CFR 450.22(b). In addition to promulgating a numeric limit, the C&D rule also requires monitoring consistent with requirements established by the permitting authority. *See* 40 CFR 450.22(a)(2). The rule specifies that each sample must be analyzed for turbidity in accordance with the requirements established by the permitting authority. *See id.*

As stated previously, the 280 NTU numeric limit that was originally promulgated has been found to be based on data that was misinterpreted. EPA has issued a stay of the 280 NTU numeric limit, which indefinitely postpones the application of this limit in permits. EPA also intends to propose and finalize a recalculated numeric limit. In accordance with the Agency's plan, once a recalculated limit and extension of the first phase-in date are promulgated, they would replace the 280 NTU limit and the August 1, 2011 phase-in date, respectively. Assuming the stay of the 280 NTU limit is in effect, the CWA does not require states whose construction stormwater permits expire prior to the promulgation of the new, corrected numeric limit to include the stayed numeric limit of 280 NTU in their construction stormwater permit. However, if any state permits expire after the effective date of a final rule containing the recalculated numeric limit, those states would be required under the CWA to incorporate the new numeric effluent limit into their construction stormwater permits.

The draft permit implements the numeric effluent limit provisions of the C&D rule by including provisions explaining which sites are required to comply with the numeric limit and the two phase-in dates for compliance (while noting the possibility that the first phase-in date may change), the exceptions where the numeric limit does not apply, sampling and analysis requirements for compliance monitoring, and requirements to report sampling data to EPA. The draft permit includes a placeholder reference for the actual numeric limit itself, which EPA plans to promulgate prior to the expiration of the 2008 CGP, so that the numeric limit may be incorporated into the new CGP prior to issuance.

C. Water Quality-Based Effluent Limits

Because the C&D rule requirements are technology-based, they do not account for the level of pollutant control that may be necessary in a specific area to meet applicable water quality standards. EPA's regulations at 40 CFR 122.44(d)(1) require permitting authorities to include additional or more stringent permit requirements when necessary to achieve water quality standards. With this requirement in mind, the draft CGP includes additional requirements that apply to those sites that discharge to waters impaired for sediment, sediment-related parameters, or nutrients, including nitrogen and phosphorus, which are parameters typically associated with stormwater discharges from construction sites, and to those sites that discharge to waters requiring enhanced protection under a State or Tribe's antidegradation requirements.

D. Summary of Significant Proposed Changes to the CGP

The draft CGP includes a number of new or modified requirements, many of which are related to the implementation of the new C&D rule effluent limits, and thus differ from the 2008 CGP. The following list summarizes the proposed changes to the CGP:

1. *Structure/Appearance of Permit:* EPA attempted to restructure its CGP so that it would be better organized to present requirements in a generally more readable manner. It is EPA's hope that this structure will enhance the permittees' understanding of and compliance with the permit's requirements. For instance, the permit's stormwater control requirements are organized into distinct and related categories, such as erosion and sediment control requirements, stabilization requirements, and pollution prevention requirements. Within the erosion and sediment control requirements of the permit, EPA has organized the section to reflect the general sequence of the construction process. For example, the proposed permit places in separate sections requirements that apply to the site planning phase, which should occur prior to earth-disturbance, followed by requirements affecting the selection, design, and installation of stormwater controls. Similarly, in the pollution prevention section, EPA organizes the requirements based on where in the construction sequence they would apply. Therefore, there are requirements relating to (1) where pollution-generating activities may be placed, (2) how to design stormwater controls, (3) what performance standards to meet during construction, and (4) how to maintain required stormwater controls.

2. *Eligibility for Emergency-Related Construction:* EPA proposes to provide immediate authorization for construction activities required for response to public emergencies (*e.g.,* tornado, hurricane, flooding). Immediate authorization would enable work that is necessary to avoid imminent endangerment to human health or the environment to proceed without administrative delay. The construction operator must still comply with the terms of the permit, and must submit an NOI within 7 days of commencing earth-disturbing activities, whereas typically operators must submit NOIs 30 days prior to commencing earth-disturbing activities. The operator is then required to develop its stormwater pollution prevention plan (SWPPP) within 7 days of submitting the NOI.

3. *Authorization Process/NOIs:* EPA proposes to increase the "waiting period" from 7 days to 30 days for new projects. This new timeframe is intended to better reflect the endangered species-related reviews that must take place prior to authorization. EPA also proposes to maximize the use of its electronic NOI, or eNOI, process for authorizing construction discharges by requiring that construction operators seek coverage using the eNOI system. Certain case-by-case exceptions, i.e., instances in which a "paper NOI" will be allowed, will still exist, but approval by the applicable EPA Region will be necessary first.

4. *Sediment and Erosion Controls:* The draft permit includes specific requirements that implement the C&D rule's sediment and erosion control limits. While many of these requirements are already included in the 2008 CGP, the draft permit includes more detail in order to properly implement the C&D rule. The following is a list of requirements that can be considered significant modifications to the 2008 CGP:

i. Buffer Compliance Alternatives—To implement the C&D rule requirement to provide and maintain natural buffers around surface waters, unless feasible, sites must ensure that any discharges flowing through the area between the disturbed portions of the site and any waters of the U.S. are treated by an area of undisturbed natural vegetation that alone or supplemented by erosion and sediment controls achieves a reduction in sediment loads equivalent to that achieved by 50 feet of undisturbed natural vegetation. Appendix M of the draft permit has been added to provide guidance to operators in complying with this requirement.

ii. Installation of Sediment Controls Prior to Construction—Operators must install and make operational all sediment controls prior to conducting earth-disturbing activities.

iii. Sediment Removal Requirements—Operators are specifically required to remove deposited sediment on the site, tracked out of the site, or accumulated near sediment controls before it compromises the effectiveness of on-site controls and/or is discharged to surface waters.

iv. Entrance and Exit Points—Any entrance and exit points created on the site must be stabilized for a minimum of 50 feet into the site.

v. Storm Drain Inlets—Controls must be installed and maintained to protect any storm drain inlets to which the site discharges and that are accessible to the operator.

vi. Chemical Treatment—Where operators plan to employ treatment chemicals to reduce sediment discharges, they are subject to specific use restrictions and stormwater control design requirements.

vii. Dewatering Practices—Specific controls and discharge restrictions apply to sites that will discharge groundwater or accumulated stormwater removed from excavations, trenches, foundations, vaults, or other points of accumulation associated with construction activity.

5. *Stabilization Requirements:* The permit includes modified stabilization requirements that define more specifically what EPA requires for temporary and final stabilization. Criteria are proposed for both vegetative and non-vegetative stabilization that are based on the Revised Universal Soil Loss Equation's (RUSLE) cover management factor, or "C-factor". EPA has provided guidance in Appendix H to assist permittees in understanding what stabilization measures meet the requirements of the draft permit.

6. *Pollution Prevention:* Beyond adopting the specific C&D rule requirements for pollution prevention and the prohibition of certain discharges, the draft permit includes specific location restrictions (e.g., locate pollutant-generating activities outside of any buffers established under the permit and set back from stormwater conveyance channels) and design standards (e.g., install secondary containment or cover activities). The pollution prevention requirements also include a proposal to restrict the discharge of fertilizers at construction sites.

7. *Numeric Turbidity Limit:* EPA proposes that it will include whatever numeric turbidity limit is effective under the C&D rule, at the time of final permit issuance, as well as applicability (i.e., phase-in dates), sampling, and reporting requirements.

8. *Water Quality-Based Effluent Limits:* The draft permit includes specific requirements that apply to sites discharging to waters impaired for common pollutants associated with construction activities, such as sediment and nutrients. For such sites,

construction activities are subject to additional requirements, including tighter stabilization deadlines (immediately initiate stabilization if construction in an area is inactive for 7 days, as opposed to 14 days) and more frequent site inspections. For sites disturbing 10 or more acres at a time, the permittees would be subject to the additional requirement to conduct benchmark monitoring of their discharge based on benchmarks that are tied to the receiving water's water quality criteria. The permit also proposes to include additional requirements for waters identified as Tier 2, Tier 2.5, or Tier 3 for antidegradation purposes.

9. *Site Inspections:* EPA proposes to make explicit the requirement for permittees to visually assess the quality of the discharge (e.g., color, odor, floating, settled, or suspended solids) if the site inspection occurs during a discharge-generating rain event.

10. *Corrective Actions:* Although the 2008 CGP requires corrective action, it does not include specific requirements instructing the permittee as to what conditions trigger specific corrective actions and what deadlines apply. The draft permit includes specific triggering conditions for corrective action as well as deadlines to fix such problems and document what was done.

11. *Stormwater Pollution Prevention Plan (SWPPP):* The SWPPP requirements are modified in accordance with the proposed changes discussed above. In general, the requirements are more specific, but consistent with the current permit.

12. *Notice of Termination:* EPA proposes to include additional requirements that affect when a site may terminate coverage under the CGP. For instance, beyond enabling sites to terminate coverage when earth-disturbing activities have stopped and the site is stabilized, the permit would require the removal of all temporary stormwater controls and construction materials, waste, and waste handling devices.

E. Permit Provisions for Which EPA is Soliciting Comment

While EPA encourages the public to review and comment on all provisions of the draft permit, EPA has included in the body of the draft CGP several specific requirements on which it requests feedback. The following list summarizes these specific requests for comment, and where they are included in the permit:

1. How to submit your NOI—Request for comment on the transition to a "paperless" NOI system for the CGP. Part 1.5.2.

2. Natural buffers and equivalent sediment controls—Request for comment on the buffer compliance alternatives. Part 2.1.2.1.

3. General design requirements/required design factors—Request for comment on the concept, not included in the proposal, to adopt a minimum design storm standard for designing stormwater controls. Part 2.1.3.1.a.

4. Install stormwater controls before construction starts—Request for comment on whether there are situations in which it would be infeasible or impracticable to make operators install all stormwater controls before commencing earth disturbances. Part 2.1.3.2.a.

5. Stabilize construction entrance and exit points—Request for comment on the feasibility of stabilizing entrance and exit points for a minimum of 50 feet. Part 2.1.4.1.a.

6. Chemical treatment—Request for comment on the draft permit's restrictions on the use of polymers, flocculants, or other treatment chemicals to enhance sediment removal. Part 2.1.4.6.

7. Deadline to complete stabilization activities—Request for comment on the practicability of the stabilization timeframes. Part 2.2.1.2.

8. Stabilization deadlines for arid/semi-arid areas and sensitive areas—Request for comment on the proposed deadlines for initiating and completing stabilization of exposed areas of the site in arid and semi-arid areas. EPA also requests comment on treating as a sensitive area for stabilization purposes sites that will conduct construction activities in critical habitat areas or areas where listed endangered species exist. Part 2.2.1.4.

9. Criteria for stabilization/vegetative stabilization—Request for comment on whether the C-factor stabilization criteria should be used as the sole option for complying with the permit's stabilization requirements, as opposed to allowing, as the draft permit does, permittees to choose either the C-factor method or the 70 percent areal cover approach. Part 2.2.2.1.

10. Pollution prevention standards for fueling and maintenance of equipment and vehicles—Request for comment on the practicability of providing secondary containment or cover for fueling and maintenance areas on the site. Part 2.3.2.1.b.

11. Pollution prevention standards for staging and storage areas—Request for comment on the practicability of providing secondary containment or cover for staging and storage areas on the site. Part 2.3.2.3.b.

12. Types of discharge conditions requiring sampling—Request for comment on whether the permit should include a minimum rainfall amount below which no sampling is required. Part 3.3.1.1.

13. Sampling frequency—Request for comment on the sampling frequency specified, and on the alternative option of requiring samples to be taken once every 2 hours following the first sample. Part 3.3.2.

14. Sampling location—Request for comment on whether the permit should allow representative samples for other types of construction projects. Part 3.3.3.4.

15. Actions required if you violate the numeric turbidity limit—Request for comment on whether the permit should require immediate notification of EPA for extremely high turbidity levels. Part 3.3.8.

16. Reporting turbidity sample results to EPA—Request for comment on whether allowances should be made in the permit for quarterly reporting for sites that have not exceeded the turbidity limit. Part 3.3.9.

17. Discharge limitations for impaired waters—Request for comment on the way in which this permit determines whether there is a discharge to impaired waters. Part 4.2.

18. Requirements for discharges to sediment or nutrient-impaired waters without an EPA-approved or established TMDL/water quality benchmark monitoring—Request for comment on whether benchmark monitoring is an appropriate tool for assessing the effectiveness of controls in not contributing to impairments, and request for comments on the 10-acre threshold for requiring sites to conduct benchmark monitoring. EPA also requests comment on how benchmark monitoring might be used for discharges to waters that are habitat for listed fish species (e.g., white sturgeon, sockeye salmon). Part 4.2.2.1.

19. Daily visual examination—Request for comment on the appropriateness of daily visual examinations. Part 4.2.2.3.b.

20. Requirements for discharges to sediment or nutrient-impaired waters without an EPA-approved or established TMDL—Request for comment on the proposed additional requirements on sites discharging to sediment or nutrient-impaired waters. Also request for comment on whether the focus should be expanded to cover certain biological impairments attributable to sediment or nutrients. Part 4.2.2.

21. Requirements for inspections—Request for comment on the proposed application of the same inspection requirements for linear projects as to other types of construction projects. Part 5.1.4.

22. Residual chitosan testing—Request for comment on whether there is a level of chitosan residual below which corrective action would not be necessary. Part 6.3.1.3.

23. Requirement to install and make operational corrective action stormwater controls—Request for comment on whether the 7-day timeframe is feasible. Part 6.3.2.4.

24. Reporting to EPA—Request for comments on whether the deadline for reporting to EPA is reasonable, or whether a different deadline is more appropriate. Part 6.6.

25. Person(s) responsible for developing SWPPP—Request for comment on whether the owner of the site should bear the initial requirement to develop the SWPPP. Part 8.1.2.

26. Turbidity benchmarks—Request for comment on how the proposed methodology used to establish benchmarks for waters impaired for turbidity for which the underlying water quality criterion is based on natural background levels of turbidity. Appendix J.

F. Construction Projects Eligible for Permit Coverage

This draft permit provides coverage to eligible operators of "new sources", "existing permitted dischargers", "existing unpermitted dischargers", "new operators of new sources and existing permitted dischargers", and "emergency-related projects." Although the existing 2008 CGP will have expired, existing permitted dischargers authorized under that permit will continue to be authorized to discharge under that permit, in accordance with EPA's regulations at 40 CFR 122.6, for a period of 90 days after the issuance of the new permit. Within 90 days of the issuance of the new CGP, owners/operators of permitted ongoing projects must submit a complete Notice of Intent (NOI) for coverage under the new permit. New operators of new sources or existing permitted dischargers that were authorized under the existing 2008 permit prior to its expiration date must submit a complete NOI for coverage under the new permit a minimum of 30 days prior to the date that the transfer will take place to the new owner/operator. Operators of emergency-related projects are required to submit their completed NOIs within 7 days of commencing earth-disturbing activities.

G. Geographic Coverage

This permit provides coverage for stormwater discharges from construction activities that occur in areas not covered by an approved State NPDES program. The areas of geographic coverage of this permit are listed in Appendix B, and include the States of New Hampshire, Massachusetts, New Mexico, and Idaho as well as all Indian Country lands, and federal facilities in selected states. Permit coverage is also provided in Puerto Rico, the District of Columbia, and the Pacific Island territories. The only changes to the current permit's area of coverage is that Indian Country lands in Region 4 are now added to the draft permit's area of coverage, and due to a phased delegation of the NPDES program to the State of Alaska starting in late 2008, EPA now retains NPDES permitting authority only for discharges occurring within the Denali National Park and Preserve, and in Indian Country located within the State of Alaska.

IV. Notice of Intent To Prepare an Environmental Assessment (EA) for the National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges From Large and Small Construction Activities

Pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4307h), the Council on Environmental Quality's NEPA regulations (40 CFR Part 15), and EPA's regulations for implementing NEPA (40 CFR Part 6), EPA plans to prepare an Environmental Assessment (EA) to analyze the potential environmental impacts of the new CGP. The EA will consider the potential environmental impacts from the discharge of pollutants in stormwater discharges associated with construction activity where EPA is the permitting authority to determine whether to prepare an Environmental Impact Statement (EIS).

This notice initiates the scoping process by inviting comments from Federal, State, and local agencies, Indian tribes, and the public to help identify the environmental issues and reasonable alternatives to be examined in the EA. The scoping process will inform the preparation and issuance of the draft/preliminary EA, which will be made available for public comment.

To ensure that EPA has an opportunity to fully consider your comments and to facilitate EPA's prompt preparation of the EA, scoping comments should be received on or before May 25, 2011. You may submit scoping comments to the Docket ID No. EPA–HQ–OW–2010–0782 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments by clicking on "Help" or "FAQs."
- *Mail:* U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 2252A, Washington, DC 20460.
- *Courier:* U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Rm # 7241C, Washington, DC 20004, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* 202–564–0072.

For further information regarding scoping contact: Jessica Trice, NEPA Compliance Division, Office of Federal Activities, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mail Code: 2252A, Washington, DC 20460. *Telephone:* (202) 564–6646.

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

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

EPA has determined that this draft CGP 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. The permit provisions in this permit include new requirements for erosion and sediment control and pollution prevention, and result in an increase in the level of environmental protection. The requirements in this permit apply equally to all construction projects that disturb one or more acres in areas where EPA is the permitting authority, and therefore do not disproportionately and adversely affect minority or low-income populations.

VI. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

In compliance with Executive Order 13175, EPA is in the process of consulting with tribal officials to gain an understanding of and, where necessary, to address the tribal implications of the draft CGP. In the course of this consultation, EPA plans to undertake the following activities:

1. Provide education and outreach on the draft CGP;

2. Hold national conference call(s) to discuss issues and concerns of the tribes and document discussions held in this call;

3. Solicit comment on the draft permit; and

4. Provide feedback through a written communication explaining how tribal issues and concerns were considered in the final action. This communication will be completed and made available to the tribes at the same time the permit is promulgated and the other responses to the comments are published.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: April 12, 2011.

H. Curtis Spalding,

Regional Administrator, EPA Region 1.

Dated: April 12, 2011.

Carl-Axel P. Soderberg,

Division Director, Caribbean Environmental Protection Division, EPA Region 2.

Dated: April 12, 2011.

Kevin Bricke,

Acting Director, Division of Environmental Planning & Protection, EPA. Region 2.

Dated: April 12, 2011.

Jon M. Capacasa,

Director, Water Protection Division, EPA Region 3.

Dated: April 12, 2011.

Douglas Mundrick,

Acting Director, Water Protection Division, EPA Region 4.

Dated: April 12, 2011.

Tinka G. Hyde,

Director, Water Division, EPA Region 5.

Dated: April 12, 2011.

Miguel I. Flores,

Director, Water Quality Protection Division, EPA Region 6.

Dated: April 12, 2011.

Jamie Green,

Acting Director, Water, Wetlands and Pesticides Division, EPA Region 7.

Dated: April 11, 2011.

Stephen S. Tuber,

Assistant Regional Administrator, EPA Region 8.

Dated: April 11, 2011.

Alexis Strauss,

Director, Water Division, EPA Region 9.

Dated: April 11, 2011.

Michael A. Bussell,

Director, Office of Water and Watersheds, EPA Region 10.

[FR Doc. 2011–9929 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9297–8; EPA–HQ–OW–2008–0238]

Modification to 2008 National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Construction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10 propose to modify the 2008 National Pollutant Discharge Elimination System (NPDES) general permits for stormwater discharges associated with construction activity in order to extend until January 31, 2012 the expiration date of the permit. Hereinafter, these NPDES general permits will be referred to as "permit" or "2008 construction general permit" or "2008 CGP." This proposed modification would, if finalized, extend the three-year permit so that it expires on January 31, 2012 instead of June 30, 2011. Prior to this proposed extension, EPA modified the 2008 CGP in January 2010 to extend the permit by one year, thus making it a three-year permit. By Federal law, no NPDES permit may be issued for a period that exceeds five years.

DATES: EPA is proposing a modification to its 2008 CGP that would extend the permit until January 31, 2012. If the proposed modification is finalized, the 2008 CGP would expire on midnight, January 31, 2012, instead of June 30, 2011. Comments on EPA's proposal must be postmarked by May 25, 2011.

FOR FURTHER INFORMATION CONTACT: Greg Schaner, Water Permits Division, Office of Wastewater Management (Mail Code: 4203M), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., EPA East, Washington, DC 20460; telephone number: (202) 564–0721; fax number: (202) 564–6431; email address: *schaner.greg@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

If a discharger chooses to apply for coverage under the 2008 CGP, the permit provides specific requirements for preventing contamination of waterbodies from stormwater discharges from the following construction activities:

Category	Examples of affected entities	North American Industry Classification System (NAICS) Code
Industry.	Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities:	
	Building, Developing and General Contracting	233
	Heavy Construction	234

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of activities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of "construction activity" and "small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Eligibility for coverage under the 2008 CGP is limited to operators of "new projects" or "unpermitted ongoing projects." A "new project" is one that commences after the effective date of the 2008 CGP. An "unpermitted ongoing project" is one that commenced prior to the effective date of the 2008 CGP, yet never received authorization to discharge under the 2003 CGP or any other NPDES permit covering its construction-related stormwater discharges. Construction sites that originally obtained permit coverage under the 2003 CGP will continue to be covered under that permit. The 2008 CGP is effective only in those areas where EPA is the permitting authority. A list of eligible areas is included in Appendix B of the 2008 CGP.

B. How can I get copies of this document and other related information?

1. Docket. EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2008–0238. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available electronically through *www.regulations.gov* and in hard copy at the EPA Docket Center Public Reading Room, 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 Water Docket is (202) 566–2426.

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/.* Electronic versions of the final permit and fact sheet are available at EPA's stormwater website *http://www.epa.gov/npdes/stormwater.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov/fdmspublic/component/main* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search", then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Section I.B.1.

Submitting CBI. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark all of the information that you claim to be CBI. For CBI information on computer disks mailed to EPA, mark the surface of the disk as CBI. Also identify electronically the specific information contained in the disk or that you claim is CBI. In addition to one complete version of the specific information claimed as CBI, you must submit a copy that does not contain the information claimed as CBI for inclusion in the public document. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to whom do I submit comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency would prefer that commenters cite, where possible, the paragraph(s) or section in the fact sheet or permit to which each comment refers. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD–ROM you submit, and in any cover letter accompanying the disk or CD–ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. The system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD–ROM.* These electronic submissions will be accepted in Microsoft Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send the original and three copies of your comments.

3. *By Hand Delivery or Courier.* Such deliveries are only accepted during the Docket's normal hours of operation as identified in Section I.B.

D. Public Hearings

EPA has not scheduled any public hearings to receive public comment concerning the proposed extension. All persons will continue to have the right to provide written comments during the public comment period. However, interested persons may request a public hearing pursuant to 40 CFR 124.12 concerning the proposed extension. Requests for a public hearing must be sent or delivered in writing to the same address as provided above for public comments prior to the close of the comment period. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. Pursuant to 40 CFR 124.12, EPA shall hold a public hearing if it finds, on the basis of requests, a significant degree of public interest in a public hearing on the proposed extension. If EPA decides to hold a public hearing, a public notice of the date, time and place of the hearing will be made at least 30 days prior to the hearing. Any person may provide written or oral statements and data pertaining to the proposed permit at the public hearing.

E. Finalizing This Action

This action will not be finalized until after all significant public comments have been considered and addressed. EPA's response to public comments received will be included in the docket as part of the final action. Once the final permit becomes effective, operators of new and unpermitted ongoing construction projects may seek authorization under the 2008 CGP prior to the midnight January 31, 2012 expiration date.

F. Who are the EPA Regional contacts for this permit?

For EPA Region 1, contact Jessica Hing at tel.: (617) 918–1560 or e-mail at *hing.jessica@epa.gov.*

For EPA Region 2, contact Stephen Venezia at tel.: (212) 637–3856 or e-mail at *venezia.stephen@epa.gov,* or for Puerto Rico, contact Sergio Bosques at tel.: (787) 977–5838 or e-mail at *bosques.sergio@epa.gov.*

For EPA Region 3, contact Chuck Schadel at tel.: (215) 814–5761 or e-mail at *schadel.chuck@epa.gov.*

For EPA Region 5, contact Brian Bell at tel.: (312) 886–0981 or e-mail at *bell.brianc@epa.gov.*

For EPA Region 6, contact Suzanna Perea at tel.: (214) 665–7217 or e-mail at: *perea.suzannabrent@epa.gov.*

For EPA Region 7, contact Mark Matthews at tel.: (913) 551–7635 or e-mail at: *matthews.mark@epa.gov.*

For EPA Region 8, contact Amy Clark at tel.: (303) 312–7014 or e-mail at: *clark.amy@epa.gov.*

For EPA Region 9, contact Eugene Bromley at tel.: (415) 972–3510 or e-mail at *bromley.eugene@epa.gov.*

For EPA Region 10, contact Misha Vakoc at tel.: (206) 553–6650 or e-mail at *vakoc.misha@epa.gov.*

II. Background of Permit

A. Statutory and Regulatory History

The Clean Water Act ("CWA") establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA also includes the objective of attaining "water quality which provides for the protection and propagation of fish, shellfish and wildlife and * * * recreation in and on the water." 33 U.S.C. 1251(a)(2)). To achieve these goals, the CWA requires EPA to control point source discharges of pollutants to waters of the United States through the issuance of National Pollutant Discharge Elimination System ("NPDES") permits.

The Water Quality Act of 1987 (WQA) added section 402(p) of the Clean Water Act (CWA), which directed EPA to develop a phased approach to regulate stormwater discharges under the NPDES program. 33 U.S.C. 1342(p). EPA published a final regulation in the **Federal Register**, often called the "Phase I Rule" on November 16, 1990, establishing, among other things, permit application requirements for, among other things, "storm water discharges associated with industrial activity." See 55 FR 47990. EPA defines the term "storm water discharge associated with industrial activity" in a comprehensive manner to cover a wide variety of facilities. See id. Construction activities, including activities that are part of a larger common plan of development or sale, that ultimately disturb at least five acres of land and have point source discharges to waters of the U.S. were included in the definition of "industrial activity" pursuant to 40 CFR 122.26(b)(14)(x). The second rule implementing section 402(p), often called the Phase II Rule, was published in the **Federal Register** on December 8, 1999, requires NPDES permits for discharges from construction sites disturbing at least one acre but less than five acres, including sites that are less than one acre but are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres, pursuant to 40 CFR 122.26(b)(15)(i). See 64 FR 68722.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, NPDES permits issued by the NPDES permitting authorities must incorporate requirements based on such limitations and standards. See 40 CFR 122.44(a)(1). Prior to the promulgation of national effluent limitations guidelines and new source performance standards, permitting authorities incorporate technology-based effluent limitations on a best professional judgment basis. CWA section 402(a)(1)(B); 40 CFR 125.3(a)(2)(ii)(B).

B. Summary of 2008 CGP

EPA announced the issuance of the 2008 CGP on July 14, 2008. See 73 FR 40338. Construction operators choosing to be covered by the 2008 CGP must certify in their notice of intent (NOI) that they meet the requisite eligibility requirements described in Part 1.3 of the permit. If eligible, operators are authorized to discharge under this permit in accordance with Part 2. Permittees must install and implement control measures to meet the effluent limits applicable to all dischargers in Part 3, and must inspect such stormwater controls and repair or modify them in accordance with Part 4. The permit in Part 5 requires all construction operators to prepare a stormwater pollution prevention plan (SWPPP) that identifies all sources of pollution, and describes control measures used to minimize pollutants discharged from the construction site. Part 6 details the requirements for terminating coverage under the permit.

The 2008 CGP permit provides coverage for discharges from construction sites that occur in areas not covered by an approved State NPDES program. EPA Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10 issued the 2008 CGP to replace the expired 2003 CGP for operators of new and unpermitted ongoing construction projects. The geographic coverage and scope of the 2008 CGP is listed in Appendix B of the permit.

C. What Is EPA's rationale for the modification of the 2008 CGP for an extension of the expiration date?

As stated above, EPA proposes to modify the 2008 CGP by extending to January 31, 2012 the expiration date of the permit. EPA finds it necessary to propose this extension in order to provide sufficient time to finalize the new CGP, which will incorporate for the first time new effluent limitations guidelines and new source performance standards, which EPA promulgated in December 2009. The extension is necessary in order to make up for a delay in the issuance process of the new CGP due to an error discovered in the December 2009 final rule regarding the calculation of the numeric limitation on turbidity. This numeric limit has since been stayed by EPA. EPA's proposed extension would provide the Agency with sufficient time to account for this delay and to meet its other permit issuance obligations.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, any NPDES permits issued after the effective date of these requirements must incorporate limits based on such limitations and standards. See 40 CFR 122.44(a)(1). In the case of the CGP, EPA promulgated effluent limitations guidelines and new source performance standards for the construction and development point source category on December 1, 2009 ("C&D rule"), which for the first time imposed a set of minimum federal numeric and non-numeric effluent limitations on regulated construction sites. See 74 FR 62996 (December 1, 2009). The C&D rule (located at 40 CFR Part 450) became effective on February 1, 2010, thus requiring that any NPDES permit issued after this date, whether issued by EPA or an authorized state, must incorporate the substantive technology-based requirements of the rule into the permit. For the next CGP, this means that EPA must incorporate the effective requirements of the C&D rule into the permit.

Among other requirements, the C&D rule subjected discharges from certain larger construction sites to a numeric effluent limitation of 280 NTU for the pollutant turbidity starting in August of 2011 (for sites disturbing 20 or more acres at one time) and February of 2014 (for sites disturbing 10 or more acres at one time). Subsequent to the promulgation of the C&D rule, EPA received two petitions for reconsideration of the rule. These petitions pointed out a potential error in the calculation of the numeric limitation. Based on EPA's examination of the dataset underlying the 280 NTU limit, EPA concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280 NTU numeric effluent limitation. In response to this finding, EPA finalized a stay of the 280 numeric NTU limit and associated monitoring requirements (see 40 CFR 450.22(a)) on January 4, 2011, in order to enable the Agency to correct its error in calculating the numeric limitation. See 75 FR 68215 (November 5, 2010). EPA is currently in the process of initiating a limited rulemaking to correct the numeric limitation.

Preceding the decision to stay the numeric turbidity limit, the uncertainty surrounding the error in calculating the 280 NTU limit and the appropriate way for EPA to address it, caused a delay of several months to the permit issuance process for the new CGP. The result of this delay makes it a near certainty that, given even the most optimistic timeframe for finalizing the new CGP, EPA will not be able to finalize the new CGP by the June 30, 2011 expiration date of the 2008 CGP. With less than three months remaining before the 2008 CGP expires, EPA believes it is impracticable to finalize the new CGP when considering the minimum tasks required of the Agency to finalize the permit. For instance, EPA has provided 60 days for the public to comment on the draft CGP (Refer to other FR Notice), which is typical of the amount of time provided for review of similar permits. Depending on the type and amount of comments the Agency receives, it is not unusual for EPA to take between two to three additional months to adequately review and respond to those comments, and to make corresponding changes to the permit and fact sheet. In addition to this time, EPA is required to complete inter-agency review on the modified permit prior to final issuance, which may take up to 90 days, all requiring an amount of time that is several months beyond the June 30, 2011 expiration of the 2008 CGP.

EPA was unaware of the present need to extend the expiration date of the 2008 CGP when it first modified the 2008 CGP's expiration date in January 2010 by one year to June 30, 2011. At that time, EPA was under the impression that June 30, 2011 provided sufficient time to finalize a new permit incorporating all of the new C&D rule requirements. However, with the setback of time related to the stay of the 280 NTU limit, EPA needs additional time to complete the permit issuance process as explained above. EPA believes that the proposed extension to January 31, 2012 will provide the Agency with sufficient time to finalize the new CGP.

EPA believes it is imperative that EPA has sufficient time to incorporate the C&D ELG into the new CGP and issue the new CGP prior to the existing permit's expiration date. If EPA does not issue the new CGP before expiration of the existing permit, no new construction projects may be permitted under the CGP, leaving individual NPDES permits as the only available option for permitting new projects. The sole reliance on individual permits would mean that discharge authorizations would almost certainly be delayed due to the greater amount of time and Agency resources that are required for developing and issuing individual permits. In turn, construction projects that need to begin construction activity on or after midnight June 30, 2011 would be delayed for an uncertain amount of time until EPA can review their individual permit application and issue the necessary permits. Rather than risk detrimental delays to new construction projects, with no clear benefit to our nation's surface waters, EPA has decided that it is advisable to instead propose a modification to the 2008 CGP to extend the expiration date until January 31, 2012.

D. EPA's Authority To Modify NPDES Permits

EPA regulations establish when the permitting authority may make modifications to existing NPDES permits. In relevant part, EPA regulations state that "[w]hen the Director receives any information * * * he or she may determine whether or not one or more of the causes listed in paragraph (a) * * * of this section for modification * * * exist. If cause exists, the Director may modify * * * the permit accordingly, subject to the limitations of 40 CFR 124.5(c)." 40 CFR 122.62. For purposes of this **Federal Register** notice, the relevant cause for modification is at 40 CFR 122.62(a)(2), which states that a permit may be modified when "[t]he Director has received new information" and that information was not available at the time of permit issuance * * * and would have justified the application of different permit conditions at the time of issuance." Pursuant to EPA regulations, "[w]hen a permit is modified, only the conditions subject to the modification are reopened." 40 CFR 122.62.

In the case of the 2008 CGP, a permit modification is justified based on the new information EPA received since it issued the 2008 CGP, and more specifically, since it modified the 2008 CGP in January 2010, in terms of the delay to the permit process associated with the discovery of the numeric limit calculation error and resulting stay to the numeric turbidity limit. If this information was available at the time of issuance of the 2008 CGP, and more specifically, in January 2010 when EPA extended the expiration date to June 30, 2011, it would have justified EPA establishing an expiration date for the 2008 CGP that was later than June 30, 2011. As a result, cause exists under EPA regulations to justify modification of the 2008 CGP to extend the expiration date of the permit from midnight June 30, 2011 to midnight January 31, 2012.

EPA notes that, by law, NPDES permits cannot be extended beyond 5 years. 40 CFR 122.46. The proposed extension of the 2008 CGP complies with this restriction. The 2008 CGP was first issued on June 30, 2008. Assuming the extension of the 2008 CGP is finalized as proposed, the permit would still have been in effect for less than the 5-year limit.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: April 12, 2011.

H. Curtis Spalding,

Regional Administrator, EPA Region 1.

Dated: April 12, 2011.

Carl-Axel P. Soderberg,

Division Director, Caribbean Environmental Protection Division, EPA Region 2.

Dated: April 12, 2011.

Kevin Bricke,

Acting Director, Division of Environmental Planning & Protection, EPA Region 2.

Dated: April 12, 2011.

Jon M. Capacasa,

Director, Water Protection Division, EPA Region 3.

Dated: April 12, 2011.

Tinka G. Hyde,

Director, Water Division, EPA Region 5.

Dated: April 12, 2011.

Miguel I. Flores,

Director, Water Quality Protection Division, EPA Region 6.

Dated: April 12, 2011.

Jamie Green,

Acting Director, Water, Wetlands and Pesticides Division, EPA Region 7.

Dated: April 11, 2011.

Stephen S. Tuber,

Assistant Regional Administrator, EPA Region 8.

Dated: April 11, 2011.

Alexis Strauss,

Director, Water Division, EPA Region 9.

Dated: April 11, 2011

Michael A. Bussell,

Director, Office of Water and Watersheds, EPA Region 10.

[FR Doc. 2011–9926 Filed 4–22–11; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Notice of Submission for OMB Review—Request for an Extension Without Change: State and Local Government Information Report (EEO–4).

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for an extension through 2014 of the existing collection requirements under 29 CFR part 1602, Recordkeeping and Reporting Requirements, under Title VII. The Commission has

requested an extension of an existing collection as listed below.

DATES: Written comments on this notice must be submitted on or before May 25, 2011.

ADDRESSES: The Request for Clearance (SF83–I), supporting statement, and the other documents submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street NE., Washington, DC 20507. Comments on this final notice must be submitted to Chad A. Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or electronically mailed to, *Chad_A_Lallemand@omb.eop.gov.* Copies of comments should be sent to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507. As a convenience to commentors, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile ("FAX") machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number.) Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, 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. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9 a.m. and 5 p.m. EST or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Room 4SW30F, Washington, DC 20507; (202) 663–4958 (voice) or (202) 663–7063 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the **Federal Register** on February 4, 2011 allowing for a 60-day public comment period. There were no comments received from the public.

Overview of Information Collection

Type of Review: Extension—No change.
OMB Control NO.: 3046–0008.
Collection Title: State and Local Government Information Report (EEO–4).
Frequency of Report: Biennial.
Type of Respondent: State and local government jurisdictions with 100 or more Employees.
Description of Affected Public: State and local governments excluding elementary and secondary public school districts.
Number of Responses: 13,456.
Reporting Hours: 44,719.
Cost to Respondents: $1,045,000.
Number of Forms: 1.
Form Number: EEOC Form 164.
Federal Cost: $187,500.
Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations, Title 29, Chapter XIV Subpart F, § 1602.30–37, prescribing the reporting requirements for state and local governments. State and local governments with 100 or more employees have been required to submit EEO–4 reports since 1973 (biennially in odd-numbered years since 1993). The individual reports are confidential.

EEO–4 data are used by the EEOC to investigate charges of discrimination against state and local governments and to provide information on the employment status of minorities and women. The data are shared with several other federal agencies. Pursuant to Section 709(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–8(d), as amended, EEO–4 data is shared with state and local Fair Employment Practices Agencies (FEPAs). Aggregated data are also used by researchers and the general public.

Burden Statement: The estimated number of respondents included in the EEO–4 survey is 9,000 state and local governments. These 9,000 jurisdictions file about 13,456 reports due to the requirement for some to file separate reports by function. The form is estimated to impose 44,719 burden hours biennially.

Dated: April 19, 2011.

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2011–9943 Filed 4–22–11; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Notice of Submission for OMB Review—Extension Without Change: Local Union Report (EEO–3).

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for an extension through 2014 of the existing collection requirements under 29 CFR 1602, Recordkeeping and Reporting Requirements, under Title VII. The Commission has requested an extension of an existing collection as listed below.

DATES: Written comments on this notice must be submitted on or before May 25, 2011.

ADDRESSES: The Request for Clearance (SF83–I), supporting statement, and the other documents submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Washington, DC 20507. Comments on this final notice must be submitted to Chad A. Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or electronically mailed to, *Chad_A_Lallemand@omb.eop.gov.* Copies of comments should be sent to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507. As a convenience to commentors, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile ("FAX") machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is

(202) 663–4114. (This is not a toll-free number.) Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, 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. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9 a.m. and 5 p.m. EST or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Room 4SW30F, Washington, DC 20507; (202) 663–4958 (voice) or (202) 663–7063 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the **Federal Register** on February 4, 2011 allowing for a 60-day public comment period. There was one comment received from the public; however, it did not apply to the proposed extension.

Overview of Information Collection

Type of Review: Extension—No change.

OMB Control NO.: 3046–006.

Collection Title: Local Union Report (EEO–3).

Frequency of Report: Biennial.

Type of Respondent: Referral local unions with 100 or more members.

Description of Affected Public: Referral local unions and independent or unaffiliated referral unions and similar labor organizations.

Responses: 1,399.

Reporting Hours: 2,098 (including recordkeeping).

Cost to Respondents: $39,871.

Federal Cost: $60,000.

Number of Forms: 1.

Form Number: EEOC Form 274.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires labor organizations to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed and to produce reports from the data. The EEOC issued regulations, Title 29, Chapter XIV, Subpart F, Section 1602.22–26, requiring referral local unions with 100 or more members to submit EEO–3 reports. The individual reports are confidential. The EEOC uses EEO–3 data to investigate charges of discrimination and for research.

Burden Statement: The estimated number of respondents included in the biennial EEO–3 survey is 1,399 referral unions. The form is estimated to impose 2,098 burden hours biennially. In order to help reduce survey burden, respondents are encouraged to report data electronically whenever possible.

Dated: April 19, 2011.

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2011–9946 Filed 4–22–11; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Notice of Submission for OMB Review—Extension Without Change: Employer Information Report (EEO–1).

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for an extension through 2014 of the existing collection requirements under 29 CFR 1602, Recordkeeping and Reporting Requirements under Title VII. The Commission has requested an extension of an existing collection as listed below.

DATES: Written comments on this notice must be submitted on or before May 25, 2011.

ADDRESSES: The Request for Clearance (SF83–I), supporting statement, and the other documents submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street NE., Washington, DC 20507. Comments on this final notice must be submitted to Chad A. Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building Washington DC 20503 or electronically mailed to *Chad_A_Lallemand@omb.eop.gov.* Copies of comments should be sent to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507. As a convenience to commentors, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile ("FAX") machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number.) Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, 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. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9 a.m. and 5 p.m. EST or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Room 4SW30F, Washington, DC 20507; (202) 663–4958 (voice) or (202) 663–7063 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the Federal Register on February 4, 2011 allowing for a 60-day public comment period. Only one comment was received and it supported EEOC's intent to request a three-year extension.

Overview of Information Collection

Type of Review: Extension—No change.

OMB Control NO.: 3046–007.

Collection Title: Employer Information Report (EEO–1).

Frequency of Report: Annual.

Type of Respondent: Private employers with 100 or more employees and certain federal government contractors and first-tier subcontractors with 50 or more employees.

Description of Affected Public: Private employers with 100 or more employees and certain federal government contractors and first-tier subcontractors with 50 or more employees.

Reporting Hours: 599,000.

Respondent Cost: $11.4 million.

Federal Cost: $2.1 million.

Number of Forms: 1.

Form Number: EEOC Form 100.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations, Title 29, Chapter XIV, Subpart B, Section 1602.7, prescribing the EEO–1 reporting requirement. Employers in the private sector with 100 or more employees and some federal contractors with 50 or more employees have been required to submit EEO–1 reports annually since 1966. The individual reports are confidential. EEO–1 data is used by EEOC to investigate charges of employment discrimination against employers in private industry and to provide information about the employment status of minorities and women. The data is shared with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other federal agencies. Pursuant to § 709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO–1 data is also shared with state and local Fair Employment Practices Agencies (FEPAs).

Burden Statement: The estimated number of respondents included in the annual EEO–1 survey is 45,000 private employers. The estimated number of establishment-based responses per reporting company is between three and four EEO–1 reports annually. The annual number of responses is approximately 170,000. The form is estimated to impose 599,000 burden hours annually. In order to help reduce survey burden, respondents are encouraged to report data electronically whenever possible.

Dated: *April 19, 2011.*

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2011–9947 Filed 4–22–11; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review

AGENCY: Equal Employment Opportunity Commission.

ACTION: No Final Notice of Submission for OMB Review—Extension Without Change: Elementary-Secondary Staff Information Report (EEO–5).

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for an extension through 2014 of the existing collection requirements under 29 CFR part 1602, Recordkeeping and Reporting Requirements under Title VII. The Commission has requested an extension of an existing collection as listed below.

DATES: Written comments on this notice must be submitted on or before May 25, 2011.

ADDRESSES: The Request for Clearance (SF83–I), supporting statement, and the other documents submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Washington, DC 20507. Comments on this final notice must be submitted to Chad A Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or electronically mailed to, *Chad_A_Lallemand@omb.eop.gov.* Copies of comments should be sent to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507. As a convenience to commentors, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile ("FAX") machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number). Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, 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. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9 a.m. and 5 p.m. EST or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, 131 M Street, NE., Room 4SW30F, Washington, DC 20507; (202) 663–4958 (voice) or (202) 663–7063 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the **Federal Register** on February 4, 2011 allowing for a 60-day public comment period. There were no comments received from the public.

Overview of Information Collection

Type of Review: Extension—No change.

OMB Control NO.: 3046–0003.

Collection Title: Elementary-Secondary Staff Information Report (EEO–5).

Frequency of Report: Biennial.

Type of Respondent: Certain public elementary and secondary school districts.

Description of Affected Public: Certain public elementary and secondary school districts.

Number of Responses: 7,155.

Reporting Hours: 10,000.

Cost to the Respondents: $190,000.

Federal Cost: $170,000.

Number of Forms: 1.

Form Number: EEOC Form 168A.

Abstract: Section 709 (c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations, Title 29, Chapter XIV, Subpart F, § 1602.39–45, prescribing the reporting requirements for elementary and secondary public school districts. The EEOC uses EEO–5 data to investigate charges of employment discrimination against elementary and secondary public school districts. The data also are used for research. The data are shared with the Department of Education (Office for Civil Rights) and the Department of Justice. Pursuant to Section 709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO–5 data also are shared with state and local Fair Employment Practices Agencies (FEPAs).

Burden Statement: The estimated number of respondents included in the biennial EEO–5 survey is 7,155 public elementary and secondary school districts. The form is estimated to impose 10,000 burden hours biennially.

Dated: April 19, 2011.

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2011–9948 Filed 4–22–11; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or Tto Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 10, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *BancFirst Corporation,* Oklahoma City, Oklahoma; to acquire 100 percent of the voting shares of FBC Financial Corporation, and thereby indirectly acquire voting shares of 1st Bank Oklahoma, both in Claremore, Oklahoma, and thereby engage in the operating a savings association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, April 20, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–9909 Filed 4–22–11; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice: 2011–OGP–2; Docket 2011–0006; Sequence 7]

Discontinuance of the Looseleaf Version of the Federal Management Regulation (FMR) and Federal Travel Regulation (FTR)

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice.

SUMMARY: As part of GSA's effort to increase efficiency and reduce and attain the goal of zero environmental impact (ZEF), the Office of Governmentwide Policy (OGP) has determined that it will no longer produce the looseleaf version of the Federal Management Regulation (FMR) and the Federal Travel Regulation (FTR).

DATES: This notice is effective April 25, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Michael Hopkins, Office of Governmentwide Policy, at (202) 208–4421.

SUPPLEMENTARY INFORMATION:

A. Background

Looseleaf pages of the FMR and the FTR were originally made available at a time when it was the only means to view a change to either regulation in context with the existing text until the publication of the next volume of Title 41 of the Code of Regulations (41 CFR title 41) was published the following July 1. Patrons who maintained the regulations in looseleaf could purchase subscriptions from the Government Printing Office (GPO) and when any change to the FMR or FTR occurred, they would be sent the new pages. At best, it could be weeks and even months before patrons would receive the latest changes. With the coming of new technology, GSA began producing these pages and sending them to patrons electronically.

Because of today's technologies, those who follow the FMR and FTR can view and print the latest changes on the day the changes are published in the **Federal Register**. Through the years, GSA continued to produce the looseleaf pages for these changes although the need for them has become almost nonexistent. GSA has come to the conclusion that the time that it takes to produce the pages for information already available is not an efficient use of government resources and has decided to discontinue the production of the looseleaf versions of the FMR and FTR immediately. In addition, printing updated pages for those maintaining looseleaf binders of the regulations will no longer be necessary and this supports GSA's goal of a zero environmental footprint.

B. Procedures

The FMR and related documents can be found at *http://www.gsa.gov/fmr.* The FTR and related documents can be found at *http://www.gsa.gov/fmr.* In addition to the Federal Register's web page (*http://www.archives.gov/federal-register*) you can access the Electronic Code of Regulations (eCFR) through the GPO Web site at *http://ecfr.gpoaccess.gov.*

Dated: April 19, 2011.

Kathleen M. Turco,

Associate Administrator, General Services Administration.

[FR Doc. 2011–9959 Filed 4–22–11; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Federal Health IT Strategic Plan: 2011–2015 Open Comment Period Extended Until Friday, May 6

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice.

SUMMARY: The *Federal Health IT Strategic Plan: 2011–2015* ("the Plan")

was posted on the ONC Web site on March 25, 2011 and originally open for public comment through Friday, April 22 at 11:59 p.m. (Eastern). This notice serves to announce that the public comment period for the Plan has been extended through Friday, May 6 at 11:59 p.m. (Eastern).

In order for your comments to be read and considered, you must submit your comment via the Federal Health IT Buzz Blog: *http://www.healthit.gov/buzz-blog/from-the-onc-desk/hit-strat-plan/.*

Dated: April 19, 2011.

Erin Poetter,

Office of Policy and Planning, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–9941 Filed 4–22–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Decision To Evaluate a Petition To Designate a Class of Employees From Ames Laboratory in Ames, IA, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from Ames Laboratory in Ames, Iowa, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Ames Laboratory.

Location: Ames, Iowa.

Job Titles and/or Job Duties: All Department of Energy (DOE) employees, its predecessor agencies, and its contractors and subcontractors who worked in any area of the DOE facility.

Period of Employment: January 1, 1942 through December 31, 1970.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2011–9928 Filed 4–22–11; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Information (RFI) To Identify and Obtain Relevant Information From Public or Private Entities With an Interest in Biovigilance

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This Request for Information (RFI) seeks to identify and obtain relevant information regarding the possible development of a public-private partnership (PPP) designed to facilitate the identification of risks and strategies to assure safety of the U.S. supply of blood and blood components, tissues, cells, and organs. This RFI is intended to inform the Department of Health and Human Services (HHS) regarding stakeholders, mechanisms, and approaches on issues related to developing and managing a PPP and scope of PPP activities. Replies are invited from (1) public or private entities with an interest in biovigilance, and (2) entities with experience and capabilities managing public-private partnerships (PPPs) in the biological sciences and public health domains. This RFI is for information and planning purposes only and is not a solicitation for applications or an obligation on the part of the U.S. Government to provide support for any ideas identified in response to it. Please note that the U.S. Government will not pay for the preparation of any information submitted or for its use of that information.

DATES: All responses must be received no later than 4 p.m. EDT on June 9, 2011 at the address listed below.

ADDRESSES: All responses should be e-mailed to *Biovigilance@hhs.gov* (attention Dr. Jerry Holmberg). Please limit responses to 10 pages. Include in the subject line, the following information:

- Name of the institution or site.
- Respondent, title, and full contact information.

FOR FURTHER INFORMATION CONTACT: Dr. Jerry Holmberg, Senior Advisor for Blood Safety, Office of the Assistant Secretary for Health, Office of the Secretary, U.S. Department of Health and Human Services, 1101 Wootton Parkway, Tower Building, Suite 250, Rockville, MD 20852.

SUPPLEMENTARY INFORMATION: In 2009, the Advisory Committee on Blood Safety and Availability (ACBSA) within the Department of Health and Human Services (HHS), Office of the Assistant Secretary of Health, reviewed and discussed a report on the current state of biovigilance. In that report ("Biovigilance: Efforts to Bridge a Critical Gap in Patient Safety and Donor Health" *http://www.hhs.gov/ash/bloodsafety/biovigilance/index.html*), biovigilance was defined as "a comprehensive and integrated national patient safety program to collect, analyze, and report on the outcomes of collection and transfusion and/or transplantation of blood components and derivatives, tissues, cells, and organs. This definition does not include vaccines, allergenic products, and most recombinant human proteins." Safety surveillance for plasma derivatives, while a logical part of biovigilance, already falls under FDA mandated drug adverse event reporting and is not addressed in the current HHS initiative. Among the recommendations in that report was for HHS to develop an HHS action plan to support a national biovigilance program, integration of systems within government and private sectors, and steps to enhance mechanisms for surveillance.

HHS is continuing its efforts to develop an action plan to support a national biovigilance program for blood and blood components, tissues, cells, and organs. As part of these efforts, HHS is exploring the feasibility of a PPP. HHS believes that a PPP potentially could serve as an appropriate mechanism for achieving the broad goals and mission of biovigilance. A PPP might provide the American public with a mechanism for leveraging and maximizing resources, for collaborating on research and problem solving, for creating new opportunities, and for advancing the Department's public health mission as it relates to challenges associated with disease prevention (including emerging infectious diseases or EIDs), adverse events, and process improvements.

Biovigilance is an area of growing importance, with a potential role in any of the following areas:

- Identifying strategies for protecting recipients and living donor health;

• Identifying processes that reduce medical errors and improve donor/patient outcomes in blood transfusions, and tissue and organ transplantations;
• Reporting and analyzing adverse events, including medical "near misses" and patient adverse reactions;
• Identifying emerging infectious disease prevalence and incidence in donors and recipients, both quickly and effectively;
• Informing public health and regulatory policy, and reimbursement decisions; and,
• Contributing to and collaborating on research studies, including research that provides a basic understanding of recipient outcomes so as to inform future surveillance activities.

Specific areas and activities in which a biovigilance PPP is likely to be involved may include:

• Safety and surveillance—Identifying areas where greater safety and surveillance measures are needed.
• Process improvement—Proposing new processes or process enhancements to improve blood and blood component, tissue, cell, and organ safety for donors and recipients.
• Standards and measurements—Identifying areas where standards are lacking or need additional development; proposing definitions for standards; defining measurement approaches or best practices for collecting measurement data.
• Research and analysis—Identifying research needs; proposing and conducting short and long-term research studies; identifying knowledge gaps that prevent effective surveillance or reporting; proposing strategies for closing these gaps.
• Data repositories, infrastructure and policies—Identifying requirements for new data repositories and related infrastructure; developing policies for data sharing, access, privacy and confidentiality; establishing and operating such data repositories and related infrastructure (or contractually arranging for the operation).
• Baseline data, data quality, measurement, and collection—Establishing baseline data and associated quality standards for measurement and collection of that data.
• Goal setting—Establishing targets or goals for improved outcomes.
• Reporting—Issuing regular and periodic reports on progress, trends, adverse outcomes, and corrective actions to improve patient safety and donor health.
• Innovation in technologies and post-marking surveillance of new technologies.

Interested stakeholders in biovigilance may include any of the following, and/or others:

• Foundations and non-profit entities with an interest or responsibilities in biovigilance, in particular those with a public advocacy mission related to supply, access, safety, use, or payment of blood, tissues, cells and organs and/or those with expertise in PPPs;
• Recipients of blood or blood components, tissues, cells, or organs;
• Donors, potential donors, and donor families;
• Healthcare facilities, including transfusion services and transplant centers;
• Pharmaceutical, diagnostic, and other related biotechnology companies offering products, services, medical equipment, or technology;
• Organizations engaged in collecting, recovery banking, preserving, distributing or processing blood, organs, or tissues, or cells;
• Insurance companies, self-insured entities, and other payers;
• IT and database companies;
• Professional, research, and academic organizations;
• Other U.S. Federal, State, or local government groups with an interest or responsibilities in biovigilance; and,
• Managing partners or consultancy firms.

Information Requested

The Assistant Secretary for Health has charged a biovigilance working group, with membership from the HHS Operating Divisions, to define the foundational elements and operating framework for a National Biovigilance Program within HHS and for a PPP. This framework for a National Biovigilance Program will propose a set of high-level strategic goals, priorities, and key initiatives for the next five years. In developing the framework, HHS will take into account the feasibility, as well as foundational elements and basic operating framework for a PPP.

HHS is interested in exploring a biovigilance PPP that could achieve its mission through collaboration among public sector entities (*e.g.,* government agencies and institutions) and private sector entities. Private sector entities include, but are not limited to academia; non-governmental organizations (NGOs); philanthropic institutions; patient groups; blood bank operators; blood, tissue, cell, and organ establishments or manufacturers, transplant centers, and professional societies; and other members of the blood, tissue, cells, and organ communities. Under such a partnership, all partners might engage in the development of an operating structure and policies that will meet the broad goals of biovigilance as well as serving the needs and interests of the partners. Due to the expanding role of blood transfusion, and tissue, cell and organ transplantation in the healthcare sector, sustained involvement among partners might be needed for the foreseeable future.

This RFI is being issued to notify the public that HHS is exploring the feasibility of a PPP as an approach for achieving the broad goals of biovigilance. This RFI, moreover, is being issued to encourage all interested parties to comment on any aspect of a PPP. This may include any of the following:

• General or organizational issues:
  ○ Scope, key priorities, goals, or initiatives for the PPP in the first five years;
  ○ Key PPP challenges and critical success factors.
• Structural issues, such as:
  ○ Governance structure, operating and voting rules, and decision-making processes for the PPP;
  ○ Funding mechanisms and models for both the start-up period (during the initial 6–18 months) and the long term, to support sustained funding for an ongoing collaboration.
• Partner issues, including:
  ○ Identification of potential partners;
  ○ Management approaches for optimizing public and private-sector involvement.
• PPP scope and activities:
  ○ Project and research selection strategies in evaluation of the suitability of projects, partners, and overall internal decision-making structure;
  ○ Standards and measurements (definition, development, implementation)
  ○ Data collection through surveillance;
  ○ Analysis of data;
  ○ Public policy influence and development;
  ○ International biovigilance.
• PPP Management issues, such as:
  ○ Expertise and experience in managing a PPP, particularly in the biological sciences and public health domains;
  ○ Expertise and input on applicable research agendas. This could include how the PPP functions with regard to direct solicitation of research applications, how funding decisions are made, and the performance of administrative or oversight functions for such

projects;
- ○ Fund-raising experience;
- ○ Fiscal management experience, including management of the flow of funds among the partners.

This RFI is for information and planning purposes only and should not be construed as a solicitation or as an obligation on the part of HHS. HHS does not intend to award a grant or contract to pay for the preparation of any information submitted or for the use of such information by HHS. Acknowledgment of receipt of responses may not be made, nor will respondents be notified of the evaluation by HHS of the information received. No basis for claims against HHS shall arise as a result of a response to this request for information or to the use of such information by HHS as either part of our evaluation process or in developing specifications for any subsequent announcement. Any proprietary information submitted should be clearly marked for confidentiality.

Dated: April 20, 2011.

James J. Berger,

Associate Public Health Advisor for Blood, Organ, and Tissue Safety.

[FR Doc. 2011–9966 Filed 4–22–11; 8:45 am]

BILLING CODE 4150–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–11–0020]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Coal Workers' Health Surveillance Program (CWHSP)—OMB 0920–0020–Reinstatement With Change—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This submission will incorporate the National Coal Workers' X-Ray Surveillance Program 42 CFR 37 (0920–0020) and National Coal Workers' Autopsy Study 42 CFR part 37.204 (0920–0021) into one complete package which will be called the Coal Workers' Health Surveillance Program (CWHSP). Upon OMB approval, 0920–0021 will be discontinued. CWHSP is a congressionally-mandated medical examination program for monitoring the health of underground coal miners, established under the Federal Coal Mine Health and Safety Act of 1969, as amended in 1977 and 2006, PL–91–173 (the Act). The Act provides the regulatory authority for the administration of the CWHSP. This Program, which includes both a health surveillance and an autopsy component, has been useful in providing tools for protecting the health of miners (whose participation is entirely voluntary), and also in documenting trends and patterns in the prevalence of coal workers' pneumoconiosis ('black lung' disease) among miners employed in U.S. coal mines. During the early 1970s, one out of every three miners examined through the CWHSP who had worked at least 25 years underground had evidence of pneumoconiosis on their chest x-ray. An analysis among over 25,000 miners who participated in the x-ray Programs from 1996 to 2002 indicated that the proportion of affected individuals had decreased to about one in 20. However, recent surveillance analyses and research studies have confirmed that the prevalence of 'black lung' disease is increasing, there is regional clustering of rapidly progressive pneumoconiosis cases, and coal miners have a higher risk of disease if they perform certain jobs, work in smaller mines, or are from certain geographic areas. Importantly, young coal miners are developing the disabling and lethal forms of 'black lung'.

Demographic and logistical information is gathered from coal mine operators and participating x-ray facilities. Participating miners also provide health and work histories, and participating physicians report radiographic findings. The Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health, Division of Respiratory Disease Studies, 1095 Willowdale Road, Morgantown, WV 26505, also called the Appalachian Laboratory for Occupational Safety and Health (ALOSH), is charged with administration of this Program.

From October 1, 1999 through September 30, 2002, the Mine Safety and Health Administration (MSHA), in consultation with NIOSH, conducted a pilot health surveillance program for both underground and surface miners (The Miners' Choice Program). The Miners' Choice Program has been continued as an extension of the CWHSP (currently called the Enhanced Coal Workers' Health Surveillance Program—ECWHSP). This extension of the CWHSP currently operates utilizing a mobile examination unit which travels to mining regions to provide locally accessible and more comprehensive health surveillance, including chest radiography, spirometry, and blood pressure screening.

Under the Act, the provision of periodic chest x-ray examinations is specifically mandated, and the x-rays are to be supplemented by such other tests as the Secretary deems necessary. In addition to radiographically-apparent pneumoconiosis, miners are at risk for the development of chronic obstructive pulmonary disease (COPD). Chest radiographs alone cannot provide a measure of airflow obstruction and therefore often miss important lung disease. For this reason, spirometry, a simple breathing test, is an additional component that is particularly useful for the health assessment of miners. Periodic medical history and spirometry tests have been recommended by NIOSH for both surface and underground coal miners since 1995, to facilitate preventive actions, increase miners' participation in programs for early detection of disease, and improve the derivation of representative estimates of the burden, distribution, and determinants of occupational lung disease in relation to coal mining in the U.S. Finally, unrecognized hypertension has previously been observed among many miners, and the ECWHSP offers blood pressure screening as a safe, simple, and inexpensive test, which can help target initiation of proven health conserving medications.

The National Coal Workers' Autopsy Study (NCWAS) provides standardized lung specimens for ongoing scientific research as well as information to the next-of-kin regarding the presence and extent of coal workers' pneumoconiosis (black lung) in the lungs of the deceased miner. The Consent Release and History Form is primarily used to obtain written authorization from the next-of-kin to perform an autopsy on the deceased miner. Because a basic reason for the post-mortem examination is research (both epidemiological and clinical), a minimum of essential information is collected regarding the deceased miner, including occupational history and smoking history. The data collected are used by scientists for research purposes in defining the diagnostic criteria for pneumoconiosis and in correlating pathologic changes with exposures and x-ray findings.

There are no costs of the NCWAS to respondents other than their time. The total estimated burden hours are 4,470.

Type of respondent	Form name	Number of respondents	Responses per respondent	Average burden per response (in hours)
Physicians B Readers	Roentgenographic Interpretation Form—CDC/NIOSH (M) 2.8.	10,000	1	3/60
	Interpreting Physician Certification Document—CDC/NIOSH (M) 2.12.	300	1	10/60
Miners	Miner Identification Document—CDC/NIOSH (M) 2.9	5,000	1	20/60
	No form—X-ray	5,000	1	15/60
	No form—Spirometry	2,500	1	20/60
Coal Mine Operators	Coal Mine Operator's Plan—CDC/NIOSH (M) 2.10	200	1	30/60
Supervisor at X-ray Facilities	Facility Certification Document—CDC/NIOSH (M) 2.11	100	1	30/60
Pathologist	No form—Invoice	50	1	5/60
	No form—Final Diagnosis Report	50	1	5/60
Next-of-Kin	Consent, Release, and History Form—CDC/NIOSH (M) 2.6	50	1	15/60

Daniel Holcomb,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–9922 Filed 4–22–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0125]

Draft Guidance for Industry and Food and Drug Administration Staff; Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007." This draft guidance provides information on how a manufacturer may demonstrate that a tobacco product was commercially marketed in the United States as of February 15, 2007. In this draft guidance, FDA provides recommendations on the evidence that a manufacturer may use to demonstrate that a tobacco product was commercially marketed in the United States as of February 15, 2007. This draft guidance is not final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment of this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by June 24, 2011.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled "Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007" to the Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance document may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: With regard to the draft guidance: Annette Marthaler, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373, e-mail: *annette.marthaler@fda.hhs.gov.*

With regard to the proposed collection of information: Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3794, e-mail: *Jonnalynn.Capezzuto@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This draft guidance provides information on how a manufacturer may establish that a tobacco product was commercially marketed in the United States as of February 15, 2007. In this draft guidance, FDA provides recommendations on the information that a manufacturer may use to establish that a tobacco product was commercially marketed in the United States on February 15, 2007, and is, therefore, a grandfathered product not subject to premarket review requirements. In the draft guidance document, FDA recommends that this information may include, among other things, dated copies of advertisements, dated catalog pages, and dated promotional material.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on "Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007." It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

An electronic version of the draft guidance document is available on the Internet at *http://www.regulations.gov* and *http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/default.htm.*

IV. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (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.

Draft Guidance on Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007—(OMB Control Number 0910–NEW)

This draft guidance provides information on how a manufacturer may establish that a tobacco product was commercially marketed in the United States as of February 15, 2007, and is, therefore, a grandfathered product not subject to premarket review. The draft guidance recommends that the manufacturer provide evidence that may include, among other things, dated copies of advertisements, dated catalog pages, dated promotional material, and dated bills of lading. FDA recommends that the manufacturer submit as much information as possible to demonstrate that the tobacco product was commercially marketed in the United States as of February 15, 2007. FDA's estimate of the number of respondents is based on the fact that requesting an agency determination of the grandfathered status of a tobacco product under the draft guidance is not required and also on indications of interest in making such request. The number of hours is FDA's estimate of how long it might take one to review, gather, and submit dated information if making a request for an agency determination.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ONE TIME REPORTING BURDEN [1]

Activity	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Submit evidence of commercial marketing in the United States as of February 15, 2007	150	1	150	10	1,500

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

V. 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.

Dated: April 15, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–9939 Filed 4–22–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–F–0225]

Ferm Solutions, Inc.; Filing of Food Additive Petition (Animal Use); Erythromycin Thiocyanate

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Ferm Solutions, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of erythromycin thiocyanate as an antimicrobial processing aid in fuel-ethanol fermentations with respect to its consequent presence in byproduct distiller grains used as an animal feed or feed ingredient.

DATES: Submit either electronic or written comments on the petitioner's environmental assessment by May 25, 2011.

ADDRESSES: Submit electronic comments to: *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Isabel W. Pocurull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6853, e-mail: *isabel.pocurull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5)), notice is given that a food additive petition (FAP 2271) has been filed by Ferm Solutions, Inc., P.O. Box 203, 445 Roy Arnold Ave., Danville, KY 40423. The petition proposes to amend the food additive regulations in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use of erythromycin thiocyanate as an antimicrobial processing aid in fuel-ethanol fermentations with respect to its consequent presence in byproduct distiller grains used as an animal feed or feed ingredient.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), the Agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Division of Dockets Management (see **DATES** and **ADDRESSES**) for public review and comment.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on its review, the Agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the Agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.51(b).

Dated: April 15, 2011.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2011–9913 Filed 4–22–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0431]

Guidance for Food and Drug Administration Staff and Tobacco Retailers on Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled "Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers." This guidance document describes FDA's current policies with respect to civil money penalties and no-tobacco-sale orders for retailers who violate requirements of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) relating to tobacco products, including the FD&C Act requirement that tobacco products may not be sold or distributed in violation of FDA's "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents." With the release of this final guidance document, several provisions in the Family Smoking Prevention and Tobacco Control Act (the Tobacco Control Act) that relate to civil money penalties and no-tobacco-sale orders become effective.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance entitled "Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers" to the Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance document may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Gerie A. Voss, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373, *gerie.voss@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for FDA staff and tobacco retailers entitled "Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers." On June 22, 2009, President Obama signed the Tobacco Control Act (Pub. L. 111–31) into law. The Tobacco Control Act grants FDA important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors.

Among its many provisions, the Tobacco Control Act authorizes FDA to impose civil money penalties for violations of the FD&C Act requirements that relate to tobacco products (section 303(f)(9) of the FD&C Act (21 U.S.C. 333(f)(9)). Of special interest to retailers, one of the FD&C Act's requirements is that tobacco products may not be sold or distributed in a manner that violates regulations issued under section 906(d) of the FD&C Act (21 U.S.C. 387f(d)), such as the "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" that were published by FDA on March 19, 2010 (75 FR 13225) (21 CFR part 1140). The Tobacco Control Act also authorizes FDA to impose a no-tobacco-sale order on a retail outlet for repeated violations of regulations issued under section 906(d) of the FD&C Act, and discusses a number of technical and procedural issues relating to civil money penalties and no-tobacco-sale orders.

This guidance document describes the penalty structure and FDA policies with respect to civil money policies and no-tobacco-sale orders. With the release of this final guidance document, several Tobacco Control Act provisions that relate to civil money penalties and no-tobacco-sale orders become effective (section 103(q)(3) of the Tobacco Control Act).

In the **Federal Register** of August 31, 2010 (75 FR 53316), FDA announced the availability of the draft guidance of the same title dated August 2010. FDA received a few comments on the draft guidance, and those comments were considered as the guidance was finalized. In addition, editorial changes were made to improve clarity.

II. Significance of Guidance

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on "Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers." It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments.

Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/default.htm* or *http://www.regulations.gov.*

Dated: *April 15, 2011.*

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–9938 Filed 4–22–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2006–D–0094]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled, "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities." This guidance document was developed as a special control to support the reclassification of the topical oxygen chamber for extremities (TOCE) from class III (premarket approval) into class II (special controls). This guidance document describes a means by which manufacturers of TOCE may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule reclassifying these devices from class III into class II (special controls).

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled, "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities," to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 240–276–3151. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov.* Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Charles N. Durfor, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3555.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of April 6, 2006 (71 FR 17390), FDA's Center for Devices and Radiological Health (CDRH) published a proposed rule to reclassify the TOCE device type from class III (premarket approval) into class II (special controls) after reviewing current technological and scientific developments. To support the reclassification, CDRH issued a draft class II special controls guidance document entitled "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities" (71 FR 17476). Interested persons were invited to comment on the proposed rule and guidance by July 5, 2006. FDA received 11 comments on the proposed rule. The comments received discussed academic literature, clinical experiences, and patient outcomes that support the proposed reclassification's determinations of the safety and effectiveness of the TOCE device. The comments did not recommend any changes to the proposed regulation.

FDA is now identifying the guidance document entitled "Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities" as the special control for these devices. This guidance document provides a means by which manufacturers of TOCE devices may comply with the requirement of special controls for class II devices. Following the effective date of the final reclassification rule, any manufacturer submitting a premarket notification submission under section 510(k) of the Federal Food, Drug, and Cosmetic Act (the FD&C act) (21 U.S.C. 360(k)) for a TOCE device will need to address the issues covered in the special controls guidance document. However, the manufacturer need only show that its device meets the recommendations in the guidance document or in some other way provides equivalent assurances of safety and effectiveness.

II. Significance of Special Controls Guidance

FDA believes that adherence to the recommendations described in this guidance document, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of TOCE classified under § 878.5650 (21 CFR 878.5650). The final rule establishing this guidance document as a special control will be effective May 25, 2011. Following the effective date of the final rule, TOCE classified under § 878.5650 must comply with the requirement of special controls; manufacturers must address the issues requiring special controls as identified in the guidance, either by following the recommendations in the guidance or by some other means that provides equivalent assurances of safety and effectiveness.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/RegulatoryInformation/Guidances/default.htm* or *http://www.regulation.gov.* Always access an FDA guidance document by using FDA's Web site listed previously to find the most current version of the guidance.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information were subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520).

The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; and the collections of information in 21 CFR parts 50 and

56 have been approved under OMB control number 0910–0130.

V. 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.

Dated: *April 19, 2011.*

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–9898 Filed 4–22–11; 8:45 am]

BILLING CODE 4160–01–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: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Auditory System Study Section.

Date: June 1–2, 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: Lynn E Luethke, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5166, MSC 7844, Bethesda, MD 20892, (301) 806–3323, *luethkel@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences; Integrated Review Group. Molecular and Cellular Endocrinology Study Section.

Date: June 1, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John Bleasdale, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170 MSC 7892, Bethesda, MD 20892, 301–435–4514, *bleasdaleje@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics B Study Section.

Date: June 1–2, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Avenue Crowne Plaza Hotel and Suites, 160 E. Huron Street, Chicago, IL 60611.

Contact Person: Richard A Currie, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, (301) 435–1219, *currieri@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Cognitive Neuroscience Study Section.

Date: June 1, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: Kirk Thompson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function E Study Section.

Date: June 1, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monticello, 1075 Thomas Jefferson Street, NW., Washington, DC 20007.

Contact Person: Nitsa Rosenzweig, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry B Study Section.

Date: June 1–2, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue, NW., Washington, DC 20036.

Contact Person: Kathryn M Koeller, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–2681, *koellerk@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Surgery, Anesthesiology and Trauma Study Section.

Date: June 1–2, 2011.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: The Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60611.

Contact Person: Weihua Luo, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435–1170, *luow@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular, Molecular and Integrative Reproduction Study Section.

Date: June 2, 2011.

Time: 7 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: The Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60611.

Contact Person: Gary Hunnicutt, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, 301–435–0229, *gary.hunnicutt@nih.gov.*

Name of Committee: Oncology 1–Basic Translational Integrated Review Group; Cancer Molecular Pathobiology Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Manzoor Zarger, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Cognition and Perception Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Washington, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, (301) 435–2309, *pluded@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics A Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Contact Person: Michael M Sveda, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1114, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Vector Biology Study Section.

Date: June 2, 2011.

Time: 8 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: Liangbiao Zheng, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–402–5671, *zhengli@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Transplantation, Tolerance, and Tumor Immunology Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

Contact Person: Jin Huang, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4199, MSC 7812, Bethesda, MD 20892, 301–435–1230, *jh377p@nih.gov.*

Name of Committee: Immunology Integrated Review Group; Immunity and Host Defense Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 2 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: Patrick K Lai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, 301–435–1052, *laip@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative and Clinical Endocrinology and Reproduction Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60611.

Contact Person: David Weinberg, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, 301–435–1044, *David.Weinberg@nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Nuclear and Cytoplasmic Structure/Function and Dynamics Study Section.

Date: June 2, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: David Balasundaram, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, *balasundaramd@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neuroendocrinology, Neuroimmunology, Rhythms and Sleep Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202.

Contact Person: Michael Selmanoff, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Clinical and Integrative Diabetes and Obesity Study Section.

Date: June 2, 2011.

Time: 8 a.m. to 7 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: Nancy Sheard, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6046–E, MSC 7892, Bethesda, MD 20892, 301–408–9901, *sheardn@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Developmental Brain Disorders Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Beacon Hotel and Corporate Quarters, 1615 Rhode Island Avenue, NW., Washington, DC 20036.

Contact Person: Pat Manos, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–408–9866, *manospa@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative Physiology of Obesity and Diabetes Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: Reed A Graves, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Gastrointestinal Mucosal Pathobiology Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 3 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: Peter J Perrin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Risk and Disease Prevention Study Section.

Date: June 2–3, 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: Stacey FitzSimmons, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7808, Bethesda, MD 20892, 301–451–9956, *fitzsimmonss@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Risk, Prevention and Intervention for Addictions Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Gabriel B Fosu, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3108, MSC 7808, Bethesda, MD 20892, (301) 435–3562, *fosug@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Adult Psychopathology and Disorders of Aging Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Washington, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, (301) 435–2309, *pluded@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Intercellular Interactions Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street, San Francisco, CA 94102.

Contact Person: Wallace Ip, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, 301–435–1191, *ipws@mail.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genomics, Computational Biology and Technology Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Barbara J Thomas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2218, MSC 7890, Bethesda, MD 20892, 301–435–0603, *bthomas@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Development, Risk and Prevention Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: W Chicago Lakeshore, 644 North Lake Shore Drive, Chicago, IL 60611.

Contact Person: Anna L Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Behavioral Medicine, Interventions and Outcomes Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 15 E Street, NW., Washington, DC 20001.

Contact Person: Lee S Mann, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0677, *mannl@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Cell Death in Neurodegeneration Study Section.

Date: June 2–3, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Latham Hotel, 3000 M Street, NW., Washington, DC 20007.

Contact Person: Kevin Walton, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–435–1785, *kevin.walton@nih.hhs.gov.*

Name of Committee: Cell Biology Integrated Review Group; Development—1 Study Section.

Date: June 2, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: Jonathan Arias, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301–435–2406, *ariasj@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiological Basis of Mental Disorders and Addictions Study Section.

Date: June 2–3, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points by Sheraton Washington DC Downtown, 1201 K Street, NW., Washington, DC 20005.

Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Respiratory Integrative Biology and Translational Research Study Section.

Date: June 2–3, 2011.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Clift Hotel, 495 Geary Street, San Francisco, CA 94102.

Contact Person: Everett E Sinnett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, (301) 435–1016, *sinnett@nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Medical Imaging Study Section.

Date: June 2–3, 2011.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Valencia Riverwalk, 150 East Houston Street, San Antonio, TX 78205.

Contact Person: Xiang-Ning Li, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room

5112, MSC 7854, Bethesda, MD 20892, 301–435–1744, *lixiang@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: April 19, 2011.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–9936 Filed 4–22–11; 8:45 am]

BILLING CODE 4140–01–P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

ACHP Quarterly Business Meeting

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Advisory Council on Historic Preservation (ACHP) will meet Thursday, May 5, 2011. The meeting will be held in Room M09 at the Old Post Office Building, 1100 Pennsylvania Ave, NW., Washington, DC at 10 a.m.

The ACHP was established by the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*) to advise the President and Congress on national historic preservation policy and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The ACHP's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, Defense, Housing and Urban Development, Commerce, Education, Veterans Affairs, and Transportation; the Administrator of the General Services Administration; the Chairman of the National Trust for Historic Preservation; the President of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; a Native American; and eight non-Federal members appointed by the President.

Call to Order—10 a.m.

I. Chairman's Welcome
II. Presentation of Chairman's Award
III. Chairman's Report
IV. ACHP Management Issues
  a. Credentials Committee report and recommendations
  b. ACHP legislative agenda
  c. Voting membership for the National Association of Tribal Historic Preservation Officers
  d. Realignment of the Native American Advisory Group
  e. Alumni Foundation
  f. Future meeting planning
V. Preservation Initiatives
  a. Follow up to youth session
  b. Economic benefits study-presentation and next steps
  c. Historic preservation in America's Great Outdoors
VI. "Rightsizing" America's cities and historic preservation
Recess for working lunch
VII. Discussion on "rightsizing"
VIII. Section 106 Issues
  a. Executive Order 13563 on regulatory revision and Section 106 regulations
  b. Archaeological issues for future consideration
  c. Southwest Renewable Energy Development and Historic Preservation Working Group
IX. New Business
X. Adjourn

Note: The meetings of the ACHP are open to the public.

If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Room 803, Washington, DC, 202–606–8503, at least seven (7) days prior to the meeting. For further information:

Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue NW., #803, Washington, DC 20004.

Dated: April 18, 2011.

John M. Fowler,

Executive Director.

[FR Doc. 2011–9760 Filed 4–22–11; 8:45 am]

BILLING CODE 4310–K6–M

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0021]

Agency Information Collection Activities: Submission for Review; Information Collection Request for the Department of Homeland Security (DHS), Science and Technology, CyberForensics Electronic Technology Clearinghouse (CyberFETCH) Program

AGENCY: Science and Technology Directorate, DHS.

ACTION: 30-day Notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS), Science & Technology (S&T) Directorate invites the general public to comment on data collection forms for the CyberForensics Electronic Technology Clearinghouse (CyberFETCH) program. CyberFETCH is responsible for providing a collaborative environment for cyber forensics practitioners from law enforcement, private sector and academia. This clearinghouse will enable its users to share information, best practices and lessons learned within a secure collaborative environment. In order for a user to access this clearinghouse, he/she must complete a registration form to establish a user account. The information collected is used by the DHS S&T CyberFETCH program to determine the authenticity and suitability of the practitioner requesting access. Once approved, users will utilize the collaborative environment to upload documents/resources, exchange information, network with other users, as well as post blogs and comments.

The DHS invites interested persons to comment on the following form and instructions (hereinafter "Forms Package") for the S&T CyberFETCH: (1) Request a CyberFETCH Account (DHS Form 10073). Interested persons may receive a copy of the Forms Package by contacting the DHS S&T PRA Coordinator. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Comments are encouraged and will be accepted until May 25, 2011.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to: Desk Officer for the Department of Homeland Security, Science and Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number DHS–2011–0021 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: DHS S&T PRA Coordinator John Koran (202) 254–5676 (Not a toll free number).

SUPPLEMENTARY INFORMATION: The 60-day notice and request for comment was published in the **Federal Register** on February 11, 2011. No comments on the collection instruments were received. The information will be collected via the DHS S&T CyberFETCH secure Web site at *http://www.cyberfetch.org/*. The CyberFETCH Web site will only employ secure Web-based technology (*i.e.,* electronic registration form) to collect information from users to both reduce the burden and increase the efficiency of this collection.

The Department is committed to improving its information collection and urges all interested parties to suggest how these materials can further reduce burden while seeking necessary information under the Act.

DHS is particularly interested in comments that:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest 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, e.g., permitting electronic submissions of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Information Collection.

(2) *Title of the Form/Collection:* Science and Technology, CyberForensics Electronic Technology Clearinghouse (CyberFETCH) program.

(3) *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Department of Homeland Security, Science & Technology Directorate—(1) Request a CyberFETCH Account (DHS Form 10073).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals, consisting of Federal, State and local law enforcement, private sector and academia practitioners. The information collected will be leveraged to determine the authenticity and suitability of the practitioner requesting access. Once approved, users will utilize the collaborative environment to upload documents/resources, exchange information, network with other users, as well as post blogs and comments.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 1000.

b. *An estimate of the time for an average respondent to respond:* .25 burden hours.

c. *An estimate of the total public burden (in hours) associated with the collection:* 250 burden hours.

Dated: April 8, 2011.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2011–9933 Filed 4–22–11; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The National Advisory Council will meet on May 11–12, 2011 in Los Angeles, CA. The meeting will be open to the public.

DATES: The National Advisory Council will meet Wednesday, May 11, 2011, from 10 a.m. PDT to 6 p.m. PDT and on Thursday, May 12, 2011, 8:30 a.m. PDT to 5:30 p.m. PDT. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held at the Kyoto Grand Hotel, Golden Ballroom on the Banquet Level, 120 South Los Angeles Street, Los Angeles, CA 90012.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Patricia A. Kalla of the Office of the National Advisory Council as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the "Agenda" section below. Written comments or requests to make oral presentations must be submitted in writing no later than April 29, 2011 and must be identified by Docket ID FEMA–2007–0008 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: FEMA-RULES@dhs.gov.* Include the Docket ID FEMA–2007–0008 in the subject line of the message.
- *Fax:* (703) 483–2999.
- *Mail:* Office of Chief Counsel, Federal Emergency Management Agency (Room 835), 500 C Street, SW., Washington, DC 20472–3100.

Instructions: All submissions received must include the words "Federal Emergency Management Agency" and the Docket ID FEMA–2007–0008 for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the National Advisory Council, go to *http://www.regulations.gov.*

A public comment period will be held during the meeting on May 12, 2011 from 1:30 p.m. PDT to 2 p.m. PDT, and speakers are requested to register in advance, be present and seated by 10:45 a.m. PDT, and limit their comments to 3 minutes. Please note that the public comment period may start and end before the time indicated, if the committee has finished its business. Contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to register as a speaker.

FOR FURTHER INFORMATION CONTACT: Patricia A. Kalla, The National Advisory Council Office, Federal Emergency Management Agency (Room 832), 500 C Street, SW., Washington, DC 20472–3100, telephone (202) 646–3746, fax (202) 646–3930, and e-mail *FEMA-NAC@dhs.gov.* The National Advisory Council Web site is located at: *http://www.fema.gov/about/nac/.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). The National Advisory Council (NAC) advises the Administrator of the Federal Emergency Management Agency (FEMA) on all aspects of emergency management. The NAC incorporates State, local, and Tribal governments, private sector, and nongovernmental partners' input in the development and revision of FEMA policies and strategies. FEMA's NAC Office serves as the focal point for all NAC coordination.

Agenda

The NAC will meet for the purpose of reviewing the progress and/or potential recommendations of the following NAC subcommittees: Preparedness and Protection, Response and Recovery, Public Engagement and Mission Support, and Federal Insurance and

Mitigation. The NAC will hold discussions on professionalism of emergency management, approaches for National Incident Management System (NIMS) Credentialing implementation, and the Public Assistance (PA) Bottom-Up Review.

The NAC plans to discuss implementation of the credentialing process. FEMA's "NIMS Guideline for the Credentialing of Personnel" describes the process and standards for validating personnel qualifications and providing authorization, so that those personnel may perform specific functions and have specific access to an incident involving mutual aid. The credentialing process entails the objective evaluation and documentation of an individual's current certification, license, or degree; training and experience; and competence or proficiency to meet nationally accepted standards, provide particular services and/or functions, or perform specific tasks under specific conditions during an incident.

The NAC will discuss and take comment on the Bottom-Up Review. FEMA is currently performing a Bottom-Up Review to identify changes to improve the effectiveness and efficiency of the PA program. FEMA is approaching the Bottom-Up Review as an opportunity to re-evaluate the PA Program in its entirety and will consider new concepts for the operation of the PA Program, consistent with the FEMA's statutory authorities. FEMA's goal is to formulate and implement changes to the PA Program to provide grantees and subgrantees with the greatest flexibility possible in the use of PA funding, while ensuring program effectiveness and accountability for taxpayer dollars and compliance with Federal statutes and requirements.

Finally, the NAC may receive updates from FEMA offices regarding response, recovery, preparedness, and on the Regional Advisory Councils.

Dated: April 19, 2011.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–9901 Filed 4–22–11; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Cancellation of Customs Broker Licenses

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General Notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), and the U.S. Customs and Border Protection regulations (19 CFR 111.51), the following Customs broker licenses and all associated permits are cancelled without prejudice.

Name	License No.	Issuing port
David W. Price	11001	San Francisco
Liner Services International, Inc.	20794	Mobile
Coronet of California, Inc.	04400	Los Angeles
Bruni International, Inc.	11179	Laredo
Seattle Logistics, Inc.	23509	Seattle
Berardino & Associates, Inc.	09464	Chicago
Zimmer Worldwide Logistics, Inc.	23285	Houston

Dated: April 14, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–9957 Filed 4–22–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Cancellation of Customs Broker Licenses Due to Death of the License Holder

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to Title 19 of the Code of Federal Regulations at section 111.51(a), the following individual Customs broker licenses and any and all permits have been cancelled due to the death of the broker:

Name	License No.	Port name
Leandro U. Guevarra	16332	Los Angeles.
Jill O'Brien	74245	Miami.

Dated: April 14, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–9958 Filed 4–22–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs And Border Protection

Notice of Revocation of Customs Broker License

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General Notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and the U.S. Customs and Border Protection regulations (19 CFR 111.51(b)), the following Customs broker license and all associated permits are revoked with prejudice.

Name	License #	Issuing port
I.F.T.C., Inc.	11373	Miami

Dated: April 14, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–9960 Filed 4–22–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–13]

Notice of Proposed Information Collection: Comment Request; Emergency Homeowners' Loan Program Data Elements

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* June 24, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within sixty (60) days from the date of this Notice. Comments should refer to the proposal by name/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Karin Hill, Director, Office of Single Family Housing, Program Development, U.S Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, Room 9278, telephone (202) 402–2307. (This is not a toll-free number). Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Hill.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected 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 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: Emergency Homeowners' Loan Program Data Elements.

OMB Control Number, if applicable: 2502–0597.

Description of the need for the information and proposed use: This information collection is necessary to determine applicant eligibility to receive mortgage relief assistance under the Emergency Homeowners' Loan Program. This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, an information collection package with respect to implementing the Emergency Homeowners' Loan Program targeted to borrowers facing foreclosure.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 (Pub. L. 111–203, approved July 21, 2010, Sec 1496) appropriated $1billion to HUD to establish an Emergency Homeowner's Relief Fund, pursuant to section 107 of the Emergency Housing Act of 1975, that will provide emergency mortgage assistance to homeowners that are at risk of foreclosure due to involuntary unemployment or underemployment due to an adverse economic or medical condition. Accordingly, HUD is implementing the Emergency Homeowners Loan Program (EHLP) that is designed to offer a declining balance, deferred payment "bridge loan" (non-recourse, subordinate loan with zero interest) for up to $50,000 to assist eligible homeowners with payments of arrearages, including delinquent taxes and insurance. Additionally, EHLP maybe used to assist eligible homeowners with up to 24 months of monthly payments on their mortgage principal, interest, mortgage insurance premiums, taxes, and hazard insurance. Assistance will not exceed $50,000 per eligible homeowner.

HUD will use two approaches to implement EHLP: (1) Provide allocations to States that currently have substantially similar programs to administer their mortgage relief funds directly; and (2) delegate key administrative functions to third party entities that will assist HUD with program implementation. The third party entities will be primarily responsible for application intake, eligibility screening, funds control, payment distribution, and note processing.

Homeowners'(borrowers') participation in the program is voluntary. However, to help determine eligibility for assistance borrowers must submit the required application information and loan documentation to demonstrate that they meet program eligibility guidelines to receive mortgage relief assistance through EHLP.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The total number of respondents are estimated to be 36,264; the frequency of response (one time) for initial intake and an on-occasion response to re-certify changes in required eligibility data, the estimated time needed to prepare the response averages 3 hours ; and the total estimated annual burden hours are 108,792.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 20, 2011.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2011–9953 Filed 4–22–11; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Alcoholic Beverage Control Ordinance of the Paiute Tribe of Utah

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Alcoholic Beverage Control Ordinance of the Paiute Tribe of Utah (Tribe). The Ordinance regulates and controls the manufacture, distribution, possession, sale, service and consumption of liquor

on all lands within the exterior boundaries of the Tribe and its five (5) constituent Bands. This Ordinance will enhance the ability of the Tribe to control alcohol-related activities within the Tribe's jurisdiction, and at the same time it will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective on April 25, 2011.

FOR FURTHER INFORMATION CONTACT: Sharlot Johnson, Tribal Government Services Officer, Western Regional Office, P.O. Box 10, Phoenix, Arizona 85001, Telephone (602) 379–6786; Fax (602) 379–4100; or Elizabeth Colliflower, Office of Tribal Services, 1849 C Street, NW., MS 4513–MIB, Washington, DC 20240; Telephone: (202) 513–7640.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Tribal Council of Paiute Indian Tribe of Utah adopted its Alcoholic Beverage Control Ordinance on June 1, 2010 and enacted Resolution No. 2010–19 on June 1, 2010, requesting certification and publication of the Ordinance in the **Federal Register** by the Secretary of the Interior. The purpose of this Ordinance is to govern the sale, possession and distribution of alcohol within all tribal lands of the Tribe.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that this Alcoholic Beverage Control Ordinance was duly adopted by the Tribal Council of the Paiute Indian Tribe of Utah on June 1, 2010.

Dated: March 21, 2011.

Donald Laverdure,

Principal Deputy Assistant Secretary—Indian Affairs.

The Alcoholic Beverage Control Ordinance of the Paiute Indian Tribe of Utah reads as follows:

ALCOHOLIC BEVERAGE CONTROL ORDINANCE OF THE PAIUTE INDIAN TRIBE OF UTAH

SECTION 1. TITLE

This Ordinance shall be known as the Alcoholic Beverage Control Ordinance of the Paiute Indian Tribe of Utah.

SECTION 2. FINDINGS AND PURPOSE

A. The purpose of this Ordinance is to regulate and control the manufacture, distribution, possession, sale, service, and consumption of Alcoholic Beverages within all lands within the exterior boundaries of the Paiute Indian Tribe of Utah Reservation. The enactment of this Ordinance will enhance the ability of the Paiute Indian Tribe of Utah to control alcohol-related activities within the Tribe's jurisdiction, and at the same time will provide an important source of revenue for the continued operation and strengthening of tribal government and the delivery of governmental services.

B. The manufacture, distribution, possession, sale, service, and consumption of Alcoholic Beverages within the Paiute Indian Tribe of Utah Reservation are matters of significant concern and special interest to the Tribe.

C. Federal law currently prohibits the introduction of liquor in Indian country (18 U.S.C. § 1154), except as provided therein, leaving tribes the decision regarding when and to what extent liquor transactions, sales, possession and service shall be permitted on their reservation (18 U.S.C. § 1161).

D. This Ordinance is enacted pursuant to the Act of August 15, 1953, Pub. L. 83–277, 67 Stat. 586, codified at 18 U.S.C. 1161, by the authority of the Tribal Council of the Paiute Indian Tribe of Utah under the Constitution of the Paiute Indian Tribe of Utah, Article V, Section 1.

E. This Ordinance shall apply to all lands within the exterior boundaries of the Paiute Indian Tribe of Utah and its constituent Bands consistent with applicable federal Indian liquor laws.

F. Authorized sales of Alcoholic Beverages on the Paiute Indian Tribe of Utah Reservation shall comply with State of Utah liquor law standards to the extent required by 18 U.S.C. § 1161.

SECTION 3. DEFINITIONS

As used in this Ordinance, the following words and phrases shall have the following meanings, unless the context clearly requires otherwise:

A. "Alcoholic Beverage(s)" means and shall include beer, wine, and liquor, as herein defined.

B. "Bands" means the five constituent Bands of the Paiute Indian Tribe of Utah, the Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes. "Band" means any one of the five constituent Bands.

C. "Beer" means a product that contains at least 0.5% alcohol by volume, but not more than 4.0% alcohol by volume or 3.2% alcohol by weight, and is obtained by fermentation, infusion, or decoction of any malted grain. Such products may or may not contain hops or other vegetable products. "Beer" includes products referred to as light beer, malt liquor, or malted beverages.

D. "Heavy beer" means a product that contains more than 4.0% alcohol by volume or 3.2% alcohol by weight and is obtained by fermentation, infusion, or decoction of malted grain. Heavy beer is considered liquor for purposes of this Ordinance.

E. "Licensee" means a person or entity that holds an Off-Premise Beer Retail License, as herein defined, and includes any employee or agent of the Licensee.

F. "Liquor" means alcohol, or an alcoholic, spirituous, vinous, fermented, malt, flavored malt beverage, or other liquid, or combination of liquids, a part of which is spirituous, vinous, or fermented, and all other drinks, or drinkable liquids, that contains at least 0.5% alcohol by volume and is suitable to use for beverage purposes. "Liquor" does not include any beverage defined as Beer.

G. "Off-Premise Beer Retail License" shall mean a license issued by the Tribal Council of the Paiute Indian Tribe of Utah in accordance with Utah state law and this Ordinance.

H. "Retailer" means a person engaged in the sale or distribution of an alcoholic beverage to a consumer.

I. "Sale," "sell" and "to sell" means a transaction, exchange, or barter whereby, for consideration, an alcoholic beverage is either directly or indirectly transferred, solicited, ordered, delivered for value, or by a means or under a pretext is promised or obtained, whether done by a person as a principal, proprietor, or as an agent, servant, or employee.

J. "Tribal Council" shall mean the Tribal Council of the Paiute Indian Tribe of Utah, which is the supreme governing body of the Paiute Indian Tribe of Utah.

K. "Tribal Land(s)" shall mean and reference the geographic area that includes all land included within the definition of "Indian country" as established and described by federal law and that is under the jurisdiction of the Paiute Indian Tribe of Utah, including all tribally and Band owned trust lands located within same as are now in existence or may hereafter be added to.

L. "Tribal Law" means the Constitution of the Paiute Indian Tribe of Utah and all laws, ordinances, codes, resolutions and regulations now and hereafter duly enacted by the Tribe.

M. "Tribe" shall mean the Paiute Indian Tribe of Utah.

N. "Wine" means an alcoholic beverage obtained by the fermentation of the natural sugar content of fruits, plants, honey, or milk, or other like substance, whether or not another ingredient is added.

SECTION 4. JURISDICTION

This Ordinance is in conformity with the laws of the State of Utah as required by 18 U.S.C. § 1161. To the extent permitted by applicable law, the Paiute Indian Tribe of Utah asserts jurisdiction to determine whether Liquor sales and service are permitted within the exterior boundaries of the Paiute Indian Tribe of Utah Reservation.

SECTION 5. RELATION TO OTHER LAWS

All prior codes, ordinances, resolutions and motions of the Paiute Indian Tribe of Utah and its five constituent Bands authorizing, prohibiting, or in any way dealing with the sale or service of Alcoholic Beverages are hereby repealed and are of no further force or effect to the extent they are inconsistent or conflict with the provisions of this Ordinance. No tribal business licensing law or other Tribal Law shall be applied in a manner inconsistent with the provisions of this Ordinance.

SECTION 6. COMPUTATION OF TIME

Unless otherwise provided in this Ordinance, in computing the period of time prescribed or allowed by this Ordinance, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday. For the purposes of this Ordinance, the term "legal holiday" shall mean all legal holidays under tribal or federal law. All documents mailed shall be deemed served at the time of mailing.

SECTION 7. AUTHORIZED SALE OF LIQUOR

No person or entity shall sell Alcoholic Beverages on the Paiute Indian Tribe of Utah Reservation without the prior authorization of the Tribal Council, as set forth in this Ordinance. The Tribal Council shall not authorize the sale of Alcoholic Beverages on the lands of a constituent Band without the express written request of the affected Band by duly adopted Band Resolution.

SECTION 8. PROHIBITIONS

A. General Prohibitions. The unauthorized sale and/or service of Liquor is prohibited within the Paiute Indian Tribe of Utah Reservation, and is hereby declared an offense under Tribal Law. Federal liquor laws applicable to Indian country shall remain applicable to any person, act or transaction which is not authorized by this Ordinance and violators of this Ordinance shall be subject to federal prosecution as well as to legal action in accordance with the law of the Paiute Indian Tribe of Utah.

B. Age Restrictions. No person shall be authorized to sell or serve Liquor within the Paiute Indian Tribe of Utah Reservation unless he or she is at least twenty-one (21) years of age. No person may be served Liquor within the Paiute Indian Tribe of Utah Reservation unless he or she is at least twenty-one (21) years of age. Any person violating this Section shall be guilty of a separate violation of this Ordinance for each and every drink served.

C. No Credit Liquor Sales. The sale of Liquor authorized by this Ordinance shall be upon a cash basis only. Payment for Liquor shall be by cash, credit card, or check.

SECTION 9. LICENSING IN GENERAL

Pursuant to Utah state law, a state license, issued by the Utah Department of Alcoholic Beverage Control, is required for the sale and service of Alcoholic Beverages within the state. However, a state license is not required for "to go" sales of Beer. Utah state law provides that only a local license is required for the sale of Beer for consumption off the premises. Accordingly, pursuant to Utah state law and this Ordinance, the Tribal Council shall have the authority to issue, suspend and revoke Off-Premise Beer Retail Licenses. All other licenses for the sale and/or service of Alcoholic Beverages on Tribal Lands must be issued by the State of Utah, with approval by the Tribe and the affected Band, and in accordance with federal, state, and Tribal Law, including this Ordinance.

SECTION 10. OFF-PREMISE BEER RETAIL LICENSES

As set forth in this Ordinance and in conformity with Utah state law, the Tribal Council shall have the authority to issue, suspend and revoke Off-Premise Beer Retail Licenses. An Off-Premise Beer Retail License shall entitle the Licensee to sell Beer on the licensed premises in original containers, of a size not to exceed two liters, for consumption off the premises.

A. Eligibility. Only applicants operating on Tribal Lands shall be eligible to receive an Off-Premise Beer Retail License issued by the Tribe.

B. Application for an Off-Premise Beer Retail License.

1. Application Process. Applicants meeting the eligibility requirements of this Ordinance, as well as applicable federal, state and/or Tribal Law, must apply to the Tribal Council for an Off-Premise Beer Retail License. The applicant shall file a written application with the Tribal Council, in a form prescribed and approved by the Tribal Council. The application shall be accompanied by a nonrefundable application fee, as set by the Tribal Council, and such other information and/or documentation as the Tribal Council may require.

2. Action on the Application. The Tribal Council shall have the authority to deny, approve, or approve with conditions, an application for an Off-Premise Beer Retail License or for the renewal of such license, consistent with the laws of the Tribe and with this Ordinance.

3. Denial of License or Renewal. An application may be denied for one or more of the following reasons.

a. The applicant has materially misrepresented facts contained in the application;

b. The applicant is presently not in compliance with this Ordinance or other tribal or federal law, or with the applicable laws of the State of Utah;

c. The applicant has failed to complete the application properly, has failed to provide required information and/or documentation, and/or has failed to tender the appropriate fee;

d. The Tribal Council finds that granting the license (or renewal thereof) would create a threat to the peace, safety, morals, health or welfare of the Tribe, and/or is otherwise not in the best interest of the Tribe or tribal members.

4. Temporary Denial. If the application is denied solely on the basis of Section 10–B–3(c), the Tribal Council shall, within fifteen (15) days of receipt of the application, issue a written notice of temporary denial to the applicant. Such notice shall set forth the reasons for denial and shall state that the denial will become permanent if the problem(s) is not corrected within

fifteen (15) days following receipt of the notice.

5. Cure. If an applicant is denied a license, the applicant may cure the deficiency and resubmit the application for consideration. Each re-submission will be treated as a new application for license or renewal of a license.

6. Investigation. Upon receipt of an application for the issuance or renewal of a license, the Tribal Council shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this Ordinance have been complied with.

7. Term and Renewal of License. Each license shall be issued for a period not to exceed one (1) year from the original date of issuance and may be renewed thereafter on a year-to-year basis, in compliance with this Ordinance and any rules and/or regulations hereafter adopted by the Tribe. The applicant shall renew a license by, not less than sixty (60) days prior to the expiration of the license, submitting a written renewal application to the Tribal Council on the prescribed form.

8. Posting of License. The Licensee shall post and keep posted its Off-Premise Beer Retail License on the licensed premises.

C. Prohibited Actions. It shall be unlawful for any person to sell Beer for off-premises consumption without first having obtained an Off-Premise Beer Retail License from the Tribe. It shall also be unlawful for an Off-Premise Beer Retail Licensee to permit the consumption of Beer or other Alcoholic Beverages on the licensed premises.

D. No Employment of Minors. The Licensee shall not employ any person at the licensed premises at which Beer is sold unless the person to be employed is at least twenty-one (21) years of age.

E. Alcohol Training and Education. The Tribe shall require the Licensee of an Off-Premise Beer Retail License to comply with the requirements of Utah state law regarding alcohol training and education for off-premise consumption, including Utah Code Ann. §§ 32A–10–103 and 62A–15–401.

F. Separation of Alcoholic Beverages from Non-Alcoholic Beverages. In accordance with Utah Code Ann. § 32A–10–102(5) and R81–10–1, an Off-Premise Beer Retailer must display Beer products in an area that is visibly separate and distinct from the area where non-alcoholic beverages are displayed.

G. Required Signage. A Licensee holding a Off-Premise Beer Retail License shall conform with the sign requirements of applicable Utah state law, including Utah Code Ann. § 32A10–102(5) and R81–10–1.

H. Tribe's Right to Inspect. The Tribe shall have the right to inspect the licensed premises during regular business hours for the purpose of insuring the Licensee's compliance with all provisions of this Ordinance and other applicable law.

I. Record requirements. Holders of Off-Premise Beer Retail Licenses shall maintain records which shall disclose the gross sale of Beer during each and every year. Such records shall be available for inspection and audit by the Tribe at any time following the end of each year and for eighteen (18) months thereafter. Failure of a Licensee to properly maintain the required records or failure to submit such records for inspection and audit shall be cause for suspension or revocation of an Off-Premise Beer Retail License.

J. Conformity with State Law. A Licensee holding an Off-Premise Beer Retail License issued by the Tribe shall conform with all applicable Utah state law, including, but not limited to, those provisions of Utah state law specifically described and referenced in this Ordinance.

SECTION 11. PENALTIES

Any person or entity found to be in violation of this Ordinance, including any lawful rule or regulation promulgated pursuant thereto, and/or other applicable federal, state or Tribal Law, shall be subject to penalties, including, but not limited to, suspension or revocation of the license by the Tribal Council. Violations shall be subject to a civil fine of not more than Five Hundred Dollars ($500.00) for each such violation. The Tribal Council may adopt by Resolution a schedule of fines for each violation, taking into account the severity of the offense and threat the violation may pose to the general health and welfare. Such schedule may also provide for the imposition of increased monetary penalties for repeated violations. The civil penalties provided for in this section shall be in addition to any criminal penalties that may be imposed under applicable law.

SECTION 12. COLLECTION OF APPLICABLE FEES, TAXES AND/OR FINES

The Tribal Council shall have the authority to collect all applicable and lawful fees, taxes, and/or fines from person or Licensee as imposed under this Ordinance.

SECTION 13. REQUEST FOR RECONSIDERATION

Any person or entity may request reconsideration of the Tribal Council's decision to deny an application, approve an application with conditions, deny a request for renewal, or revoke a license by formally submitting a written request for reconsideration to the Tribal Council. The Tribal Council shall respond to any such request for reconsideration within fifteen (15) days. The applicant shall have the right to present witnesses to testify and to present written documents in support of his or her position. The Tribal Council shall render its decision within sixty (60) days after the date of the hearing. The decision of the Tribal Council shall be final.

SECTION 14. SOVEREIGN IMMUNITY PRESERVED

Nothing in this Ordinance is intended as or shall be construed as a waiver of the sovereign immunity of the Tribe.

SECTION 15. LIBERAL CONSTRUCTION

Provisions of this Ordinance shall be liberally construed to achieve the purposes set forth, whether clearly stated or apparent from the context of the language used herein.

SECTION 16. SEVERABILITY

If any provision or provisions of this Ordinance is/are held invalid by a court of competent jurisdiction, this Ordinance shall continue in effect as if the invalid provision(s) was/were not a part hereof.

SECTION 17. EFFECTIVE DATE

This Ordinance shall be effective following approval by the Paiute Indian Tribe of Utah Tribal Council and approval by the Secretary of the Interior or his/her designee and publication in the Federal Register as provided by federal law.

ENACTMENT

BE IT ORDAINED BY THE TRIBAL COUNCIL OF THE PAIUTE INDIAN TRIBE OF UTAH: That this Alcoholic Beverage Control Ordinance of the Paiute Indian Tribe of Utah was fully considered by the Tribal Council at a duly called meeting, at which a quorum was present and that the same was passed by a vote of 5 in favor, 0 opposed, 0 abstained, and 0 absent this 1 day of June, 2010.

/s/

Jeanine Borchardt, Tribal Chairwoman

ATTEST:

/s/

Patrick Charles, Tribal Council Secretary

[FR Doc. 2011–9900 Filed 4–22–11; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO-–0315–696; 8145–8B90–SZM]

Dog Management Plan/Draft Environmental Impact Statement, Golden Gate National Recreation Area, California

AGENCY: National Park Service, Interior.

ACTION: Notice of extended public comment period for Draft Environmental Impact Statement/Dog Management Plan, Golden Gate National Recreation Area.

SUMMARY: The National Park Service has prepared a Draft Dog Management Plan and Environmental Impact Statement (Plan/DEIS). The Plan/DEIS evaluates six alternatives for dog management in 21 areas of Golden Gate National Recreation Area (GGNRA). The original Notice of Availability (published in the **Federal Register** on January 20, 2011) announced a 90-day public comment period. In recognition of the complexity of the document and with deference to interest from the public and interested organizations, the comment period has been extended for an additional 45 days.

SUPPLEMENTAL INFORMATION: It will not be necessary for individuals, organizations, and agencies that have already commented to do so again. All other comments must now be postmarked or transmitted no later than May 30, 2011. Respondents wishing to comment electronically may do so online (*http://parkplanning.nps.gov/dogplan*), or letters may be submitted via regular mail to: Frank Dean, General Superintendent, GGNRA, Ft. Mason, Bldg. 201, San Francisco, CA 94123. Up-to-date information may be obtained by contacting GGNRA at (415) 561–4947.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 9, 2011.

Patricia L. Neubacher,

Acting Regional Director, Pacific West Region.

[FR Doc. 2011–9889 Filed 4–22–11; 8:45 am]

BILLING CODE 4312–FN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0411–7141; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before April 9, 2011. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by May 10, 2011. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

DISTRICT OF COLUMBIA

District of Columbia

Engine Company 16—Truck Company 3, (Firehouses in Washington DC MPS) 1018 13th St., NW., Washington, 11000281

Engine Company 22, (Firehouses in Washington DC MPS) 5760 Georgia Ave., NW., Washington, 11000282

Engine Company 26, (Firehouses in Washington DC MPS) 1340 Rhode Island Ave., NW., Washington, 11000283

Engine Company 27, (Firehouses in Washington DC MPS) 4201 Minnesota Ave., NE., Washington, 11000284

Engine Company 31, (Firehouses in Washington DC MPS) 4930 Connecticut Ave., NW., Washington, 11000285

Fire Department Headquarters—Fire Alarm Headquarters, (Firehouses in Washington DC MPS) 300 McMillan Dr., NW., Washington, 11000286

FLORIDA

Miami-Dade County

Lincoln Road Mall, 400–1100 Lincoln Rd., Washington Ave. to Alton Rd., Miami Beach, 11000287

KANSAS

Ellis County

Chestnut Street Historic District (Boundary Increase), 1302 Main St., Hays, 11000288

NEW YORK

Essex County

Wells Memorial Library, 12230 NY 9N, Upper Jay, 11000289

Otsego County

Gilbertsville Water Works, Reservoir Rd., Gilbertsville, 11000290

Rockland County

Christ Church, 416 Valentine Ave., Sparkill, 11000291

Ferdon, William, House, 270 Ferdon Ave., Piermont, 11000292

St. Lawrence County

Young Memorial Church, Jct. of School St. & NY 37, Brier Hill, 11000293

NORTH CAROLINA

Catawba County

Ridgeview Public Library, 415 1st St., SW., Hickory, 11000294

OREGON

Klamath County

Klamath County Armory & Auditorium, 1451 Main St., Klamath Falls, 11000295

VERMONT

Bennington County

Holden—Leonard Workers Housing Historic District, 121–139, 124–150 Benmont Ave. & 105–115, 117–123 Holden St., Bennington, 11000296

VIRGINIA

Richmond Independent City

Washington, George, Building, 1100 Bank St., Richmond (Independent City), 11000297

A request for REMOVAL has been made for the following resource:

NEW JERSEY

Bergen County

Anderson Street Station (Operating Passenger Railroad Stations TR) Anderson St., Hackensack, 84002520

[FR Doc. 2011–9887 Filed 4–22–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–769]

In the Matter of Certain Handheld Electronic Computing Devices, Related Software, and Components Thereof; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 21, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Microsoft Corporation of Redmond, Washington. An amended complaint and additional exhibits were filed on April 8, 2011 and April 12, 2011. The complaint, as amended, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain handheld electronic computing devices, related software, and components thereof by reason of infringement of certain claims of U.S. Patent No. 5,778,372 (“the ’372 patent”); U.S. Patent No. 5,889,522 (“the ’522 patent”); U.S. Patent No. 6,339,780 (“the ’780 patent”); U.S. Patent No. 6,891,551 (“the ’551 patent”); and U.S. Patent No. 6,957,233 (“the ’233 patent”). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 18, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain handheld electronic computing devices, related software, and components thereof that infringe one or more of claims 1 and 5 of the ’372 patent; claims 1, 2, and 12 of the ’522 patent; claims 1–6, 9–14, 17–26, and 29–42 of the ’780 patent; claims 1–3, 5, and 7–11 of the ’551 patent; claims 21 and 22 of the ’233 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant: Microsoft Corporation, One Microsoft Way, Redmond, WA 98052.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Barnes & Noble, Inc., 122 Fifth Avenue, New York, NY 10011.

barnesandnoble.com LLC, 76 9th Avenue, 9th Floor, New York, NY 10011.

Hon Hai Precision Industry Co., Ltd., 2 Zihyou Street, Tucheng City, Taipei County, 236, Taiwan.

Foxconn Electronics, Inc., 2 Zihyou Street, Tucheng City, Taipei County, 236, Taiwan.

Foxconn Precision Component (Shenzhen) Co. Ltd., No. 2, East Ring Road, No. 10 Industrial Zone, Yousong, Longhua, Shenzhen, Guandong 518109, China.

Foxconn International Holdings Ltd., 8F Peninsula Tower, 538 Castle Peak Road, Cheung Sha Wan Kowloon, New Territories, Hong Kong.

Inventec Corporation, Inventec Building, No. 66 Hou-Kang Street, Shin-Lin District, Taipei County, 111, Taiwan.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefore is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: April 19, 2011.

By order of the Commission.

James R. Holbein,

Acting Secretary to the Commission.

[FR Doc. 2011–9890 Filed 4–22–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

Notice is hereby given that on April 19, 2011, a proposed Consent Decree in *United States et al.* v. *Terra Industries Inc. et al.,* Civ. A. No. 5:11–cv–04038 was lodged with the United States Court for the Northern District of Iowa.

In this action, the United States and Co-Plaintiff States of Iowa, Mississippi and Oklahoma, sought the penalties and injunctive relief for violations of the Clean Air Act ("CAA") by Terra Industries Inc. ("Terra Industries"), Terra International (Oklahoma) Inc. ("Terra Oklahoma"), Terra Nitrogen, Limited Partnership ("Terra Nitrogen"), Port Neal Corporation ("Port Neal"), and Terra Mississippi Nitrogen, Inc. ("Terra Mississippi"), (collectively "Defendants" or "Terra"). Defendants are the owners and operators of nine nitric acid plants in the States of Iowa, Mississippi and Oklahoma. The Complaint alleged violations of: (1) The Prevention of Significant Deterioration of Air Quality provisions ("PSD"), Part C of Title I, at §§ 160–169B of the CAA, 42 U.S.C. 7470–7492 and corollary State Implementation Plans ("SIPs"); (2) the New Source Performance Standards for Nitric Acid Plants ("NSPS") promulgated pursuant to Section 111(b) of the CAA, 42 U.S.C. 7411(b) and codified at 40 CFR part 60, Subpart G; and (3) the Title V Permit Program Sections 502 and 503 of the CAA, 42 U.S.C. 7661a through 7661f, and corollary state provisions.

Pursuant to the proposed Consent Decree, Defendants will pay to the United States and State Co-Plaintiffs a civil penalty of $625,000 and implement injunctive relief at all nine of their nitric acid plants.

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, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States et al.* v. *Terra Industries Inc. et al.,* Civ. A. No. 5:11–cv–04038 (Northern District of Iowa), Department of Justice Case Number 90–5–2–1–2062/1.

During the public comment period, the Consent Decree may be examined at the Office of the United States Attorney, Northern District of Iowa, Hach Building Suite 400, 401 First St. SE, Cedar Rapids, IA 52401–1825. The Consent Decree may also 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, 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 $18.50 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Section Chief.

[FR Doc. 2011–9876 Filed 4–22–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1551]

National Institute of Justice Offender Tracking System Standard Workshop

AGENCY: National Institute of Justice, DOJ.

ACTION: Notice of Meeting of the NIJ Offender Tracking System Standard Workshop.

SUMMARY: The National Institute of Justice (NIJ) is hosting an Officer Tracking System Standard Workshop specifically to introduce manufacturers, certification bodies and test laboratories to the new *Offender Tracking System Standard* that is under development and to receive input and feedback. All participants are strongly encouraged to come prepared to ask questions and to voice suggestions and concerns.

The workshop will be held on Thursday, May 12, 2011 from 9 a.m. to 3 p.m. (EST) at the 20 F Street, NW., Conference Center, located at 20 F Street, NW., Washington, DC 20001–6701. The meeting room is the Conference Room B. Space is limited at this workshop, and as a result, we request that each participating organization limit their representatives to no more than two. Participants planning to attend are responsible for their own travel arrangements and lodging.

Please visit the Web site below to submit your registration request: *http://www.justnet.org/Documents/NIJ-Offender-Tracking-System-Standard-Workshop-Registration-Form.pdf* You will receive a response to your request within two (2) business days.

FOR FURTHER INFORMATION CONTACT: Jack Harne, by telephone at 202–616–2911 [**Note:** this is not a toll-free telephone number], or by e-mail at *Jack.Harne@usdoj.gov*.

John H. Laub,

Director, National Institute of Justice.

[FR Doc. 2011–9903 Filed 4–22–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1550]

Protective Helmet Standard Special Technical Committee Request for Proposals for Certification and Testing Expertise

AGENCY: National Institute of Justice, DOJ.

ACTION: Request for Proposals for Certification and Testing Expertise.

SUMMARY: The National Institute of Justice (NIJ) is in the process of developing a new Protective (possibly including both ballistic and riot protection) Helmet Standard and corresponding certification program requirements. This work will be performed by a Special Technical Committee (STC), comprised of practitioners from the field, researchers, testing experts, certification experts, and representatives from stakeholder organizations. It is anticipated that the STC members will participate in up to twelve 2-day meetings over an 18-month time period with the goal of completing development of the standard and certification program requirements.

It is anticipated that STC meetings will begin in June 2011. Travel expenses and per diem will be reimbursed for all STC meetings; however, participation time will not be funded. NIJ is seeking representatives from (1) certification bodies and (2) test laboratories with experience in programs for similar types of personal protective equipment. Additional preferred knowledge includes experience with ballistic testing or experience with law enforcement operations. There are up to four positions to be filled on the STC, and NIJ will accept the first 20 submissions for review. Interested parties are requested to nominate individuals from their organizations and submit no more than two pages describing the nominee's applicable experience, preferred knowledge, and affiliations with standards development organizations. To be considered, there must not be any conflict of interest in which the proposed STC member has a direct financial relationship with manufacturers of protective helmets.

Debra Stoe is the NIJ Program Manager responsible for this work, and Jim Wong is the point of contact for Ms. Stoe. Responses to this request for proposals shall be submitted to Jim Wong at *jim.wong@srnl.doe.gov* by May 13, 2011. The submissions will be reviewed, and participants will be notified regarding their acceptance by May 20, 2011.

FOR FURTHER INFORMATION CONTACT: Jim Wong by telephone at 803–725–5721 [**Note:** this is not a toll-free telephone number], or by e-mail at *jim.wong@srnl.doe.gov.*

John H. Laub,

Director, National Institute of Justice.

[FR Doc. 2011–9907 Filed 4–22–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1550]

Stab Resistance of Personal Body Armor (2000) Standard Special Technical Committee Request for Proposals for Certification and Testing Expertise

AGENCY: National Institute of Justice, DOJ.

ACTION: Request for Proposals for Certification and Testing Expertise.

SUMMARY: The National Institute of Justice (NIJ) is in the process of revising its *Stab Resistance of Personal Body Armor (2000)* Standard and corresponding certification program requirements. This work will be performed by a Special Technical Committee (STC), comprised of practitioners from the field, researchers, testing experts, certification experts, and representatives from stakeholder organizations. It is anticipated that the STC members will participate in up to twelve 2-day meetings over an 18-month time period with the goal of completing development of the standard and certification program requirements.

It is anticipated that STC meetings will begin in June 2011. Travel expenses and per diem will be reimbursed for all STC meetings; however, participation time will not be funded. NIJ is seeking representatives from (1) certification bodies and (2) test laboratories with experience in programs for similar types of personal protective equipment. Additional preferred knowledge includes experience with law enforcement and corrections operations. There are up to four positions to be filled on the STC, and NIJ will accept the first 20 submissions for review. Interested parties are requested to nominate individuals from their organizations and submit no more than two pages describing the nominee's applicable experience, preferred knowledge, and affiliations with standards development organizations. To be considered, there must not be any conflict of interest in which the proposed STC member has a direct financial relationship with manufacturers of stab-resistant armor.

Debra Stoe is the NIJ Program Manager responsible for this work, and Casandra Robinson is the point of contact for Ms. Stoe. Responses to this request for proposals shall be submitted to Casandra Robinson at *casandra.robinson@usdoj.gov* by May 13, 2011. The submissions will be reviewed, and participants will be notified regarding their acceptance by May 20, 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. 2011–9904 Filed 4–22–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities: Proposed Collection; Comment Request; DOL Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

ACTION: Notice.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the Department of Labor (DOL) is submitting a Generic Information Collection Request (Generic ICR): "DOL Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*).

DATES: Submit comments on or before May 25, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Departmental Management, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the DOL and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL received no comments were received in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB ICR Reference Number 201104–1225–001. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and

Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Below we provide the DOL projected average estimates for the next three years: [1]

Title: DOL Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Current Actions: New collection of information.

Type of Review: New Collection.

ICR Reference Number: 201104–1225–001.

Affected Public: Individuals and Households; Private Sector—Businesses or other for-profits and not-for-profit institutions; Public Sector—State, Local or Tribal Governments.

Average Expected Annual Number of activities: 20.

Total Estimated Number of Respondents: 300,000.

Total Estimated Number of Responses: 300,000.

Average minutes per response: 6 minutes.

Total Estimated Annual Burden Hours: 30,000.

Total Estimated Annual Costs Burden: $0.

Frequency of Response: Once per request.

Dated: April 18, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–9915 Filed 4–22–11; 8:45 am]

BILLING CODE 4510–23–P

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance Federal-wide:

Average Expected Annual Number of activities: 25,000.

Average number of Respondents per Activity: 200.

Annual responses: 5,000,000.

Frequency of Response: Once per request.

Average minutes per response: 30.

Burden hours: 2,500,000.

DEPARTMENT OF LABOR

Child Labor, Forced Labor, and Forced or Indentured Child Labor in the Production of Goods in Foreign Countries and Efforts by Certain Countries to Eliminate the Worst Forms of Child Labor

AGENCY: The Bureau of International Labor Affairs, United States Department of Labor.

ACTION: Notice: Request for information and invitation to comment.

SUMMARY: This notice is a request for information and/or comment on reports issued by the Bureau of International Labor Affairs (ILAB) on December 15, 2010, regarding child labor and forced labor in foreign countries. Relevant information will be used by the Department of Labor (DOL) in preparation of its ongoing reporting under Congressional mandates and Presidential directive.

DATES: Submitters of information are requested to provide their submission to the Office of Child Labor, Forced Labor and Human Trafficking (OCFT) at the e-mail or physical address below by 5 p.m., May 20, 2011.

To Submit Information: Information submitted to DOL should be submitted directly to OCFT, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693–4843 (this is not a toll free number). Comments, identified as "Docket No. DOL–2011–0002," may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.*

The portal includes instructions for submitting comments. Parties submitting responses electronically are encouraged not to submit paper copies.

- *Facsimile (fax):* OCFT at 202–693–4830.
- *Mail, Express Delivery, Hand Delivery, and Messenger Service (2 copies):* Tina McCarter at U.S. Department of Labor, OCFT, Bureau of International Labor Affairs, 200 Constitution Avenue, NW., Room S–5317, Washington, DC 20210.
- *E-mail:* E-mail submissions should be addressed to Tina McCarter at *mccarter.tina@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Tina McCarter (see contact information above).

SUPPLEMENTARY INFORMATION: I. Section 105(b)(1) of the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA of 2005"), Public Law 109–164 (2006), directed the Secretary of Labor, acting through ILAB, to "develop and make available to the public a list of goods from countries that the Bureau of International Labor Affairs has reason to believe are produced by forced labor or child labor in violation of international standards."

Pursuant to this mandate, in December 2007 DOL published in the **Federal Register** a set of procedural guidelines that ILAB follows in developing the list of goods (72 FR 73374). The guidelines set forth the criteria by which information is evaluated; established procedures for public submission of information to be considered by ILAB; and identified the process ILAB follows in maintaining and updating the list after its initial publication.

On September 10, 2009, ILAB released its initial list of goods from countries (TVPRA list). This list will be updated periodically, as additional countries and territories are researched and new information for countries and territories already reviewed is evaluated. The first update to the list was published December 15, 2010. For a copy of the 2010 TVPRA report, Frequently Asked Questions, and other materials relating to the TVPRA list, see ILAB's TVPRA Web page at: *http://*

www.dol.gov/ILAB/programs/ocft/tvpra.htm.

II. Executive Order No. 13126 (E.O. 13126) declared that it was "the policy of the United States Government * * * that the executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor." Pursuant to E.O. 13126, and following public notice and comment, the Department of Labor published in the January 18, 2001, Federal Register, a final list of products (the "List"), identified by country of origin, that the Department, in consultation and cooperation with the Departments of State (DOS) and Treasury [relevant responsibilities now within the Department of Homeland Security (DHS)], had a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor (66 FR 5353). In addition to the List, the Department also published on January 18, 2001, "Procedural Guidelines for Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor," which provide for maintaining, reviewing, and, as appropriate, revising the List (66 FR 5351). Based on DOL research and information submitted by the public, DOL issued an initial determination on September 11, 2009, announcing proposed updates to the E.O. 13126 list and requesting public comments. Public comments were received and reviewed by all relevant agencies, and a final determination was issued on July 20, 2010, that included all products proposed in the initial determination except for carpets from India (75 FR 42164). Further DOL research was conducted in 2010 and a new initial determination was published December 16, 2010, proposing to remove one good from the current list (charcoal from Brazil) and add another (textiles from Ethiopia). The current E.O. 13126 List, Procedural Guidelines, and related information can be accessed on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm.* Pursuant to Sections D through G of the Procedural Guidelines, the EO 13126 List may be updated through consideration of submissions by individuals or through OCFT's own initiative.

III. The Trade and Development Act of 2000 (TDA), Public Law 106–200 (2002), established a new eligibility criterion for receipt of trade benefits under the Generalized System of Preferences (GSP), Caribbean Basin Trade and Partnership Act (CBTPA), and Africa Growth and Opportunity Act (AGOA). The TDA amends the GSP reporting requirements of Section 504 the Trade Act of 1974, 19 U.S.C. 2464, to require that the President's annual report on the status of internationally recognized worker rights include "findings by the Secretary of Labor with respect to the beneficiary country's implementation of its international commitments to eliminate the worst forms of child labor." Title II of the TDA and the TDA Conference Report, Joint Explanatory Statement of the Committee of Conference, 106th Cong.2d.Sess. (2000), indicate that the same criterion applies for the receipt of benefits under CBTPA and AGOA, respectively.

In addition, the Andean Trade Preference Act (ATPA), as amended and expanded by the Andean Trade Promotion and Drug Eradication Act (ATPDEA), Public Law 107–210, Title XXXI (2002), includes as a criterion for receiving benefits "[w]hether the country has implemented its commitments to eliminate the worst forms of child labor as defined in section 507(6) of the Trade Act of 1974." DOL fulfills these reporting mandates through annual publication of the U.S. Department of Labor's Findings on the Worst Forms of Child Labor with respect to countries eligible for the aforementioned programs. The 2010 report and additional background information are available on the Internet at *http://www.dol.gov/ILAB/programs/ocft/tda.htm.*

Information Requested and Invitation to Comment: Interested parties are requested to consider DOL's 2009 Findings on the Worst Forms of Child Labor (TDA report); the 2010 List of Goods Produced by Child Labor or Forced Labor (TVPRA list); and the current Executive Order 13126 List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor (E.O. 13126 list), all of which may be found on the Internet at *http://www.dol.gov/ilab/highlights/if-20101215.htm* or obtained from OCFT. DOL requests comments on or information to update the findings and suggestions for government action for countries reviewed in the TDA report; information on the nature and extent of child labor, forced labor, and forced or indentured child labor in the production of goods in foreign countries; and information on government, industry, or third-party actions and initiatives to address these issues.

Materials submitted should be confined to the specific topics of these reports. DOL will generally consider sources with dates up to five years old (*i.e.,* data not older than January 1, 2005). DOL appreciates the extent to which submissions clearly indicate the time period to which they apply. In the interest of transparency, classified information will not be accepted. Where applicable, information submitted should indicate its source or sources, and copies of the source material should be provided. If primary sources are utilized, such as research studies, interviews, direct observations, or other sources of quantitative or qualitative data, details on the research or data-gathering methodology should be provided. Please see the 2010 TDA report, TVPRA List, and E.O. 13126 List for a complete explanation of relevant terms, definitions, and reporting guidelines employed by DOL, or refer to ILAB's previous Request for Information published in the **Federal Register** on Feb. 24, 2010 (75 FR 8402).

This notice is a general solicitation of comments from the public.

Signed at Washington, DC, this 20th day of April, 2011.

Sandra Polaski,

Deputy Undersecretary for International Labor Affairs.

[FR Doc. 2011–9934 Filed 4–22–11; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,131]

JLG Industries, Inc., Access Division, A Subsidiary of Oshkosh Corporation, Hagerstown, MD; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated April 8, 2011, by a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of JLG Industries, Inc., Access Division, a subsidiary of Oshkosh Corporation, Hagerstown, Maryland (subject firm). The determination was issued on March 9, 2011. The Department's Notice of Determination was published in the **Federal Register** on March 23, 2011 (76 FR 16450). The workers are engaged in activities related to the supply of design engineering, global procurement supply chain, and safety and reliability for the production of access equipment.

The negative determination was based on the findings that the subject firm worker group did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974, as amended. Further, the group eligibility requirements under Section 222(f) of the Act were not satisfied because the workers' firm has not been identified in an affirmative finding of injury by the U.S. International Trade Commission.

In the request for reconsideration, the petitioner stated that "Remaining employees were required to take a pay cut as well as a one week furlough without pay every three month * * * There were over 200 employees at the JLG Hagerstown, Maryland facilities who were affected by this and 100 percent of these employees were required to participate in the wage reduction and furlough lay-offs although the furlough lay-offs were scheduled at different times for different employees to maintain some semblance of a work force."

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the petitioning workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 14th day of April 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–9911 Filed 4–22–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,895, et al.]

Wellpoint, Inc. D/B/A/Anthem Blue Cross & Blue Shield Enterprise Provider Data Management Team Including On-Site Leased Workers From Kelly Services and Jacobsen Group, et al.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

TA–W–74,895
Wellpoint, Inc., D/B/A/Anthem Blue Cross & Blue Shield, Enterprise Provider Data Management Team, Including On-Site Leased Workers From Kelly Services and Jacobsen Group, Indianapolis, Indiana

TA–W–74,895A
Wellpoint, Inc., D/B/A/Anthem Health Plans Of Kentucky, Enterprise Provider Data Management Team, Louisville, Kentucky

TA–W–74,895B
Wellpoint, Inc., Enterprise Provider Data Management Team, Saint Louis, Missouri

TA–W–74,895C
Wellpoint, Inc., D/B/A/Anthem, Enterprise Provider Data Management Team, (Pewaukee) Waukesha, Wisconsin

TA–W–74,895D
Wellpoint, Inc., D/B/A/Anthem, Enterprise Provider Data Management Team, Richmond, Virginia

TA–W–74,895E
Wellpoint, Inc., D/B/A/Anthem East, Enterprise Provider Data Management Team, North Haven, Connecticut

TA–W–74,895F
Wellpoint, Inc., D/B/A/Blue Cross Blue Shield Of Georgia, Enterprise Provider Data Management Team, Atlanta, Georgia

TA–W–74,895G
Wellpoint, Inc., D/B/A/Blue Cross Blue Shield of Georgia, Enterprise Provider Data Management Team, Columbus, Georgia

TA–W–74,895I
Wellpoint, Inc., D/B/A/Anthem East, Enterprise Provider Data Management Team, Manchester, New Hampshire

TA–W–74,895J
Wellpoint, Inc., D/B/A/Empire Blue Cross and Blue Shield, Enterprise Provider Data Management Team, Albany, New York

TA–W–74,895K
Wellpoint, Inc., D/B/A/Empire Blue Cross and Blue Shield, Enterprise Provider Data Management Team, Brooklyn, New York

TA–W–74,895L
Wellpoint, Inc., D/B/A/Anthem, Enterprise Provider Data Management Team, Mason, Ohio

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 12, 2011, applicable to workers of Wellpoint, Inc., Enterprise Provider Data Management Team, including on-site leased workers from Kelly Services and Jacobsen Group, Indianapolis, Indiana. The workers provide health insurance transactional services. The notice was published in the **Federal Register** on January 26, 2011 (76 FR 4731). The certification was amended on March 30, 2011 to include workers from auxiliary facilities in multiple states who were similarly affected by the acquisition of services that contributed importantly to separations at the Indianapolis, Indiana facility. The amended certification will be published soon in the **Federal Register.**

At the request of a State agency, the Department reviewed the amended certification for workers of the subject firm.

A review of the amended certifications shows that workers of Wellpoint, Inc., d/b/a Anthem East, Enterprise Provider Data Management Team, South Portland, Maine (TA–W–895H) are currently covered under an existing certification, TA–W–74,299, that expires on August 2, 2012.

Accordingly, the Department is amending this certification to delete TA–W–895H. The other locations covered by the amended certification are unaffected.

The amended notice applicable to TA–W–74,895 is hereby issued as follows:

All workers of Wellpoint, Inc., d/b/a Anthem Blue Cross & Blue Shield, Enterprise Provider Data Management Team, including on-site leased workers from Kelly Services and Jacobsen Group, Indianapolis, Indiana (TA–W–74,895), Wellpoint, Inc., d/b/a Anthem Health Plans of Kentucky, Enterprise Provider Data Management Team, Louisville, Kentucky (TA–W–74,895A), Wellpoint, Inc., Enterprise Provider Data Management Team, Saint Louis, Missouri (TA–W–74,895B), Wellpoint, Inc., d/b/a Anthem, Enterprise Provider Data Management Team, (Pewaukee), Waukesha, Wisconsin (TA–W–74,895C), Wellpoint, Inc., d/b/a Anthem, Enterprise Provider Data Management Team, Richmond, Virginia (TA–W–74,895D), Wellpoint, Inc., d/b/a Anthem East, Enterprise Provider Data Management Team, North Haven, Connecticut (TA–W–74,895E), Wellpoint, Inc., d/b/a Blue Cross Blue Shield of Georgia, Enterprise Provider Data Management Team, Atlanta, Georgia (TA–W–74,895F), Wellpoint, Inc., d/b/a Blue Cross Blue Shield of Georgia, Enterprise Provider Data Management Team, Columbus, Georgia (TA–W–74,895G), Wellpoint, Inc., d/b/a Anthem East, Enterprise Provider Data Management Team, Manchester, New Hampshire (TA–W–74,895I) Wellpoint, Inc., d/b/a Empire Blue Cross, Enterprise Provider Data Management Team, Albany, New York (TA–W–74,895J) Wellpoint, Inc., d/b/a Empire Blue Cross and Blue Shield, Enterprise Provider Data Management Team, Brooklyn, New York (TA–W–74,895K) Wellpoint, Inc., d/b/a Anthem, Enterprise Provider Data Management Team, Mason, Ohio (TA–W–74,895L), who became totally or partially separated from employment on or after November 15, 2009, through January 12, 2013, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 15th day of April 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–9912 Filed 4–22–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–042)]

Re-Establishment of the National Space-Based Positioning, Navigation, and Timing (PNT) Advisory Board

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of advisory committee re-establishment.

SUMMARY: Notice is hereby given that in accordance with the President's 2004 U.S. Space-Based PNT Policy established on December 8, 2004, and continuing and consistent Executive Branch PNT policy objectives since that time, it has been determined that an advisory board comprised of experts from outside the United States Government is necessary and in the public interest. Accordingly, NASA is re-establishing the National Space-Based PNT Advisory Board. The previous charter for the National Space-Based PNT Advisory Board expired on January 26, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. James J. Miller, Designated Federal Officer and Deputy Director of Policy and Strategic Communications, Office of Space Communications and Navigation, National Aeronautics and Space Administration, Washington, DC 20546, telephone 202–358–4417, *jj.miller@nasa.gov.*

SUPPLEMENTARY INFORMATION: The National Space-Based PNT Advisory Board will provide advice on U.S. space-based PNT policy, planning, program management, and funding profiles in relation to the current state of national and international space-based PNT services. The National Space-Based PNT Advisory Board will function solely as an advisory body and will comply fully with the provisions of the Federal Advisory Committee Act (FACA). Copies of the charter will be filed with the General Services Administration, the appropriate Committees of the Congress, and with the Library of Congress.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–9872 Filed 4–22–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before *May 25, 2011.* Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (*See* 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending:

1. Department of the Interior, Office Surface Mining and Reclamation Enforcement (N1- 471–10–5, 2 items, 1 temporary item). Master files of an electronic information system used to document unfunded high priority coal reclamation projects. Proposed for permanent retention are snapshots of the master files.

2. Department of Justice, Federal Bureau of Investigation (N1–65–10–14, 3 items, 2 temporary items). Records of the Domestic Emergency Support Team in the Critical Incident Response group, including files related to training, exercises, and responses to events as well as administrative files. Proposed for permanent retention are policy files.

3. Department of Justice, Federal Bureau of Investigation (N1–65–10–17, 1 item, 1 temporary item). Master files of electronic information systems used to analyze large volumes of evidence to facilitate case processing. Evidence used in an investigation is filed in the appropriate investigation case file.

4. Department of Justice, Federal Bureau of Investigation (N1–65–10–19, 3 items, 1 temporary item). Records of the Foreign Emergency Report Team in the Critical Incident Response Group, including deployment files for protection at overseas meetings, events, training, and exercises. Proposed for permanent retention are deployment files related to terrorist incidents and other high-profile incidents.

5. Department of Justice, Federal Bureau of Investigation (N1–65–11–8, 5 items, 5 temporary items). Records of the Office of Congressional Affairs, including calendars, reference material, routine constituent inquiries, and master files of an electronic information system used to track correspondence.

6. Department of Justice, Federal Bureau of Investigation (N1–65–11–9, 2 items, 2 temporary items). Records of the Institutional Review Board relating to research projects undertaken within the agency, including research proposals, informed consent forms, and other administrative management records.

7. Department of Justice, Federal Bureau of Investigation (N1–65–11–12, 1 item, 1 temporary item). Records of the Critical Incident Response Group, including case files related to counterterrorism preparedness for special events.

8. Administrative Office of the United States Courts, United States Bankruptcy Courts (N1–578–11–1, 11 items, 2 temporary items). Non-electronic bankruptcy case files and adversary proceedings files not selected as permanent by random sampling or by historical selection criteria. Proposed for permanent retention are case files dated 1940 and earlier; cases filed under the Bankruptcy Acts of 1800, 1841, and 1867; cases files under the Bankruptcy Acts of 1898 and 1978 under Chapter VIII, Section 75 (Agricultural), Chapter VIII, Section 77 (Railroad Reorganization), Chapter IX (Political Subdivisions), Chapter X (Corporate Reorganizations), Chapter XV (Railroad Adjustments), Chapter 7, Subchapters III (Stockbroker) and IV (Commodity Broker), Chapter 9 (Municipality), Chapter 11, Subchapter IV (Railroad Reorganization), case files containing orders pursuant to Chapter XIV of the Bankruptcy Act of 1898 or Section 908 of Title IX of the Merchant Marine Act; Chapter 12 of the Congressional Act of 1986 (Family Farms and Family Fishermen); historically significant cases; cases selected in a random sample; and adversary proceedings that go to trial, are historically significant, and are selected by a random sample.

9. Administrative Office of the United States Courts, United States District Courts (N1–21–11–1, 6 items, 2 temporary items). Criminal case files for misdemeanors, petty offenses, non-trial cases from 1970 or after. Proposed for permanent retention are trial cases; cases relating to treason, national security, or crimes by public officials; and historically significant cases.

10. Federal Maritime Commission, Agency-wide (N1–358–10–1, 2 items, 2 temporary items). Master files of an electronic information system containing copies of commission issuances and public filings for public use. Also included is the agency website containing information about the agency and its programs.

Dated: April 20, 2011.

Sharon G. Thibodeau,

Deputy Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 2011–10023 Filed 4–22–11; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Assumption Buster Workshop: Abnormal Behavior Detection Finds Malicious Actors

AGENCY: The National Coordination Office (NCO) for the Networking and Information Technology Research and Development (NITRD) Program, National Science Foundation.

ACTION: Call for participation.

FOR FURTHER INFORMATION CONTACT: *assumptionbusters@nitrd.gov.*

DATES: *Workshop:* June 20, 2011; *Deadline:* May 13, 2011. Apply via e-mail to *assumptionbusters@nitrd.gov.* Travel expenses will be paid at the government rate for selected participants who live more than 50 miles from Washington DC.

SUMMARY: The NCO, on behalf of the Special Cyber Operations Research and Engineering (SCORE) Committee, an interagency working group that coordinates cyber security research activities in support of national security systems, is seeking expert participants in a day-long workshop on abnormal and malicious behavior detection. The workshop will be held June 20, 2011 in the Washington DC area. Applications will be accepted until 5 p.m. EDT, May 13, 2011. Accepted participants will be notified by May 25, 2011.

SUPPLEMENTARY INFORMATION:

Overview: This notice is issued by the National Coordination Office for the Networking and Information Technology Research and Development (NITRD) Program on behalf of the SCORE Committee.

Background:

There is a strong and often repeated call for research to provide novel cyber security solutions. The rhetoric of this call is to elicit new solutions that are radically different from existing solutions. Continuing research that achieves only incremental improvements is a losing proposition. We are lagging behind and need technological leaps to get, and keep, ahead of adversaries who are themselves rapidly improving attack technology. To answer this call, we must examine the key assumptions that underlie current security architectures. Challenging those assumptions both opens up the possibilities for novel solutions that are rooted in a fundamentally different understanding of the problem and provides an even stronger basis for moving forward on those assumptions that are well-founded. The SCORE Committee is conducting a series of four workshops to begin the assumption buster process. The assumptions that underlie this series are that cyber space is an adversarial domain, that the adversary is tenacious, clever, and capable, and that re-examining cyber security solutions in the context of these assumptions will result in key insights that will lead to the novel solutions we desperately need. To ensure that our discussion has the requisite adversarial flavor, we are inviting researchers who develop solutions of the type under discussion, and researchers who exploit these solutions. The goal is to engage in robust debate of topics generally believed to be true to determine to what extent that claim is warranted. The adversarial nature of these debates is meant to ensure the threat environment is reflected in the discussion in order to elicit innovative research concepts that will have a greater chance of having a sustained positive impact on our cyber security posture.

The fourth topic to be explored in this series is "Abnormal Behavior Detection Finds Malicious Actors." The workshop on this topic will be held in the Washington, DC area on June 20, 2011.

Assertion: "Abnormal Behavior Detection Finds Malicious Actors."

In an effort to reduce losses due to fraud, financial services companies have been fairly successful in establishing fraud detection analytics, based on abnormal behavior identification, which identify financial transactions that seem out of norm for a particular financial services customer. For example, credit card companies acting on this information will contact cardholders to validate anomalous behavior, or if costs are high, and users unavailable, can freeze accounts until the anomaly is investigated. In this way, they can curtail the loss due to prolonged invalid use of a credit card. Fraud detection algorithms (based on user behavior models) and procedures immediately set off account alarms and/or deny additional transactions after they have detected a fraudulent or suspicious transaction. Depending upon the fraud method (*e.g.,* automated gasoline purchase), they may not always block the first fraudulent transaction on a given card.

Online banking financial institutions employ similar behavioral models to monitor the size and destinations of financial transfers, and/or on-line transactions (such as change of address or payee) will delay transfers until the customer can be reached to confirm the transactions and/or provide additional authentication. Despite the use of best available behavior modeling and monitoring, financial institutions continue to sustain significant financial loss from fraud. Can the field of fraud detection (and cybersecurity in general) be improved by new technology and approaches?

Fraud detection works on the assumption that malicious fiscal behavior is a subset of abnormal behavior—if the fraudulent user mimics the financial behavior of the authorized user, these methods do not work. Detection methods do not assume that malicious behavior is automatically distinguishable from unusual behavior on the part of authorized users. The fraud detection algorithms use the financial services customer's history to build a profile of "normal" transactions and develop thresholds for unusual behavior. The volume of transactions allows for reasonable thresholds to be established. Fraud detection methods rely on strong models of normal behavior, or known criminal behavior characteristics. The development of many of these models is aided by the fact that the value of a transaction is numeric and allows sets of values to be analyzed with well understood algorithms. For example, credit card purchases have relatively small and fixed semantics: Store names are typed, businesses are categorized, relationships among businesses and purchases by card users are fairly easy to establish (e.g., people who buy plane tickets may also purchase luggage, or may eat out more when they are away, or may spend more in general while traveling). These models enable gradual change in behavior to be learned and help drive down false alerts.

Many cyber intrusion detection techniques, or insider threat detection techniques, aim to achieve similar results by using abnormal behavior detection as a starting point. Yet, it is an open question whether these techniques can expect to attain the same broad-based success when applied in the broader cyber security domain. The domains share an adversarial dynamic that might indicate that similar analyses could be effective. But do the assumptions of the relationship between malicious and normal behavior hold true? Can we establish a solid footing in terms of models of normal transaction semantics and transaction value? Does the real time nature of cyber decision making, and the ease of dynamic changes in the criminal's attack signature, present insurmountable challenges for behavioral techniques?

In this workshop, representatives from government and industry financial organizations will present different financial services fraud detection mechanisms, strengths, and areas needing further development. This will allow workshop participants to have a common understanding of the state of fraud detection practice.

How To Apply

If you would like to participate in this workshop, please submit (1) a resume or curriculum vita of no more than two pages which highlights your expertise in this area and (2) a one-page paper stating your opinion of the assertion and exploring new ideas to improve fraud detection specifically, and malicious cyber behavior in general. The workshop will accommodate no more than 60 participants, so these brief documents need to make a compelling case for your participation. Applications should be submitted to *assumptionbusters@nitrd.gov* no later than 5 p.m. EDT on May 13, 2011.

Selection and Notification:

The SCORE committee will select an expert group that reflects a broad range of opinions on the assertion. Accepted participants will be notified by e-mail no later than May 25, 2011. We cannot guarantee that we will contact individuals who are not selected, though we will attempt to do so unless the volume of responses is overwhelming.

Submitted by the National Science Foundation for the National Coordination Office (NCO) for Networking and Information Technology Research and Development (NITRD) on April 19, 2011.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2011–9877 Filed 4–22–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–0036; NRC–2009–0278]

Notice of Availability of Draft Environmental Assessment and Finding of No Significant Impact for a License Amendment to Materials, License No. SNM–33, Westinghouse Electric Company, LLC, Hematite Decommissioning Project, Festus, Missouri (TAC NO. J00357)

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Availability.

DATES: The public comment period on the draft Environmental Assessment and Finding of No Significant Impact (FONSI) closes on May 25, 2011. Written comments should be submitted as described in the **ADDRESSES** section of this notice. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before May 25, 2011.

ADDRESSES: Please include Docket ID NRC–2009–0278 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov*. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed. You may submit comments by any one of the following methods:

• Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0278. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: *Carol.Gallagher@nrc.gov*.

• Mail comments to: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• Fax comments to: RADB at 301–492–3446.

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

• NRC's Public Document Room (PDR): The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. The draft Environmental Assessment and Finding of No Significant Impact is available electronically under ADAMS Accession Number ML110870992.

• Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2009–0278.

FOR FURTHER INFORMATION CONTACT: John J. Hayes, Senior Project Manager, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: 301–415–5928; fax number: 301–415–5369; e-mail: *John.Hayes@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is intending to issue a license amendment to special nuclear material (SNM) license number SNM–33. SNM–33 was issued to Westinghouse Electric Company, LLC (WEC) for the former Hematite Fuel Cycle Facility in Hematite, Missouri. Since the fuel cycle facility operations have ceased, the Hematite site is undergoing preparation for site decommissioning. The facility is now referred to as the Hematite Decommissioning Project (HDP). The purpose of the proposed amendment is to authorize disposal of approximately 23,000 m^3 (30,000 yd^3) of soil and debris containing low concentrations of byproduct material and SNM at the US Ecology Idaho, Inc. (USEI) hazardous waste disposal facility near Grand View, Idaho. WEC requested authority for this action on May 21, 2009 (ADAMS No. ML091480071), pursuant to Section 20.2002 of Title 10 of the *Code of Federal Regulations* (10 CFR 20.2002), "Method of Obtaining Approval of Proposed Disposal Procedures." This action would also exempt USEI from further NRC licensing requirements to possess and dispose of byproduct material and special nuclear material (SNM) identified in WEC's proposed license amendment. Waste generated from the proposed action would be classified as meeting regulatory requirements for unrestricted release or as radioactive material and be packaged, transported and disposed of based on applicable regulations.

NRC has prepared a draft EA (ML110870992) in support of this amendment to allow WEC HDP, under their current license, to dispose of certain low-level waste (LLW) at the USEI hazardous waste disposal facility in Grand View, Idaho.

II. EA Summary

Under 10 CFR 20.2002, WEC proposes to dispose of about 23,000 m^3 (30,000 yd^3) of LLW from the HDP that contains byproduct material and SNM at the USEI hazardous waste disposal facility. The LLW will be generated as part of decommissioning activities, which will include exhumation of existing burial pits, as described in the Hematite DP. There are 40 unlined pits, each of which is approximately 12 meters (40 feet) long, 6 meters (20 feet) wide, and 3.6 meters (12 feet) deep. The pits were used to dispose of waste generated by the former owners of the facility from 1965 to 1971. In addition, it is estimated that there are 20–25 burials for which there are no records. These unrecorded burials are believed to be in the area between the documented Burial Pits and the site buildings, under roadways in the eastern portion of the central tract area of the HDP site. Additional impacted material may come from underneath the site buildings.

The NRC staff has prepared the draft EA in support of the proposed license amendment. The NRC staff considered impacts to many aspects of the surrounding environment as listed in Table 1.

TABLE 1—ENVIRONMENTAL ASPECTS CONSIDERED FOR THE HEMATITE DECOMMISSIONING PROJECT SITE AND US ECOLOGY IDAHO, INC.

Land use	Noise
Transportation	Historic and cultural resources
Geology and soils	Visual/scenic resources
Water resources	Socioeconomics
Ecological resources	Public and occupational health
Air Quality	Waste management

The NRC has concluded that the proposed action to grant a license amendment to WEC HDP, and an exemption to USEI from the requirements for a license under 10 CFR 30.3 and 10 CFR 70.3 is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest.

III. Finding of No Significant Impact

On the basis of this EA, NRC has concluded that there are no significant environmental impacts and the issuance of a license amendment does not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the letter requesting the amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. The ADAMS accession numbers for the documents related to this notice are:

1. May 21, 2009 Hematite Alternate Disposal Request (ML091480071)

2. July 31, 2009 HDP Environmental Report (ML092870403 and ML092870405)

3. Hematite Response to NRC RAIs, December 29 2009, (ML100320540)

4. Response to Additional Information Requested for Alternate Waste Disposal Authorization, March 31, 2010, (ML100950386)

5. Hematite Soil Contour Data, March 31, 2010, (ML100950393)

6. Hematite Additional Information and Clarifications Concerning 10 CFR 20.2002 Alternate Waste Disposal Authorization and Exemption for Specific Hematite Decommissioning Project Waste, May 24, 2010, (ML101450240)

7. Waste Characterization for Alternate Disposal Request for Decommissioning Soils, December 21, 2010, (ML103570023)

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's Public Document Room (PDR) Reference staff at 800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*.

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 14th day of April 2011.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2011–9828 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 and 50–301; NRC–2010–0380]

Nextera Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact Related to the Proposed License Amendment To Increase the Maximum Reactor Power Level

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment for Renewed Facility Operating License Nos. DPR–24 and DPR–27, issued to NextEra Energy Point Beach, LLC (NextEra, the licensee) for operation of the Point Beach Nuclear Plant (PBNP), Units 1 and 2, located near Two Rivers, Wisconsin. In accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) 51.21, the NRC has prepared an environmental assessment (EA) documenting its finding. The NRC concluded that the proposed actions will have no significant environmental impact.

The NRC published a draft EA and draft finding of no significant impact (FONSI) on the proposed action for public comment in the **Federal Register** on December 10, 2010 (75 FR 77010). Comments were received on the draft EA from: (1) the licensee; (2) members of the public; and 3) the Wisconsin Public Service Commission. Publicly available documents created or received at the NRC, including the public comments and responses, are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. From this site, the public can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The document summarizing and addressing the public comments is located at ADAMS accession number ML110950476.

Environmental Assessment

Plant Site and Environs

The PBNP site is located approximately 6 miles (10 kilometers) east-northeast of the town of Mischot on the western shore of Lake Michigan, midway along the western shore, near the northeastern corner of Manitowoc County, Wisconsin. The City of Green Bay is located approximately 25 miles (40 kilometers) northwest of PBNP, and the Kewaunee Nuclear Plant is located approximately 4 miles (6 kilometers) north of PBNP on the shore of Lake Michigan. The PBNP site is comprised of approximately 1,260 acres (510 hectares), with 104 acres (42 hectares) that includes the two nuclear reactors, parking and ancillary facilities. Approximately 1,050 acres (425 hectares) are used for agriculture, and the remaining land is a mixture of woods, wetlands, and open areas. Each of the two units at PBNP use Westinghouse pressurized water reactors.

Identification of the Proposed Action

By application dated April 7, 2009, the licensee requested an amendment for an extended power uprate (EPU) for PBNP to increase the licensed thermal power level from 1,540 megawatts thermal (MWt) to 1,800 MWt for each unit, which represents an increase of approximately 17 percent above the current licensed thermal power and approximately 18 percent over the original licensed thermal power level. This change in core thermal power level requires the NRC to amend the facility's operating license. The operational goal of the proposed EPU is a corresponding increase in electrical output for each unit from 519 megawatts electric (MWe) to 607 MWe. The proposed action is considered an EPU by NRC because it exceeds the typical 7 percent power increase that can be accommodated with only minor plant changes. EPUs typically involve extensive modifications to the nuclear steam supply system.

The licensee plans to make extensive physical modifications to the plant's secondary side to implement the proposed EPU over the course of two refueling outages currently scheduled for spring 2011 and fall 2011. The actual power uprate, if approved by the NRC, would occur for each unit following the respective refueling outages in 2011.

The Need for the Proposed Action

NextEra stated in their environmental report that the proposed action is needed to provide the licensee flexibility to increase the electrical output of PBNP Units 1 and 2.

Environmental Impacts of the Proposed Action

As part of the licensing process for PBNP Units 1 and 2, the NRC published a Final Environmental Statement (FES) in October 1970, for PBNP Unit 1, and in March 1973 for PBNP Unit 2. The two FESs provide an evaluation of the environmental impacts associated with the operation of PBNP Units 1 and 2 over their licensed lifetimes. In addition, in 2005, the NRC evaluated the environmental impacts of operating PBNP for an additional 20 years beyond its current operating license, and determined that the environmental impacts of license renewal were small. The NRC staff's evaluation is contained in NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plant, Supplement 23, Regarding Point Beach Nuclear Plant, Units 1 and 2" (SEIS–23) issued in August 2005 (ADAMS Accession No. ML052230490). The NRC staff used information from the licensee's license amendment request, the FESs, and the SEIS–23 to perform its EA for the proposed EPU.

There will be extensive changes made to the secondary side of the PBNP related to the EPU action, but no new construction is planned outside of existing facilities, and no extensive changes are anticipated to buildings or plant systems that directly or indirectly interface with the environment. All necessary modifications would be performed in existing buildings at PBNP. Modifications to the secondary side of each unit include the following: replacing the high-pressure side of the turbine; replacing all of the feedwater heaters, feedwater and condensate pumps and motors to operate at higher capacity; providing supplemental cooling for some plant systems; implementing electrical upgrades; other modifications to accommodate greater steam and condensate flow rates; and changing setpoints and modifying software.

The sections below describe the non-radiological and radiological impacts in the environment that may result from the proposed EPU.

Non-Radiological Impacts

Land Use and Aesthetic Impacts

Potential land use and aesthetic impacts from the proposed EPU include impacts from plant modifications at PBNP. While some plant components would be modified, most plant changes related to the proposed EPU would occur within existing structures, buildings, and fenced equipment yards housing major components within the developed part of the site. The licensee identified the need for additional EPU project and operating plant support facilities to provide office space for personnel (*i.e.*, 22 trailers located at the plant entrance) and two new parking facilities at the north side of the PBNP facility. The locations of the trailers and one parking facility are within the industrial facilities, and construction of two additional new parking facilities has occurred in a previously-disturbed field on the north end of the site. For the placement of the trailers and construction of the parking facilities, environmental permitting from the State of Wisconsin and Manitowac County has been obtained. The environmental permits for parking address Manitowac County Soils and Erosion and Wisconsin Pollution Discharge Elimination System (WPDES) construction storm water requirements. Storm water monitoring for the parking facilities will continue after EPU implementation. There would be no land use changes along transmission lines (no new lines would be required for the proposed EPU), transmission corridors, in switch yards, or in substations.

Upgrades are expected within the next ten years to the PBNP transmission line corridor related to improvements to the regional power grid. These upgrades include the following work: two new substations; conversion of several transmission lines from 138 kV to 345 kV; construction of three new lines to connect existing lines to the two new substations; and two lien upgrades. According to the licensee, these upgrades will provide long-term grid reliability and stability.

Land use conditions would not change significantly PBNP, and there would be no significant impact from EPU-related plant modifications on land use and aesthetic resources in the vicinity of PBNP.

Air Quality Impacts

Air quality within the Point Beach area is generally considered good, with an exception occurring for a designated 8-hour ozone nonattainment area. PBNP is located in Manitowoc County within the Lake Michigan Intrastate Air Quality Control Region (AQCR). With the exception of the 8-hour standard for ozone, the Lake Michigan AQCR is designated as being in attainment or unclassifiable for all air-quality criteria pollutants in 40 CFR 81.350.

There are approximately 650 people employed at the PBNP on a full-time basis, and 150 long and short-term contractors. This workforce is typically augmented by an additional 700 persons during regularly scheduled refueling outages. For the EPU work conducted during the spring 2011 outage and the fall 2011 outage, there will be approximately 1,200 more workers supplementing the typical 700 additional workers scheduled for refueling outages. The workforce numbers would be somewhat larger than for a routine outage and would take longer to complete, but would still be of a relatively short duration (approximately 68 days). A typical refueling outage typically requires 35 days to complete. During implementation of the EPU at PBNP, some minor and short duration air quality impacts would occur. The main source of the air emissions would be from the vehicles of the additional outage workers needed for the EPU work. An approximate 727 additional truck deliveries will be needed to support EPU modifications for the spring 2011 outage, and approximately 888 additional truck deliveries will support the EPU modifications for the fall 2011 EPU modifications.

The majority of the EPU work would be performed inside existing buildings and would not impact air quality. Operation of the reactor at the increased power level would not result in increased non-radioactive emissions that would have a significant impact on air quality in the region. Therefore, there would be no significant impact on air quality during and following implementation of the proposed EPU.

Water Use Impacts

Groundwater

The PBNP is not connected to a municipal water system, and utilizes groundwater from the Silurian aquifer for potable and sanitary purposes withdrawn from five wells located within the plant yard. PBNP has approval from the Wisconsin Department of Natural Resources through the State's water appropriation permit program for groundwater withdrawal from wells with a combined withdrawal for over 10,000 gallons per day (gpd). Groundwater withdrawals from these five wells at PBNP have historically averaged about 6.5 gallons per minute (gpm) (9,300 gpd). While potable water in the vicinity of PBNP is drawn primarily from Lake Michigan, groundwater does provide potable water for smaller towns and rural residences in the plant region.

Groundwater samples taken from PBNP's supply wells as part of the PBNP site environmental monitoring program have shown no contamination. There are no discharges to groundwater from PBNP requiring permits by regulatory agencies, and discharge of wastewater to onsite retention ponds ended in 2002.

The EPU is not projected to increase groundwater use or liquid effluent discharges by PBNP during the operating life of the plant. As a result, local and regional groundwater users would not be affected by the proposed EPU. While potable water use would be expected to increase over the short term in association with the influx of the 1,200 additional workers supporting EPU implementation activities, this potential increase would be within the capacity of PBNP's wells and would be unlikely to have any effect on other groundwater users. Therefore, there would be no significant impact on groundwater resources following implementation of the proposed EPU.

Surface Water

The PBNP uses surface water from Lake Michigan for its once-through cooling system for both units for its plant condenser cooling, auxiliary water systems, the service water system, and for fire protection. The cooling system removes waste heat from the condensers and other plant equipment, and discharges the water through separate flumes for each unit back into Lake Michigan. As described in the licensee's application and SEIS–23, cooling water is circulated through PBNP at 680,000 gpm, and will remain unchanged under EPU conditions. Thus, no change in PBNP's water use or on the availability of water for other Lake Michigan users is expected.

Main condenser cooling water is withdrawn from Lake Michigan at a depth of approximately 22 feet (7 meters) from an offshore intake located approximately 1,750 feet (533 meters) east of the shoreline. The plant has two discharges located about 200 feet (60 meters) from the shoreline. Non-radioactive chemical effluent discharges into Lake Michigan are regulated in accordance with a WPDES permit (WI–0000957–07). The licensee submitted an application for renewal to the State in December 2008. The current WPDES permit is valid until the new WPDES permit is issued. The licensee's evaluation stated that no significant changes in WPDES permit-regulated discharges to outfalls are expected from EPU operations. Therefore, there would be no significant impact on surface water resources following implementation of the proposed EPU.

Aquatic Resources Impacts

The potential impacts to aquatic biota from the proposed action could include impingement, entrainment, and chemical and thermal discharge effects. A permanent acoustic fish-deterrent system was installed around the intake structure at PBNP in 2002, to help reduce the influx of fish into the intake structure and to reduce potential impingement. The intake structure was originally constructed in an area of the lake devoid of fish spawning habitat or nursery grounds, which reduces the rate of entrainment. The proposed EPU will not result in an increase in water being withdrawn from Lake Michigan, nor will it result in an increase in the amount of water discharged to Lake Michigan. Therefore, there would be no additional impact to aquatic biota from entrainment and impingement from the proposed EPU.

While the proposed EPU would not result in an increase in the amount of water discharged into Lake Michigan, it would result in an approximate 17 percent increase in the amount of waste heat discharged into Lake Michigan. According to a modeling study performed by the licensee in 2008, the temperature of the discharge water is expected to increase by a maximum of 3.6 °F (2.0 °C) as a result of the proposed EPU. Although the cooling water thermal plume of PBNP is expected to be somewhat larger as a result of the proposed EPU, it is not expected to disrupt the balanced indigenous community of aquatic resources, and will have a negligible impact on representative important species of Lake Michigan. The current WPDES permit for PBNP does not contain thermal effluent limitations.

The circulating water system and service water system for PBNP are treated with biocides, sodium hypochlorite, and an electrolytic system adding copper to control biofouling from zebra mussels (*Dreissena polymorpha*) and to control algal growth. The NRC staff concluded in the SEIS–23 that there are no significant impacts of discharge of chlorine or other biocides during the license renewal term. The chemicals used for the above treatments at PBNP are regulated through the PBNP WPDES permit. The State of Wisconsin Coastal Management Program (WCMP) informed the licensee on March 16, 2010, that the WCMP has no comments on the project and will not conduct a Federal consistency review for PBNP as part of their WPDES permit. The licensee has noted that they will maintain compliance with the WPDES permit and all other licenses, permits, approvals or other requirements currently held by the plant as a function of the proposed EPU. Therefore, there would be no significant adverse impacts to the aquatic biota from entrainment, impingement, thermal discharges, or from biocides for the proposed action.

Terrestrial Resources Impacts

As discussed in the Plant Site and Environs section, the PBNP site consists of approximately 1,260 acres, with over 2 miles (3 kilometers) of shoreline on Lake Michigan. Approximately 104 acres are used for power generation and support facilities. Much of the remaining area (1,050 acres) is farmed, and approximately 100 acres consists largely of woods, wetlands, and open areas. As previously discussed in the Land Use and Aesthetic Impacts section, the proposed action would not affect land use at PBNP. Therefore, there would be no significant impacts on terrestrial biota associated with the proposed action.

Threatened and Endangered Species Impacts

Correspondence between the licensee and the U.S. Fish and Wildlife Service (USFWS) in connection with the PBNP license renewal environmental review indicated that no Federally-listed endangered, threatened, or candidate terrestrial or aquatic species are likely to occur in the vicinity of the PBNP site. However, two species that are Federally-listed, the endangered piping plover (*Charadrius melodus*) and the threatened dune or Pitcher's thistle (*Cirsium pitchen*) have been recorded in Manitowoc County. In addition, the dwarf lake iris (*Iris lacustris*) has been documented in Brown County, which is traversed by the PBNP transmission line. The USFWS determined that portions of the PBNP shoreline may be suitable nesting habitat for the piping plover. And there is critical breeding habitat designated for the piping plover at Point Beach State Forest, which is approximately 3 miles (5 kilometers) southeast of PBNP, although no piping plovers have been recorded as breeding at this location. The bald eagle (*Haliaeetus leucocephalus*) (now delisted, but still protected under the Bald and Golden Eagle Protection Act) has not been observed foraging on or near the plant area, but bald eagles have been observed foraging on smaller, interior water bodies that may be found near the transmission lines. Regardless, the planned construction-related activities related to the proposed EPU primarily involve changes to existing structures, systems, and components internal to existing buildings within the plant, and would not involve earth disturbance. While traffic and worker activity in the developed parts of the plant site during the spring 2011 and fall 2011 refueling outages would be somewhat greater and of longer duration than for a normal refueling outage, the potential impact on terrestrial wildlife would be minor and temporary.

Since there are no planned changes to the terrestrial wildlife habitat on the PBNP site from the proposed EPU, and the potential impacts from worker activity would be minor and temporary, there would be no significant impacts to any threatened or endangered species for the proposed action.

Historic and Archaeological Resources Impacts

Records at the Wisconsin Historical Society identify several historic and archaeological sites in the vicinity of PBNP and three sites on PBNP property. None of these sites have been determined eligible for listing on the National Register of Historic Places (NRHP). There are a number of historic properties in Manitowoc County listed on the NRHP and the nearest, the Rawley Point Light Station, is within 6 miles (10 kilometers) of PBNP.

As previously discussed, all EPU-related plant modifications, except for construction of the two parking facilities in the fallow farm field, would take place within existing buildings and facilities at PBNP, including replacing two electrical transformers on an existing pad. Since no ground disturbance or construction-related activities would occur outside of previously disturbed areas and existing electrical transmission facilities, there would be no significant impact from EPU-related plant modifications on historic sites and to archaeological resources located on and within the vicinity of the PBNP.

Socioeconomic Impacts

Potential socioeconomic impacts from the proposed EPU include temporary increases in the size of the workforce at the PBNP and associated increased demand for public services, housing, and increased traffic in the region. The proposed EPU could also increase tax payments due to increased power generation.

Currently, there are approximately 650 people employed at the PBNP on a full-time basis, and 150 long- and short-term contractors, residing primarily in Manitowoc County, Wisconsin. During regularly scheduled refueling outages the number of workers at PBNP increases by as many as 700 workers for 35 days.

The proposed EPU is expected to temporarily increase the size of the refueling outage workforce by approximately 1,200 additional workers. The refueling outage would last approximately 68 days during two refueling outages (one for each unit). The majority of the EPU-related modifications would take place during the Spring 2011 and Fall 2011 refueling outages. Once completed, the size of the refueling outage workforce at the PBNP would return to approximately 700 workers, with no significant increases during future refueling outages. After EPU-related plant modifications, the number of plant operations workers would return to approximately 800 workers.

Most of the EPU-related plant modification workers would relocate temporarily to Manitowoc County, resulting in short-term increases in the local population along with increased demands for public services and housing. Because plant modification work would be short-term, most workers would stay in available rental homes, apartments, mobile homes, and camper-trailers. According to the 3-year average estimate (2006–2008) for census housing data, there were nearly 3,200 vacant housing units in Manitowoc County that could potentially ease the demand for local rental housing. Therefore, a temporary increase in plant employment for a short duration would have little or no noticeable effect on the availability of housing in the region.

The additional number of refueling outage workers and truck material and equipment deliveries needed to support EPU-related plant modifications would cause short-term level of service impacts on access roads in the immediate vicinity of PBNP. Due to the short duration of the outages, increased traffic volumes during normal refueling outages typically have not degraded the level of service capacity on local roads. However, an additional 727 truck deliveries are anticipated to support implementation of the EPU modifications during the spring 2011 outage, and an additional 888 deliveries are anticipated to support the fall 2011 outage. Based on this information and given that EPU-related plant modifications would occur during a normal refueling outage, there could be noticeable short term (during certain hours of the day) level-of-service traffic impacts beyond what is experienced during normal outages. During periods of high traffic volume (*i.e.,* morning and afternoon shift changes), work schedules could be staggered and employees and/or local police officials could be used to direct traffic entering and leaving PBNP to minimize level of service impacts on State Route 42.

NextEra pays a lump sum gross revenue tax to the State of Wisconsin in lieu of property taxes. Portions of this tax are based on the "net book value" of the PBNP and the amount of megawatts generated. The annual amount of taxes paid by NextEra would increase due to increased power generation. Future tax payments would also take into account the increased net book value of the PBNP as a result of the EPU implementation and incentive payments, should megawatt production exceed negotiated annual benchmarks as power generation increases.

The proposed EPU would also increase local tax revenues generated by sales taxes and State and Federal income taxes paid by temporary workers residing in Manitowoc County. However, due to the short duration of EPU-related plant modification activities, there would be little or no noticeable effect on tax revenue streams in Manitowoc County. Therefore, there would be no significant adverse socioeconomic impacts from EPU-related plant modifications and operations under EPU conditions in the vicinity of the PBNP.

Environmental Justice Impacts

The environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from activities associated with the proposed EPU at the PBNP. Such effects may include human health, biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing in the vicinity of the PBNP, and all are exposed to the same health and environmental effects generated from activities at the PBNP.

The NRC staff considered the demographic composition of the area within a 50-mile (80-km) radius of the PBNP to determine the location of minority and low-income populations and whether they may be affected by the proposed action.

Minority populations in the vicinity of PBNP, according to the U.S. Census Bureau data for 2000, comprise 7.6 percent of the population (approximately 722,000 individuals) residing within a 50-mile (80-kilometer) radius of PBNP. The largest minority group was Hispanic or Latino (approximately 19,000 persons or 2.7 percent), followed by Asian (approximately 17,000 persons or about 2.4 percent). According to the U.S. Census Bureau, about 5.0 percent of the Manitowoc County population identified themselves as minorities, with persons of Asian origin comprising the largest minority group (2.0 percent). According to census data, the 3-year average estimate for 2006–2008 for the minority population of Manitowoc County, as a percent of total population, increased to 6.4 percent, with persons of Hispanic or Latino origin comprising the largest minority group (2.5 percent).

Low-income populations in the vicinity of PBNP, according to 2000 census data, comprise approximately 7,300 families and 40,900 individuals (approximately 3.8 and 5.7 percent, respectively) residing within a 50-mile (80-kilometer) radius of the PBNP. These individuals and families were identified as living below the Federal poverty threshold in 1999. The 1999 Federal poverty threshold was $17,029 for a family of four.

According to census data in the 2006–2008 American Community Survey 3–Year Estimates, the median household income for Wisconsin was $52,249, with 10.7 percent of the State population and 7.0 percent of families determined to be living below the Federal poverty threshold. Manitowoc County had a lower median household income average ($49,867) than the State of Wisconsin, but had lower percentages of county individuals (7.9 percent) and families (4.8 percent), respectively, living below the poverty level.

Environmental Justice Impact Analysis

Potential impacts to minority and low-income populations would mostly consist of environmental and socioeconomic effects (*e.g.,* noise, dust, traffic, employment, and housing impacts). Radiation doses from plant operations after the EPU are expected to continue to remain well below regulatory limits.

Noise and dust impacts would be short-term and limited to onsite activities. Minority and low-income populations residing along site access roads could experience increased commuter vehicle traffic during shift changes. Increased demand for rental housing during the refueling outages that would include EPU-related plant modifications could disproportionately affect low-income populations. However, due to the short duration of the EPU-related work and the availability of rental housing, impacts to minority and low-income populations would be short-term and limited. According to census information, there were approximately 3,200 vacant housing units in Manitowoc County.

Based on this information and the analysis of human health and environmental impacts presented in this environmental assessment, the proposed EPU would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the vicinity of the PBNP.

Non-Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant non-radiological impacts. Table 1 summarizes the non-radiological environmental impacts of the proposed EPU at PBNP.

TABLE 1—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS

Land Use	No significant impact on land use conditions and aesthetic resources in the vicinity of the PBNP.
Air Quality	Temporary short-term air quality impacts from vehicle emissions related to the workforce. No significant impacts to air quality.
Water Use	Water use changes resulting from the EPU would be relatively minor. No significant impact on groundwater or surface water resources.
Aquatic Resources	No significant impact to aquatic resources due to impingement, entrainment, and chemical or thermal discharges.
Terrestrial Resources	No significant impact to terrestrial resources.
Threatened and Endangered Species	No significant impact to Federally-listed species.
Historic and Archaeological Resources	No significant impact to historic and archaeological resources on site or in the vicinity of the PBNP.
Socioeconomics	No significant socioeconomic impacts from EPU-related temporary increase in workforce.
Environmental Justice	No disproportionately high and adverse human health and environmental effects on minority and low-income populations in the vicinity of the PBNP.

Radiological Impacts

Radioactive Gaseous and Liquid Effluents, Direct Radiation Shine, and Solid Waste

PBNP uses waste treatment systems to collect, process, recycle, and dispose of gaseous, liquid, and solid wastes that contain radioactive material in a safe and controlled manner within NRC and Environmental Protection Agency (EPA) radiation safety standards. The licensee's evaluation of plant operation at the proposed EPU conditions shows that no physical changes would be needed to the radioactive gaseous, liquid, or solid waste systems.

Radioactive Gaseous Effluents

The gaseous waste management systems include the radioactive gaseous system, which manages radioactive gases generated during the nuclear fission process. Radioactive gaseous wastes are principally activation gases and fission product radioactive noble gases resulting from process operations, including continuous degasification of systems, gases collected during system venting, and gases generated in the radiochemistry laboratory. The licensee's evaluation determined that implementation of the proposed EPU would not significantly increase the inventory of carrier gases normally processed in the gaseous waste management system, since plant system functions are not changing and the volume inputs remain the same. The analysis also showed that the proposed EPU would result in an increase (approximately 17.6 percent for noble gases, particulates, radioiodines, and tritium) in the equilibrium radioactivity in the reactor coolant, which in turn increases the radioactivity in the waste disposal systems and radioactive gases released from the plant.

The licensee's evaluation concluded that the proposed EPU would not change the radioactive gaseous waste system's design function and reliability to safely control and process the waste. The existing equipment and plant procedures that control radioactive releases to the environment will continue to be used to maintain radioactive gaseous releases within the dose limits of 10 CFR 20.1302 and the as low as is reasonably achievable (ALARA) dose objectives in Appendix I to 10 CFR part 50.

Radioactive Liquid Effluents

The liquid waste management system collects, processes, and prepares radioactive liquid waste for disposal. Radioactive liquid wastes include liquids from various equipment drains, floor drains, the chemical and volume control system, steam generator blowdown, chemistry laboratory drains, laundry drains, decontamination area drains and liquids used to transfer solid radioactive waste. The licensee's evaluation shows that the proposed EPU implementation would not significantly increase the inventory of liquid normally processed by the liquid waste management system. This is because the system functions are not changing and the volume inputs remain the same. The proposed EPU would result in an increase (approximately 17.6 percent) in the equilibrium radioactivity in the reactor coolant which in turn would impact the concentrations of radioactive nuclides in the waste disposal systems.

Since the composition of the radioactive material in the waste and the volume of radioactive material processed through the system are not expected to significantly change, the current design and operation of the radioactive liquid waste system will accommodate the effects of the proposed EPU. The existing equipment and plant procedures that control radioactive releases to the environment will continue to be used to maintain radioactive liquid releases within the dose limits of 10 CFR 20.1302 and ALARA dose standards in Appendix I to 10 CFR part 50.

Occupational Radiation Dose at EPU Conditions

The licensee stated that the in-plant radiation sources are expected to increase approximately linearly with the proposed increase in core power level. To protect the workers, the plant's radiation protection program monitors radiation levels throughout the plant to establish appropriate work controls, training, temporary shielding, and protective equipment requirements so that worker doses will remain within the dose limits of 10 CFR Part 20 and ALARA.

In addition to the work controls implemented by the radiation protection program, permanent and temporary shielding is used throughout the PBNP to protect plant personnel against radiation from the reactor and auxiliary systems containing radioactive material. The licensee determined that the current shielding design, which uses conservative analytical techniques to establish the shielding requirements, is adequate to offset the increased radiation levels that are expected to occur from the proposed EPU. The proposed EPU is not expected to significantly affect radiation levels within the plant and therefore there would not be a significant radiological impact to the workers.

Offsite Doses at EPU Conditions

The primary sources of offsite dose to members of the public from the PBNP are radioactive gaseous and liquid effluents. As discussed above, operation at the proposed EPU conditions will not change the radioactive gaseous and liquid waste management systems' abilities to perform their intended functions. Also, there would be no change to the radiation monitoring system and procedures used to control the release of radioactive effluents in accordance with NRC radiation protection standards in 10 CFR part 20 and Appendix I to 10 CFR part 50.

Based on the above, the offsite radiation dose to members of the public would continue to be within regulatory limits and therefore, would not be significant.

Radioactive Solid Wastes

Radioactive solid wastes include solids recovered from the reactor coolant systems, solids that come into contact with the radioactive liquids or gases, and solids used in the reactor coolant system operation. The licensee evaluated the potential effects of the proposed EPU on the solid waste management system. The largest volume of radioactive solid waste is low-level radioactive waste which includes sludge, oily waste, bead resin, spent filters, and dry active waste (DAW) that result from routine plant operation, refueling outages, and routine maintenance. DAW includes paper, plastic, wood, rubber, glass, floor sweepings, cloth, metal, and other types of waste generated during routine maintenance and outages.

As stated by the licensee, the proposed EPU would not have a significant effect on the generation of radioactive solid waste volume from the primary reactor coolant and secondary side systems since the systems functions are not changing and the volume inputs remain consistent with historical generation rates. The waste can be handled by the solid waste management system without modification. The equipment is designed and operated to process the waste into a form that minimizes potential harm to the workers and the environment. Waste processing areas are monitored for radiation and there are safety features to ensure worker doses are maintained within regulatory limits. The proposed EPU would not generate a new type of waste or create a new waste stream. Therefore, the impact from the proposed EPU on radioactive solid waste would not be significant.

Spent Nuclear Fuel

Spent fuel from the PBNP is stored in the plant's spent fuel pool and in dry casks in the Independent Spent Fuel Storage Installation. The PBNP is licensed to use uranium-dioxide fuel that has a maximum enrichment of 5 percent by weight uranium-235. The typical average enrichment is approximately 4.8 percent by weight of uranium-235. The average fuel assembly discharge burnup for the proposed EPU is expected to be approximately 52,000 megawatt days per metric ton uranium (MWd/MTU) with no fuel pins exceeding the maximum fuel rod burnup limit of 62,000 MWd/MTU. The licensee's fuel reload design goals will maintain the PBNP fuel cycles within the limits bounded by the impacts analyzed in 10 CFR Part 51, Table S–3—Table of Uranium Fuel Cycle Environmental Data, and Table S–4—Environmental Impact of Transportation of Fuel and Waste to and from One Light-Water-Cooled Nuclear Power Reactor. Therefore, there would be no significant impacts resulting from spent nuclear fuel.

Postulated Design-Basis Accident Doses

Postulated design-basis accidents are evaluated by both the licensee and the NRC staff to ensure that PBNP can withstand normal and abnormal transients and a broad spectrum of postulated accidents without undue hazard to the health and safety of the public.

On December 8, 2008, the licensee submitted License Amendment Request (LAR) number 241 (LAR 241) to the NRC, to update its design basis accident analysis. In LAR 241, the licensee requests NRC approval to use a set of revised radiological consequence analyses using the guidance in NRC's Regulatory Guide 1.183, *Alternative Radiological Source Terms [AST] for Evaluating Design Basis Accidents at Nuclear Power Reactors.* The analyses for LAR 241 are applicable for the power level in the proposed EPU. The NRC staff is evaluating LAR 241 separately from the EPU to determine if it is acceptable to approve. The results of the NRC's evaluation and conclusion will be documented in a Safety Evaluation Report that will be publically available in ADAMS.

In LAR 241, the licensee reviewed the various design-basis accident (DBA) analyses performed in support of the proposed EPU for their potential radiological consequences and concludes that the analyses adequately account for the effects of the proposed EPU. The licensee states that the plant site and its dose-mitigating engineered safety features remain acceptable with respect to the radiological consequences of postulated DBAs, since the calculated doses to members of the public meet the exposure guideline values specified in 10 CFR 50.67 and General Design Criteria 19 in Appendix A of 10 CFR Part 50. If the NRC should approve LAR 241, then the proposed EPU will not have a significant human health impact with respect to radiological consequences of DBAs.

Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant radiological impacts. Table 2 summarizes the radiological environmental impacts of the proposed EPU at the PBNP.

TABLE 2—SUMMARY OF RADIOLOGICAL ENVIRONMENTAL IMPACTS

Radioactive Gaseous Effluents	Amount of additional radioactive gaseous effluents generated would be handled by the existing system.
Radioactive Liquid Effluents	Amount of additional radioactive liquid effluents generated would be handled by the existing system.
Occupational Radiation Doses	Occupational doses would continue to be maintained within NRC limits.
Offsite Radiation Doses	Radiation doses to members of the public would remain below NRC and EPA radiation protection standards.
Radioactive Solid Waste	Amount of additional radioactive solid waste generated would be handled by the existing system.
Spent Nuclear Fuel	Amount of additional spent nuclear fuel would be handled by the existing system.
Postulated Design- Basis Accident Doses	Calculated doses for postulated design-basis accidents would remain within NRC limits.

Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed EPU (*i.e.,* the "no-action" alternative). Denial of the application would result in no change in the current environmental impacts. However, if the EPU were not approved for the PBNP, other agencies and electric power organizations may be required to pursue other means, such as fossil fuel or alternative fuel power generation, to provide electric generation capacity to offset future demand. Construction and operation of such a fossil-fueled or alternative-fueled plant may create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed EPU at the PBNP. Furthermore, the proposed EPU does not involve environmental impacts that are significantly different from those originally identified in the PBNP Unit 1 or Unit 2 FESs, and the SEIS–23.

Alternative Use of Resources

The action does not involve the use of any resources than those previously considered in the FES.

Agencies and Persons Consulted

In accordance with its stated policy, on April 6, 2011, the NRC staff consulted with the State of Wisconsin official regarding the environmental impact of the proposed action. The State official had no comments. Comments were received from the Wisconsin PSC and incorporated into the EA. The Wisconsin PSC has no objections to the projects as proposed.

Finding of No Significant Impact

On the basis of the details provided in the EA, the NRC concludes that the proposed action of implementing the PBNP EPU will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's application dated April 7, 2009, and supplements dated May 13, 2010, and July 15, 2010 (on environmental issues).

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of April 2011.

For the Nuclear Regulatory Commission.

Terry A. Beltz,

Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–9835 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Reliability and Probabilistic Risk Assessment; Notice of Meeting

The ACRS Subcommittee on Reliability and Probabilistic Risk Assessment (PRA) will hold a meeting on May 11, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Monday, May 11, 2011—1 p.m. until 5 p.m.

The Subcommittee will hear a briefing on the plan and schedule for developing a level 3 PRA. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (Telephone 301–415–5197 or E-mail: *John.Lai@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010 (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs*. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please contact Ms. Jessie Delgado (Telephone 301–415–7360) to be escorted to the meeting room.

Dated: April 19, 2011.

Yoira Diaz-Sanabria,

Acting Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–9918 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on U.S. Evolutionary Power Reactor; Notice of Meeting

The ACRS Subcommittee on U.S. Evolutionary Power Reactor (U.S. EPR) will hold a meeting on May 11, 2011, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, May 11, 2011—8:30 a.m. Until 12 p.m.

The Subcommittee will review Chapter 18 of the Safety Evaluation Report (SER) with open items associated with the review of the U.S. EPR Design Control Document (DCD). The Subcommittee will hear presentations by and hold discussions with AREVA, the NRC staff, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Derek Widmayer (Telephone 301–415–7366 or E-mail: *Derek.Widmayer@nrc.gov* five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010, (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Dated: April 19, 2011.

Yoira Diaz-Sanabria,

Acting Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–9920 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–8; NRC–2011–0085]

Calvert Cliffs Nuclear Power Plant, LLC Independent Spent Fuel Storage Installation; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for Renewal of Special Nuclear Materials License No.–2505

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license renewal, and opportunity to request a hearing.

DATES: A request for hearing and/or petition for leave to intervene must be filed by June 24, 2011.

FOR FURTHER INFORMATION CONTACT: John M. Goshen, Project Manager, Licensing Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555–0001. *Telephone:* 301–492–3325; *fax number:* 301–492–3348; *e-mail: john.goshen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is considering an application dated September 17, 2010, as supplemented February 10, and March 9, 2011, Calvert Cliffs Nuclear Power Plant (CCNPP), LLC, for the renewal of its Special Nuclear Material (SNM) License No.–2505, under the provisions of 10 CFR Part 72, for the receipt, possession, storage and transfer of spent fuel, reactor-related Greater than Class C (GTCC) waste and other radioactive materials associated with spent fuel storage at the CCNPP site-specific Independent Spent Fuel Storage Installation (ISFSI), located near Lusby, Maryland. If granted, the renewed license will authorize the applicant to continue to store spent fuel in a dry cask storage system at the applicant's CCNPP ISFSI. Pursuant to the provisions of 10 CFR 72.42, the renewal term of the license for the ISFSI would be twenty (20) years; however, the applicant has submitted an exemption request with the license renewal application, which, if granted, would allow the license to be renewed for 40 years. On February 16, 2011, (76 FR 8872) the revised 10 CFR 72.230(b) rule was published changing the renewal term to a period not to exceed 40 years to be effective May 17, 2011. The exemption request is no longer required. The renewal application was docketed under 10 CFR Part 72; the ISFSI Docket No. is 72–8.

An NRC acceptance review, documented in a letter to CCNPP dated March 11, 2011, found that the application contains sufficient information for the NRC staff to begin its technical review. The Commission will approve the license renewal application if it determines that the application meets the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations, including the findings required by 10 CFR 72.40. These findings will be documented in a Safety Evaluation Report. The NRC will complete an environmental evaluation, in accordance with 10 CFR Part 51, to determine if the preparation of an environmental impact statement is warranted or if an environmental assessment and finding of no significant impact are appropriate. This action will be the subject of a subsequent notice in the **Federal Register**.

II. Opportunity To Request a Hearing

The NRC hereby provides notice that this is a proceeding on an application for the renewal of SNM–2505 issued to CCNPP for its ISFSI located at the CCNPP site near Lusby, Maryland. All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from April 25, 2011. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

III. Further Information

Documents related to this action, including the application for renewal and supporting documentation, are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are: License Renewal Application dated September 17, 2010 (ML102650247), supplements dated February 10 and March 9, 2011, (ML110620120 and ML110730731) and the acceptance review letter dated March 11, 2011 (ML110730101). If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 14th day of April, 2011.

For The Nuclear Regulatory Commission.

John Goshen,

Project Manager, Licensing Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2011–9930 Filed 4–22–11; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, OPM has submitted a Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery " to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et. seq.).

DATES: Comments are encouraged and will be accepted until May 25, 2011. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Written comments may be submitted on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results. The Agency received 0 comments in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542) and the correction published on February 22, 2011 (76 FR 9862).

Below we provide OPM's projected average estimates for the next three years: [1]

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance federal-wide:

Average Expected Annual Number of activities: 25,000.

Average number of Respondents per Activity: 200.

Annual responses: 5,000,000.

Frequency of Response: Once per request.

Average minutes per response: 30.

Burden hours: 2,500,000.

Average Expected Annual Number of activities: 200.

Respondents: 2,074,892.

Annual responses: 691,631.

Frequency of Response: Once per request.

Average minutes per response: 14.

Burden hours: 742,386.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2011–9885 Filed 4–22–11; 8:45 am]

BILLING CODE 6325–47–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: RI 25–37, Evidence To Prove Dependency of a Child

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0206, Evidence to Prove Dependency of a Child. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until June 24, 2011. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Linda Bradford (Acting) Deputy Associate Director, Retirement Operations, Retirement Services, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500 or sent via electronic mail to *Martha.Moore@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street, NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: RI 25–37, Evidence to Prove Dependency of a Child, is designed to collect sufficient information for the Office of Personnel Management to determine whether the surviving child of a deceased Federal employee is eligible to receive benefits as a dependent child.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Evidence to Prove Dependency of a Child.

OMB Number: 3206–0206.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 250.

Estimated Time Per Respondent: 1 hour.

Total Burden Houses: 250.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2011–9884 Filed 4–22–11; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, April 28, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, April 28, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

A litigation matter; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: April 21, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10054 Filed 4–21–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") will hold a public roundtable to discuss the schedule for implementing final rules for swaps and security-based swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act on Monday, May 2, 2011 and Tuesday, May 3, 2011 at the CFTC's headquarters at Three Lafayette Centre, Conference Centre, 1155 21st Street, NW., Washington, DC 20581.

Both meetings will being open to the public, with seating on a first-come, first-served basis. Visitors will be subject to security checks.

This Sunshine Act notice is being issued because a majority of the Commission may attend the meetings.

The roundtable is expected to include panel discussions of (1) compliance dates for new rules for existing trading platforms and clearinghouses and the registration and compliance with rules for new platforms, such as swap and security-based swap execution facilities, and data repositories for swaps and security-based swaps; (2) compliance dates for new requirements for dealers and major participants in swaps and security-based swaps; (3) implementation of clearing mandates; (4) compliance dates for financial entities such as hedge funds, asset managers, insurance companies and pension funds subject to a clearing mandate and other requirements; and (5) considerations with regard to non-financial end users.

For further information, please contact the CFTC's Office of Public Affairs at (202) 418–5080 or the SEC's office of Public Affairs at (202) 551–4120.

Dated: April 20, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–9991 Filed 4–21–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on April 27, 2011 at 10 a.m., in the Auditorium, Room L–002.

The subject matters of the Open Meeting will be:

Item 1: The Commission will consider whether to propose joint rules with the Commodity Futures Trading Commission relating to the definitions of "Swap," "Security-Based Swap," "Security-Based Swap Agreement," the regulation of mixed swaps, and books and records requirements regarding security-based swap agreements.

Item 2: The Commission will consider whether to propose regulations with respect to removing references to credit ratings in various rules under the Securities Exchange Act of 1934.

Commissioner Aguilar, as duty officer, determined that no earlier notice thereof was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: April 21, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10072 Filed 4–21–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64153; File No. SR–CFE–2011–002]

Self-Regulatory Organizations; CBOE Futures Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Listing and Trading CBOE Gold ETF Volatility Index Security Futures

Correction

In notice document 2011–7981 appearing on pages 18818–18821 in the issue of Tuesday, April 5, 2011, make the following correction:

On page 18821, in the first column, in the second line from the top, "April 25, 2011" should read "April 26, 2011".

[FR Doc. C1–2011–7981 Filed 4–22–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF STATE

[Public Notice: 7425]

30-Day Notice of Proposed Information Collection: Form- DS–1950, Department of State Application for Employment, OMB Control Number 1405–0139

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Department of State Application for Employment.
- *OMB Control Number:* 1405–0139.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Bureau of Human Resources, Office of Recruitment, Examination, Employment (HR/REE)
- *Form Number:* DS–1950.
- *Respondents:* U.S. Citizens seeking entry into certain Department of State Foreign Service positions.
- *Estimated Number of Respondents:* 3,000.
- *Estimated Number of Responses:* 3,000.
- *Average Hours per Response:* 30 minutes.
- *Total Estimated Burden:* 1,500.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from April 25, 2011.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- E-mail: *oira_submission@omb.eop.gov*. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- Fax: 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Marvin E. Moore, Bureau of Human Resources, Recruitment Division, Student Programs, U.S. Department of State, Washington, DC 20522, who may be reached on 202–261–8885 or by e-mail at *MooreME1@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond,

Abstract of proposed collection:

The DS–1950 has been the form used by individuals to apply for certain excepted jobs at the Department of State such as Foreign Service specialist positions. We wish to continue to use this form to clarify interpretation of applicant responses and how applicants become aware of our program opportunities.

Methodology:

The form will be used by applicants for excepted service jobs at the Department of State, such as certain Foreign Service jobs. These programs generate approximately 3,000 applications per year, submitted by mail. Data, which is extracted from the form, is necessary to determine qualifications, and selections, in accordance with Federal policies.

Dated: April 5, 2011.

Ruben Torres,

Director, HR/EX, Department of State.

[FR Doc. 2011–9952 Filed 4–22–11; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF TRANSPORTATION

Intelligent Transportation Systems Program Advisory Committee; Notice of Meeting

AGENCY: Research and Innovative Technology Administration, DOT.

ACTION: Notice.

This notice announces, pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Pub. L. 72–363; 5 U.S.C. app. 2), a Web conference of the Intelligent Transportation Systems (ITS) Program Advisory Committee (ITS PAC). The Web conference will be held on May 18, 2011, from 1 p.m. to 4 p.m.

The ITS PAC, established under Section 5305 of Public Law 109–59, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, August 10, 2005, and re-chartered on February 7, 2010, was created to advise the Secretary of Transportation on all matters relating to the study, development, and implementation of intelligent transportation systems. Through its sponsor, the ITS Joint Program Office (JPO), the ITS PAC makes recommendations to the Secretary regarding ITS Program needs, objectives, plans, approaches, content, and progress.

Following is the Web conference preliminary agenda: (1) Welcome and Opening Remarks; (2) Review Technology Strategy Subcommittee Findings; (3) Review Standards and Harmonization Subcommittee Findings; (4) Review Program Evaluation and Strategy Subcommittee Findings; and (5) Summary and Action Item Review.

The Web conference will be available to the public, but limited conference lines will be available on a first-come, first-serve basis. Members of the public who wish to participate must notify Mr. Stephen Glasscock, the Committee Designated Federal Official, at (202) 366–9126 no later than May 11, 2011, at which time the Web conference URL and call-in phone number will be provided. Members of the public who wish to present oral statements during the Web conference must request approval from Mr. Glasscock no later than May 11, 2011.

Questions about the agenda or written comments may be submitted by U.S. Mail to: U.S. Department of Transportation, Research and Innovative Technology Administration, ITS Joint Program Office, Attention: Stephen Glasscock, 1200 New Jersey Avenue, SE., HOIT, Room E33–415, Washington, DC 20590 or faxed to (202) 493–2027. The JPO requests that written comments be submitted no later than May 11, 2011.

Notice of this Web conference is provided in accordance with the FACA and the General Services Administration regulations (41 CFR part 102–3) covering management of Federal advisory committees.

Issued in Washington, DC, on the 19th day of April 2011.

Linda Dodge,

Chief of Staff, ITS Joint Program Office.

[FR Doc. 2011–9954 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0025]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt twenty-one individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective April 25, 2011. The exemptions expire on April 25, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On February 22, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from twenty-one individuals and requested comments from the public (76 FR 9862). The public comment period closed on March 24, 2011 and no comments were received.

FMCSA has evaluated the eligibility of the twenty-one applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These twenty-one applicants have had ITDM over a range of 1 to 19 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the February 22, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the twenty-one exemption applications, FMCSA exempts, Kevin J. Agler, Roger R. Cabana, Andrew J. Causey, Steven J. Ceckiewicz, Jamie P. Chapman, Dennis J. Dallmann, Wade Dawson, Craig A. Fisher, Ryan D. Gibson, Omar S. Griffin Jr., George E. Heffernan, Dennis Hohnerlein, Joshua P. Kramer, Chad M. Kunkel, Donald L. Kurtz, Jeffery S. Lomber, Rodney C. McCowan, Jennifer L. Moran, Kevin J. Van Horn, Jimmy M. Welch and Michael L. Wintrow from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under "Conditions and Requirements" above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: April 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–9896 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0011]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt sixteen individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective April 25, 2011. The exemptions expire on April 25, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On February 22, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from sixteen individuals and requested comments from the public (76 FR 9854). The public comment period closed on March 24, 2011 and one comment was received.

FMCSA has evaluated the eligibility of the sixteen applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These sixteen applicants have had ITDM over a range of 1 to 51 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the February 22, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA received one comment in this proceeding. The comment was considered and discussed below.

The Pennsylvania Department of Transportation stated that it had reviewed the driving records for William Hepp and Todd A. Kozemchak and are in favor of granting them a Federal diabetes exemption.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the sixteen exemption applications, FMCSA exempts, Paul C. Anderson, Brenda A. Barnhill, Warren S. Brown, Gregory M. Cox, Bruce R. Davis, Neal J. Gifford, William Hepp, Ryan B. Homles, Todd A. Kozemchak, James L. Mynars, Dale A. Roberts, Charles C. Schutz, Andrew J. Shown, Daniel H. Starrett, Bruce K. Thomas and Kory M. Tobias from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under "Conditions and Requirements" above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: April 15, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–9897 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice

announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on February 3, 2011, and comments were due by April 4, 2011. No comments were received.

DATES: Comments must be submitted on or before May 25, 2011.

FOR FURTHER INFORMATION CONTACT: Albert Bratton, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5769 or e-mail: *albert.bratton@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

Maritime Administration

Title: Determination of Fair and Reasonable Rates for Carriage of Agriculture Cargoes on U.S.-Flag Commercial Vessels.

OMB Control Number: 2133–0514.

Type of Request: Extension of currently approved collection.

Affected Public: U.S. citizens who own and operate U.S.-flag vessels.

Forms: MA–1025, MA–1026, and MA–172.

Abstract: This collection of information requires U.S.-flag operators to submit annual vessel operating costs and capital costs data to Maritime Administration officials. The information is used by the Maritime Administration in determining fair and reasonable guideline rates for the carriage of preference cargoes on U.S.-flag vessels. In addition, U.S.-flag vessel operators are required to submit Post Voyage Reports to the Maritime Administration after completion of a cargo preference voyage.

Annual Estimated Burden Hours: 546 hours.

Addressees: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention Maritime Administration Desk Officer.

Comments Are Invited On: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Authority: 49 CFR 1.66.

Dated: April 13, 2011.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–9906 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0043]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before June 24, 2011.

FOR FURTHER INFORMATION CONTACT: Sheila Brown, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5178 or e-mail: *sheila.brown@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

Maritime Administration (MARAD)

Title of Collection: Automated Mutual-Assistance Vessel Rescue System (AMVER).

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0025.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection of information is used to gather information regarding the location of U.S.-flag vessels and certain other U.S. citizen-owned vessels for the purpose of search and rescue in the saving of lives at sea and for the marshalling of ships for national defense and safety purposes.

Need and Use of the Information: The collection of information is necessary for maintaining a current plot of U.S.-flag and U.S.-owned vessels.

Description of Respondents: U.S.-flag and U.S. citizen-owned vessels.

Annual Responses: 729,280 responses.

Annual Burden: 51,050 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov/search/index.jsp.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. *EDT (or EST),* Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov/search/index.jsp.*

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.regulations.gov/search/index.jsp.*

Authority: 49 CFR 1.66.

Dated: April 13, 2011.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–9905 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2011–0084]

Pipeline Safety: Notice of Public Webinars on Implementation of Distribution Integrity Management Programs

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of Public Webinars.

SUMMARY: Members of the state and Federal Distribution Integrity Management Program Implementation Team (Team) recently completed a series of pilot inspections of gas distribution operators' distribution integrity management programs (DIMP). The purpose of the two separate and distinct webinars is to discuss the Team's findings and general observations from the pilot inspections; the expectations for operators in implementing their plan; the DIMP inspection forms; and a question and answer session.

DATES: The webinars will be held on May 10, 2011, between 10:30 a.m. and 12:30 p.m. EDT and June 8, 2011, at 10:30 a.m. and 12:30 p.m. EDT. Refer to the DIMP Web site for additional information: *http://primis.phmsa.dot.gov/dimp/index.htm.* Copies of the presentations will be available on the DIMP website within 30 days following the webinar.

FOR FURTHER INFORMATION CONTACT: Chris Mclaren by e-mail at *Chris.Mclaren@dot.gov* or by phone at 281–216–4455.

SUPPLEMENTARY INFORMATION: *Purpose:* The DIMP Team is a collaboration of state and Federal regulators to support improvements in the integrity of the Nation's gas distribution pipeline systems through development of inspection methods and guidance for the evaluation of an operator's DIMP. The Team recognizes the individual characteristics of each state's oversight program and operating conditions as well as the evolutionary process that distribution system operators will go through in building an integrity management culture from a prescriptive, compliance-based culture. Due to the high level, risk-based, performance oriented nature of the regulations contained in 49 CFR 192.1001–1015, the Team recognizes that operators are seeking guidance in implementing their programs. Two webinars are being sponsored to provide operators with information and to direct operators to resource material.

The material presented at this webinar was created by the Team through a consensus process. States will implement the DIMP rule under their individual state statutory authority in accordance with the applicable certification under 49 U.S.C. 60105 or agreement under section 60106. States may establish their own procedures, inspection forms, and guidance in implementing the DIMP rule. Since regulatory structures differ among states, operators should contact the state authority regulating their distribution pipeline system for more information.

Preliminary Webinar Agenda

May 10, 2011—DIMP Implementation Webinar Agenda

- Welcome, Introductions, and Overview
- DIMP Pilot Inspection Findings
- DIMP Web Site Navigation & Contents
- Presentation of the Inspection Form
- Question & Answer Session
- Session Concludes

June 8, 2011—DIMP Implementation Webinar Agenda

- Welcome, Introductions, and Overview
- Industry Perspective
- Performance Data From CY 2010 DIMP Annual Reports
- DIMP Implementation Topics
- Question & Answer Session
- Session Concludes

Registration: Members of the public may attend this free webinar. To help assure that adequate space is provided, all attendees are required to register for the webinar at *http://opsweb.phmsa.dot.gov/webinars.* Upon registration, the webinar information will be distributed. Due to the limited capacity, we encourage and request that parties at the same location share a webinar link. The Webinars will use the internet link for the visual and audio capabilities and not a standard phone line.

Comments: Members of the public may also submit written comments, either before, during, or after the webinar. Comments should reference Docket ID PHMSA–2011–0084. Comments can be submitted during the webinar through the provided internet link. Instructions describing how to submit questions will be given at the beginning of the webinar.

Comments may be submitted before or after the webinar in the following ways:

- *DIMP Web site: http://primis.phmsa.dot.gov/dimp/comment.htm.* This site allows the public to enter comments about DIMP before or after the webinar. Follow the instructions for submitting comments.
- *E-Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management System, Room W12–140, on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the Docket ID at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.* Note: Comments will be posted without changes or edits to *http://www.regulations.gov* including any personal information provided. Please see the Privacy Act heading in the Regulatory Analyses and Notices section of the **SUPPLEMENTARY INFORMATION** for additional information.

Privacy Act Statement: Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477).

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance during the webinar, please contact Chris Mclaren at 281–216–4455 by May 3, 2011.

Issued in Washington, DC on April 20, 2011.

Alan K. Mayberry,

Deputy Associate Administrator for Field Operations.

[FR Doc. 2011–9955 Filed 4–22–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Superior Bank, Birmingham, AL; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section

5(d)(2) of the Home Owners' Loan Act, The Office of Thrift Supervision has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for Superior Bank, Birmingham, Alabama, (OTS No. 18010) on April 15, 2011.

Dated: April 18, 2011.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2011–9735 Filed 4–22–11; 8:45 am]

BILLING CODE 6720–01–M

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—May 4, 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 May 4, 2011, to address "China's Intellectual Property Rights and Indigenous Innovation Policy."

Background: This is the sixth 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 hearing will examine China's policies regarding intellectual property rights and indigenous innovation, with a particular emphasis on the consequences of these policies for the film, broadcast, and software industries. The hearing will be co-chaired by Commissioners Dick D'Amato and Dennis Shea.

Any interested party may file a written statement by May 4, 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, May 4, 2011, 8:30 a.m. to 4:15 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 485 of the Russell Senate Office Building, located at Constitution Avenue and 1st 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: April 19, 2011.

Michael Danis,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2011–9874 Filed 4–22–11; 8:45 am]

BILLING CODE 1137–00–P

FEDERAL REGISTER

Vol. 76 Monday,

No. 79 April 25, 2011

Part II

Federal Reserve System

12 CFR Part 226

Truth in Lending; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1393]

RIN 7100–AD55

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: On February 22, 2010 and June 29, 2010, the Board published in the **Federal Register** final rules amending Regulation Z's provisions that apply to open-end (not home-secured) credit plans, in each case in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009. The Board believes that clarification is needed regarding compliance with certain aspects of the final rules. Accordingly, to facilitate compliance, the Board is further amending specific portions of the regulations and official staff commentary.

DATES: *Effective Date:* October 1, 2011. Mandatory Compliance Date: October 1, 2011. Creditors may, at their option, comply with this rule prior to October 1, 2011.

FOR FURTHER INFORMATION CONTACT: Stephen Shin, Attorney, or Amy Henderson or Benjamin K. Olson, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Credit Card Act

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) was signed into law on May 22, 2009. Public Law 111–24, 123 Stat. 1734 (2009). The Credit Card Act primarily amended the Truth in Lending Act (TILA) and instituted a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans.

The requirements of the Credit Card Act that pertain to credit cards or other open-end credit for which the Board has rulemaking authority became effective in three stages. First, provisions generally requiring that consumers receive 45 days' advance notice of interest rate increases and significant changes in terms (TILA Section 127(i)) and provisions regarding the amount of time that consumers have to make payments (TILA Section 163) became effective on August 20, 2009 (90 days after enactment of the Credit Card Act). A majority of the requirements under the Credit Card Act for which the Board has rulemaking authority, including, among other things, provisions regarding interest rate increases (TILA Section 171), over-the-limit transactions (TILA Section 127(k)), and student cards (TILA Sections 127(c)(8), 127(p), and 140(f)) became effective on February 22, 2010 (9 months after enactment). Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (TILA Section 149) and re-evaluation by creditors of rate increases (TILA Section 148) became effective on August 22, 2010 (15 months after enactment).

Implementation of Credit Card Act

The Board issued rules to implement the provisions of the Credit Card Act in stages, consistent with the statutory timeline established by Congress. On July 22, 2009, the Board published an interim final rule to implement the provisions of the Credit Card Act that became effective on August 20, 2009. *See* 74 FR 36077 (July 2009 Interim Final Rule). On January 12, 2010, the Board issued a final rule adopting in final form the requirements of the July 2009 interim final rule and implementing the provisions of the Credit Card Act that became effective on February 22, 2010. *See* 75 FR 7658 (February 2010 Final Rule). Independent of the Credit Card Act, this rule also incorporated the Board's comprehensive changes to the Regulation Z provisions applicable to open-end (not home-secured) credit, including amendments that affected all of the five major types of required disclosures: credit card applications and solicitations, account-opening disclosures, periodic statements, notices of changes in terms, and advertisements. Finally, on June 29, 2010, the Board published a final rule implementing the provisions of the Credit Card Act that became effective on August 22, 2010. *See* 75 FR 37526 (June 2010 Final Rule).

Since publication of the February 2010 and June 2010 Final Rules, the Board has become aware that clarification is needed to resolve confusion regarding how institutions must comply with particular aspects of those rules. In order to provide guidance and facilitate compliance with the final rules, the Board published proposed amendments to portions of the regulation and the accompanying staff commentary on November 2, 2010. *See* 75 FR 67458 (November 2010 Proposed Rule).

In response to the proposed rule, the Board received approximately 200 comment letters from members of Congress, credit card issuers and their employees, consumer groups and individual consumers, trade associations, and others. Based on a review of these comments and on its own analysis, the Board is adopting this final rule. The provisions of this rule are discussed in detail in Section III of this supplementary information. In the proposed rule, the Board encouraged commenters to limit their submissions to the issues addressed in the proposal, emphasizing that the purpose of this rulemaking is to clarify and facilitate compliance with the consumer protections contained in the February 2010 and June 2010 Final Rules, not to reconsider the need for—or the extent of—the protections in those rules. Accordingly, to the extent that commenters raised issues that are beyond the scope of the proposed rule, those issues are not addressed in this final rule.

II. Statutory Authority

In the supplementary information for the February 2010 and June 2010 Final Rules, the Board set forth the sources of its statutory authority under the Truth in Lending Act and the Credit Card Act. *See* 75 FR 7662 and 75 FR 37528. For purposes of this final rule, the Board continues to rely on this legal authority.

III. Section-by-Section Analysis

Section 226.2 Definitions and Rules of Construction

2(a) Definitions

2(a)(15) Credit Card

2(a)(15)(ii) Credit Card Account Under an Open-End (Not Home-Secured) Consumer Credit Plan

In the February 2010 Final Rule, the Board retained the pre-existing definition of "credit card" as any card, plate, or other single credit device that may be used from time to time to obtain credit. *See* § 226.2(a)(15)(i). However, the Board also added a new, somewhat narrower definition in order to implement the provisions of the Credit Card Act that apply to "credit card account[s] under an open end consumer credit plan." Specifically, in a new § 226.2(a)(15)(ii), the Board defined "credit card account under an open-end (not home-secured) consumer credit plan" to mean any open-end credit account accessed by a credit card except: (1) A home-equity plan subject to the requirements of § 226.5b that is accessed by a credit card; or (2) an overdraft line of credit that is accessed by a debit card. This term is generally used in the provisions of Regulation Z that implement the Credit Card Act.

The Board's February 2010 Final Rule declined requests from industry commenters to exempt all lines of credit accessed solely by an account number from the definition in § 226.2(a)(15)(ii), noting Congress' apparent intent that the Credit Card Act apply broadly to all products that meet the definition of "credit card." *See* 75 FR 7664–7665. However, the Board understands that this determination has caused uncertainty about whether *all* credit products accessed by an account number are subject to TILA's credit card provisions.

In particular, some institutions offer general purpose open-end lines of credit that are linked to a checking or other asset account with the same institution. The consumer can use the line's account number to request an extension of credit, which is then deposited into the asset account. The Board understands that there has been some confusion as to whether, in these circumstances, the account number is a "credit card" for purposes of § 226.2(a)(15)(i) and therefore a "credit card account under an open-end (not home-secured) consumer credit plan" for purposes of § 226.2(a)(15)(ii). Because most if not all credit accounts can be accessed in some fashion by an account number, the Board does not believe that Congress generally intended to treat account numbers that access a credit account as credit cards for purposes of TILA. However, the Board is concerned that, when an account number can be used to access an open-end line of credit to purchase goods or services, it would be inconsistent with the purposes of the Credit Card Act to exempt the line of credit from the protections provided for credit card accounts. For example, creditors may offer open-end credit accounts designed for online purchases that function like a traditional credit card account but can only be accessed using an account number. In these circumstances, the Board believes that TILA's credit card protections should apply.

Accordingly, the Board proposed to clarify the application of § 226.2(a)(15)(i) and (a)(15)(ii) to account numbers by amending comment 2(a)(15)–2, which provides illustrative examples of credit devices that are and are not credit cards. Specifically, the Board proposed to add an additional example clarifying that an account number that accesses a credit account is not a credit card, unless the account number can access an open-end line of credit to purchase goods or services. The comment would further clarify that, if, for example, a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of § 226.2(a)(15)(i). However, if the account number can also access the line of credit in order to purchase goods or services (such as an account number that can be used to purchase goods or services on the Internet), the account number is a credit card for purposes of § 226.2(a)(15)(i). Furthermore, if the line of credit can also be accessed by a card (such as a debit card or prepaid card), then that card is a credit card for purposes of § 226.2(a)(15)(i).

Consistent with this treatment of account numbers, the Board also proposed to amend § 226.2(a)(15)(ii)(B)—which currently excludes overdraft lines of credit accessed by a debit card from the definition of "credit card account under an open-end (not home-secured) consumer credit plan"—to also exclude overdraft lines of credit accessed by an account number (such as when a debit card number or checking account number is used to make an online purchase that overdraws the asset account). In addition, the Board proposed to adopt a new comment 2(a)(15)–4, which clarifies the test used for determining whether an account is a credit card account under an open-end (not home-secured) consumer credit plan for purposes of § 226.2(a)(15)(ii). Finally, for clarity and consistency, the Board proposed additional non-substantive revisions to the exception for home-equity plans in § 226.2(a)(15)(ii)(A).

Except as discussed below, the revisions to § 226.2(a)(15)(ii) and the commentary to § 226.2(a)(15) are adopted as proposed. While industry commenters generally supported or did not oppose this aspect of the proposal, comments from the prepaid card industry strongly objected to the reference to prepaid cards in the proposed example in comment 2(a)(15)–2. As discussed above, the Board's proposed amendments to comment 2(a)(15)–2 were intended to clarify § 226.2(a)(15)(i)'s definition of "credit card" with respect to account numbers that access lines of credit, not prepaid cards that access lines of credit. Accordingly, the Board has revised the proposed example in comment 2(a)(15)–2 to remove the specific reference to prepaid cards. However, a prepaid card is a credit card for purposes of Regulation Z if it falls within the general definition of "credit card" set forth in § 226.2(a)(15) and the accompanying commentary.

Consumer group commenters objected to the proposed revisions to comment 2(a)(15)–2, which could—in their view—create an incentive for creditors to develop new products designed to circumvent the Credit Card Act. However, the proposed revisions are intended to prevent circumvention by clarifying that an account number that accesses an open-end line of credit to purchase goods or services is generally treated as a credit card for purposes of Regulation Z. To the extent that additional products emerge that raise concerns regarding circumvention, further revisions to Regulation Z may be appropriate. Nevertheless, the Board has revised comment 2(a)(15)–2 to clarify that, when an account number can access an open-end line of credit to purchase goods or services, a creditor cannot evade Regulation Z's credit card provisions by treating the purchases as cash advances or as some other type of transaction.

2(a)(15)(iii) Charge Card

The Board understands that there has been some confusion as to whether a charge card is a "credit card account under an open-end (not home-secured) consumer credit plan," as defined in § 226.2(a)(15)(ii). Section 226.2(a)(15)(iii) defines a "charge card" as a credit card on an account for which no periodic rate is used to compute a finance charge. The Board has historically applied the same requirements to credit and charge cards, unless otherwise stated. *See* § 226.2(a)(15); comment 2(a)(15)–3. Therefore, as discussed in the February 2010 Final Rule, the Board adopted a similar approach when implementing the provisions of the Credit Card Act. *See* 75 FR 7672–7673. Nevertheless, for clarity and consistency, the Board proposed to amend comment 2(a)(15)–3 to state that references to a credit card account under an open-end (not home-secured) consumer credit plan in Subpart B (Open-End Credit) and Subpart G (Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to Students) include charge cards unless otherwise stated.

The Board also proposed to update the list of provisions in comment 2(a)(15)–3 that distinguish charge cards from credit cards. In addition, the Board proposed to remove the statement in the comment that, when the term "credit card" is used in the listed provisions, it refers to credit cards other than charge cards. While generally accurate, this statement may be overbroad in certain circumstances. For example, the exemption in § 226.7(b)(12)(v)(A) and the safe harbor in § 226.52(b)(1)(ii)(C) are limited to charge card accounts that require payment of outstanding balances in full at the end of each billing cycle. Accordingly, the applicability of a particular provision should be determined based on a review of that provision and the relevant staff commentary.

The Board did not receive significant comment on the proposed revisions to comment 2(a)(15)–3. Accordingly, that comment is revised as proposed.

Section 226.5 General Disclosure Requirements

5(b) Time of Disclosures

5(b)(2) Periodic Statements

Prior to enactment of the Credit Card Act, TILA Section 163 generally required creditors to send periodic statements for open-end consumer credit plans at least 14 days before the expiration of any period within which any credit extended may be repaid without incurring a finance charge (*i.e.,* a "grace period"). *See* 15 U.S.C. 1666b (2008). The Board's Regulation Z, however, extended this 14-day requirement to apply even if no grace period was provided. Specifically, prior to the 2009 amendments implementing the Credit Card Act, § 226.5(b)(2)(ii) required that creditors mail or deliver periodic statements at least 14 days before the date by which payment was due for purposes of avoiding not only finance charges as a result of the loss of a grace period but also any other charges (such as late payment fees). *See also* former comment 5(b)(2)(ii)–1 (2008). Thus, before the Credit Card Act, creditors were generally required to provide consumers with at least 14 days to make payments for all open-end consumer credit accounts.

Effective August 20, 2009, the Credit Card Act amended TILA Section 163 to generally prohibit a creditor from treating a payment as late or imposing additional finance charges with respect to open-end consumer credit plans unless the creditor mailed or delivered the periodic statement at least 21 days before the payment due date and the expiration of any grace period. *See* Credit Card Act § 106(b)(1). The Board's July 2009 interim final rule made corresponding amendments to § 226.5(b)(2)(ii) and the accompanying official staff commentary. *See* 74 FR 36077 (July 22, 2009). Because amended TILA 163 required that periodic statements be mailed at least 21 days before the payment due date for all open-end consumer credit accounts even if no grace period was provided, the amendments to § 226.5(b)(2)(ii) removed the pre-existing 14-day requirement as unnecessary.

However, in November 2009, the Credit CARD Technical Corrections Act of 2009 (Technical Corrections Act) further amended TILA Section 163. Pub. L. 111–93, 123 Stat. 2998 (Nov. 6, 2009). The Technical Corrections Act narrowed the requirement in TILA Section 163(a) that statements be mailed or delivered at least 21 days before the payment due date to apply only to credit card accounts, rather than to all open-end consumer credit plans. However, open-end consumer credit plans that provide a grace period remain subject to the 21-day requirement in TILA Section 163(b). In its February 2010 Final Rule, the Board narrowed the application of § 226.5(b)(2)(ii) for consistency with the Technical Corrections Act. However, in doing so, the Board inadvertently failed to reinsert the 14-day requirement for open-end consumer credit plans without a grace period.

The Board believes that it would be inconsistent with the purposes of the Credit Card Act for consumers to receive less time to make payments after its implementation than they did beforehand. Accordingly, pursuant to its authority under Section 105(a) of TILA and Section 2 of the Credit Card Act, the Board proposed to amend § 226.5(b)(2)(ii) to reinsert the 14-day requirement for open-end consumer credit plans that are not subject to the Credit Card Act's 21-day requirements.

Specifically, the Board proposed to revise § 226.5(b)(2)(ii) to provide that, in these circumstances, the creditor must adopt reasonable procedures designed to ensure that: (1) Periodic statements are mailed or delivered at least 14 days prior to the date on which the required minimum periodic payment must be made to avoid being treated as late; and (2) payments received on or prior to that date are not treated as late for any purpose. The Board also proposed corresponding revisions to the commentary to § 226.5(b)(2)(ii). Comments from industry and consumer groups supported these revisions, which are generally adopted as proposed. However, based on further analysis the Board has revised § 226.5(b)(2)(ii)(B) to clarify that the 14-day requirement applies regardless of whether a grace period applies to the account. In other words, the fact that a grace period applies to an account does not permit the creditor to treat a payment as late during the 14-day period, even if that payment does not satisfy the requirements of the grace period.

The Board also proposed to delete comment 5(b)(2)(iii)–1, which provided guidance regarding the pre-Credit Card Act versions of TILA Section 163 and § 226.5(b)(2) and was inadvertently retained in the February 2010 Final Rule. Prior to enactment of the Credit Card Act, TILA Section 163(b) stated that the 14-day mailing requirement did not apply "in any case where a creditor has been prevented, delayed, or hindered in making timely mailing or delivery of [the] periodic statement within the time specified * * * because of an act of God, war, natural disaster, strike, or other excusable or justifiable cause. * * *" Comment 5(b)(2)(iii)–1 clarified that these exceptions did not extend to the failure to provide a periodic statement because of a computer malfunction. Consumer groups opposed the deletion of this comment, arguing that the Board should reaffirm that a computer malfunction never excuses a creditor from providing periodic statements in a timely manner.

The Credit Card Act and the Board's final rules replaced the exceptions in TILA Section 163(b) with a requirement that creditors adopt "reasonable procedures" for ensuring that periodic statements are mailed or delivered consistent with the appropriate timelines. In the February 2010 Final Rule, the Board noted that the Credit Card Act's removal of the statutory exceptions was consistent with the adoption of a "reasonable procedures" standard insofar as a creditor's procedures for responding to any of the situations listed in prior TILA Section 163(b) will now be evaluated for reasonableness. *See* 75 FR 7667. Similarly, the Board believes that it is appropriate to evaluate a creditor's procedures for responding to a computer malfunction for reasonableness. Accordingly, the final rule deletes comment 5(b)(2)(iii)–1.

Section 226.5a Credit and Charge Card Applications and Solicitations

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

Limitations on Rate Decreases

Section 226.5a(b)(1) requires that the tabular disclosure provided with credit and charge card applications and solicitations state each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer, expressed as an annual percentage rate. Section 226.5a(b)(1)(i) clarifies this disclosure requirement when a rate is a variable rate. In part, § 226.5a(b)(1)(i) provides that a card issuer may not disclose any applicable limitations on rate increases or decreases in the table.

Section 226.55 sets forth limitations on rate increases applicable to credit card accounts under an open-end (not home-secured) consumer credit plan. Section 226.55(b)(2) provides that a card issuer may increase an annual percentage rate when (1) the rate varies according to an index that is not under the card issuer's control and is available to the general public, and (2) the rate increase is due to an increase in that index. In the February 2010 Final Rule, the Board adopted comment 55(b)(2)–2 that clarified that a card issuer exercises control over the operation of an index if the variable rate based on that index is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index.

In November 2010, the Board proposed to amend § 226.5a(b)(1)(i) for conformity with comment 55(b)(2)–2. The Board is aware that, as a practical matter, § 226.55(b)(2) and comment 55(b)(2)–2 preclude card issuers from imposing a variable rate that is subject to a fixed minimum rate. Accordingly, the Board proposed to delete as unnecessary language in § 226.5a(b)(1)(i) providing that a card issuer may not disclose any applicable limitations on rate decreases in the table. The Board received no comment on this change, which is adopted as proposed.

In the supplementary information to the November 2010 Proposed Rule, the Board noted that § 226.6(b)(2)(i)(A) contains analogous language regarding limitations on rate decreases. However, § 226.55(b)(2) applies only to credit card accounts under an open-end (not home-secured) consumer credit plan while § 226.6(b) applies to all open-end (not home-secured) credit. Therefore, the Board did not propose to delete the reference to limitations on rate decreases from § 226.6(b)(2)(i)(A). *But see* § 226.9(c)(2)(v)(C) regarding the notice requirements that apply to an open-end (not home-secured) plan with a variable rate that is subject to a fixed minimum rate.

Loss of Employee Preferential Rates

If a rate may increase as a penalty for one or more events specified in the account agreement, § 226.5a(b)(1)(iv) requires that the card issuer disclose the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. This disclosure generally must appear in the § 226.5a table; however, § 226.5a(b)(1)(iv)(B) provides that, for introductory rates as defined in § 226.16(g)(2)(ii), the card issuer must briefly disclose directly beneath the table the circumstances, if any, under which the introductory rate may be revoked, and the type of rate that will apply after the introductory rate is revoked. The Board adopted this format requirement for the disclosure regarding loss of an introductory rate in part due to concerns that including this information in the tabular disclosure could lead to "information overload." *See* 74 FR 5244, 5286.

The Board noted in the November 2010 Proposed Rule that some issuers may offer preferential or reduced rates at account opening that are not "introductory rates" as defined in § 226.16(g)(2)(ii). For example, an issuer may offer a preferential rate to its employees. Eligibility for the preferential or reduced rate is conditioned upon the consumer's continued employment with the issuer. Accordingly, if the consumer's employment is terminated, the contract provides that the rate will increase from the reduced preferential rate to a higher rate, such as the standard rate on the account.[1]

In the November 2010 Proposed Rule, the Board proposed to adopt a new § 226.5a(b)(1)(iv)(C), which would require that disclosures regarding the loss of an employee preferential rate be placed directly below the tabular disclosure. Proposed § 226.5a(b)(1)(iv)(C) generally mirrored § 226.5a(b)(1)(iv)(B) and provided that if a card issuer discloses in the table a preferential annual percentage rate for which only employees of the creditor or employees of a third party are eligible, the card issuer must briefly disclose directly beneath the table the circumstances under which such preferential rate may be revoked, and the rate that will apply after such preferential rate is revoked. The Board also proposed a new § 226.6(b)(2)(i)(D)(*3*) that would mirror proposed § 226.5a(b)(1)(iv)(C) and would require that brief disclosures regarding the loss of an employee preferential rate be placed directly below the tabular disclosure provided at account opening. The Board also proposed conforming amendments to the formatting requirements set forth in §§ 226.5a(a)(2)(iii) and 226.6(b)(1)(ii). For ease of reference, this section of supplementary information addresses both proposed § 226.5a(b)(1)(iv)(C) and § 226.6(b)(2)(i)(D)(*3*).

The Board also proposed a new comment 5a(b)(1)–5.iv to provide guidance regarding the disclosure below the table of the circumstances under which an employee preferential rate may be revoked. Proposed comment 5a(b)(1)–5.iv generally mirrored relevant portions of the guidance set forth in comment 5a(b)(1)–5.ii regarding the revocation of introductory rates. In addition, proposed comment 5a(b)(1)–5.iv clarified that the description of the circumstances in which an employee preferential rate could be revoked should be brief. For example, if an issuer may increase an employee preferential rate based upon termination of the employee's employment relationship with the issuer or a third party, the proposed comment clarified that an issuer may describe this circumstance as "if your employment with [issuer or third party] ends."

Several industry commenters expressed concerns that the proposal would add new disclosure requirements for employee preferred rates. One commenter stated that when a creditor offers an employee rate it is not usually disclosed in the tabular disclosures provided pursuant to §§ 226.5a and 226.6(b). This commenter stated that the tabular disclosures are drafted for general use and, if an employee applies, the account terms are subsequently amended to provide for the employee preferred rate. The commenter asked the Board to clarify that the proposal would not require creditors to disclose employee preferential rates in the tables provided pursuant to §§ 226.5a and 226.6(b). Two other industry commenters expressed concerns that the proposal would require a new disclosure to be included in application and account-opening disclosures relating to the potential loss of an employee preferred rate. These commenters argued that such disclosure requirements, particularly when paired with the advance notice requirements of § 226.9 and the limitations on rate increases in § 226.55, could result in reduced availability of beneficial employee rate programs, because issuers would be required to provide special disclosures to employees who receive preferred employee rates, while at the same time the advance notice requirements and limitations on rate increases would apply when the consumer's employment ends. These commenters recommended that the temporary rate exception be expanded

[1] The Board notes that 45 days' advance notice is required pursuant to § 226.9(g) prior to imposition of the higher rate. *See* 74 FR 5346. In addition, the limitations set forth in § 226.55 apply.

to permit issuers to increase rates, or fees where appropriate, based on termination of a consumer's employment, without being subject to 45-day advance notice or the limitations in § 226.55.

The Board notes that proposed §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) were not intended to impose any new disclosure requirements regarding employee preferential rates, but were rather intended to clarify the placement requirements for disclosures that are already required under Regulation Z. Sections 226.5a(b)(1) and 226.6(b)(2)(i) currently require disclosure of each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer. Thus, the Board believes that under current Regulation Z requirements, employee preferential rates must be included in the tabular disclosures provided pursuant to §§ 226.5a and 226.6(b), if they are, or will be, included in the initial account agreement.[2] In addition, §§ 226.5a(b)(1)(iv)(A) and 226.6(b)(2)(i)(D) currently require that certain additional disclosures be provided if a rate may increase as a penalty for one or more events specified in the account agreement. As stated in the supplementary information to its final rule published on January 29, 2009, the Board believes that an increase in rate due to the termination of a consumer's employment is a type of rate increase as a penalty, even if the circumstances under which the change may occur are set forth in the account agreement. *See* 74 FR 5244, 5346 (January 2009 Final Rule). Accordingly, the Board believes that §§ 226.5a(b)(1)(iv)(A) and 226.6(b)(2)(i)(D) currently require disclosures regarding the revocation of an employee preferential rate that is offered at account opening.

The Board noted in the proposal that the proposed placement requirement would be appropriate in order to prevent "information overload" and to focus consumers' attention on the disclosures that they find the most important. The Board continues to believe that it is appropriate to require that disclosures regarding the revocation of an employee preferential rate be provided with the tabular disclosures provided with credit card applications and solicitations and at account opening. However, the Board is concerned that including this information, which is likely relevant only to a limited subset of consumers, in the tabular disclosure may distract other consumers from other key disclosures. Accordingly, the Board is adopting §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) generally as proposed.

One industry commenter stated that the Board also should apply proposed §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) to situations in which a preferential rate is offered to a bank's insiders, such as executive officers, directors, or principal shareholders. The commenter noted that applicable regulations may permit preferential rates to be offered to such individuals, but that such preferential rates might not be covered by proposed §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) because insiders such as executive officers, directors, or principal shareholders are not employees of the creditor. The Board believes that it is appropriate to extend the guidance in §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) to apply to individuals who, while not technically employees of the card issuer or third party, have a similar affiliation to such entities. The Board believes that, as with employee preferential rates, requiring that disclosures regarding the revocation of preferential rates offered to such insiders be placed in the tabular disclosure may distract some consumers from other key disclosures and contribute to information overload. Thus, as adopted, §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) would apply if a card issuer or creditor discloses in the table a preferential annual percentage rate for which only employees of the card issuer or creditor, employees of a third party, or other individuals with similar affiliations with the card issuer, creditor, or third party, such as executive officers, directors, or principal shareholders, are eligible.

Consumer group commenters agreed with the Board's statement that termination of an employee preferential rate is not a promotional rate but is in fact a contingent rate increase. These commenters supported the inclusion of footnote 1 in the supplementary information to the proposal, which noted that 45 days' advance notice is required pursuant to § 226.9(g) prior to imposition of a higher rate upon loss of an employee promotional rate and that the limitations set forth in § 226.55 apply to the rate increase. Consumer groups requested that the substance of this footnote be incorporated into the commentary and that comment 55(b)(1)–4 be amended to expressly prohibit application of a rate increase due to loss of an employee preferential rate to existing balances on the account. For the reasons stated in the supplementary information to the January 2009 Final Rule and February 2010 Final Rule, the Board believes that rate increases that occur upon expiration of an employee preferential rate should continue to be subject to the advance notice requirements of § 226.9(g) and the substantive limitations in § 226.55. *See, e.g.,* 74 FR 5346, 75 FR 7736. However, the Board believes that Regulation Z already clearly provides that rate increases upon loss of an employee preferential rate require 45 days' advance notice under § 226.9(g) and are subject to the limitations in § 226.55.

Proposed §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) would have applied only to loss of employee preferential rates. The Board solicited comment on whether there are other types of preferential or reduced rates that are not introductory rates as defined in § 226.16(g)(2)(ii) but for which similar treatment under § 226.5a would be appropriate. Several industry commenters identified other scenarios in which creditors or card issuers may offer preferred rates that do not meet the definition of "introductory rates" in § 226.16(g)(2)(ii). For example, an issuer or creditor may offer preferred rates for making payments automatically via electronic recurring payments or payroll deduction. Other creditors may offer preferred rates as relationship rewards, for example for maintaining a deposit account with the creditor or for maintaining a minimum balance in a deposit account with the creditor. If the consumer fails to continue to meet the conditions associated with the preferential rate, the preferential rate will be revoked and a higher rate will be imposed.[3]

At this time, the Board is not extending the guidance in §§ 226.5a(b)(1)(iv)(C) and 226.6(b)(2)(i)(D)(*3*) to address the loss of preferred rates offered in other circumstances, such as preferred rates offered to consumers who make automatic payments or preferred rates otherwise offered as relationship rewards. Unlike employee preferred rates, which are likely relevant only to a subset of an issuer or creditor's

[2] If an employee preferential rate is not included in the initial account agreement, but is instead added by an amendment to the agreement after account opening, such a rate is not required to be disclosed in the tabular disclosures pursuant to §§ 226.5a and 226.6(b). But see § 226.9(c)(2) and (g) for other disclosure requirements that may apply.

[3] Similar to employee preferential rates, the Board notes that 45 days' advance notice is required pursuant to § 226.9(g) prior to imposition of the higher rate when the consumer ceases to meet the conditions for such preferential rates. In addition, the limitations set forth in § 226.55 apply.

consumers, the Board believes that relationship rewards or a discount for making automatic payments may be relevant to a much larger portion of a creditor's customer base. In addition, the Board believes that creditors may be more likely to market credit products on the basis of preferred rates based on automatic payments or other relationship rewards than on the basis of discounted rates that are available only if the consumer is employed with the creditor or another specific third party. Accordingly, the Board is concerned that permitting disclosures regarding the loss of preferential rate programs made available to the general public, such as those based upon automatic payments or as other types of relationship rewards, to be placed below the §§ 226.5a and 226.6 tables may detract from consumers' awareness and understanding of the circumstances under which such preferred rates can be terminated by the creditor.

Disclosure of How Long a Penalty Rate Will Remain in Effect

If a rate may increase as a penalty for one or more events specified in the account agreement, § 226.5a(b)(1)(iv) requires that the card issuer disclose the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. The Board understands that, in light of several provisions of the Credit Card Act, there is confusion regarding how issuers must disclose the period for which the penalty rate will remain in effect. The Board understands that historically some issuers' card agreements provided that penalty rates, once triggered, could remain in effect indefinitely. However, the enactment of the Credit Card Act established certain circumstances in which a card issuer must reduce the rate even after penalty pricing has been triggered. In particular, § 226.55(b)(4) requires a card issuer to reduce a rate that was raised based upon a delinquency of more than 60 days, if the consumer makes the first six required minimum payments on time following the effective date of the rate increase. In addition, § 226.59 requires a card issuer to periodically review accounts on which a rate increase has been imposed and, where appropriate based on the review, reduce the rate applicable to the account.

As a consequence of §§ 226.55(b)(4) and 226.59, the Board understands that it may be unclear how issuers should disclose the duration for which a penalty rate will be in effect, for example if the contract provides that the penalty rate may remain in effect indefinitely, except to the extent otherwise required by §§ 226.55(b)(4) and 226.59. Accordingly, the Board proposed to amend comment 5a(b)(1)–5.i to clarify that a card issuer may not disclose in the table any limitations imposed by §§ 226.55(b)(4) and 226.59 on the duration of increased rates. Proposed comment 5a(b)(1)–5.i set forth two examples. First, the proposed comment provided that if a card issuer reserves the right to apply the increased rate to any balances indefinitely, the issuer should disclose that the penalty rate may apply indefinitely, even though §§ 226.55(b)(4) and 226.59 may impose limitations on the continued application of a penalty rate to certain balances. The second example provided that if the issuer generally provides that the increased rate will apply until the consumer makes twelve timely consecutive required minimum periodic payments, the issuer should disclose that the penalty rate will apply until the consumer makes twelve consecutive timely minimum payments, even though §§ 226.55(b)(4) and 226.59 may impose limitations on the continued application of a penalty rate to certain balances.[4]

One industry commenter supported the proposed changes to comment 5a(b)(1)–5.i. However, two other industry commenters expressed concerns regarding this aspect of the proposal. These commenters stated that comment 5a(b)(1)–5.i could contribute to consumer confusion and reduce a card issuer's incentive to implement practices that are more beneficial to consumers than the minimum requirements of Regulation Z. The commenters expressed concern that if an issuer discloses a practice that is more beneficial to consumers than the requirements of §§ 226.55(b)(4) and 226.59—for example, that the issuer will lower the rate if the consumer makes three consecutive timely minimum payments—consumers will assume that the disclosed practice is detrimental to their interests.

The Board notes that § 226.5a(b)(1)(iv) requires issuers to disclose a brief description of how long a penalty rate will remain in effect. While the proposed clarification provided that a card issuer may not disclose in the table any limitations imposed by §§ 226.55(b)(4) and 226.59 on the duration of increased rates, § 226.5a(b)(1)(iv) nonetheless requires a card issuer to provide a disclosure regarding the duration of penalty rates. For example, if an issuer's account agreement generally provides for no automatic cure for penalty rates (except as required pursuant to § 226.55(b)(4)), the issuer would be required to disclose that the penalty rate may remain in effect indefinitely. Similarly, if the account agreement provides for a more advantageous cure for penalty rates than is required pursuant to § 226.55(b)(4), for example that penalty rates will be reduced if the consumer makes three consecutive timely payments, the issuer would disclose that fact. Accordingly, the Board believes that consumers will be able to compare the practices of different issuers and that a disclosure of an automatic penalty pricing cure based upon three consecutive timely payments will compare favorably with the disclosure provided by an issuer who offers no cure for penalty pricing except to the extent required under §§ 226.55(b)(4) and 226.59.

Accordingly, the Board is adopting the changes to comment 5a(b)(1)–5.i as proposed. The Board believes more complex disclosures explaining the applicability of the rules in §§ 226.55(b)(4) and 226.59 would be confusing to consumers, and would be of limited assistance in shopping for credit, given that those provisions apply to all issuers. In addition, consumers to whose accounts the cure right under § 226.55(b)(4) applies will be notified of that right when they receive a notice under § 226.9(c)(2) or (g) disclosing the associated rate increase.

Other Amendments to § 226.5a(b)(1)

The Board also proposed an amendment to comment 5a(b)(1)–5.ii to correct a technical error. As discussed above, pursuant to § 226.5a(b)(1)(iv)(B), information regarding the revocation of an introductory rate is required to be disclosed directly beneath the table. Comment 5a(b)(1)–5.ii, which discusses the disclosures regarding the revocation of an introductory rate, contained an erroneous reference to a disclosure *in,* rather than *beneath,* the table. Accordingly, the Board proposed a technical amendment to comment 5a(b)(1)–5.ii for conformity with the placement requirements in § 226.5a(b)(1)(iv)(B). The Board received no comments on this technical correction, which is adopted as proposed.

5a(b)(2) Fees for Issuance or Availability

Comment 5a(b)(2)–4 states that, if fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee

[4] The Board notes that the second example in proposed comment 5a(b)(1)–5.i erroneously referred to § 226.54(b)(4) instead of § 226.55(b)(4). This typographical error has been corrected in the final rule.

waivers may be disclosed in the table in addition to the required fees if the card issuer also discloses how long the reduced fees or waivers will remain in effect. For the reasons discussed below, the Board has revised this comment to clarify that the card issuer must comply with the disclosure requirements in §§ 226.9(c)(2)(v)(B) and 226.55(b)(1).

5a(b)(5) Grace Period

Section 226.5a(b)(5) requires that the tabular disclosure provided with credit and charge card applications and solicitations state the date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed.

Comment 5a(b)(5)–1 states that an issuer that offers a grace period on all purchases and conditions the grace period on the consumer paying his or her outstanding balance in full by the due date each billing cycle, or on the consumer paying the outstanding balance in full by the due date in the previous and/or the current billing cycle(s) will be deemed to meet the requirements in § 226.5a(b)(5) by providing the following disclosure, as applicable: "Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month." This model language was developed through extensive consumer testing.

In the February 2010 Final Rule, the Board adopted comment 5a(b)(5)–4, which clarifies that § 226.5a(b)(5) does not require a card issuer to disclose the limitations on the imposition of finance charges in § 226.54. Implementing the Credit Card Act, § 226.54 provides that, when a consumer pays some but not all of the balance subject to a grace period prior to the expiration of the grace period, the card issuer is prohibited from imposing finance charges on the portion of the balance paid. In adopting comment 5a(b)(5)–4, the Board was concerned that the inclusion of language attempting to describe the limitations set forth in § 226.54 could reduce the effectiveness of the grace period disclosure in the table. The Board also stated its belief that a disclosure of the limitations set forth in § 226.54 is not necessary insofar as the model language set forth in comment 5a(b)(5)–1 accurately states that a consumer generally will not be charged any interest on purchases if the entire balance is paid by the due date each month. Thus, although § 226.54 limits the imposition of finance charges if the consumer pays less than the entire balance shown on the periodic statement, the model language achieves its intended purpose of explaining succinctly how a consumer can avoid all interest charges on purchases.

Many issuers offer a grace period on all purchases under which no interest will be charged on purchases shown on a periodic statement if a consumer pays his or her outstanding balance shown on the periodic statement in full by the due date in the previous and/or the current billing cycle(s). Many of these issuers are using the model language set forth in comment 5a(b)(5)–1, or substantially similar language, to describe the grace period and the conditions on its availability. Nonetheless, other issuers have chosen not to use the model language set forth in comment 5a(b)(5)–1, even though the issuers would be permitted to do so. Some of the issuers that have chosen not to use the model language are disclosing the grace period in more technical detail, including a discussion of the limitations on imposition of finance charges under § 226.54, and the impact of payment allocation on whether interest will be charged on purchases due to the loss of a grace period. Other issuers are including detailed language to explain the conditions on the grace period, such as an explanation that the consumer will not be charged any interest on new purchases, or any portion of a new purchase, paid by the due date on the consumer's current billing statement if the consumer paid his or her entire balance on the previous billing statement in full by the due date on that statement.

Thus, in the November 2010 Proposed Rule, the Board proposed to revise comment 5a(b)(5)–1 to clarify that issuers must not disclose in the table required by § 226.5a the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period. However, issuers would not have been prohibited from disclosing this information outside the table. Comment 5a(b)(5)–4, which states that card issuers are not required to disclose the limitations set forth in § 226.54, would have been deleted. As discussed above, the Board believed the inclusion of language attempting to describe the limitations set forth in § 226.54 or the impact of payment allocation on whether interest will be charged on purchases due to the loss of a grace period could reduce the effectiveness of the grace period disclosure in the table.

In addition, the Board proposed to revise comment 5a(b)(5)–1 to clarify that, for purposes of the tabular disclosures required by § 226.5a, certain issuers must use the disclosure language set forth in proposed comment 5a(b)(5)–1. Specifically, proposed comment 5a(b)(5)–1 noted that some issuers may offer a grace period on all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. The proposed comment would have clarified that in these circumstances, § 226.5a(b)(5) requires that the issuer disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month." As discussed above, this disclosure language was developed through extensive consumer testing, and the Board believed this disclosure language achieves its intended purpose of explaining succinctly how a consumer can avoid all interest charges on purchases.

The Board recognized that some issuers may structure their grace periods differently than as described above, and the disclosure language described above may not be accurate for those issuers. Proposed comment 5a(b)(5)–1 noted that some issuers may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. As an example, the proposal noted that an issuer may charge interest on purchases if the consumer uses the account for a cash advance, regardless of whether the outstanding balance shown on the periodic statement is paid in full by the due date shown on that statement. In these circumstances, proposed comment 5a(b)(5)–1 clarified that § 226.5a(b)(5) requires the issuer to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period. Nonetheless, under the proposal, these issuers in disclosing the grace period and the conditions on its availability in the § 226.5a table still would not have been allowed to disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in

§ 226.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period.

Consumer group commenters objected to the proposed example in comment 5a(b)(5)–1, arguing that, when a consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement, a card issuer should not be permitted to charge interest on purchases based on the consumer's use of the account for a cash advance. As discussed below, these commenters requested that the Board ban this and other issuer practices related to grace periods using its authority under the Federal Trade Commission Act (FTC Act). In revising comment 5a(b)(5)–1, the Board intended to clarify the requirements for disclosing grace periods, not to opine on whether particular grace period practices are permissible. Accordingly, the final version of comment 5a(b)(5)–1 does not include the proposed example.

One industry commenter opposed the proposed modifications to comment 5a(b)(5)–1 that would prohibit a card issuer from disclosing in the table any limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period. The commenter believes the impact of payment allocation on whether interest is charged on purchases as the result of a loss of a grace period is very important information for an applicant attempting to determine the cost of a credit program based on how they intend to use various features of the account. For example, if a customer must pay one credit feature in full (due to payment allocation requirements) before payments are applied to a second credit feature nearing the end of its grace period, the commenter believed that the consumer should be alerted to such a situation in the table because it could require a significant commitment of resources by the consumer to avoid paying interest on the second credit feature. The commenter requested that the Board adopt model language that would address this situation, such as the following language: "We will not charge you interest if you pay the full balance of credit feature 1 and any balance in credit feature 2 in full by the due date each billing period."

Except as discussed above, comment 5a(b)(5)–1 is adopted as proposed. As noted earlier, the Board believes the inclusion of language attempting to describe the limitations set forth in § 226.54 or the impact of payment allocation on whether interest will be charged on purchases due to the loss of a grace period could reduce the effectiveness of the grace period disclosure in the table. Under comment 5a(b)(5)–1, an issuer must use the following language to describe the grace period as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month." This language achieves its intended purpose of explaining succinctly how a consumer can avoid all interest charges on purchases, namely by paying the entire balance by the due date each month.

Ban on certain types of grace periods. In response to the November 2010 Proposed Rule, several consumer groups requested that the Board develop model language for different types of grace periods and require the use of such model language for all issuers. In addition, the consumer groups requested that the Board use its authority under the FTC Act to limit issuers to the types of grace period for which there is model language. These consumer groups believe that some issuers are making grace period disclosures, and structuring grace periods themselves, in a manner that is confusing, deceptive, or unfair. In the November 2010 Proposed Rule, the Board did not propose to use its FTC Act authority to ban issuers from using certain types of grace periods, and is not adopting such a ban as part of the final rule.

Conditions on the grace period for certain future promotional offers. One industry commenter requested that the Board revise proposed comment 5a(b)(5)–1 to clarify that an issuer is not required to disclose in the table any conditions that a future promotional offer might place on the grace period. Specifically, this commenter indicated that some promotional offers place limitations on the grace period. For example, a promotional offer may provide that the grace period is eliminated for purchases under that offer, even if the customer pays his or her balance in full. The commenter argued that if the promotion is part of the account-opening offer, it is appropriate to include the specific limitations in the account-opening table. The commenter argued, however, that if the promotion is not offered at account-opening, it would not be appropriate to include the specific limitations in the account-opening table because they may never apply. The commenter believed that such disclosure would be confusing to consumers and potentially incorrect and misleading. In this case, the commenter believed that the applicable grace period disclosures should be given with the promotional materials.

To avoid consumer confusion, the Board believes that issuers should not include in the table any conditions that a future promotional offer might place on the grace period. The Board believes that it is more appropriate for issuers to treat any conditions that a future promotional offer might place on the grace period as a change to the grace period under § 226.9(c)(2), or under § 226.9(b)(3) if the change is applicable only to checks that access a credit card account. The Board notes that if the change in the grace period is applicable only to checks that access a credit card account, the issuer is not required to provide a disclosure pursuant to § 226.9(c)(2) (including the 45-day notice requirement), so long as the issuer complies with the disclosure requirements in § 226.9(b)(3). *See* comment 9(c)(2)–4. The Board recognizes that comment 9(c)(2)–1 indicates that no notice of a change in terms need be given under § 226.9(c)(2) if the specific change is set forth initially. For comment 9(c)(2)–1 to apply, however, both the triggering event and the resulting modification must be stated with specificity. The Board believes that comment 9(c)(2)–1 is not applicable in these situations. The Board believes that creditors are not able to identify with sufficient specificity at account opening which future promotional offers would trigger the additional conditions on the grace period in a way that consumers would understand.

Other grace period disclosures. The proposal provides that the § 226.54 limitations on imposition of finance charges must not be disclosed when describing a grace period in the disclosure table under § 226.5a(b)(5), or in the account-opening table under § 226.6(b)(2)(v). One industry commenter suggested that the Board clarify that the § 226.54 limitations on imposition of finance charges must not be disclosed with respect to any grace period disclosure required by the regulation, such as the disclosure of any grace period related to checks that access credit card accounts under § 226.9(b)(3)(i)(D), on the periodic statement under § 226.7(b)(8), or on the renewal notice under § 226.9(e).

1. *Grace period disclosure for checks that access a credit card account.* Section 226.9(b)(3)(i)(D) provides that with respect to checks that access a credit card account, creditors generally must disclose on the front of the page containing those checks whether or not

any grace period will apply to the check transactions. This grace period disclosure must be disclosed in a table, along with other disclosures relating to the checks. Comment 9(b)(3)(i)(D)–1 currently provides that creditors may use the following language to describe a grace period on check transactions: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you interest on check transactions if you pay your entire balance by the due date each month." Creditors may use the following language to describe that no grace period on check transactions is offered, as applicable: "We will begin charging interest on these checks on the transaction date."

As discussed above, one industry commenter suggested that the Board clarify that the § 226.54 limitations on imposition of finance charges must not be disclosed with respect to the disclosure of any grace period related to checks that access credit card accounts under § 226.9(b)(3)(i)(D), consistent with proposed guidance in comment 5a(b)(5)–1 and comments 6(b)(2)(v)–1 and –3. For the reasons discussed below, the final rule revises comment 9(b)(3)(i)(D)–1 to be consistent with guidance adopted under comment 5a(b)(5)–1 and comments 6(b)(2)(v)–1 and –3. Specifically, revised comment 9(b)(3)(i)(D)–1 clarifies that creditors in disclosing any grace period related to checks that access a credit card under § 226.9(b)(3)(i)(D) must not disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. The revised comment notes that some creditors may offer a grace period on credit extended by the use of an access check under which interest will not be charged on the check transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, comment 9(b)(3)(i)(D)–1 clarifies that § 226.9(b)(3)(i)(D) requires that the creditor disclose the grace period using the following language, or substantially similar language, as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on check transactions if you pay your entire balance by the due date each month." Revised comment 9(b)(3)(i)(D)–1 notes, however, that other creditors may offer a grace period on check transactions under which interest may be charged on check transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, revised comment 9(b)(3)(i)(D)–1 clarifies that § 226.9(b)(3)(i)(D) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

The Board believes that it is appropriate to adopt similar guidance for disclosure of a grace period applicable to access checks, as is adopted for disclosure of a grace period in the disclosure table under § 226.5a and the account-opening table under § 226.6. The grace period disclosure on checks accessing a credit card account required under § 226.9(b)(3)(i)(D) must be disclosed in a tabular format on the front of the page containing the checks, along with other required disclosures. The Board believes that the language contained in revised comment 9(b)(3)(i)(D)–1 for describing the grace period succinctly communicates to the consumer how he or she can avoid all interest charges on the check transactions, namely by paying the entire balance on the account by the due date each month. The Board believes the inclusion of language attempting to describe the limitations set forth in § 226.54 or the impact of payment allocation on whether interest will be charged on the check transactions due to the loss of a grace period could reduce the effectiveness of the grace period disclosure, and could distract consumers from other important information disclosed in the table.

2. *Grace period disclosure on periodic statements.* Section 226.7(b)(8) provides that a creditor must disclose on the periodic statement the date by which or the time period within which the new balance or any portion of the new balance shown on that periodic statement must be paid to avoid additional finance charges. Comment 7(b)(8)–3 clarifies that § 226.7(b)(8) does not require a card issuer to disclose the limitations on the imposition of finance charges in § 226.54. The final rule retains in comment 7(b)(8)–3 the clarification that § 226.7(b)(8) does not require a card issuer to disclose the limitations on the imposition of finance charges in § 226.54. The final rule also revises comment 7(b)(8)–3 to clarify that § 226.7(b)(8) does not require a card issuer to disclose the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. Thus, under revised comment 7(b)(8)–3, a creditor would not be required to disclose under § 226.7(b)(8) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period.

Nonetheless, unlike for the disclosure of the grace period in the tables under §§ 226.5a, 226.6, and 226.9(b)(3), a creditor in disclosing the grace period on the periodic statement under § 226.7(b)(8) would retain the flexibility to disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, and the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. The Board believes that it is appropriate to provide creditors with additional flexibility in describing the grace period on the periodic statement because this disclosure is not subject to tabular or other format requirements. In addition, the information about the limitations on the imposition of finance charges as result of a loss of a grace period in § 226.54, and the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period could be more relevant to consumers on the periodic statement, as consumers decide how much to pay in a particular billing cycle. Some consumers might find this information useful in evaluating the impact of a partial payment on whether they will pay interest on transactions in that billing cycle as a result of a loss of the grace period.

3. *Grace period disclosures on renewal notices under § 226.9(e).* In some instances, a card issuer is required under § 226.9(e) to send a notice to the consumer prior to the renewal of a consumer's credit or charge card. In this renewal notice, the card issuer must disclose certain account terms that would apply if the account were renewed, such as any grace period applicable to purchases as described in § 226.5a(b)(5). The Board does not believe, however, that any additional guidance is needed with respect to how a card issuer must disclose the grace period disclosure in the renewal notice under § 226.9(e). Under § 226.9(e), the grace period disclosure must be described using the same level of detail as the grace period disclosure in § 226.5a(b)(5). *See* § 226.9(e)(1)(i). Thus, guidance in § 226.5a(b)(5) and related commentary would be applicable to the grace period disclosure in the renewal notice under § 226.9(e).

4. *Disclosure of change to the grace period under § 226.9(c)(2).* The Board also notes if a creditor changes any

grace period disclosed under § 226.6(b)(2)(v), the creditor must disclose the change under § 226.9(c)(2), except as provided in § 226.9(c)(2)(v). The Board does not believe, however, that any additional guidance is needed with respect to how to disclose any change to the grace period under § 226.9(c)(2). Under § 226.9(c)(2)(iv)(D), the new grace period must be described using the same level of detail as required when disclosing the grace period in the account-opening table under § 226.6(b)(2). Thus, guidance in § 226.6(b)(2)(v) and related commentary is applicable to the grace period disclosure in the change-in-terms notice required under § 226.9(c)(2).

5a(b)(6) Balance Computation Method

Section 226.5a(b)(6) requires that a card issuer disclose on or with a credit card application or solicitation information about the method it uses to determine the balance for purchases on which the finance charge is computed. Comment 5a(b)(6)–1 provides guidance on how to comply with this requirement to disclose balance computation information for purchase balances. This comment also contains a cross-reference to the commentary to § 226.5a(g) for guidance on particular balance computation methods. In the November 2010 Proposed Rule, the Board proposed to delete this cross-reference as obsolete because there currently is no commentary to § 226.5a(g). The Board adopts this deletion as proposed. For clarity, the final rule also revises comment 5a(b)(6)–1 to reference § 226.5a(g), where particular balance computation methods are described in the regulation.

Section 226.6 Account-Opening Disclosures

6(b) Rules Affecting Open-End (Not Home-Secured) Plans

6(b)(2) Required Disclosures for Account-Opening Table for Open-End (Not Home-Secured) Plans

6(b)(2)(i) Annual Percentage Rate

The Board proposed to replace the reference to "card issuer" in § 226.6(b)(2)(i)(B) with "creditor" in order to correct a typographical error and to provide clarity and consistency with the scope of § 226.6(b). The Board did not receive significant comment on this aspect of the proposal, which is adopted as proposed.

In addition, for the reasons discussed in the supplementary information to § 226.5a(b)(1), the Board is adopting new § 226.6(b)(2)(i)(D)(*3*), which requires that certain information regarding revocation of an employee preferential rate be disclosed directly beneath the account-opening table.

6(b)(2)(v) Grace Period

Section 226.6(b)(2)(v) requires that the account-opening summary table state the date by which or the period within which any credit may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed.

Many creditors offer a grace period on purchases, but do not offer a grace period on cash advances and balance transfers. Samples G–17(B) and G–17(C) provide guidance on complying with § 226.6(b)(2)(v) when a creditor offers a grace period on purchases but no grace period on balance transfers and cash advances. *See* comment 6(b)(2)(v)–3. Specifically, Samples G–17(B) and G–17(C) contain the following model language to meet the requirements in § 226.6(b)(2)(v): "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date." This model language was developed through extensive consumer testing.

Comment 6(b)(2)(v)–1 provides model language for creditors to use when they provide a grace period on all types of transactions for the account. Specifically, this comment states that an issuer that offers a grace period on all types of transactions for the account and conditions the grace period on the consumer paying his or her outstanding balance in full by the due date each billing cycle, or on the consumer paying the outstanding balance in full by the due date in the previous and/or the current billing cycle(s) will be deemed to meet the requirements in § 226.6(b)(2)(v) by providing the following disclosure, as applicable: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on your account if you pay your entire balance by the due date each month."

In addition, for the reasons discussed in the section-by-section analysis to § 226.5a(b)(5), in the February 2010 Final Rule, the Board adopted comment 6(b)(2)(v)–4, which clarifies that § 226.6(b)(2)(v) does not require a card issuer to disclose the limitations on the imposition of finance charges in § 226.54. Implementing the Credit Card Act, § 226.54 provides that, when a consumer pays some but not all of the balance subject to a grace period prior to the expiration of the grace period, the card issuer is prohibited from imposing finance charges on the portion of the balance paid. In adopting comment 6(b)(2)–4, the Board was concerned that the inclusion of language attempting to describe the limitations set forth in § 226.54 could reduce the effectiveness of the grace period disclosure in the table.

As discussed above, many creditors offer a grace period on purchases, but do not offer a grace period on cash advances and balance transfers. Many of these creditors are using the model language set forth in Samples G–17(B) and G–17(C), or substantially similar language, to meet the requirements in § 226.6(b)(2)(v). Nonetheless, other creditors have chosen not to use this model language, even though the creditors could do so. Some of the creditors that have chosen not to use the model language are disclosing the grace period for purchases in more technical detail, including a discussion of the limitations on imposition of finance charges under § 226.54, and the impact of payment allocation on whether interest will be charged on purchases due to the loss of a grace period. Other creditors are including detailed language to explain the conditions on the grace period for purchases, such as an explanation that the consumer will not be charged any interest on new purchases, or any portion of a new purchase, paid by the due date on the consumer's current billing statement if the consumer paid his or her entire balance on the previous billing statement in full by the due date on that statement.

Consistent with proposed changes to comment 5a(b)(5)–1 and for the reasons discussed in the section-by-section analysis to § 226.5a(b)(5), the Board proposed to revise comment 6(b)(2)(v)–1 to clarify that creditors must not disclose in the table required by § 226.6(b) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. The Board believed the inclusion of language attempting to describe the limitations set forth in § 226.54 and the impact of payment allocation on whether interest will be charged on transactions due to the loss of a grace period could reduce the effectiveness of the grace period disclosure required by § 226.6(b)(2)(v). Comment 6(b)(2)(v)–4, which states that card issuers are not required to disclose the limitations set forth in § 226.54, would have been deleted.

In addition, consistent with proposed changes to comment 5a(b)(5)–1 and for the reasons discussed in the section-by-section analysis to § 226.5a(b)(5), the Board proposed to revise comment 6(b)(2)(v)–3 to clarify that § 226.6(b)(2)(v) requires certain creditors that provide a grace period on purchases but not on cash advances and balance transfers to use the disclosure language this is currently set forth in Samples G–17(B) and G–17(C). Specifically, proposed comment 6(b)(2)(v)–3 noted that some creditors do not offer a grace period on cash advances and balance transfers, but offer a grace period for all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. Proposed comment 6(b)(2)(v)–3 would have clarified that in these circumstances, § 226.6(b)(2)(v) requires that the creditor disclose the grace period for purchases and the conditions for its applicability, and the lack of a grace period for cash advances and balance transfers using the following language, or substantially similar language, as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date." This disclosure language, which also is set forth in the "Paying Interest" row in Samples G–17(B) and G–17(C), was developed through extensive consumer testing. The Board believed this disclosure language achieves its intended purpose of explaining succinctly how a consumer can avoid all interest charges on purchases, while explaining that no grace period is offered for cash advances and balance transfers.

The Board recognized that some creditors may offer a grace period on purchases but structure their grace periods differently than as described above, and the disclosure language described above may not be accurate for those creditors. Proposed comment 6(b)(2)(v)–3 noted that some creditors may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. Proposed comment 6(b)(2)(v)–3 would have clarified that in these circumstances, § 226.6(a)(2)(v) requires the creditor to amend the above disclosure language to accurately describe the conditions on the applicability of the grace period. Nonetheless, under the proposal, these creditors in disclosing the grace period and the conditions on its availability still would not have been allowed to disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in 226.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period.

Similarly, some creditors may not offer a grace period on cash advances and balance transfers, and will begin charging interest on these transactions from a date other than the transaction date, such as the posting date. Proposed comment 6(b)(2)(v)–3 would have clarified that in these circumstances, § 226.6(a)(2)(v) requires the creditor to amend the above disclosure language to be accurate.

Consistent with the proposed changes to comment 6(b)(2)(v)–3, the Board also proposed changes to comment 6(b)(2)(v)–1 which discusses circumstances where a creditor offers a grace period on all types of transactions on the account, including purchases, cash advances, and balances transfers. Specifically, proposed comment 6(b)(2)(v)–1 noted that some creditors may offer a grace period on all types of transactions under which interest will not be charged on transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, proposed comment 6(b)(2)(v)–1 would have clarified that § 226.6(b)(2)(v) requires that the creditor disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on your account if you pay your entire balance by the due date each month." Proposed comment 6(b)(2)(v)–1 also noted that other creditors may offer a grace period on all types of transactions under which interest may be charged on transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. This proposed comment would have clarified that in these circumstances, § 226.6(b)(2)(v) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

Consistent with changes to comment 5a(b)(5)–1 and for the reasons discussed in the section-by-section analysis to § 226.5a(b)(5), the final rule adopts comments 6(b)(2)(v)–1 and –3 as proposed, except that—as discussed above with respect to comment 5a(b)(5)–1—the Board has removed the proposed example regarding the loss of a grace period on purchases when the account is used for a cash advance. The Board believes the inclusion of language attempting to describe the limitations set forth in § 226.54 and the impact of payment allocation on whether interest will be charged on transactions due to the loss of a grace period could reduce the effectiveness of the grace period disclosure required by § 226.6(b)(2)(v). Comment 6(b)(2)(v)–3 clarifies that § 226.6(b)(2)(v) requires the creditor to disclose the grace period for purchases and the conditions for its applicability, and the lack of a grace period for cash advances and balance transfers using the following language, or substantially similar language, as applicable: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date." This disclosure language, which also is set forth in the "Paying Interest" row in Samples G–17(B) and G–17(C), was developed through extensive consumer testing. The Board believed this disclosure language achieves its intended purpose of explaining succinctly how a consumer can avoid all interest charges on purchases, while explaining that no grace period is offered for cash advances and balance transfers.

6(b)(2)(vi) Balance Computation Method

Section 226.6(b)(2)(vi) requires that a creditor disclose information about balance computation methods as part of the account-opening disclosures. Specifically, § 226.6(b)(2)(vi) provides that a creditor must disclose the name of the balance computation method listed in § 226.5a(g) that is used to determine the balance on which the finance charge is computed for each feature, or an explanation of the method used if it is not listed, along with a statement that an explanation of the method(s) required by § 226.6(b)(4)(i)(D) is provided with the account-opening disclosures. The information required by § 226.6(b)(2)(vi) must appear directly beneath the account-opening summary table. *See* § 226.6(b)(2)(ii).

The names of the balance computation methods listed in

§ 226.5a(g) describe balance computation methods for purchases (*e.g.,* "*average daily balance (including new purchases*)" and "*average daily balance (excluding new purchases*)"). Nonetheless, unlike § 226.5a(b)(6), creditors are required in § 226.6(b)(2)(vi) to disclose the balance computation method used for each feature on the account. Samples G–17(B) and G–17(C) provide guidance on how to disclose the balance computation method where the same method is used for all features on the account. *See* comment 6(b)(2)(vi)–1. Samples G–17(B) and G–17(C) disclose, as an example, the "*average daily balance (including new purchases)*" as the method that is being used to calculate the balance for all features on the account. Thus, for simplicity, where the balance for each feature is computed using the same balance computation method, a creditor may use the name of the appropriate balance computation method listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") to satisfy the requirement to disclose the name of the method for all features on the account, even though the name only refers to purchases.

Questions have been asked, however, regarding whether a creditor may revise the names of the balance computation methods listed in § 226.5a(g) to be more accurate by referring more broadly to all new transactions (rather than referring only to "new purchases") when the same method is used to calculate the balances for all features on the account. For example, creditors have asked whether they can revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new transactions)*" when this method is used to calculate the balances for all features of the account. Also, creditors have asked whether they may revise the names listed in § 226.5a(g) to be applicable to features other than purchases. Creditors in some cases may disclose the balance computation methods separately for each feature, such as when a different balance computation method applies to purchases than to cash advances.

To address these compliance issues and to provide additional flexibility to creditors, in the November 2010 Proposed Rule, the Board proposed to revise comment 6(b)(2)(vi)–1 to provide that in cases where the balance for each feature is computed using the same balance computation method, a single identification of the name of the balance computation method is sufficient. In that case, the proposed comment would have made clear that a creditor may use an appropriate name listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") to satisfy the requirement to disclose the name of the method for all features on the account, even though the name only refers to purchases. For example, if a creditor uses the average daily balance method including new transactions as the balance computation method for all features, a creditor may use the name "*average daily balance (including new purchases)*" listed in § 226.5a(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, the proposed comment would have provided that a creditor may revise the balance computation names listed in § 226.5a(g) to refer more broadly to all new credit transactions, such as using the language "new transactions" or "current transactions" (*e.g.,* "*average daily balance (including new transactions)*"), rather than simply referring to new purchases when the same method is used to calculate the balances for all features of the account.

In addition, the Board proposed to add comment 6(b)(2)(vi)–2 to address situations where a creditor is disclosing the name of the balance computation methods separately for each feature. In that case, in using the names listed in § 226.5a(g) to satisfy the requirements of § 226.6(b)(2)(vi) for features other than purchases, proposed comment 6(b)(2)(vi)–2 would have made clear that a creditor must revise the names listed in § 226.5a(g) to refer to the other features. For example, under proposed comment 6(b)(2)(vi)–2, when disclosing the name of the balance computation method applicable to cash advances, a creditor would have been required to revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, under proposed comment 6(b)(2)(vi)–2, a creditor would have been required to revise the name listed in § 226.5a(g)(ii) to disclose it as "*average daily balance (excluding new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

The Board received several comments supporting proposed comment 6(b)(2)(vi)–2, and no comments opposing it. For the reasons discussed above, the Board adopts comment 6(b)(2)(vi)–2 as proposed.

Balance computation methods that consider transactions from previous cycles. One industry commenter requested that the Board confirm that the balance computation methods listed in § 226.5a(g) can be used for transactions that accrue interest beginning on the transaction date even if the transaction date is prior to the first day of the cycle in which the transaction posts to the account, which may be the case for cash advances. The Board notes that § 226.54 provides that a card issuer cannot impose finance charges as a result of the loss of a grace period on a credit card account under an open-end (not home-secured) consumer credit plan if those finance charges are based on balances for days in billing cycles that precede the most recent billing cycle. Nonetheless, § 226.54 does not apply if transactions are not eligible for a grace period. *See* comment 54(a)(1)–1. Thus, in certain instances, a card issuer is not prohibited by § 226.54 from calculating interest charges beginning on the transaction date even if the transaction date is prior to the first day of the cycle in which the transaction posts to the account. Nonetheless, a creditor that uses such a balance computation method may not use the names of the balance computation methods listed in § 226.5a(g) to describe such method. The balance computation methods listed in § 226.5a(g) contemplate that the balances are computed using only days in the current billing cycle. For balance computation methods that calculate the balance using days from the previous cycle, the creditor may not use the names of the balance computation methods listed in § 226.5a(g). Instead, the creditor must provide an explanation of the method underneath the disclosure table required under § 226.5a and the account-opening table required under § 226.6. *See* § 226.5a(b)(2)(iii), § 226.5a(b)(6), § 226.6(b)(1)(ii), and § 226.6(b)(2)(vi). In describing this balance computation method below the tables required under § 226.5a and § 226.6, the creditor must clearly explain the method in as much detail as set forth in the descriptions of balance methods in § 226.5a(g). *See* comment 5a(b)(6)–1.

Using the phrase "(including new transactions") in describing balance computation method for § 226.5a. One industry commenter requested that, consistent with proposed comment 6(b)(2)(vi)–2, the Board clarify that an issuer may use either the name "*daily balance (including new purchases)*" or "*daily balance (including new* *transactions)*" to disclose the balance computation method underneath the disclosure table required by § 226.5a. The final rule does not contain this clarification. Section 226.5a(b)(6) requires that a card issuer disclose on or with a credit card application or solicitation information about the balance computation method it uses for purchases. Under § 226.5a(b)(6), an issuer is not required to disclose the balance computation method used for other features on the account. Accordingly, the names of the balance computation methods listed in § 226.5a(g) describe balance computation methods for purchases (*e.g.,* "*average daily balance (including new purchases)*" and "*average daily balance (excluding new purchases)*"). Thus, the Board believes it is appropriate to continue to describe the balance computation methods in § 226.5a(g) with respect to purchases.

Section 226.7 Periodic Statement

7(b) Rules Affecting Open-End (Not Home-Secured) Plans

7(b)(5) Balance on Which Finance Charge Computed

Section 226.7(b)(5) provides that a creditor must disclose on the periodic statement the amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined, using the term *Balance Subject to Interest Rate.* As an alternative to providing an explanation of how the balance was determined, a creditor that uses a balance computation method identified in § 226.5a(g) may, at the creditor's option, identify the name of the balance computation method and provide a toll-free telephone number where consumers may obtain from the creditor more information about the balance computation method and how resulting interest charges were determined. If the method used is not identified in § 226.5a(g), the creditor must provide a brief explanation of the method used.

Comment 7(b)(5)–7 provides guidance on the use of one balance computation method explanation or name when multiple balances are disclosed. Specifically, comment 7(b)(5)–7 notes that sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation or a single identification of the name of the balance computation method is sufficient. In addition, sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(b)(5)–1. In these cases, one explanation or a single identification of the name of the balance computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method).

The comment does not specify, however, whether in this case a creditor may use the balance computation method names listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") as the single identification of the name of the balance computation method used for all features, even though the name only refers to purchases. In addition, as discussed in the section-by-section analysis to § 226.6(b)(2)(vi), questions have been asked as to whether a creditor may revise the names of the balance computation methods listed in § 226.5a(g) to refer more broadly to all new transactions (rather than referring only to "new purchases") when the same method is used to calculate the balances for all features on the account. For example, creditors have asked whether they may revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new transactions)*" when this method is used to calculate the balances for all features of the account. Also, creditors have asked whether they may revise the names listed in § 226.5a(g) to be applicable to features other than purchases. Creditors in some cases may disclose the balance computation methods separately for each feature, such as when a different balance computation method applies to purchases than for cash advances.

To address these issues and to provide flexibility to creditors, consistent with proposed guidance in comment 6(b)(2)(vi), the Board proposed to revise comment 7(b)(5)–7 to provide that in cases where each balance was computed using the same balance computation method, a creditor may use an appropriate name listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") as the single identification of the name of the balance computation method applicable to all features, even though the name only refers to purchases. For example, under proposed comment 7(b)(5)–7, if a creditor uses the average daily balance method including new transactions as the balance computation method for all features, a creditor would have been allowed to use the name "*average daily balance (including new purchases)*" listed in § 226.5a(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, the proposed comment provided that a creditor may revise the balance computation names listed in § 226.5a(g) to refer more broadly to all new credit transactions, such as using the language "new transactions" or "current transactions" (*e.g.,* "*average daily balance (including new transactions)*"), rather than simply referring to new purchases when the same method is used to calculate the balances for all features of the account.

Also consistent with proposed comment 6(b)(2)(vi)–2, the Board proposed to add a new comment 7(b)(5)–8 to address situations where a creditor is disclosing the name of the balance computation methods separately for each feature. Proposed comment 7(b)(5)–8 would have provided that in those cases, where a creditor is using the names listed in § 226.5a(g) to satisfy the requirements of § 226.7(b)(5) for features other than purchases, a creditor must revise the names listed in § 226.5a(g) to refer to the other features. For example, under proposed comment 7(b)(5)–8, when disclosing the name of the balance computation method applicable to cash advances, a creditor would have been required to revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, a creditor would have been required to revise the name listed in § 226.5a(g)(ii) to disclose it as "*average daily balance (excluding new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

The Board received several comments supporting proposed comments 7(b)(5)–7 and -8, and no comments opposing them. For the reasons discussed above, the Board adopts these comments as proposed.

7(b)(6) Charges Imposed

Section 226.7(b)(6) generally requires the disclosure of the amounts of any charges imposed on a plan, which consists of finance charges attributable to periodic interest rates (disclosed as *Interest Charged*), and charges imposed as part of a plan other than charges attributable to periodic interest rates (disclosed as *Fees*). In addition, calendar year-to-date totals for both interest and fees must be disclosed. Comment 7(b)(6)–3 provides guidance for disclosing calendar-year-to-date totals for fees. In order to avoid inconsistency, the Board proposed to amend comment 7(b)(6)–3 to clarify that this guidance applies to fees as well as interest charged. The Board did not receive significant comment on this clarification, which is adopted in the final rule. The Board has modified the proposed comment to clarify that creditors must disclose separate totals for interest and fees.

7(b)(8) Grace Period

See discussion regarding § 226.5a(b)(5).

7(b)(12) Repayment Disclosures

Section 226.7(b)(12) requires that for a credit card account under an open-end (not home-secured) consumer credit plan, card issuers generally must disclose the following repayment disclosures on each periodic statement: (1) A "warning" statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the length of time it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and no further advances are made; (3) the total cost to the consumer of paying the balance in full if the consumer pays only the required minimum monthly payment and no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made; (5) the total cost to the consumer of paying the balance in full if the consumer pays the balance over 36 months; (6) the total savings of paying the balance in 36 months (rather than making only minimum payments); and (7) a toll-free telephone number at which the consumer may receive information about accessing consumer credit counseling. *See* § 226.7(b)(12)(i).

To simplify the disclosures, § 226.7(b)(12)(i) and (ii) provide that card issuers must round the following disclosures to the nearest whole dollar when disclosing them on the periodic statement: (1) The minimum payment total cost estimate, (2) the estimated monthly payment for repayment in 36 months, (3) the total cost estimate for repayment in 36 months, and (4) the savings estimate for repayment in 36 months. *See* § 226.7(b)(12)(i)(C), (b)(12)(i)(F)(*1*)(*i*), (b)(12)(i)(F)(*1*)(*iii*), (b)(12)(i)(F)(*1*)(*iv*) and (b)(12)(ii)(C). Some card issuers have requested, however, that they be permitted to provide these disclosures on the periodic statement rounded to the nearest cent to be more accurate and to avoid potential consumer confusion that rounding to the dollar might cause in certain circumstances. For example, assume that a consumer's balance is $3,000 and the APR on the account is 14.4%. The estimated monthly payment to repay the balance in 36 months would be $103.12 (rounded to the nearest cent). A card issuer would be required to disclose on the periodic statement the estimated monthly payment for repayment in 36 months as $103, and the total cost estimate for repayment in 36 months as $3,712. (The total cost estimate for repayment in 36 months is calculated by multiplying $103.12 times 36, and rounding that result to the nearest whole dollar.) Nonetheless, if a consumer pays $103 each month for 36 months, the consumer will have paid only $3,708 (not the $3,712 shown on the statement). Thus, rounding the disclosures to whole dollars when providing them on the periodic statement in some cases may make the disclosures appear to be inconsistent with each other.

To provide additional flexibility to card issuers, in the November 2010 Proposed Rule, the Board proposed to revise § 226.7(b)(12)(i) and (b)(12)(ii) to allow card issuers, at their option, to provide the following disclosures on the periodic statement either rounded to the nearest whole dollar or to the nearest cent: (1) The minimum payment total cost estimate, (2) the estimated monthly payment for repayment in 36 months, (3) the total cost estimate for repayment in 36 months, and (4) the savings estimate for repayment in 36 months. Nonetheless, proposed comment 7(b)(12)–1 would have provided that an issuer's rounding for all of these disclosures must be consistent. Under proposed comment 7(b)(12)–1, an issuer would have been allowed to round all of these disclosures to the nearest whole dollar when providing them on periodic statements, or round all of these disclosures to the nearest cent. An issuer would not have been allowed, however, to round some of the disclosures to the nearest whole dollar, while rounding other disclosures to the nearest cent. The Board believed that requiring an issuer to be consistent in how it rounds these disclosures helps to ensure that these disclosures remain consistent with each other.

The Board received several comments supporting the proposed changes to § 226.7(b)(12)(i) and (b)(12)(ii) and comment 7(b)(12)–1, and no comments opposing them. For the reasons discussed above, the Board adopts these changes as proposed.

7(b)(14) Deferred Interest or Similar Transactions

Section 226.7(b)(14) generally requires disclosure of the date by which any outstanding balance subject to a deferred interest or similar program must be paid in full in order to avoid finance charges on the front of each periodic statement issued during the deferred interest period. In order to avoid potential confusion, the Board proposed to amend § 226.7(b)(14) and its commentary to clarify that the disclosure required by § 226.7(b)(14) may be on the front of any page of each periodic statement issued during the deferred interest period that reflects the deferred interest or similar transaction. Industry commenters generally supported the proposal.

However, consumer group commenters opposed the proposal as well as deferred interest plans generally. These commenters argued that the deferred interest disclosure should be on the front of the first page of the periodic statement, or in the alternative, grouped with the disclosure of the deferred interest balance, deferred interest APR, and accrued interest for the deferred interest balance.

The clarifications in § 226.7(b)(14) and its commentary is adopted as proposed. The Board believes this clarification ensures that consumers continue to receive conspicuous disclosure of the end of the deferred interest period and also provides greater certainty and flexibility to creditors in order to facilitate compliance.

Section 226.9 Subsequent Disclosure Requirements

9(b) Disclosures for Supplemental Credit Access Devices and Additional Features

9(b)(3) Checks That Access a Credit Card Account

Section 226.9(b)(3) sets forth requirements for disclosures that must be provided with checks that access a credit card account. These disclosures set forth certain key terms, such as the rates that will apply to the checks, any transaction fees applicable to the checks, and whether or not a grace period is given within which any credit extended by use of the checks may be repaid without incurring interest charges. In the November 2010 Proposed Rule, the Board proposed to clarify that if any rate disclosed pursuant to § 226.9(b)(3) is a variable rate, the card issuer must disclose that the rate may vary and how the rate is determined. Proposed § 226.9(b)(3)(iii) generally mirrored the disclosure requirements for variable rates set forth in §§ 226.5a(b)(1)(i) and 226.6(b)(2)(i)(A). In describing how the applicable rate will be determined, the proposal would have required the card issuer to identify the type of index or formula that is used in setting the rate. The proposal would not have permitted disclosure of the value of the index and the amount of the margin that are used to calculate the variable rate in the table. In addition, the proposal would not have permitted a card issuer to disclose any applicable limitations on rate increases in the table.

One card issuer commented in support of the proposed variable-rate disclosure requirements in § 226.9(b)(3)(iii). One other card issuer agreed that it is important that variable rate information be disclosed to consumers who receive checks that access a credit card account, but questioned the benefit of providing the proposed variable rate disclosures to consumers who have already received variable rate disclosures at account opening. Several other issuers commented that requiring additional disclosures about variable rates could contribute to information overload and impose burden on issuers that may result in reduced availability of promotional offers in connection with checks that access a credit card account. Two such commenters recommended that the final rule limit the requirement to provide variable rate disclosures to situations where the promotional or post-promotional rates or fees that apply to the checks exceed the rates applicable prior to the promotion.

The Board continues to believe that it is important that consumers be informed if the rates that apply to checks that access a credit card account are variable rates, to better assist consumers with making an informed decision regarding use of the checks. Accordingly, the Board is adopting § 226.9(b)(3)(iii) as proposed. Even if variable rates are disclosed at account opening, the Board also believes it is important that consumers receive information regarding any applicable variable rate at the same time that they receive other disclosures regarding the check offer, including the annual percentage rates that will apply to the checks. The Board is concerned that even if variable rates are disclosed at account opening, consumers may not be aware when they receive a check offer that the rates that apply to those checks and that must be disclosed pursuant to § 226.9(b)(3) also will be variable rates. Indeed, it may be confusing or even misleading for the rates disclosed pursuant to § 226.9(b)(3) to state nothing regarding the fact that the rates that apply to the checks are variable, when disclosures of annual percentage rates provided with credit card applications and solicitations and at account opening are required to set forth certain information identifying a rate as variable. The variable-rate disclosure requirements in new § 226.9(b)(3)(iii) are based on the approach in §§ 226.5a(b)(1)(i) and 226.6(b)(2)(i)(A), which was informed by consumer testing conducted on behalf of the Board. The Board believes that § 226.9(b)(3)(iii) strikes the appropriate balance between informing consumers of key information regarding the variable rate or rates applicable to checks that access a credit card account and avoiding overly detailed information that may be confusing to consumers.

Section 226.9(b)(3)(i) requires that the disclosures given in connection with checks that access a credit card account be in the form of a table with headings, content, and form substantially similar to Sample G–19. In the November 2010 Proposed Rule, the Board proposed a new comment 9(b)(3)(i)–2 to clarify that a card issuer may include in the tabular disclosure provided pursuant to § 226.9(b)(3) disclosures regarding the terms offered on non-check transactions, provided that such transactions are subject to the same terms that are required to be disclosed pursuant to § 226.9(b)(3)(i) for the checks that access a credit card account. Proposed comment 9(b)(3)(i)–2 stated, however, that a card issuer may not include in the table information regarding additional terms that are not required disclosures for access checks pursuant to § 226.9(b)(3).

Commenters who addressed this aspect of the proposal supported comment 9(b)(3)(i)–2, which is adopted as proposed. As stated in the November 2010 Proposed Rule, the Board believes that if a card issuer offers a single set of terms that apply both to checks that access a credit card account and to other transactions, it is appropriate to permit the card issuer to present one combined tabular disclosure. For example, a card issuer may offer a single set of promotional terms that apply both to checks that access a credit card account and to balance transfers made without use of an access check. Under these circumstances, it is unnecessary to require card issuers to provide two substantively identical but separate sets of disclosures, one for check transactions and one for other balance transfers. Accordingly, the Board believes that comment 9(b)(3)(i)–2 will ensure that consumers receive clear disclosures regarding checks that access a credit card account, while at the same time minimizing the operational burden that would be associated with providing two sets of disclosures of substantively identical terms.

Finally, the Board has revised the guidance regarding grace periods in comment 9(b)(3)(i)(D)–1 consistent with the revisions to the commentary for § 226.5a(b)(5), which are discussed in detail above.

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

Comment 9(c)(2)–1 states that, except as provided in § 226.9(g)(1), no notice of a change in terms need be given if the specific change is set forth initially, such as rate increases under a properly disclosed variable-rate plan in accordance with § 226.9(c)(2)(v)(C). The Board proposed to revise this comment to clarify that the initial disclosure of the change must be provided consistent with any applicable requirements. For example, no notice of a change in terms is required when a promotional rate expires, provided that the card issuer disclosed the terms associated with that promotional rate consistent with § 226.9(c)(2)(v)(B). Commenters supported this revision, which is adopted as proposed.

9(c)(2)(i) Changes Where Written Advance Notice is Required

9(c)(2)(ii) Significant Changes in Account Terms

Section 226.9(c)(2) sets forth the change-in-terms notice requirements for open-end consumer credit plans that are not home-secured. Section 226.9(c)(2)(i) states that, when a significant change in account terms as described in § 226.9(c)(2)(ii) is made to a term required to be disclosed under § 226.6(b)(3), (b)(4), or (b)(5), a creditor must generally provide a written notice at least 45 days prior to the effective date of the change. Section 226.9(c)(2)(i) defines a "significant change in account terms" as a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, or the acquisition of a security interest.

The Board is aware that some confusion has arisen regarding the references to § 226.6(b)(3), (b)(4), and (b)(5) contained in § 226.9(c)(2). In particular, given that "significant change in account terms" is defined in § 226.9(c)(2)(ii) generally with respect to terms required to be disclosed in the account-opening table under § 226.6(b)(1) and (b)(2), several creditors asked the Board to clarify what advance notice requirements apply when a change is made to a term required to be disclosed under § 226.6(b)(3), (b)(4), or (b)(5) that (1) may impact a term required to be disclosed in the account-opening table pursuant to § 226.6(b)(1) and (b)(2), but (2) is not a term that itself is required or permitted to be included in the account-opening table. For example, the Board was asked whether 45 days' advance notice is required prior to changing the date or schedule on which the value of a variable annual percentage rate is adjusted, if the formula for computing the value of the variable rate otherwise remains the same (*i.e.,* based on the same index and margin). The Board notes that the variable annual percentage rate is a term required to be disclosed pursuant to § 226.6(b)(1) and (b)(2). In contrast, the date or schedule on which the rate is computed is not required or permitted to be disclosed in the tabular disclosure pursuant to § 226.6(b)(1) and (b)(2). However, the date or schedule on which the rate is computed is required to be disclosed at account opening outside of the table pursuant to § 226.6(b)(4).

The Board proposed several amendments to § 226.6(b)(1) and (b)(2) to clarify the advance notice requirements for changes to terms specified in § 226.6(b)(3), (b)(4), or (b)(5) that are not also terms required to be disclosed under § 226.6(b)(1) and (b)(2). First, the Board proposed to delete as unnecessary the references to § 226.6(b)(3), (b)(4) and (b)(5), as well as a reference to increases in the required minimum periodic payment, from § 226.9(c)(2)(i). The Board noted in the November 2010 Proposed Rule that defining the term "significant change in account terms" exclusively in § 226.9(c)(2)(ii) and deleting the references to § 226.6(b)(3), (b)(4) and (b)(5) and increases in the required minimum periodic payment in § 226.9(c)(2)(i) would alleviate confusion regarding compliance with the change-in-terms notice requirements.

Second, the Board proposed to amend the definition of "significant change in account terms" in § 226.9(c)(2)(ii) to clarify to which terms the 45-day advance notice requirements in § 226.9(c)(2) apply. The proposal would have amended § 226.9(c)(2)(ii) to define "significant change in account terms" as a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 226.6(b)(4), or the acquisition of a security interest.

Two industry commenters objected to the proposed amendment clarifying that changes to terms required to be disclosed under § 226.6(b)(4) are "significant changes in account terms." These commenters argued that 45 days' advance notice of changes in terms required to be disclosed under § 226.6(b)(4) is unnecessary and that 45 days' advance notice should be required only in connection with changes to those terms that are required to be disclosed in the account opening disclosure table. The commenters argued that advance notice of changes in terms required to be disclosed under § 226.6(b)(4) would better be addressed by state or contract law, and that highlighting these changes by requiring notice pursuant to § 226.9(c)(2) could contribute to "information overload." Finally, these commenters indicated that application of the advance notice rules to changes in terms required to be disclosed under § 226.6(b)(4) would increase regulatory burden and administrative costs.

In contrast, consumer groups and one industry commenter supported the Board's proposal to expressly provide that changes to terms required to be disclosed under § 226.6(b)(4) are "significant changes in account terms." The industry commenter acknowledged that the clarification could result in the provision of more change-in-terms notices but agreed that the changes are significant to the consumer and should be subject to 45 days' advance notice.

One industry commenter erroneously stated that the proposal would create a new requirement that 45 days' advance notice be given prior to changing the balance computation method applicable to an open-end (not home-secured) account. This commenter argued that a change in the balance computation method is not a significant change in account terms and that 45 days' advance notice should not be required. The Board notes that the balance computation method is a term required to be disclosed under § 226.6(b)(1) and (b)(2), and therefore a change in the balance computation method currently is a "significant change in account terms" under existing § 226.9(c)(2)(ii), and would remain a "significant change in account terms" under the November 2010 Proposed Rule.

The Board is adopting the changes to § 226.9(c)(2)(i) and (c)(2)(ii) as proposed. Accordingly, § 226.9(c)(2)(ii) as adopted specifically categorizes changes in terms required to be disclosed under § 226.6(b)(4) as "significant change[s] in account terms." Section 226.6(b)(4) requires disclosure of certain information regarding periodic rates that may be used to calculate interest. The Board believes that changes in the manner in which annual percentage rates are computed, for example, changes in the frequency with which a variable rate may increase, are significant changes because they may impact the amount of interest imposed on a consumer's account, which is one of the key costs associated with open-end (not home-secured) credit. While certain details regarding rates mandated by § 226.6(b)(4) are not required or permitted to be disclosed in the account-opening table, changes in the manner in which an interest rate is computed may have a direct impact on the annual percentage rate expressed as a yearly rate, which is a required disclosure in the account-opening table under § 226.6(b)(1) and (b)(2). For example, for variable rates § 226.6(b)(4) requires disclosure of the frequency with which the rate may increase and the circumstances under which the rate may increase, both of which may impact the computation of the rate required to be disclosed in the account-opening table. Thus, the Board continues to believe that 45 days' advance notice of such changes is appropriate to ensure that consumers can take actions to mitigate the potential impact of changes in the way in which the annual percentage rate or rates applicable to their accounts are computed.

As discussed below, the Board notes that the final rule provides creditors with flexibility in how to format the notice of a change to a term required to be disclosed pursuant to § 226.6(b)(4); if the change does not result in a change to a term required to be disclosed pursuant to § 226.6(b)(1) or (b)(2), the notice would not be required to be presented in a tabular format pursuant to § 226.9(c)(2)(iv)(D). The Board believes that this flexibility will alleviate burden on creditors, while ensuring that the changes of the most importance to consumers are appropriately highlighted.

Proposed § 226.9(c)(2)(ii) did not specifically identify changes in terms required to be disclosed under § 226.6(b)(3) in the list of "significant change[s] in account terms." The Board stated in the proposal that it believes a reference to § 226.6(b)(3) is unnecessary, for several reasons. Section 226.6(b)(3) addresses disclosure of charges imposed as part of an open-end (not home-secured) plan. Certain charges imposed as part of a plan are specifically required to be disclosed in the account-opening table under § 226.6(b)(1) and (b)(2), while other charges imposed as part of the plan are not required or permitted to be disclosed in the table. Therefore, the 45-day advance notice requirement would continue to apply to charges that are identified in § 226.6(b)(3) that are also required to be disclosed in the account-opening table under § 226.6(b)(1) and (b)(2). In addition, § 226.9(c)(2)(iii) sets forth a special rule for notice of changes to charges imposed as part of the plan that are not required to be disclosed in the account-opening table. In particular, for charges imposed as part of the plan under § 226.6(b)(3) that are not required to be disclosed in the account-opening table under § 226.6(b)(1) and (b)(2), § 226.9(c)(2)(iii) requires a creditor to either, at its option (1) provide at least 45 days' written advance notice before the change becomes effective, or (2) provide notice orally or in writing of the amount of the charge to an affected consumer at a relevant time before the consumer agrees to or becomes obligated to pay the charge.

Consumer group commenters objected to the existing rule set forth in § 226.9(c)(2)(iii), to the extent that it permits new fees that are not disclosed in the account opening table to be disclosed orally at a relevant time before the consumer agrees or becomes obligated to pay the charge. Consumer groups believe that the addition of a new fee, other than one-time fees for time-sensitive matters, should require a change in terms notice. However, for the reasons discussed in the supplementary information to the January 2009 Final Rule, the Board is not expanding the 45-day advance notice requirements to charges imposed as part of the plan under § 226.6(b)(3) that are not required to be disclosed in the account-opening table under § 226.6(b)(1) and (b)(2). *See, e.g.,* 74 FR 5273, 74 FR 5345.

The Board proposed one wording change to § 226.9(c)(2)(iii) and comment 9(c)(2)(iii)–1; the proposal would have replaced the word "may" with "must," in order to clarify that increases in, or the introduction of new, charges imposed as part of the plan under § 226.6(b)(3) must be disclosed in accordance with § 226.9(c)(2)(iii). The Board received no comments on this change, which is adopted as proposed.

Finally, unlike current § 226.9(c)(2)(i), the definition of "significant change[s] in account terms" in proposed § 226.9(c)(2)(ii) did not expressly reference the disclosures required by § 226.6(b)(5). Section 226.6(b)(5) requires that a creditor disclose, to the extent applicable, certain information regarding voluntary credit insurance, debt cancellation or debt suspension coverage, security interests, and a statement regarding the consumer's billing rights. The disclosures regarding voluntary credit insurance and similar products and the statement of billing rights set forth in § 226.6(b)(5) are not terms of the account, but specific disclosures that must be given. Accordingly, given that these are not terms of the account, the Board noted in the proposal that there are no corresponding changes in terms for which it is appropriate to require advance notice.[5] In contrast, the acquisition of a security interest is expressly included in § 226.9(c)(2)(ii)'s definition of "significant change in account terms" for which 45 days' advance notice must generally be provided. The Board received no comments on this aspect of the proposal, which is adopted as proposed.

The Board is also amending § 226.9(c)(2)(i)(A) to correct a technical issue; this amendment is not intended as a substantive change to the change-in-terms notice requirements. Consumer group commenters noted that in the February 2010 Final Rule, the Board created a new § 226.9(c)(2)(i)(B) to address change-in-terms notice requirements for changes agreed to by the consumer. As discussed in the supplementary information to the February 2010 Final Rule, new § 226.9(c)(2)(i)(B) generally included guidance that was formerly included in the commentary to § 226.9(c)(2), which was moved into the regulation for clarity. *See* 75 FR 7693. Section 226.9(c)(2)(i)(B) sets forth guidance regarding which changes are deemed to be "agreed to" by the consumer. Consumer group commenters on the November 2010 Proposed Rule expressed concerns that the retention in the February 2010 Final Rule of a separate reference to changes agreed to by the consumer in § 226.9(c)(2)(i)(A) could be read as creating a different, broader standard than the one set forth in § 226.9(c)(2)(i)(B). Accordingly, the Board is amending § 226.9(c)(2)(i)(A) to expressly cross-reference § 226.9(c)(2)(i)(B), in order to clarify that the guidance in § 226.9(c)(2)(i)(B) is intended to exclusively address what it means for a change to be "agreed to by the consumer."

[5] The Board notes that charges for voluntary credit insurance, debt cancellation or debt suspension coverage are "charges imposed as part of the plan" under § 226.6(b)(3)(ii)(F), and accordingly changes in the cost of such coverage are required to be disclosed in accordance with § 226.9(c)(2)(iii).

9(c)(2)(iv) Disclosure Requirements

As discussed above, the Board is amending § 226.9(c)(2)(ii) to expressly provide that changes to terms required to be disclosed under § 226.6(b)(4) are "significant change[s] in account terms." The Board proposed several conforming changes to § 226.9(c)(2)(iv), which sets forth the disclosure requirements for the 45-day advance notice of a significant change in account terms. First, the Board proposed to amend § 226.9(c)(2)(iv)(A)(*1*) to provide that the notice must include a summary of changes made to terms required to be disclosed under § 226.6(b)(4). Second, the Board proposed to amend § 226.9(c)(2)(iv)(D)(*1*) to clarify the formatting requirements for the notice provided in advance of a change to a term required to be disclosed under § 226.6(b)(4). Section 226.9(c)(2)(iv)(D)(*1*) generally requires that the summary of changes included with a change-in-terms notice be in a tabular format, with headings and format substantially similar to any of the account-opening tables found in G–17 to appendix G. However, terms required to be disclosed under § 226.6(b)(4), such as the margin for a variable rate, are not permitted to be included in the account-opening table, and therefore would not be in a tabular format in the samples in G–17 to appendix G. Accordingly, the Board proposed to amend § 226.9(c)(2)(iv)(D)(*1*) to expressly state that the summary of a term required to be disclosed under § 226.6(b)(4) that is not required to be disclosed under § 226.6(b)(1) and (b)(2) need not be in a tabular format.

The Board received only one comment on this aspect of the proposal, from an industry commenter that supported this flexible approach to providing disclosures of changes to terms required to be disclosed under § 226.6(b)(4). Accordingly, the Board is adopting the changes to § 226.9(c)(2)(iv)(A)(*1*) and (c)(2)(iv)(D)(*1*) as proposed.

Right To Reject

The Board proposed several changes related to disclosure of the right to reject certain types of changes. When a creditor makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit plan, § 226.9(c)(2)(iv)(B) generally requires the creditor to disclose certain information regarding the consumer's right to reject that change under § 226.9(h). Section 226.9(c)(2)(iv)(B) also lists several types of changes to which the right to reject does not apply, including a change in the balance computation method necessary to comply with § 226.54. The Board adopted this exemption in the February 2010 Final Rule in order to facilitate compliance with the limitations on the imposition of finance charges in § 226.54, which implemented the Credit Card Act's prohibition on the two-cycle balance computation method. *See* 75 FR 7696, 7730.

Because § 226.54 went into effect on February 22, 2010, the Board proposed to remove the exemption in § 226.9(c)(2)(iv)(B) for changes necessary to comply with § 226.54. In its place, the Board proposed to adopt an exemption stating that, when a fee has been reduced consistent with the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.,* or a similar Federal or State statute or regulation, the right to reject does not apply to an increase in that fee once the statute or regulation no longer applies, provided that the amount of the increased fee does not exceed the amount of that fee prior to the reduction.

As discussed in greater detail below with respect to § 226.55(b)(6), the SCRA and some state statutes generally require creditors to reduce interest rates and fees for consumers who are in military service. When the SCRA or similar state statute ceases to apply, § 226.9(c) generally requires the creditor to provide 45 days' advance notice of any increase in a rate or fee. The right to reject does not apply to rate increases, but § 226.55(b)(6) limits the ability of a card issuer to increase the rate that applies to the existing balance on a credit card account under an open-end (not home-secured) consumer credit plan in these circumstances. Specifically, § 226.55(b)(6) provides that, if the SCRA requires a card issuer to reduce an interest rate on an existing balance when a consumer enters military service, the rate applied to that balance when the consumer leaves military service cannot exceed the rate that applied prior to military service. In other words, consumers cannot be charged higher rates once the SCRA ceases to apply than they were before the SCRA began to apply.

The Board understands that, in order to comply with the SCRA and similar Federal or State statutes or regulations, many creditors reduce or cease to impose annual fees, late payment fees, and other types of fees while a consumer is in military service. Although the right to reject generally applies to increases in fees required to be disclosed under § 226.6(b)(1) and (b)(2) (such as annual fees and late payment fees), the Board believes that, when a consumer leaves military service and the legal requirements of the SCRA or a similar Federal or State statute or regulation cease to apply, it is appropriate to permit creditors to return fees to pre-existing levels. Accordingly, the Board proposed to exempt such increases from the right to reject, although the right to reject would continue to apply if a creditor sought to apply a fee that exceeded the amount of the fee prior to the consumer entering military service. Commenters generally supported this aspect of the proposal, which is adopted as proposed.

Section 226.9(c)(2)(iv)(B) also provides that the right to reject does not apply to changes to an annual percentage rate applicable to a consumer's account. As discussed above, the Board has amended the definition of "significant change in account terms" under § 226.9(c)(2)(ii) to expressly include changes to terms required to be disclosed under § 226.6(b)(4). Section 226.6(b)(4) requires disclosure of certain information regarding periodic rates that may be used to calculate interest. One industry commenter asked the Board to expressly provide that changes to terms required to be disclosed under § 226.6(b)(4) do not trigger the right to reject under § 226.9(c)(2)(iv)(B). The Board believes that the broad language of § 226.9(c)(2)(iv)(B), which refers to "a change in an annual percentage rate applicable to a consumer's account" generally encompasses changes to terms required to be disclosed under § 226.6(b)(4).[6] Accordingly, while the Board believes that the right to reject does not apply to most changes to terms required to be disclosed under § 226.6(b)(4), it is not adopting any amendments to the text of § 226.9(c)(2)(iv)(B) to address such changes.

Changes in Type of Rate

Comments 9(c)(2)(iv)–3 and –4 and comments 9(c)(2)(v)–3 and –4 clarify that, if a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate (or vice versa), the creditor must provide a notice pursuant to § 226.9(c) even if the new rate is lower than the prior rate. The Board proposed to revise this guidance to clarify that notice is not required pursuant to § 226.9(c)(2) when a lower rate is applied in connection with a promotional or other temporary rate program or a workout or temporary hardship arrangement, provided that the terms of that program or arrangement are disclosed consistent with § 226.9(c)(2)(v)(B) or (c)(2)(v)(D). In these circumstances, the Board believes that the 45-day notice requirement would unnecessarily delay application of a lower rate to a consumer's account in circumstances where § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) generally require that the consumer be informed of the terms associated with the lower rate before it is applied to the account. Furthermore, when a promotional or temporary rate or workout or temporary hardship arrangement is applied to an account, the substantive limitations in § 226.55(b)(1) and (b)(5) protect consumers from unanticipated increases in the rates that apply to existing balances.

The Board also proposed to clarify that notice pursuant to § 226.9(c)(2) is not required when the creditor applies a lower rate in order to comply with the SCRA or a similar Federal or State statute or regulation. Finally, in order to eliminate redundancy and ensure consistent guidance, the Board proposed to replace comments 9(c)(2)(v)–3 and –4 with cross references to comments 9(c)(2)(iv)–3 and –4.

Commenters generally supported these proposed revisions, which are adopted as proposed. In addition, as suggested by consumer group commenters, the Board has added a cross reference in comment 9(c)(2)(iv)–4 to comment 55(b)(2)–4, which addresses the limitations in § 226.55(b)(2) on changing the rate that applies to a protected balance from a non-variable rate to a variable rate.

Finally, the Board has clarified that a creditor is not required to provide a notice under § 226.9(c) when changing a variable rate to a lower non-variable rate or a non-variable rate to a lower variable rate in order to comply with § 226.55(b)(4). Section 226.55(b)(4) permits a card issuer to increase the rate that applies to an existing credit card balance if the account becomes more than 60 days delinquent. However, if the consumer makes the next six required minimum payments on time, § 226.55(b)(4) requires the card issuer to lower the rate on the existing balance to

[6] The right to reject would apply, however, to changes to a balance computation method applicable to a consumer's account; the balance computation method is a required disclosure pursuant to both § 226.6(b)(2)(vi) and (b)(4)(i)(D).

the pre-existing rate. For example, assume that a credit card account became more than 60 days delinquent and that, after providing 45 days advance notice, the card issuer increased the rate on the existing balance from a 15% variable rate to a 30% non-variable penalty rate. If the consumer made the next six required minimum payments on time, § 226.55(b)(4) requires the card issuer to lower the rate that applies to the existing balance to the 15% variable rate. However, the card issuer is not required to provide 45 days advance notice before doing so.

9(c)(2)(v) Notice Not Required

Temporary Rate Exception

Section 226.9(c)(2) generally requires that 45 days' advance notice be provided of significant changes in account terms for open-end (not home-secured) consumer credit plans. Several exceptions to this 45-day advance notice requirement are set forth in § 226.9(c)(2)(v). Section 226.9(c)(2)(v)(B) sets forth an exception for increases in annual percentage rates upon the expiration of a period of time, provided that prior to the commencement of that period, the creditor discloses to the consumer clearly and conspicuously in writing the length of the period and the annual percentage rate that will apply after that period. Section 226.9(c)(2)(v)(B)(*2*) requires that the disclosure of the length of the period and the rate that will apply after expiration of the period must be disclosed in close proximity and equal prominence to the first listing of the disclosure of the rate that applies during the specified period of time.

In November 2010, the Board proposed to clarify the proximity and prominence requirements for the disclosure of introductory rates that are disclosed at account opening. The Board noted that there is confusion regarding how to comply with the proximity and prominence rules in § 226.9(c)(2)(v)(B) when an introductory rate is being disclosed in the account-opening table. The rules in § 226.6(b) contain prescriptive formatting and font size requirements for the disclosures required to be provided in tabular form at account opening. Section 226.6(b)(1) requires that the tabular disclosure have headings, content, and format substantially similar to any of the applicable tables in G–17 in appendix G. In addition, § 226.6(b)(2)(i) requires that annual percentage rates for purchases be disclosed in the tabular disclosure provided at account opening in 16-point font. Section 226.6(b)(1)(i) requires that annual percentage rates required to be disclosed pursuant to § 226.6(b)(2)(i), including introductory rates required to be disclosed under § 226.6(b)(2)(i)(F), be disclosed in bold text.

Sample G–17(C) contains a sample disclosure of an introductory rate on purchases, where the introductory and standard annual percentage rates are presented in bold 16-point font in accordance with § 226.6(b)(1)(i) and (b)(2)(i). However, the disclosure of the introductory period is displayed in 10-point font and is not presented in bold text, consistent with § 226.6(b). Accordingly, the Board sought to address confusion regarding whether the § 226.6(b) tabular disclosure would be deemed to comply with the formatting requirements in § 226.9(c)(2)(v)(B)(*2*), because the period is disclosed in a smaller font than the font in which the relevant rates are disclosed, and is not in bold text.

Specifically, the Board proposed to adopt a new comment 9(c)(2)(v)-10 which states that a disclosure of the information described in § 226.9(c)(2)(v)(B)(*1*) provided in the account-opening table in accordance with § 226.6(b) complies with the requirements of § 226.9(c)(2)(v)(B)(*2*), if the listing of the introductory rate in such tabular disclosure also is the first listing as described in comment 9(c)(2)(v)–6. The Board proposed to renumber existing comments 9(c)(2)(v)–10 through 9(c)(2)(v)–12 accordingly.

Industry commenters generally supported proposed comment 9(c)(2)(v)–10. These commenters indicated that permitting promotional rates to be disclosed in the account-opening table under § 226.9(c)(2)(v)(B), even if the duration of the period is disclosed in a smaller, non-bold font, would facilitate creditors' ability to continue to make beneficial promotional offers to consumers. However, several industry commenters objected to the language limiting comment 9(c)(2)(v)–10 to circumstances where the listing of the introductory rate in the tabular disclosure is the first listing of the rate. These commenters expressed particular concern regarding private label credit card programs that provide a cover page at account opening which includes a reference to the temporary rate offer. Accordingly, for such programs, commenters indicated that the account-opening table often may not be the first listing of the promotional rate. These commenters stated that the Board should permit lenders to comply with the disclosure requirement for temporary and introductory rates by including the required information in the account-opening table provided pursuant to § 226.6(b) even if it is not the first listing.

The Board is adopting comment 9(c)(2)(v)–10 as proposed. The Board continues to believe that additional clarification is appropriate as to the relationship between the formatting requirements of §§ 226.9(c)(2)(v)(B)(*2*) and 226.6(b). The Board believes that if the information described in § 226.9(c)(2)(v)(B)(*2*) is included in the account-opening table provided pursuant to, and in compliance with, § 226.6(b), it should be deemed to meet the equal prominence and close proximity requirements of § 226.9(c)(2)(v)(B). The format and presentation of information in the account-opening table was informed by the Board's consumer testing, and the Board believes that the requirements of § 226.6(b) are appropriate and sufficient to convey key information regarding introductory rates to consumers.

The Board notes that § 226.9(c)(2)(v)(B)(*2*) and comment 9(c)(2)(v)–6, which were adopted in the February 2010 Final Rule, apply the close proximity and equal prominence requirements for the § 226.9(c)(2)(v)(B) disclosures to the first listing of the temporary rate. The Board adopted this "first listing" rule in response to concerns raised by a commenter that, as originally proposed, § 226.9(c)(2)(v)(B) could have been construed to apply the close proximity and equal prominence requirements to each disclosure of the promotional rate, not just the first listing. *See* 75 FR 7699. The Board proposed comment 9(c)(2)(v)–10, not as a reconsideration of the "first listing" rule set forth in § 226.9(c)(2)(v)(B)(*2*) and comment 9(c)(2)(v)–6, but to clarify the relationship between the formatting requirements of §§ 226.9(c)(2)(v)(B) and 226.6(b). The Board continues to believe that the "first listing" standard set forth in § 226.9(c)(2)(v)(B)(*2*) and comment 9(c)(2)(v)–6 is appropriate, to ensure that consumers notice the disclosures required under § 226.9(c)(2)(v)(B) by requiring that those disclosures be closely proximate and equally prominent to the most prominent disclosure of the temporary rate.

Consumer groups did not oppose proposed comment 9(c)(2)(v)–10 but urged the Board to also require that creditors comply with § 226.16(g) as part of compliance with in § 226.9(c)(2)(v)(B), especially when the first listing of the introductory rate is not in the account-opening table. However, the Board is not expressly requiring compliance with § 226.16(g) as a condition of the exception set forth in § 226.9(c)(2)(v)(B), for several reasons.

First, the requirements of § 226.16(g) apply independently of the change-in-terms provisions in § 226.9(c)(2). The Board is concerned that making compliance with the advertising requirements in § 226.16(g) a prerequisite for compliance with § 226.9(c)(2)(v)(B) could be misconstrued as suggesting that the requirements of § 226.16(g) do not otherwise independently apply. Second, § 226.16(g) applies to advertisements of an open-end (not home-secured) plan. The definition of advertisement is set forth in § 226.2(a) and related staff commentary; comment 2(a)(2)–1.ii.F expressly states that communications about an existing credit account (for example, a promotion encouraging additional or different uses of an existing credit card account) are not advertisements. In contrast, § 226.9(c)(2)(v)(B) applies to promotional rates offered on both new and existing accounts; therefore, any reference to compliance with § 226.16(g) would be inapplicable in cases where a creditor is utilizing the exception in § 226.9(c)(2)(v)(B) for a promotion offered on an existing account.

One commenter urged the Board to clarify, given an issuer's ability to combine application disclosures with account-opening disclosures, that placing the temporary rate information in the tabular disclosure provided pursuant to § 226.5a would meet the timing, proximity, and prominence requirements of § 226.9(c)(2)(v)(B). The Board believes that no additional clarification is necessary. In certain circumstances, comment 5a–2 permits the account-opening summary table described under § 226.6(b)(1) to be substituted for the disclosures required by § 226.5a. Accordingly, when an issuer combines application disclosures with account-opening disclosures, the disclosures being provided are the § 226.6(b) disclosures, to which comment 9(c)(2)(v)–10 already applies.

Comment 9(c)(2)(v)–5 sets forth guidance regarding the disclosure requirements for temporary rates when the temporary rate reduction is initially offered to the consumer by telephone. Comment 9(c)(2)(v)–5 states that the timing requirements of § 226.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 226.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) if: (1) The consumer accepts the offer of the temporary rate by telephone; (2) the creditor permits the consumer to reject the temporary rate offer and have the rate or rates that previously applied to the consumer's balances reinstated for 45 days after the creditor mails or delivers the written disclosures required by § 226.9(c)(2)(v)(B); and (3) the disclosures required by § 226.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate offer and have the rate or rates that previously applied to the consumer's account reinstated are disclosed to the consumer as part of the temporary rate offer.

As discussed in the supplementary information to the February 2010 Final Rule, this rule for telephone offers of promotional rates is intended to ensure that consumers may take immediate advantage of promotions that they believe to be beneficial, while protecting consumers by allowing them to terminate the promotion and thus avoid adverse consequences, upon receipt of written disclosures. Consistent with the rationale discussed in the February 2010 Final Rule, the Board proposed to amend comment 9(c)(2)(v)–5.ii to provide that, in connection with telephone offers of temporary rates or fees,[7] the creditor need not permit the consumer to reject the temporary rate or temporary fee offer if the rate or rates or fee that will apply following expiration of the temporary rate do not exceed the rate or rates or fee that applied immediately prior to commencement of the temporary rate. The Board noted that, since such an offer never results in the increase in an interest rate or fee even on a prospective basis, it may be unnecessary to provide consumers with the opportunity to reject such an offer. The Board also proposed a conforming change to comment 9(c)(2)(v)–5.iii.

Several industry commenters supported the proposed amendment to comment 9(c)(2)(v)–5.ii. These commenters stated that it makes little sense to offer a consumer a right to reject a temporary rate or fee offer if the rejection can only result in the consumer's account being subject to higher fees or charges. Consumer group commenters, on the other hand, opposed the proposed amendment to comment 9(c)(2)(v)–5.ii. Consumer groups indicated that even if the rate that will apply after a temporary rate expires does not exceed the rate that applied immediately prior to commencement of the temporary rate, a consumer might wish to reject the promotional offer if he or she purchased goods without comprehending that the promotional rate was temporary. These commenters stated that at a minimum, the Board should provide consumers with the right to return any goods without charge when the consumer bought goods based upon telephone disclosure of a promotional rate program.

The Board is adopting comment 9(c)(2)(v)–5.ii as proposed. The Board believes that it is not necessary to provide consumers with a right to reject a temporary rate or fee offer when the rate or fee that will apply upon expiration of the temporary offer does not exceed the rate or fee that applied immediately prior to commencement of the promotion. In these circumstances, consumers still must receive oral disclosures in advance of the terms of the promotion, including the period for which the reduced rate or fee will be in effect. An issuer that fails to provide these oral disclosures has not complied with § 226.9(c)(2)(v)(B) and must provide 45 days' advance notice prior to raising the rate or fee upon expiration of the promotion; in addition, in circumstances where § 226.55 applies, such issuers are prohibited from increasing the rate or fee applicable to existing balances. Finally, the Board believes that when the rate or fee that will be in effect after the promotion expires does not exceed the standard rate or fee in effect prior to the commencement of the promotion, this situation presents less potential for harm to consumers than when the rate or fee after the promotion expires will exceed the rate or fee in effect prior to commencement of the promotion.

Exception for Temporary Reductions in Fees

The Board also proposed to amend § 226.9(c)(2)(v)(B) to provide an exception to the advance notice requirements for increases in fees that occur after the expiration of a specified period of time. The Board declined to adopt a specific exception for temporary or promotional fee programs in the February 2010 Final Rule because the Credit Card Act did not contain such an exception and because an exception did not appear to be necessary. See 75 FR 7699. In the supplementary information to the February 2010 Final Rule, the Board noted that nothing in Regulation Z prohibits a creditor from providing notice of a future increase in a fee at the same time it temporarily reduces the fee; a creditor could provide information regarding the temporary reduction in the same notice, provided that it is not interspersed with the content required to be disclosed pursuant to § 226.9(c)(2)(iv). *See* 75 FR 7699.

[7] As discussed below, the Board proposed to extend the exception in § 226.9(c)(2)(v)(B) to apply to temporary fee reductions; accordingly, proposed comment 9(c)(2)(v)–5.ii applied both to temporary rate and temporary fee offers.

However, upon further review, the Board proposed in November 2010 to use its authority under TILA Section 105(a) to specifically address the advance notice requirements for temporary or promotional fees in order to encourage issuers to disclose and structure such programs in a consistent manner that enables consumers to understand the associated costs. Accordingly, the Board proposed to amend § 226.9(c)(2)(v)(B) to apply to increases in fees upon the expiration of a specified period of time. Thus, proposed § 226.9(c)(2)(v)(B) permitted a card issuer to increase a fee after a specified period of time without providing 45 days' advance notice, if the card issuer provides the consumer in advance with a clear and conspicuous written disclosure of the length of the period and the fee or charge that will apply after expiration of the period. In addition, the Board proposed to amend comments 9(c)(2)(v)–5 through 9(c)(2)(v)–7 to expressly refer to temporary fee offers.

In addition, for clarity, and for consistency with the proposed changes to § 226.9(c)(2)(v)(B), the Board also proposed to amend comment 9(c)(2)(v)–2, which addresses skip features offered in connection with open-end (not home-secured) consumer credit plans. Comment 9(c)(2)(v)–2 addresses the disclosures that must be given when a credit program allows consumers to skip or reduce one or more payments during the year or involves temporary reductions in finance charges. Comment 9(c)(2)(v)–2 was previously amended in the February 2010 Final Rule for conformity with the exception in § 226.9(c)(2)(v)(B) for temporary reductions in interest rates. In particular, the Board added a new comment 9(c)(2)(v)–2.ii that clarifies the notice requirements for temporary reductions in interest rates. *See* 75 FR 7702. Because the Board proposed to expand § 226.9(c)(2)(v)(B) to cover promotional fee offers in addition to promotional rate offers, the Board proposed in November 2010 to amend comment 9(c)(2)(v)–2.ii to also cover temporary reductions in fees; comment 9(c)(2)(v)–2.i would accordingly apply only to programs that permit a consumer to skip or reduce a payment.

Industry commenters generally supported the proposed amendment that would create an exception to the 45-day advance notice requirements for temporary fee arrangements disclosed in advance in accordance with § 226.9(c)(2)(v)(B). Commenters indicated that the proposed clarifications provide necessary guidance regarding the content of a notice of a temporary fee, and stated that adopting the proposed amendments to § 226.9(c)(2)(v)(B) would help to facilitate the continued availability of temporary fee reductions.

Consumer group commenters expressed concerns regarding the proposed amendments to § 226.9(c)(2)(v)(B), but did not oppose promotional fee programs. Consumer groups indicated that it is important for consumers to receive advance notice when the period for a promotional fee expires and an increased fee will be imposed, and suggested that this is particularly necessary for promotional programs for annual fees. If a specific promotion provides, for example, that no annual fee will be imposed during the first year after account opening but that an annual fee will be imposed in subsequent years, consumer groups believe that consumers may forget the terms of the promotion during the first year and be unduly surprised when a fee is imposed in year two. Consumer groups urged the Board to require a notice stating that the post-promotional fee will, or may, be imposed in the next billing cycle, on the periodic statement for the billing cycle prior to expiration of the promotional period.

The Board is adopting the changes to § 226.9(c)(2)(v)(B) and the related staff commentary generally as proposed. The Board believes that it is appropriate to establish standardized disclosure requirements for promotional fee offers that permit creditors to provide advance disclosures of temporary fees, the period for which those temporary fees will be in effect, and the fee that will apply upon expiration of the temporary fee. Offers of temporarily reduced fees can benefit consumers and the Board believes that the amendments to § 226.9(c)(2)(v)(B) and the related staff commentary appropriately balance ensuring that consumers receive important information regarding the terms of a temporarily reduced fee with promoting the continued availability of offers that benefit consumers.

The Board notes that consumers will continue to receive advance notice prior to imposition of an annual fee on a credit or charge card account pursuant to § 226.9(e) in addition to the notice set forth in § 226.9(c)(2)(v)(B). The Board recognizes that § 226.9(e) requires only 30 days or one billing cycle's advance notice, rather than the 45 days' advance notice required for changes in terms under § 226.9(c)(2). However, § 226.9(e) does require that the renewal notice provided prior to imposition of an annual fee disclose how and when the cardholder may terminate credit availability under the account to avoid paying the fee. Accordingly, the Board notes that for annual fees imposed on credit card accounts, the consumer will receive both the § 226.9(c)(2)(v)(B) notice prior to commencement of the promotion and a notice pursuant to § 226.9(e) immediately prior to imposition of the annual fee.

Several industry commenters urged the Board to provide additional guidance regarding the treatment under § 226.9(c)(2) of temporary waivers of penalty fees. These commenters stated that temporary penalty fee waivers should be excluded from all notice requirements, including disclosure requirements for promotional fee reductions. These commenters indicated that a temporary reduction of the penalty fee should not trigger notice to the consumer because the reduction is an accommodation made only in circumstances where the consumer has not complied with the terms of the account agreement. One commenter noted that penalty fee waivers or reductions are typically provided in connection with workout programs rather than as a part of a marketing solicitation or offer.

The Board agrees with commenters that it would be appropriate to provide an exception to § 226.9(c)(2) for penalty fee waivers offered in connection with workout or similar programs. The Board understands that such waivers of penalty fees are generally an accommodation to consumers and that creditors do not market such waivers, given that penalty fees may only be imposed if consumers violate the terms of the account. Section 226.9(c)(2)(v)(D) sets forth an exception to the 45-day advance notice requirements for certain increases in rates or fees or charges due to the completion of, or a consumer's failure to comply with the terms of, a workout or temporary hardship arrangement provided that the annual percentage rate or fee or charge applicable following the increase does not exceed the rate that applied prior to the commencement of the workout or temporary hardship arrangement. Accordingly, the final rule amends § 226.9(c)(2)(v)(D) and comment 9(c)(2)(v)–11 to refer to fees required to be disclosed pursuant to § 226.6(b)(2)(viii) (late payment fees), (b)(2)(ix) (over-the-limit fees), and (b)(2)(xi) (returned-payment fees). The Board believes that this expansion of the workout exception under § 226.9(c)(2)(v) will encourage the waiver or reduction of penalty fees as part of a workout or other temporary hardship arrangement, which may be beneficial to consumers who are subject to such arrangements.

Variable Rate Exception

Section 226.9(c)(2)(v)(C) contains an exception to the 45-day advance notice requirements for increases in variable annual percentage rates in accordance with a credit card agreement that provides for a change in the rate according to operation of an index that is not under the control of the creditor and is available to the general public. In November 2010, the Board proposed to correct a typographical error in § 226.9(c)(2)(v)(C). In the proposal that led to the February 2010 Final Rule, proposed § 226.9(c)(2)(v)(C) referred to an increase "in accordance with a credit card or other account agreement." In the February 2010 Final Rule, the phrase "or other account" was inadvertently deleted, without explanation in the supplementary information. The Board's intent was for the exception in § 226.9(c)(2)(v)(C) to apply both to credit card accounts and to other open-end (not home-secured) consumer credit plans. Accordingly, the Board proposed to insert the phrase "or other account" into § 226.9(c)(2)(v)(C).

The exception to the advance notice requirements for an increase in a variable annual percentage rate is conditioned on the rate varying according to the operation of an index that is not under the control of the creditor and is available to the general public. Comment 9(c)(2)(v)–11 contains a cross-reference to comment 55(b)(2)–2 for guidance on when an index is deemed to be under the "card issuer's" control. The Board noted in the proposal that there has been some confusion regarding the relationship between comment 55(b)(2)–2 and the exception set forth in § 226.9(c)(2)(v)(C). Comment 55(b)(2)–2 provides that an index is under a card issuer's control if, among other things, the variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index. The substantive limitations on rate increases in § 226.55 and comment 55(b)(2)–2 apply only to credit card accounts under an open-end (not home-secured) consumer credit plan, while the advance notice requirements in § 226.9(c)(2) and the variable-rate exception in § 226.9(c)(2)(v)(C) apply to all open-end (not home-secured) consumer credit plans. Thus, the Board has been asked whether the variable-rate exception to the advance notice requirements set forth in § 226.9(c)(2)(v)(C) applies to an open-end (not home-secured) consumer credit plan that is not a credit card account, if the variable rate is subject to a fixed minimum or "floor."

The Board proposed to clarify that a variable rate plan that is subject to a fixed minimum or "floor" does not meet the conditions of the exception to the advance notice requirements set forth in § 226.9(c)(2)(v)(C). The Board stated that is appropriate to adopt a consistent interpretation of "an index that is not under the control of the creditor" for all open-end (not home-secured) credit. Accordingly, the Board proposed to amend comment 9(c)(2)(v)–11 (renumbered as comment 9(c)(2)(v)–12) to refer to guidance on when an index is deemed to be under "a creditor's" control, rather than "the card issuer's" control. The substantive provisions of § 226.55 would have continued to apply only to credit card accounts under an open-end (not home-secured) consumer credit plan; however, the proposed change clarified that 45 days' advance notice is required prior to a rate increase on a variable-rate plan subject to a fixed minimum or floor, for all open-end (not home-secured) plans.

Consumer groups supported both aspects of the proposed changes to § 226.9(c)(2)(v)(C), and stated that variable rate "floors" should be discouraged for all types of open-end credit. Several industry commenters opposed the portion of the guidance that would apply consistent guidance regarding when a variable rate plan is deemed to be outside of a creditor's control to all open-end (not home-secured) plans. These commenters stated that it is unnecessary to establish a consistent interpretation and that it would stifle competitive pricing. These commenters further argued that this clarification exceeds Congressional intent and the scope of the Credit Card Act.

The Board is adopting the changes to § 226.9(c)(2)(v)(C) and comment 9(c)(2)(v)–12 as proposed. The Board notes that it is adopting this clarification using its TILA Section 105(a) authority, rather than pursuant to the Credit Card Act, because this clarification pertains to open-end (not home-secured) credit that is not a credit card under an open-end (not home-secured) consumer credit plan. The Board continues to believe that, for consistency, it is appropriate to limit the variable rate exception to the change-in-terms notice requirements to only those rates that vary according to the operation of an index that is not under the control of the creditor and is available to the general public. The Board notes that for open-end (not home-secured) plans that are not credit card accounts under an open-end (not home-secured) consumer credit plan, the regulation does not prohibit variable rates that are subject to a minimum or "floor," but for such rates the creditor must comply with the advance notice requirements of § 226.9(c).

9(e) Disclosures Upon Renewal of Credit or Charge Card

Section 226.9(e), which implements TILA Section 127(d), sets forth the disclosures that card issuers must provide in connection with renewal of a consumer's credit or charge card account. Section 226.9(e)(1) requires, in part, that a card issuer that has amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer must mail or deliver a written renewal notice to the cardholder.

The Board did not propose any amendments to § 226.9(e) or its associated commentary in the November 2010 Proposed Rule. However, the Board has become aware of a typographical error in the title to comment 9(e)–10, which is currently entitled "Disclosure of changes in terms not required to be disclosed pursuant to § 226.6(b)(1) and (b)(2)." For conformity with the substance of the comment and the rule set forth in § 226.9(e), the Board is correcting the error by deleting the word "not" from the title of comment 9(e)–10.

Section 226.10 Payments

10(b) Specific Requirements for Payments

10(b)(4) Nonconforming Payments

Section 226.10 sets forth rules regarding the prompt crediting of payments and the permissibility of assessing fees to make expedited payments. Section 226.10(a) generally requires that payments be credited to a consumer's account as of the date of receipt, except that § 226.10(b) permits creditors to specify reasonable requirements for payments provided that those requirements enable most consumers to make conforming payments. Section 226.10(b)(4) addresses the crediting of payments that do not conform to the requirements specified by the creditor; if a creditor specifies requirements for the consumer to follow in making payments as permitted under § 226.10 but accepts a payment that does not conform to the requirements, such nonconforming payments must be credited within five days of receipt.

In November 2010, the Board proposed several amendments to § 226.10 intended to address confusion regarding the distinction between conforming payments, which must be credited as of the date of receipt, and nonconforming payments, which must be credited within five days of receipt. Currently, § 226.10(b)(4) refers to requirements specified "on or with the periodic statement," which may be read to suggest that payments received by any means not specified on or with the periodic statement generally are nonconforming payments. However, the rule in § 226.10(b) that permits a creditor to specify reasonable requirements for making payments is silent as to the manner in which these requirements must be communicated to consumers in order for such payments to be considered conforming payments. In addition, comment 10(b)–2 expressly provides that if a creditor promotes electronic payment via its Web site, any payments made via the Web site are generally conforming payments for purposes of § 226.10(b), which indicates that conforming payments are not only those payments made via methods specified on the periodic statement.

Specifically, the Board proposed to amend comment 10(b)–2 to provide that if a creditor promotes a specific payment method, any payments made via that method (prior to any cut-off time specified by the creditor to the extent permitted by § 226.10(b)(2)), are generally conforming payments for purposes of § 226.10(b). To provide further guidance, the Board also proposed to add two additional examples to comment 10(b)–2. Proposed comment 10(b)(2)–ii stated that if a creditor promotes payment by telephone (for example, by including the option to pay by telephone in a menu of options provided to consumers at a toll-free number disclosed on its periodic statement), payments made by telephone would generally be conforming payments for purposes of § 226.10(b). Similarly, proposed comment 10(b)(2)–iii stated that if a creditor promotes in-person payments, for example by stating in an advertisement that payments may be made in person at its branch locations, such in-person payments made at a branch or office of the creditor generally would be conforming payments for purposes of § 226.10(b).[8] In contrast, the supplementary information to the proposal noted that proposed comment 10(b)–2 would not apply if the creditor makes a general promotional statement regarding payments that does not refer to a specific payment method, for example a statement that the creditor offers "many convenient payment options." For conformity, the Board also proposed to amend § 226.10(b)(4), which addresses the treatment of nonconforming payments. The proposal amended § 226.10(b)(4) to provide that if a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements via a payment method that the creditor does not otherwise promote, the creditor shall credit the payment within five days of receipt.

Consumer group commenters generally supported the Board's proposal to clarify that payments made via any specific method of payment promoted by the creditor generally are conforming payments for purposes of § 226.10. Consumer groups urged the Board to adopt a broad definition of what it means to "promote" a method of payment, and suggested that making any statement offering a particular payment option should constitute promotion. These commenters further urged the Board to clearly specify in the regulation that payments made via a promoted method are conforming payments.

Industry commenters generally supported the Board's efforts to clarify the definition of a "conforming payment." However, industry commenters expressed concerns regarding the Board's specific guidance regarding what constitutes "promotion" of a method of payment. Two such commenters noted that the Board's proposed examples were helpful, but noted that they were not fully explanatory; these commenters asked the Board to provide further guidance as to the definition of "promotes." Several industry commenters were concerned that the Board's proposal would treat all payment methods made available to consumers as promoted, and therefore as conforming payments. These commenters argued that there is a distinction between actively promoting a payment option and responding to a consumer inquiry as to permissible alternatives for making payments, and urged the Board to adopt a narrower approach. One commenter stated that the final rule should be revised to indicate that there must be active advertising or encouragement of use of a particular payment method, rather than a mere listing of a method, in order for a method to be deemed promoted. This commenter stated that listing a payment option on a periodic statement or disclosing a payment option on a toll-free number should not, by itself, constitute promoting or advertising a particular payment option.

Several industry commenters identified specific payment methods that they believe should not be treated as "conforming payments." Many of these commenters urged the Board not to treat payments made through third-party payment intermediaries as promoted payment methods that constitute conforming payments. These commenters stated that a consumer might, for example, ask a customer service representative of the issuer for information about payment options. In response, the issuer's representative might provide the consumer with a list of such options that includes, among others, a third-party payment option. The commenters stated that the use of the third-party payment option should not be considered a promoted payment option, because the card issuer has no control over the receipt and handling of the payment through that third party. Commenters noted that there might be particular operational concerns and costs associated with treating such payments as conforming and noted that some card issuers might cease to disclose such payment methods among their suggested payment alternatives.

One other industry commenter indicated that the Board should clarify that payments made to a debt management program, a portion of which may ultimately be sent to a card issuer, should not be considered conforming payments. This commenter expressed concern that the required disclosure pursuant to § 226.7(b)(12)(i)(E) of information regarding credit counseling services might be deemed to constitute promotion of debt management agencies. This commenter also asked the Board to clarify that payments made to third-party collection agencies do not constitute conforming payments. This commenter noted that a cardholder's account must become delinquent before payments may be made to a third party collection agency and that issuers would accordingly be unlikely to promote third party collection agencies as a payment method.

The Board continues to believe that additional clarification is appropriate regarding the distinction between conforming and nonconforming payments, in order to facilitate compliance with the rule and to ensure that payments are posted promptly in accordance with consumer expectations

[8] The Board notes that the requirements of § 226.10(b)(3), when applicable, are not conditioned on whether the card issuer promotes in-person payments at its branches or offices. Section 226.10(b)(3) applies to credit card accounts under an open-end (not home-secured) consumer credit plan and generally requires that payments made in person at a branch or office of a card issuer that is a financial institution be considered received on the date on which the consumer makes the payment.

and the intent of TILA Section 164. TILA Section 164, as amended by the Credit Card Act, provides in part that payments received from a consumer for an open-end consumer credit plan shall be posted promptly to the account as specified in regulations of the Board. The Board believes that, if a creditor promotes a specific method of making payments, the intent of TILA Section 164 is best effectuated by a rule that requires payments made by that method to be credited as of the date of receipt. The Board believes that if a creditor promotes that payments may be made via a certain method, it would be inappropriate to permit the creditor to delay crediting such payments for five days after receipt.

Accordingly, the Board is adopting the amendments to comment 10(b)–2 and § 226.10(b)(4) generally as proposed. However, § 226.10(b)(4) has been restructured without intended substantive change from the proposal, to more clearly provide that payments made via a promoted method are conforming payments. For the reasons discussed above, the Board is adopting a new § 226.10(b)(4)(ii) which states that if a creditor promotes a method for making payments, such payments shall be considered conforming payments under § 226.10(b) and shall be credited to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge.

The Board acknowledges, however, that additional guidance would be helpful as to whether certain actions by the creditor constitute promotion of a particular payment method. The Board believes that as a practical matter, not every payment method made available or disclosed to consumers is "promoted," and accordingly is declining to adopt a rule providing that every statement offering a particular payment option constitutes promotion. Whether promotion has occurred is a fact-specific determination and, accordingly, the Board believes that "promotion" is best defined by a set of illustrative examples, including those examples that were proposed in November 2010 and are being adopted as part of comment 10(b)–2.

In addition, the Board is adopting a new comment 10(b)–2.iv to address payments made via a third-party payment method. Comment 10(b)–2.iv states that if a creditor promotes that payments may be made through an unaffiliated third party, such as by disclosing the Web site address of that third party on the periodic statement, payments made via that third party's Web site generally are conforming payments for purposes of § 226.10(b). In contrast, if a customer service representative of the creditor confirms to a consumer that payments may be made via an unaffiliated third party, but the creditor does not otherwise promote that method of payment, § 226.10(b) permits the creditor to treat payments made via such third party as nonconforming payments in accordance with § 226.10(b)(4). The Board believes that if a creditor advertises or prominently discloses a third-party payment method on the periodic statement, it would be inconsistent with consumer expectations for payments made by that method to be credited only after five days. However, the Board acknowledges that same-day crediting of payments made via unaffiliated third parties may raise special operational concerns and that mere confirmation by a customer service representative that a payment may be made via a specific third party does not by itself constitute "promotion."

The Board is not adopting any additional guidance at this time regarding payments made to debt management programs or third-party collection agencies. The Board believes that whether a payment must be treated as conforming is best determined by looking at whether the creditor promotes the payment method rather than to the identity of the party accepting the payment. Accordingly, a payment made to a debt management program or third-party collection agency would not constitute a conforming payment unless the creditor promotes that method of payment. In addition, the required disclosure pursuant to § 226.7(b)(12)(i)(E) of information regarding credit counseling services does not by itself constitute promotion of debt management programs as payment methods. The disclosure required pursuant to § 226.7(b)(12)(i)(E) is a general statement regarding the availability of credit counseling services; as set forth on Model Forms G–18(C), this disclosure consists solely of a toll-free telephone number and a statement that the consumer may call this number for more information about credit counseling services. The required disclosure does not suggest that a consumer may make payments via this toll-free number and, accordingly, the Board does not believe that this constitutes promotion of payment through a debt management program. In addition, while the Board believes it will depend on the specific facts and circumstances in any given case, the Board agrees with commenters that creditors do not generally promote payments via third party collection agencies, because promotion of such payments would entail promoting that consumers may permit their accounts to become delinquent.

10(e) Limitations on Fees Related to Method of Payment

Section 226.10(e), which implements TILA Section 127(l), generally prohibits a card issuer from imposing a separate fee for allowing consumers to make a payment by any method, unless such payment method involves expedited service by a customer service representative of the card issuer. The Board understands that card issuers may use third-party service providers to provide payment-related services on behalf of the issuer, such as receiving or processing payments from consumers. In some circumstances, in lieu of the card issuer imposing a fee for making a payment, the third-party service provider may charge consumers a fee for making a payment. Proposed comment 10(e)–4 clarified that third-party service providers or other third parties who receive payments on behalf of a card issuer are prohibited from charging a separate fee for payment, except as otherwise permitted by paragraph (e).

Several industry commenters requested that the Board clarify that the proposal does not apply to independent payment services which receive payments on behalf of the consumer and transmit the payments to an issuer at the direction of the consumer. In addition, one commenter asserted that the restriction on imposing a fee in paragraph (e) should not apply to third parties simply because the issuer makes administrative arrangements to receive payments through a third party or arranges for a discounted payment rate for customers to make a payment through a third party. Commenters expressed concern that the proposal would inhibit innovation in or availability of payment methods. One commenter also requested further clarification regarding payments initiated from a deposit account at a financial institution that offers bill payment services and also issues credit cards.

Consumer group commenters generally supported the proposed clarification. A member of Congress also supported the proposed clarification and asserted that permitting third-party service providers to charge a fee to allow a consumer to make a payment would undermine the intent of the Credit Card Act, which adopted TILA Section 127(l).

Based on the comments and further analysis, the Board believes that it would be inconsistent with the intent of the Credit Card Act for consumers to pay a separate fee for making a payment through a third party that provides payment-related services, such as collecting, receiving, or processing a payment, on behalf of an issuer, unless the issuer itself would be permitted to charge the fee. Accordingly, in order to effectuate the purposes of the Credit Card Act and to prevent circumvention, the Board is revising § 226.10(e) and adopting comment 10(e)–4 with revisions and illustrative examples. The Board is adopting these amendments in order to clarify that a third party that collects, receives, or processes payments on behalf of an issuer is prohibited from charging a consumer a separate fee for making a payment, except as otherwise permitted by paragraph (e).

For example, if an issuer uses a service provider to receive, collect, or process payments made through the issuer's Web site or made through an automated telephone payment service, the limitation in § 226.10(e) applies because the third party is processing or receiving payments on behalf of the card issuer. In contrast, however, if a consumer makes a payment to the card issuer from a checking account at a depository institution using a payment service provided by the depository institution, the limitation in § 226.10(e) would not apply because the depository institution is not collecting, receiving, or processing a payment on behalf of the card issuer.

10(f) Changes by Card Issuer

The Board proposed to replace a reference to "consumer" in comment 226.10(f)–3.ii with "card issuer" in order to correct a typographical error. The Board received no significant comment on this aspect of the proposal, which is adopted as proposed.

Section 226.12 Special Credit Card Provisions

12(c) Right of Cardholder to Assert Claims or Defenses Against Card Issuer

Section 226.12(c)(1) provides that, when a cardholder asserts a claim or defense against a card issuer, the cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount. Comment 12(c)–4 clarifies that the amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. It further clarifies that, to determine the amount of credit outstanding, payments and other credits shall be applied to: Late charges in the order of entry to the account; then to finance charges in the order of entry to the account; and then to any other debits in the order of entry to the account. It also clarifies that, if more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes. Although the February 2010 Final Rule moved this language into the commentary from a footnote to § 226.12, the guidance itself remained unchanged.

The Board understands that there has been some confusion about the interaction between the guidance on applying payments in comment 12(c)–4 and the payment allocation requirements in § 226.53. For credit card accounts under an open-end (not home-secured) consumer credit plan, § 226.53 generally requires card issuers to apply payments above the minimum first to the balance with the highest rate. However, comment 53–3 clarifies that, when a consumer has asserted a claim or defense against a card issuer pursuant to § 226.12(c), the card issuer must apply any payment above the minimum in a manner that avoids or minimizes any reduction in the amount subject to that claim or defense. Illustrative examples are provided.

In order to remove any inconsistency and to facilitate compliance, the Board proposed to revise comment 12(c)–4 to clarify that, with respect to credit card accounts under an open-end (not home-secured) consumer credit plan, § 226.53 and the guidance in comment 53–3 control. However, with respect to other types of credit card accounts (such as credit cards that access home-equity plans), the Board proposed to retain the long-standing guidance in comment 12(c)–4.

Commenters generally supported the proposed revisions to comment 12(c)–4, which—except as discussed below—are adopted with non-substantive, organizational changes. One industry commenter noted that some card issuers use a single platform to service all types of credit card accounts, regardless of whether an account is a credit card account under an open-end (not home-secured) consumer credit plan subject to § 226.53. This commenter requested clarification that, for purposes of comment 12(c)–4, issuers are permitted to apply a single set of payment allocation procedures to all credit card accounts by following § 226.53 and comment 53–3. Because a card issuer's voluntary compliance with the guidance in comment 53–3 will generally minimize the assessment of interest charges and any reduction in disputed amounts, the Board has revised comment 12(c)–4 to provide the requested guidance.

Section 226.13 Billing Error Resolution

13(c) Time for Resolution; General Procedures

Section 226.13(c)(2) generally requires a creditor to complete the billing error investigation procedures within two billing cycles (but no later than 90 days) after receiving a billing error notice. To ensure that creditors promptly complete their investigations under TILA, the Board adopted a new comment 13(c)(2)–2 in the February 2010 Final Rule to clarify that a creditor must conclusively determine whether an error occurred within two complete billing cycles (but in no event later than 90 days) after receiving a billing error notice. Once this period has expired, the comment further clarified that the creditor may not reverse any amounts previously credited for an asserted billing error, even if the creditor subsequently obtains evidence indicating that the billing error did not occur as asserted.

Since adoption of the comment, the Board has received questions regarding whether § 226.13(c)(2) would prohibit a creditor from reversing amounts previously credited by the creditor after conclusion of the two billing cycle time frame if the consumer subsequently receives a credit in the amount of the error from the merchant or person that had honored the credit card. Such an occurrence might arise, for example, because the error investigation time frames under card network rules provide merchants additional time beyond the time frame under § 226.13 to respond to a consumer error claim. As a result, a merchant may not issue a credit to the consumer's account until after the creditor has already resolved the error claim in the consumer's favor in order to comply with the time frame established under Regulation Z. In those cases, the consumer could receive more than one credit for the same billing error, one from the creditor and another from the merchant or other person honoring the credit card.

The purpose of the billing error resolution time frame is to enable consumers to have their error claims investigated and resolved promptly. That is, TILA Section 161, as implemented by § 226.13, is intended to bring finality to the billing error resolution process, and to avoid the potential of undue surprise for consumers caused by the reversal of previously credited funds when a creditor fails to complete its investigation in a timely manner. In contrast, the potential for consumer harm would not arise when a consumer has already been made whole for the error by the person honoring the credit card. In such a case, the Board believes that the creditor should be permitted to reverse amounts previously credited by the creditor to correct the error in order to avoid giving the consumer a windfall for that transaction.

Accordingly, the Board proposed to revise comment 13(c)(2)–2 to clarify that the requirement to complete an error investigation within two billing cycles does not prevent a creditor from reversing amounts it has previously credited to a consumer's account in circumstances where a consumer's account has been credited more than once for the same billing error. The proposed comment further clarified that the reversal of the credit by the creditor is appropriate so long as the total amount of the remaining credits is equal to or more than the amount of the error and the consumer does not incur any fees or other charges as a result of the timing of the creditor's reversal.

Industry and consumer group commenters supported these revisions, which are adopted as proposed. Accordingly, to ensure compliance with the requirements of § 226.13, a creditor should delay the reversal of the amounts the creditor has previously credited to the consumer's account until after the subsequent merchant credit has posted to the consumer's account. An illustrative example is set forth in the comment.

Section 226.14 Determination of Annual Percentage Rate

14(a) General Rule

The Board proposed to clarify the effect of a leap year on determining the annual percentage rate for disclosures required for open-end (not home-secured) credit accounts. Proposed comment 14(a)–6 clarified that a creditor generally may disregard any variance in the annual percentage rate which occurs solely by reason of the addition of February 29 in a leap year. For example, a creditor may use 365 days as the number of periods in a leap year when computing an annual percentage rate. In addition, if an annual percentage rate is computed using 366 days as the number of periods in a leap year, a variance in rate which occurs solely because of the addition of February 29 in the annual percentage rate computation would not trigger disclosure and other requirements under §§ 226.9 and 226.55. One industry commenter supported the Board's proposed clarification. The Board believes that the clarification promotes accuracy in the disclosure of annual percentage rates and minimizes potential consumer confusion and operational burden for creditors. Accordingly, the Board is adopting comment 14(a)–6 as proposed.

Section 226.16 Advertising

16(g) Promotional Rates and Fees

Section 226.16(g) currently sets forth the requirements for advertisements of promotional or introductory rates on open-end (not home-secured) plans. In general, § 226.16(g) requires that certain advertisements of promotional or introductory rates state the promotional period, post-promotional rate, and, in some cases, the term “introductory” or “intro,” in order to promote consumer understanding of the terms of such a promotional or introductory rate offer. As discussed elsewhere in this supplementary information, the Board is adopting changes to §§ 226.9(c)(2) and 226.55 to implement additional disclosure requirements and limitations for offers of temporary reduced or promotional fees. The Board proposed conforming changes to § 226.16(g) to require that certain advertisements of promotional fees also state the promotional period, post-promotional fee, and, in some cases, the term “introductory” or “intro,” in order to promote consumer understanding of the terms of such promotional or introductory fee offers. The Board proposed these changes using its authority under TILA Section 105(a) to effectuate the purposes of TILA.

The disclosure requirements under proposed § 226.16(g) generally applied to “promotional fee[s],” as defined in new § 226.16(g)(2)(iv). In particular, proposed § 226.16(g)(2)(iv) defined “promotional fee” as a fee required to be disclosed under § 226.6(b)(1) and (b)(2) on an open-end (not home-secured) plan for a specified period of time that is lower than the fee that will be in effect at the end of that period. Accordingly, the proposed advertising requirements for promotional fee offers applied only when the promotional fee being offered is a fee required to be disclosed in the account-opening table provided pursuant to § 226.6(b). As noted in the November 2010 Proposed Rule, based in part on the Board's consumer testing, § 226.6(b)(1) and (b)(2) require disclosure of the fees that are the most important to consumers. Accordingly, the Board believes that these key fees are those for which a creditor is the most likely to advertise a promotion. In addition, the application of the § 226.16(g) disclosure requirements to fees required to be disclosed pursuant to § 226.6(b)(1) and (b)(2) is consistent with the approach that the Board has taken in § 226.9(c)(2)(ii) when defining “significant changes in account terms.” The Board also proposed several additional amendments to § 226.16(g) and the associated commentary in order to conform the advertising disclosures for promotional fees to the advertising disclosures for promotional rate offers in § 226.16(g).

Commenters on this aspect of the proposal generally supported the proposed amendments to § 226.16(g) that would impose advertising requirements similar to those for promotional rate offers on promotional fees. Accordingly, the Board is adopting amendments to § 226.16(g) and the related commentary generally as proposed. The Board continues to believe that requiring that creditors clearly disclose the conditions of a promotional fee offer will promote the informed use of credit by consumers.

One commenter stated that the Board should revise the definition of “promotional fee” in proposed § 226.16(g)(2)(iv) to clarify that a promotional fee offer may be limited to a specific balance or specific transaction. The Board agrees that it is appropriate to clarify that a promotional fee offer may be limited in this manner and notes that such a limitation would be consistent with the definition of “promotional rate” in § 226.16(g)(2)(i). Accordingly, the final rule defines “promotional fee” as a fee required to be disclosed under § 226.6(b)(1) and (b)(2) applicable to an open-end (not home-secured) plan, or to one or more balances or transactions on an open-end (not home-secured) plan, for a specified period of time that is lower than the fee that will be in effect at the end of that period for such plan or types of balances or transactions. The Board notes that as adopted, § 226.16(g)(2)(i) clarifies that promotional fees may apply either to the plan as a whole, such as an annual fee, or to particular balances or transactions, such as a balance transfer fee.

The Board has included a reference to “types” of balances or transactions in § 226.16(g)(2)(i) to reflect the fact that a creditor may structure an introductory fee offer such that a creditor will waive or reduce a fee only for one or more specific transactions, while other transactions of the same type will be subject to a standard fee set forth in the account agreement. In such circumstances, the waived or reduced fee is nonetheless a “promotional fee” for purposes of § 226.16(g)(2)(i). For example, a card issuer may waive the balance transfer fee on any balances transferred at account opening; for other balance transfers, the issuer imposes a standard balance transfer fee of 3% of the amount of the balance. Although no fee will be imposed on the balance transfer made pursuant to the introductory offer, because other transactions of the same type are subject to a standard 3% fee, the $0 fee imposed on the balance transferred at account opening constitutes a "promotional fee" pursuant to § 226.16(g)(2)(i).

Several industry commenters objected to the Board's proposal to require creditors to disclose the term "introductory" or "intro" in immediate proximity to each listing of the introductory fee in a written or electronic advertisement pursuant to proposed § 226.16(g)(3). These commenters asked the Board to consider providing additional flexibility, to permit creditors to use phrases such as "no annual fee for the first year" or "$40 annual fee waived for the first year," and noted that they believe these phrases to be more understandable and succinct than use of the term "introductory," as required by the proposal. One commenter stated that for one-time fees (such as a waiver of balance transfer fees associated with the application), the term "introductory" would not add value to the consumer, because there will never be a balance transfer fee associated with the specific balance transfer that was the subject of the promotional fee offer.

The Board is adopting the requirement to use the term "introductory" or "intro," as proposed, in connection with written or electronic advertisements of introductory fees. The Board believes that having consistent rules for advertisements of introductory rates and introductory fees will promote consumer understanding of introductory fees. In particular, the Board has concerns that permitting different terminology for introductory fees than introductory rates may detract from consumer understanding that introductory fees are, like introductory rates, being offered only for a limited time or on a particular transaction or transactions. Accordingly, the Board is not revising § 226.16(g)(3) to permit statements such as "no annual fee for the first year" and "$40 annual fee waived for the first year," and the final rule requires, consistent with the proposal, that issuers use the word "introductory" or "intro" to highlight the temporary nature of such offers.

Section 226.30 Limitation on Rates

The Board proposed to make a technical correction to comment 30–8.i.C to correct a typographical error. The Board did not receive any significant comments on this aspect of the proposal, which is adopted as proposed.

Section 226.51 Ability to Pay

The Credit Card Act and the Board's February 2010 Final Rule

In its February 2010 Final Rule, the Board adopted § 226.51, which implements the provisions of the Credit Card Act that require card issuers to assess a consumer's ability to pay before opening a new credit card account or increasing the credit limit on an existing account. Section 226.51(a) implements TILA Section 150, which provides that "[a] card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account." Section 226.51(b) implements TILA Section 127(c)(8), which prohibits a card issuer from opening a credit card account for a consumer who is under the age of 21 unless the consumer has submitted a written application that meets certain requirements. Specifically, the application must require either: (1) "submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account"; or (2) the signature of a cosigner who has such means, is 21 or older, and assumes joint liability for the account.[9]

The Board generally intended § 226.51 to establish consistent standards for evaluating a consumer's ability to pay. Specifically, § 226.51 requires that card issuers establish and maintain reasonable written policies and procedures to consider the income or assets and the current obligations of all consumers, regardless of age. *See* § 226.51(a)(1)(ii), (b)(1)(i), and (b)(2)(ii)(B). For all consumers, a card issuer must consider either the ratio of debt obligations to income, the ratio of debt obligations to assets, or the income the consumer will have after paying debt obligations. *See id.* Furthermore, regardless of a consumer's age, it would be unreasonable for a card issuer not to review any information about a consumer's income, assets, or current obligations, or to issue a credit card to a consumer who does not have any income or assets. *See id.*

Section 226.51 does not require card issuers to verify a consumer's income or assets before opening a new account or increasing the credit limit on an existing account. Instead, a card issuer may consider a consumer's income or assets based on information from a variety of sources, including information provided by a consumer on a credit card application. *See* comment 51(a)(1)–4. In the February 2010 Final Rule, the Board stated that verification was not required by TILA Section 150 and could be burdensome for both consumers and card issuers, especially when accounts are opened at point of sale or by telephone. For example, a consumer who wants to open a credit card account in a store to get a discount or a promotional rate on a purchase is unlikely to be carrying paystubs or other documents that verify his or her income. Similarly, because these types of documents typically contain personally identifiable information about the consumer, the card issuer would need to establish procedures for safeguarding that information. The Board concluded that these burdens outweighed the benefits of requiring verification because, unlike the subprime mortgage market, there was no evidence of widespread inflation of consumers' incomes in the credit card market. The Board also noted that, because credit card accounts are generally unsecured, card issuers have the incentive to verify income when either the information supplied by the consumer is inconsistent with the data the card issuer has already obtained or when the risk in the amount of the credit line warrants such verification. *See* 75 FR 7721.

November 2010 Proposed Rule

Some card issuers request on their application forms that applicants provide their "income" or "salary," while other issuers request that applicants provide their "household income." In the November 2010 Proposed Rule, the Board acknowledged that there has been some confusion as to whether information provided by a consumer in response to a request for "household income" can be used by a card issuer to satisfy the requirements of § 226.51. In particular, the Board noted that there has been uncertainty as to whether

[9] Section 226.51(b) also implements TILA Section 127(p), which requires that, when a cosigner has assumed joint liability for a credit card account issued to an underage consumer, the account's credit limit may not be increased unless the cosigner approves in writing, and assumes joint liability for, the increase.

§ 226.51 established different standards for underage and adult consumers with respect to the consideration of household income and assets.

In order to resolve this confusion, the November 2010 Proposed Rule would have amended § 226.51 to require that, regardless of the consumer's age, a card issuer must consider the consumer's independent ability to make the required payments. The Board further proposed to clarify in a revised comment 51(a)(1)–4 that consideration of information regarding the consumer's household income or assets does not by itself satisfy this requirement. Thus, if a card issuer requested on its application forms that applicants state their "household income," the proposed rule generally would not have been permitted the issuer to use the income information provided by an applicant to satisfy the ability-to-pay requirement. In contrast, however, the income information provided by an applicant could be used if a card issuer requested on its application forms that applicants simply state their "income" or "salary."

Comments

Consumer group commenters supported the proposed rule, noting that it would limit card issuers' ability to extend credit to consumers who do not have sufficient income or assets and must rely on the income or assets of a spouse or other household member who is not liable on the account. In particular, these commenters expressed concern that, while a married couple may have sufficient collective income to make the required payments on their credit card debts during the marriage, the spouse who is solely liable for those debts may not have sufficient income to make the payments if the marriage ends. Thus, they argued, consumers and issuers are better protected if spouses apply jointly and are collectively liable for credit card debt incurred during a marriage.

Comments from members of Congress, credit card issuers, retailers, trade associations, and individual consumers generally supported applying the proposed limitations on the consideration of spousal and other household income when an applicant or accountholder is under the age of 21. However, these commenters strongly objected to the application of these limitations to consumers who are 21 or older. They argued that this aspect of the proposed rule was inconsistent with the Credit Card Act and the Board's Regulation B and would reduce access to credit, particularly for married women who do not work outside the home.

Final Rule

Pursuant to its authority under TILA Section 105(a) and Section 2 of the Credit Card Act, the Board is generally adopting the amendments to § 226.51 and its commentary as proposed. Specifically, the Board is amending § 226.51 to require that a card issuer consider a consumer's independent ability to make the required payments on a credit card account, regardless of the consumer's age. Furthermore, the Board is revising comment 51(a)(1)–4 to clarify that a card issuer may not use the income or assets of a person who is not liable for debts incurred on the account to satisfy the requirements of § 226.51, unless a Federal or State statute or regulation grants a consumer who is liable on the account an ownership interest in such income or assets. Thus, if a card issuer prompts an applicant to provide his or her "household income" on a credit card application, the card issuer cannot rely solely on the information provided by an applicant to satisfy the requirements of § 226.51. Instead, the card issuer would need to obtain additional information about an applicant's independent income (such as by contacting the applicant). However, if a card issuer requests that applicants provide their income without reference to household income (such as by requesting "income" or "salary"), the issuer may rely on the information provided by applicants to satisfy the requirements of § 226.51.

As discussed below, the Board believes that this final rule effectuates the purpose of the Credit Card Act's ability-to-pay requirement by protecting consumers from incurring unaffordable levels of credit card debt. The following discussion also addresses concerns raised by commenters.

Consistency with the Credit Card Act. The Board believes that applying an independent ability-to-pay requirement to consumers age 21 and older is consistent with both the language and the intent of TILA Section 150. Specifically, TILA Section 150 requires card issuers to consider "the ability of *the consumer* to make the required payments" (emphasis added), which indicates that Congress intended card issuers to consider only the ability to pay of the consumer or consumers who are responsible for making payments on the account. Thus, it would be inconsistent with TILA Section 150 to permit card issuers to establish a consumer's ability to pay based on the income or assets of individuals who are not liable for debts incurred on the account.

Some industry commenters argued that the Credit Card Act's use of the term "independent" in TILA Section 127(c)(8)(B)(ii) but not in TILA Section 150 indicates Congress' intent to establish a less stringent standard for consideration of spousal or other household income when the consumer is 21 or older. However, as discussed above, the Board believes that interpreting the Credit Card Act to permit card issuers to establish a consumer's ability to pay based on the income or assets of individuals who are not responsible for making payments on the account would be inconsistent with the language and intent of TILA Section 150. Furthermore, the Board believes that it would be contrary to the intent of the Credit Card Act to interpret the differences between TILA Section 127(c)(8)(B)(ii) and TILA Section 150 as limiting the Board's authority to establish reasonable standards for evaluating a consumer's ability to pay.[10]

Other commenters argued that a spouse who has access to household income has the "ability * * * to make the required payments," even if the spouse does not have a legal ownership interest in the income. Under this interpretation, if the income of an applicant's spouse is deposited into a checking or other account to which the applicant has access, the applicant would have the ability to use that income to make the required payments. The Board agrees that TILA Section 150 could be interpreted in this manner. However, this interpretation could not be limited to circumstances involving spouses without requiring card issuers to treat unmarried consumers less favorably than married consumers, which would be inconsistent with the Equal Credit Opportunity Act, 15 U.S.C. 1691 (ECOA), as implemented in the Board's Regulation B (12 CFR Part 202).[11]

Furthermore, the Board is concerned that, if this interpretation were applied to all consumers regardless of marital status, it could encourage consumers to provide—and card issuers to extend credit based on—overstated income information. Specifically, a consumer may understand a credit card application asking for "household income" to request the income of *all*

[10] *See* Credit Card Act § 2 (granting the Board the authority to "issue such rules * * * as it considers necessary to carry out this Act. * * *").

[11] Regulation B prohibits a creditor from discriminating against an applicant on a prohibited basis (which includes marital status) regarding any aspect of a credit transaction. *See* 12 CFR 202.2(z), 202.4(a). Under Regulation B, a creditor discriminates against an applicant if it treats the applicant less favorably than other applicants. *See* 12 CFR 202.2(n).

household members, including those who are not liable for debts incurred on the account. For example, if an adult applicant lives with his or her parents, the applicant may understand "household income" to include the parents' income even if the parents are not liable on the account. In the subprime mortgage lending market, the Board found that lenders relying on overstated incomes to make loans could not accurately assess consumers' repayment ability.[12] The Board believes that TILA Section 150 was intended to prevent similar practices in the credit card market.[13]

Consistency with Regulation B. In the November 2020 Proposed Rule, the Board noted that there has been some confusion as to whether Regulation B *requires* a card issuer to consider spousal or other household income when considering a consumer's ability to pay under § 226.51. Accordingly, the Board clarified that Regulation B does not compel a card issuer to consider spousal or other household income when considering an applicant's ability to pay under either § 226.51(a) or (b). Furthermore, in the proposal, the Board clarified that card issuers would not violate Regulation B by virtue of complying with the requirements in § 226.51(a) or (b). Thus, to the extent that § 226.51 does not permit a card issuer to consider spousal or other household income, the Board's November 2010 Proposed Rule stated that the card issuer does not violate Regulation B by excluding such income from consideration.

Nevertheless, some commenters raised concerns that this aspect of the proposed rule was inconsistent with Regulation B. In particular, these commenters argued that, because Regulation B limits card issuers' ability to request information concerning an applicant's spouse (such as the spouse's income),[14] issuers must request "household income" on their application forms in order to avoid violating Regulation B.

These commenters did not raise any new issues with respect to the relationship between § 226.51 and Regulation B. Thus, as in the proposal, the Board concludes that a card issuer does not violate Regulation B by virtue of complying with § 226.51. Several commenters requested that the Board delay finalizing this rule until such time as Regulation B could be amended to resolve any conflicts. However, because this rule does not conflict with Regulation B, the Board does not believe that such amendments are necessary.

Effect on access to credit. Comments from members of Congress, credit card issuers, retailers, trade associations, and individual consumers expressed concern that the proposed rule would unfairly restrict access to credit for consumers who do not work outside the home, particularly married women. These commenters stated that, in families where only one spouse is employed outside the home, the other spouse is often responsible for managing the family's finances and making major purchases that require access to credit (such as opening a new credit card account in a store in order to finance the purchase of an appliance).[15] These commenters argued that, if a spouse who is not employed cannot rely on the employed spouse's income when applying for credit, the application would likely be denied, despite the fact that the employed spouse's income can be used to make the required payments on the account.[16] Commenters also raised similar concerns with respect to low-income families where both spouses work (particularly military families) because the spouses may need to pool their incomes in order to satisfy the ability-to-pay requirements of § 226.51.

The Board believes that TILA Section 150 was intended to strengthen credit card underwriting standards in order to protect consumers from incurring unaffordable levels of credit card debt. Consistent with this intent, the Board adopted § 226.51, which requires that, before opening a new credit card account or increasing the credit limit on an existing account, card issuers must evaluate whether a consumer has the income or assets necessary to make the required payments on the credit card account and on any other debts. Thus, to the extent that credit card issuers previously extended credit to consumers who lacked sufficient income or assets to repay debts incurred on the account, § 226.51 now prohibits them from doing so. Similarly, to the extent that card issuers are currently extending credit based on the income of persons who are not liable on the account, the Board believes that it is consistent with the purposes of TILA Section 150 and § 226.51 to restrict this practice.

Furthermore, for the following reasons, the Board believes that married women who do not work outside the home and low-income families will continue to have access to credit. First, the final rule permits card issuers to ask for "income" or "salary" on their application forms and to use the information provided by applicants to satisfy the ability-to-pay requirement. As noted above, some card issuers currently request "income" or "salary" on their applications, while other issuers request "household income." The Board is unaware of any evidence that card issuers who request "income" or "salary" extend less credit to married women who do not work outside the home or to low-income families than issuers that request "household income."

Second, nothing in § 226.51 prohibits card issuers from considering the combined incomes of spouses or other household members who apply for credit jointly. Indeed, comment 51(a)(1)–6 currently states that, when two or more consumers open an account jointly, the card issuer may consider their collective ability to make the required payments. Thus, a consumer who does not have sufficient income to open a credit card account independently can open an account by applying jointly with a spouse who has sufficient income. The Board understands that a joint application could be inconvenient or impracticable in certain circumstances, such as when a consumer's spouse is not available to apply in a retail setting. However, the Board does not believe that these concerns warrant permitting issuers to extend credit based on the income of persons who are not liable on the account.

Third, consumers without sufficient income to open a credit card account independently can obtain access to credit and build a credit history by becoming authorized users on the credit card account of a spouse, which is a common practice. In particular, the Board notes that a long-standing

[12] *See* 73 FR 44522, 44539–44551 (July 30, 2008) (discussing the Board's concerns regarding overstated income in the context of higher-priced mortgage loans secured by the consumer's principal dwelling).

[13] Some card issuers stated that credit card accounts opened based on household income do not have a higher rate of delinquency or loss than accounts opened based on individual income. However, they did not provide any data in support of this statement.

[14] *See* 12 CFR 202.5(c). However, Regulation B does permit a creditor to request information concerning an applicant's spouse if, for example, the spouse will be permitted to use the account, the spouse will be contractually liable on the account, the applicant is relying on the spouse's income as a basis for repayment of the credit requested, or the applicant resides in a community property state. *See* 12 CFR 202.5(c)(2).

[15] The Board notes, however, that commenters did not submit any data supporting this statement.

[16] Again, commenters generally did not submit data substantiating this contention. One credit card issuer estimated that, if the proposed rule were adopted, over 10% of applications that are currently approved would be denied. However, the issuer did not provide any information about how this estimate was made.

provision of Regulation B provides that, when a consumer is permitted to use a spouse's account, a creditor that furnishes credit information to the credit bureaus generally must reflect the participation of both spouses for that account.[17]

Finally, as noted above, the final rule permits a card issuer to consider the income of a consumer's spouse if a Federal or State statute or regulation grants the consumer an ownership interest in that income. For example, in community property states such as California and Texas, spouses are presumed to have joint ownership of property acquired during the marriage. Thus, if an applicant resides in a community property state, the applicant's income would generally include the income of the applicant's spouse for purposes of § 226.51(a). In these circumstances, a card issuer could—consistent with Regulation B—request that applicants who reside in community property states provide information regarding their spouses' incomes.[18]

Additional Revisions to Commentary

The Board has also made the following revisions to the commentary to § 226.51:

• Comments 51(a)(1)–1 and –2 have been amended to clarify that, consistent with the revisions to § 226.51(a), card issuers must consider the consumer's independent ability to make the required payments.

• Comments 51(a)(1)–4 and –6 and comment 51(b)(1)–2 have been amended to clarify that card issuers generally are not permitted to consider the income or assets of persons who are not liable for debts incurred on the account (such as authorized users).

• In order to improve clarity, the guidance in comment 51(a)(1)–4 has been reorganized into three subparagraphs.

• Consistent with the proposed amendments to §§ 226.9, 226.16, and 226.55 regarding fees that increase after a specified period of time, comment 51(a)(2)–3 has been amended to clarify that, when estimating the required minimum periodic payments for purposes of the safe harbor in § 226.51(a)(2)(ii), the issuer must use the fee that will apply after the specified period. This approach is consistent with the guidance regarding promotional rates in comment 51(a)(2)–2.

• The Board has adopted a new comment 51(b)(1)–2 to clarify that information regarding income and assets that satisfies the requirements of § 226.51(a) also satisfies the requirements in § 226.51(b)(1) for consumers under the age of 21.

Section 226.52 Limitations on Fees

52(a) Limitations Prior to Account Opening and During First Year After Account Opening

Section 226.52(a)(1) generally limits the total amount of fees that a consumer may be required to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan to 25 percent of the account's credit limit at account opening.[19] This limitation applies "during the first year after the account is opened." However, the Board understands that some card issuers are requiring consumers to pay application, processing, or similar fees prior to account opening that, when combined with other fees charged after account opening, exceed the 25 percent threshold in § 226.52(a)(1). As discussed below, to the extent that § 226.52(a)(1) permits this practice, the Board is concerned that the regulation is inconsistent with the purposes of TILA (as amended by the Credit Card Act). Accordingly, pursuant to its authority under TILA Section 105(a) and Section 2 of the Credit Card Act, the Board proposed to amend § 226.52(a)(1) to apply to fees the consumer is required to pay prior to account opening.

The Credit Card Act amended TILA Section 127 by creating a new paragraph (n). *See* Credit Card Act § 105. Section 127(n)(1) provides that, "[i]f the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened, no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." 15 U.S.C. 1637(n)(1). Section 127(n)(2) further provides that Section 127(n) may not "be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law." 15 U.S.C. 1637(n)(2).

As discussed in the February 2010 Final Rule, the Board believes that Section 127(n) was intended to prevent card issuers from requiring consumers to pay excessive fees in order to obtain a credit card account. *See* 75 FR 7724–7726. Many subprime credit card issuers require payment of substantial one-time fees when an account is opened (such as application fees, program fees, and annual fees). By linking the maximum amount of permissible fees to the amount of credit extended, Section 127(n)(1) and § 226.52(a)(1) establish a direct relationship between the costs and benefits associated with opening a credit card account. If, for example, a card issuer provides a consumer with a $500 credit limit when the account is opened, the issuer is prohibited from requiring the consumer to pay more than $125 in non-exempt fees at account opening. Furthermore, in order to ensure that the statutory relationship between fees and the account's credit limit is maintained for a reasonable period of time, Section 127(n)(1) and § 226.52(a)(1) apply for one year after an account is opened. Thus, a card issuer that charges non-exempt fees that equal 25 percent of the credit limit at account opening cannot require the consumer to pay any transaction fees, monthly maintenance fees, or other non-exempt fees for one year after account opening.

52(a)(1) General Rule

Fees Charged Prior to Account Opening

The Board understands that, because § 226.52(a)(1) states that its limitations apply "*during* the first year after the account is opened," there has been some uncertainty as to whether those limitations apply to fees that a consumer is required to pay prior to account opening. As noted above, some card issuers are currently requiring consumers to pay application or processing fees prior to account opening that, when combined with other fees charged to the account after account opening, exceed 25 percent of the account's initial credit limit. While this practice is consistent with the current language of § 226.52(a)(1), the Board believes that it is inconsistent with the intent of Section 127(n)(1) insofar as it alters the statutory relationship between the costs and benefits of opening a credit card account. Accordingly, in order to effectuate the purpose of Section 127(n)(1), the Board proposed to use its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to amend § 226.52(a)(1) to apply the 25 percent limitation to fees the consumer is required to pay before

[17] *See* 12 CFR 202.10.

[18] *See* 12 CFR 202.5(c)(2)(iv), (d)(1).

[19] Late payment fees, over-the-limit fees, and returned payment fees are exempt from this requirement, as are fees that the consumer is not required to pay with respect to the account. *See* § 226.52(a)(2).

account opening and during the first year after account opening.[20]

Consumer groups, a member of Congress, and a credit card issuer supported the proposed amendment on the grounds that it would prevent evasion and further the purposes of TILA Section 127(n). In contrast, the proposal was opposed by other industry commenters (including employees of a credit card issuer that focuses on the subprime market). These commenters argued that the proposed amendment was inconsistent with the plain language of the Credit Card Act insofar as it would apply the 25 percent limitation to fees charged prior to account opening. They also argued that the proposal would force subprime credit card issuers to reduce credit availability by limiting revenue derived from fees. However, for the reasons discussed above, the Board believes that the proposed rule is necessary to preserve the statutory relationship between the costs and benefits of opening a credit card account. Accordingly, in order to effectuate the purposes of TILA Section 127(n) and to prevent evasion, the Board is adopting this aspect of the proposal in the final rule. *See* TILA Section 105(a); Credit Card Act § 2.

Account Opening

The proposed rule noted that some confusion exists regarding when the one-year period in § 226.52(a)(1) begins and ends. In order to resolve any uncertainty as to when the 25 percent limitation in § 226.52(a)(1) ceases to apply, the Board proposed to amend § 226.52(a)(1) to provide that, for purposes of that paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. This approach is generally consistent with § 226.5(b)(1)(i), which provides that the account-opening disclosures required by § 226.6 must be provided before the first transaction is made under the plan. Although § 226.5(b)(1)(iv) and (b)(1)(v) permit creditors to collect membership fees and application fees excludable from the finance charge under § 226.4(c)(1) before providing account-opening disclosures in certain circumstances, the Board is concerned that, because the ability to engage in transactions is a primary benefit of a credit card account, it would be inconsistent with the purpose of Section 127(n)(1) if the one-year period expired less than one year after the consumer could first use the account for transactions.

Although consumer groups supported this aspect of the proposal, industry commenters noted that, in certain circumstances, it would be operationally burdensome to track the precise date on which a particular account can first be used for transactions. These commenters conceded that the date an account is opened on a card issuer's system will coincide with the date the account can first be used for transactions when the account is opened at the point of sale in order to purchase merchandise. However, they stated that these dates will not coincide when a credit card is mailed to a consumer because the date the account can first be used for transactions will depend on how long it takes for the card to be delivered and how long the consumer waits after delivery to activate the card. Industry commenters recommended that, in order to establish a consistent standard, the first year after account opening under § 226.52(a) instead be measured from the date the account is opened on the card issuer's system.

The Board is concerned that deducting delivery time from the one-year period in TILA Section 127(n) would reduce protections for consumers. However, in order to reduce the operational burden on card issuers, the Board is adopting new comment 52(a)(1)–4 to provide additional guidance regarding how a card issuer determines the date on which the account may first be used by the consumer to engage in transactions. As an initial matter, this comment clarifies that a card issuer may consider an account open for purposes of § 226.52(a)(1) on the date the account is first used by the consumer for a transaction (such as when an account is opened at point of sale in order to make a purchase). In addition, to address circumstances in which a credit card and account-opening disclosures are mailed or delivered to consumers, the comment provides several alternative methods of determining the date on which the account may first be used for transactions (even if the account is not actually used for a transaction on that date).

First, if a card issuer requires consumers to comply with reasonable activation procedures for preventing fraud or unauthorized use of a new account (such as requiring the consumer to provide information that verifies his or her identity over the telephone after receiving the card) before permitting the consumer to use the account for transactions, the card issuer may consider the account open on the date the consumer complies with those procedures, provided that the account may be used for transactions on that date.

Second, a card issuer may consider an account open for purposes of § 226.52(a)(1) on the date that is seven days after the card issuer mails or delivers to the consumer account-opening disclosures that are consistent with § 226.6, provided that the consumer may use the account for transactions after complying with any reasonable activation procedures for preventing fraud or unauthorized use. The Board has previously used seven days as a general measure of the amount of time required for credit card mailings to reach consumers.[21] Accordingly, the Board believes that a seven-day period reasonably estimates the amount of time required for account-opening disclosures to reach consumers by mail.

The following example illustrates the application of this guidance: Assume that a card issuer approves a consumer's application for a credit card account under an open-end (not home-secured) consumer credit plan and establishes the account on its internal systems on July 1 of year one. On July 5, the card issuer mails or delivers to the consumer account-opening disclosures that are consistent with § 226.6. If the consumer may use the account for transactions after complying with any reasonable procedures imposed by the card issuer for preventing fraud and unauthorized use, the card issuer may consider the account open on July 12 of year one for purposes of § 226.52(a)(1) regardless of when the consumer actually activates the account. Accordingly, § 226.52(a)(1) ceases to apply to the account on July 12 of year two.

While this guidance should alleviate much of the burden associated with tracking the date on which an account is opened for purposes of § 226.52(a),

[20] Although TILA Section 127(n)(2) refers to the "imposition or payment of advance fees," the Board does not interpret this reference as excluding "advance fees" from the application of Section 127(n)(1). On the contrary, Section 127(n)(2) specifically states that Section 127(n) cannot "be construed as *authorizing* any imposition or payment of advance fees otherwise prohibited by any provision of law," which the Board understands to mean that a fee that falls under the 25 percent threshold may nevertheless be subject to other legal restrictions. For example, comment 52(a)(3)–1 cites 16 CFR § 310.4(a)(4), which prohibits any telemarketer or seller from "[r]equesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person."

[21] *See* 74 FR 5498, 5511 (Jan. 29, 2009) (discussing rationale behind adoption of a 21-day period between mailing or delivery of periodic statements and the payment due date); *see also* Credit Card Act § 106(b) (adopting same 21-day period in revised TILA Section 163).

the Board recognizes that, in some cases, it may be difficult for card issuers to determine the specific date on which account-opening disclosures are mailed or delivered to a particular consumer. Accordingly, comment 52(a)(1)–4 further clarifies that, if a card issuer has reasonable procedures designed to ensure that account-opening disclosures that are consistent with § 226.6 are mailed or delivered to consumers no later than a certain number of days after the card issuer establishes the account on its system, the card issuer may add that number of days to the seven-day period for purposes of determining when the account was opened under § 226.52(a)(1). As discussed above, Congress and the Board have adopted a similar "reasonable procedures" standard for the provision of credit card periodic statements.[22] Accordingly, for purposes of § 226.52(a)(1), the Board believes that the same standard is appropriate for the provision of credit card account-opening disclosures.[23]

Using the facts in the example above, if the card issuer establishes the account on its internal systems on July 1 of year one and has adopted reasonable procedures designed to ensure that account-opening disclosures are mailed or delivered to consumers no later than three days after an account is established, the issuer may consider the account open on July 11 of year one for purposes of § 226.52(a)(1). Therefore, § 226.52(a)(1) ceases to apply to the account on July 11 of year two.

Additional Amendments

The Board understands that the references in § 226.52(a)(1) and comment 52(a)(1)–1 to the charging of fees *to* a credit card account have raised concerns as to whether § 226.52(a)(1) permits card issuers to require consumers to pay an unlimited amount of fees with respect to a credit card account so long as none of those fees are actually charged to the account. Although this language was based on the language of the Credit Card Act, the Board does not believe that Congress intended to permit card issuers to evade the 25 percent limitation by collecting fees from the consumer by other means. Indeed, as discussed in the February 2010 Final Rule, the Board believes that Congress intended the 25 percent limitation to apply not only to fees charged to a credit card account but also to fees collected from other sources with respect to the account (such as fees that are charged to a consumer's deposit account). *See* 75 FR 7724–7726. Accordingly, in order to resolve any ambiguity, the Board proposed to use its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to simplify § 226.52(a)(1) by removing this language. The Board also proposed to amend the commentary to § 226.52(a)(1) for consistency with the proposed revisions discussed above and to make certain non-substantive clarifications and corrections. Consumer groups and most industry commenters supported this aspect of the proposal. Although some industry commenters argued that the Board should strictly apply the statutory language, the Board believes that doing so would undermine the purpose of the Credit Card Act. Accordingly, the Board is adopting this aspect of the proposal.

52(a)(2) Fees Not Subject to Limitations

The Board understands that there has been some uncertainty as to whether minimum interest charges are subject to § 226.52(a)(1). The Board has previously concluded elsewhere in Regulation Z that such charges should be treated as fees. *See* comment 7(b)(6)-4. Accordingly, for consistency, the Board proposed to amend comment 52(a)(2)–1 to clarify that, while § 226.52(a)(1) does not apply to charges attributable to periodic interest rates, it applies to charges imposed as a substitute for interest when the interest charge would not otherwise exceed a minimum threshold. In addition, the Board proposed to clarify that § 226.52(a)(1) applies to other fixed finance charges.

Consumer group commenters supported the proposed revisions. However, one industry commenter requested that, because § 226.52(a)(1) does not apply to accrued interest, only the difference between the accrued interest and the minimum interest charge be considered a fee. For example, the commenter suggested that, if the interest accrued during a billing cycle is 40 cents and the minimum interest charge is $1.00, only 60 cents should be considered a fee under § 226.52(a)(1). The Board declines to adopt this approach because, in these circumstances, the card issuer is not imposing accrued interest. Instead, the card issuer has chosen to impose a higher, pre-determined charge in lieu of interest. Furthermore, subdividing the minimum interest charge into accrued interest and fee portions would be inconsistent with the disclosure of minimum interest charges in the tables provided with applications and solicitations and at account opening. Sections 226.5a and 226.6 require that the minimum interest charge be disclosed in the tables with headings, content, and format substantially similar to the model forms in Appendix G–10 and G–17, which disclose the minimum interest charge as a single, specific amount. *See* §§ 226.5a(a)(2), (b)(3); 226.6(b)(1), (b)(2)(iii). Furthermore, as noted above, card issuers are required to treat the entire minimum interest charge as a fee for purposes of the periodic statement disclosures required by § 226.7(b)(6). The Board is concerned that permitting issuers to subdivide the minimum interest charge into interest and fees in these disclosures would be confusing to consumers. Similarly, if issuers were permitted to subdivide the minimum interest charge for purposes of § 226.52(a) but not for purposes of the disclosures in § 226.7, consumers would not be able to, for example, use the fee disclosures on their periodic statements to determine whether the total amount of fees imposed are consistent with the 25 percent limitation. Accordingly, the revisions to comment 52(a)(2)–1 are adopted as proposed.

52(a)(3) Rule of Construction

The Board proposed to correct a typographical error in § 226.52(a)(3) by replacing the words "This paragraph (a)" with "Paragraph (a) of this section." The Board did not receive any significant comment on this correction, which is adopted as proposed.

52(b) Limitations on Penalty Fees

Section 226.52(b)(1) prohibits card issuers from imposing fees for violating the terms or other requirements of an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee either represents a reasonable proportion of the total costs incurred by the issuer as a result of the type of violation or complies with the applicable safe harbor amount. Furthermore, under § 226.52(b)(2), the dollar amount of the fee cannot exceed the dollar amount associated with the violation and a card issuer cannot impose more than one fee based on a single event or transaction. In order to facilitate compliance, the Board proposed to amend § 226.52(b) and the accompanying commentary to provide additional guidance and illustrative examples. As discussed below, those amendments are generally adopted as proposed.

[22] *See* Credit Card Act § 106(b); § 226.5(b)(2).

[23] The Board notes that the account-opening definition in § 226.52(a)(1) and the guidance in the accompanying commentary should not be construed as altering the timing requirements for the provision of account-opening disclosures under § 226.5(b)(1)(i), which—as discussed above—require creditors to provide account-opening disclosures that are consistent with § 226.6 before the first transaction is made on the account.

52(b)(1)(ii) Safe Harbors

The safe harbors in § 226.52(b)(1)(ii)(A)–(B) provide that a card issuer generally may impose a fee of $25 for an initial violation and a fee of $35 for any additional violation of the same type during the next six billing cycles. As discussed below, the Board proposed to make several significant amendments to § 226.52(b)(1)(ii) and its commentary. In addition, the Board proposed several non-substantive clarifying or organizational amendments.[24] Except as noted below, these amendments were generally supported by commenters and are adopted as proposed.

Multiple Violations During a Billing Cycle

The safe harbors in § 226.52(b)(1)(ii) address circumstances in which a violation is repeated in one of the six billing cycles following the billing cycle during which the initial violation occurred. However, the safe harbors do not expressly address circumstances in which a repeated violation occurs in the *same* billing cycle as the initial violation. The Board proposed to correct this oversight by amending § 226.52(b)(1)(ii)(B) to state that a card issuer may impose a $35 fee for a subsequent violation of the same type that occurs *during the same billing cycle* or during the next six billing cycles.

There are relatively few circumstances in which a card issuer may impose multiple fees for multiple violations of the same type during a billing cycle. Section 226.56(j)(1) prohibits card issuers from imposing more than one over-the-limit fee per billing cycle. Furthermore, § 226.52(b)(2)(ii) prohibits the imposition of more than one penalty fee based on a single event or transaction, which prevents card issuers from imposing more than one late payment fee during a billing cycle. In addition, as discussed in comment 52(b)(2)(i)–1, a card issuer may not impose multiple returned payment fees by submitting the same check for payment multiple times. Although consumer group commenters suggested that multiple returned payment fees could be prohibited in these circumstances, the Board believes that a card issuer should be permitted to impose two returned payment fees during a billing cycle if a consumer makes two separate payments that are returned during that billing cycle.

[24] In particular, the Board proposed to move the language in § 226.52(b)(1)(ii)(A) and (B) regarding adjustments to the safe harbor amounts based on changes in the Consumer Price Index to a new § 226.52(b)(1)(ii)(D).

Furthermore, in these circumstances, the Board believes that it is consistent with the purpose of the safe harbors in § 226.52(b)(1)(ii)(A)–(B) to permit the card issuer to impose a $35 fee for the second returned payment. Accordingly, the Board has revised § 226.52(b)(1)(ii)(B) to clarify that this is permitted. The Board has also amended comment 52(b)(1)(ii)–1 for consistency with the revisions to § 226.52(b)(1)(ii)(A)–(B) and provided an illustrative example in comment 52(b)(2)(ii)–1.

Multiple Over-the-Limit Fees

The Board has adopted the proposed revisions to comment 52(b)(1)(ii)–1.ii in order to provide additional guidance regarding the relationship between the safe harbors in § 226.52(b)(1)(ii), the prohibition on imposing multiple fees based on a single event or transaction in § 226.52(b)(2)(ii), and the limitations on fees for exceeding the credit limit in § 226.56(j)(1). Consistent with the Credit Card Act, § 226.56(j)(1) permits card issuers to impose multiple over-the-limit fees based on a single over-the-limit transaction when the consumer does not make payments sufficient to bring the balance under the credit limit by the next payment due date (although no more than three fees may be imposed with respect to any single transaction). *See* Credit Card Act § 102(a); TILA Section 127(k); *see also* 75 FR 7751–7752. Consumer group commenters argued that, notwithstanding this statutory language, the Board should use its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to prohibit the imposition of multiple over-the-limit fees in these circumstances. However, because it appears that Congress intended to permit this practice, the Board does not believe that it would be appropriate to interpret § 226.52(b) as prohibiting such fees. Accordingly, the Board has provided additional guidance in comment 52(b)(1)(ii)–1.ii clarifying that, to the extent permitted by § 226.56(j)(1), § 226.52(b)(2)(ii) does not prohibit a card issuer from imposing fees for exceeding the credit limit in consecutive billing cycles based on a single over-the-limit transaction. The Board has further clarified that, in these circumstances, the second and third over-the-limit fees permitted by § 226.56(j)(1) may be $35, consistent with the safe harbor for repeated violations in § 226.52(b)(1)(ii)(B). A cross-reference has been inserted to comment 52(b)(2)(ii)–1, where similar guidance and an illustrative example are also be provided.

Waiver of Penalty Fees

As discussed in the June 2010 Final Rule, the safe harbor in § 226.52(b)(1)(ii) was designed to permit card issuers to increase the penalty for repeated violations of the same type in order to, among other things, deter consumers from engaging in future violations. *See* 75 FR 37531–37534, 37540–37543. In order to accomplish this purpose, the Board proposed to revise § 226.52(b)(1)(ii)(B) to clarify that, under the safe harbor, the higher $35 fee could only be imposed if the card issuer had previously imposed the lower $25 fee for a violation of the same type. The Board is adopting these revisions as proposed.

However, industry commenters raised concerns about when a fee would be considered "imposed" under the proposed amendment. In particular, these commenters noted that card issuers often voluntarily choose to waive the penalty fee for an initial violation but would lose the incentive do so if they could not impose the higher fee for subsequent violations. Because the waiver of penalty fees is beneficial to consumers, the Board has clarified in comment 52(b)(1)(ii)–1.i that a fee has been imposed for purposes of § 226.52(b)(1)(ii) even if the card issuer waives or rebates all or part of the fee. Thus, under the safe harbor, a card issuer may waive the $25 fee for an initial violation and still impose a $35 fee for a repeated violation of the same type during the same billing cycle or the next six billing cycles.

The Board notes that, in order to demonstrate compliance with the safe harbors in § 266.52(b)(1)(ii), a card issuer must be able to establish that the $35 fee was not imposed for the first violation of a particular type during the relevant billing cycles. One method that card issuers may use to accomplish this is to disclose the imposition of the initial $25 fee and the waiver of that fee on the consumer's periodic statements.

52(b)(2)(i) Fees That Exceed Dollar Amount Associated With Violation

Section 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a fee based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). As an illustrative example, comment 52(b)(2)(i)–5 states that § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 fee when a consumer fails to use the account for $2,000 in purchases over the course of a year. Furthermore, to prevent circumvention, the comment clarifies that § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 annual fee on all accounts but waiving the fee if the consumer uses the account for $2,000 in purchases over the course of a year.

The Board understands that comment 52(b)(2)(i)–5 has created some confusion as to whether card issuers are prohibited from considering account activity as a factor when, for example, responding to an individual consumer's request that an annual fee be waived. This was not the Board's intent. Instead, the example in comment 52(b)(2)(i)–5 was intended to clarify that card issuers are prohibited from achieving indirectly through a systematic waiver of annual fees a result that is directly prohibited by § 226.52(b)(2)(i)(B)(*2*): establishing a program under which only consumers who do not use an account for at least $2,000 in purchases over the course of a year are charged an additional $50. Accordingly, the Board proposed to amend comment 52(b)(2)(i)–5 to clarify that, if a card issuer does not promote the waiver or rebate of the annual fee for purposes of § 226.55(e), § 226.52(b)(2)(i)(B)(*2*) does not prohibit the issuer from considering account activity when waiving or rebating annual fees on individual accounts (such as in response to a consumer's request).[25]

Industry commenters generally supported the proposed revisions. However, consumer group commenters requested that waivers based on account activity only be permitted when requested by the consumer, even if the possibility of a waiver is not promoted to consumers. As discussed in greater detail below with respect to § 226.55(e), the Board believes that a card issuer waiver program or policy that is not promoted does not raise the same circumvention concerns as a promoted program or policy. Accordingly, the amendments to comment 52(b)(2)(i)–5 are adopted as proposed, with non-substantive revisions.

52(b)(2)(ii) Multiple Fees Based on a Single Event or Transaction

The Board proposed to amend comment 52(b)(2)(ii)–1 to provide additional examples further illustrating the application of § 226.52(b)(2)(ii). Among other things, these examples clarify that—if the required minimum periodic payment is not made during a billing cycle and a late payment fee is imposed—the card issuer may include the unpaid amount in the required minimum periodic payment due during the next billing cycle and impose a second late payment fee under § 226.52(b)(2)(ii) if the consumer fails to make the second minimum payment. However, the examples also clarify that—if a consumer makes a required minimum periodic payment by the applicable due date—the card issuer may not impose a late payment fee based on the consumer's failure to also pay past due amounts that the card issuer chose not to include in that required minimum periodic payment.

The Board understands that, for loss mitigation and other purposes, some card issuers do not include past due amounts in the required minimum periodic payment. The Board acknowledges that this practice is beneficial to consumers to the extent that it prevents some delinquent consumers from becoming even more delinquent. For example, if a card issuer does not include past due amounts in the required minimum periodic payment, a consumer could remain one payment past due indefinitely without ever becoming more than 60 days delinquent and thereby avoid the application of a penalty rate to existing balances pursuant to § 226.55(b)(4). However, a consumer who makes the required minimum periodic payment reflected on the periodic statement by the due date should not be charged a late payment fee. It is inconsistent with the purpose of § 226.52(b)(2)(ii) for a consumer to be charged more than one late payment fee based on the failure to make a single required minimum periodic payment.

Consumer group and one industry commenter supported this aspect of the proposal. In contrast, two industry commenters opposed it on the grounds that the card issuer cannot include the past due amount in the next minimum payment when a payment is returned after the periodic statement has been mailed or delivered to the consumer. However, it is unclear how often this scenario occurs. Furthermore, although the card issuer cannot impose a late payment fee if the consumer pays the amount reflected on the statement by the due date, the card issuer is permitted to impose a fee based on the returned payment. Accordingly, for the reasons discussed above, the revisions to comment 52(b)(2)(ii)–1 are adopted as proposed.

Section 226.53 Allocation of Payments

53(b) Special Rules

Section 226.53(a) implements TILA Section 164(b)(1), which requires that card issuers generally allocate amounts paid by the consumer in excess of the required minimum periodic payment first to the balance with the highest annual percentage rate and then to other balances in descending order based on the applicable rate. However, TILA Section 164(b)(2) and § 226.53(b)(1) set forth a special rule for accounts with balances subject to a deferred interest or similar program. In these circumstances, a card issuer is required to allocate excess payments first to the balance subject to the program during the two billing cycles immediately preceding expiration of the program. In addition, in the February 2010 Final Rule, the Board used its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to adopt § 226.53(b)(2), which permits card issuers to allocate excess payments among the balances in the manner requested by the consumer when a balance on the account is subject to a deferred interest or similar program. *See* 75 FR 7728–7729.

The Board understands that there is some concern regarding the appropriate allocation of payments when an account has multiple balances, one of which is secured. For example, some private label credit cards permit consumers to purchase equipment that is subject to a security interest (such as a motorcycle, snowmachine, or riding lawnmower) as well as related items that are not (such as helmets and other accessories). If the rate that applies to an unsecured balance is higher than the rate that applies to the secured balance, § 226.53(a) currently requires the card issuer to apply excess payments first to the unsecured balance. While this allocation method is generally beneficial to consumers insofar as it minimizes interest charges, it could also make it difficult for a consumer to pay off the secured balance in order to obtain a release of the security interest. For example, if a consumer wishes to pay off the secured balance in order to sell, trade in, or otherwise dispose of the property in which the card issuer has a security interest, § 226.53(a) requires the consumer to pay off not only the secured balance but also any other balances to which a higher rate applies.

The Board believes that, in this narrow set of circumstances, it is beneficial to consumers to provide greater flexibility regarding the allocation of excess payments. Accordingly, pursuant to its authority under TILA Section 105(a) and Section 2 of the Credit Card Act, the Board proposed to redesignate the special rules for accounts with deferred interest or similar balances as § 226.53(b)(1)(i) and (b)(1)(ii) and to adopt a new special rule for accounts with secured balances

[25] The promotion of waivers and rebates is discussed in detail below with respect to § 226.55(e).

in § 226.53(b)(2). Specifically, revised § 226.53(b)(2) provided that, when a balance on a credit card account under an open-end (not home-secured) consumer credit plan is secured, the card issuer may, at its option, allocate any amount paid by the consumer in excess of the required minimum periodic payment to that balance if requested by the consumer, even if a higher rate applies to another balance.

The Board also proposed to revise the commentary to § 226.53 consistent with the proposed revisions to § 226.53(b). In particular, the Board proposed to clarify that the guidance in comment 53(b)–3 on what constitutes a consumer request when an account has a deferred interest or similar balance also applies when an account has a secured balance.

Industry and consumer group commenters generally supported the proposal, although consumer groups expressed concern that a special payment allocation rule for secured credit card balances could encourage the use of open-end credit accounts for transactions that are more appropriately treated as closed-end credit. Accordingly, the Board is adopting the proposed revisions to § 226.53 and its commentary pursuant to its authority under TILA Section 105(a) and Section 2 of the Credit Card Act, while specifically noting that, in order to qualify as open-end credit under Regulation Z, an account must meet the definition of open-end credit in § 226.2(a)(20) and its commentary.

Section 226.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General Rule

Section 226.55 implements the restrictions on increases in annual percentage rates and certain fees and charges in TILA Sections 171 and 172. Section 226.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) unless specifically permitted by one of the exceptions in § 226.55(b). The Board understands that there has been some confusion as to whether an increase in a rate, fee, or charge is subject to this prohibition when the consumer was previously notified of the circumstances giving rise to the increase. Accordingly, in order to remove any ambiguity, the Board proposed to amend comment 55(a)–1 to clarify that—except as specifically provided in § 226.55(b)—the prohibition in § 226.55(a) applies even if the circumstances under which an increase will occur are disclosed in advance. Commenters generally supported this revision, which is adopted as proposed.

55(b) Exceptions

Section 226.55(b) contains exceptions to the general rule in § 226.55(a). As a general matter, these exceptions are not mutually exclusive, and a card issuer may increase a rate, fee, or charge pursuant to one exception even if that increase would not be permitted under a different exception. Comment 55(b)–1 provides illustrative examples of the interaction between the different exceptions in § 226.55(b).

The Board proposed to amend comment 55(b)–1 to provide additional guidance regarding the interaction between the exception in § 226.55(b)(4) for accounts that become more than 60 days delinquent, the exception in § 226.55(b)(5) for accounts subject to a workout or temporary hardship arrangement, and the exception in § 226.55(b)(6) for accounts subject to the SCRA or a similar Federal or State statute or regulation. Section 226.55(b)(4)(ii) implements the "cure" provision in TILA Section 171(b)(4)(B), which allows a consumer whose rate has been increased as a result of a delinquency of more than 60 days to "terminate" the increase (in other words, reduce the rate to the pre-existing value) by making the next six required minimum payments by the due date. For example, if the rate on a $1,000 balance was increased from 12% to 30% on January 31 based on a delinquency of more than 60 days, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate on any remaining portion of the $1,000 balance to 12% if the consumer makes the required minimum periodic payments for February, March, April, May, June, and July by the relevant due date.

However, the Board understands that, in certain circumstances, a consumer may enter into a workout or temporary hardship arrangement or enter military service after a rate has been increased based on a delinquency of more than 60 days but before the consumer has made the six timely payments necessary to obtain a reduction under § 226.55(b)(4)(ii). Section 226.55(b)(5) implements TILA Section 171(b)(3), which provides that a card issuer may increase the rate on an existing balance when a workout or temporary hardship arrangement is completed or fails, so long as the increased rate does not exceed the rate that applied prior to the arrangement. For example, if a card issuer reduced a consumer's rate on a $1,000 balance from 30% to 15% as part of a workout or temporary hardship arrangement, § 226.55(b)(5) would permit the card issuer to increase the rate on any remaining portion of the $2,000 balance to 30% upon completion or failure of the arrangement.

Similarly, when the rate that applies to a balance is reduced pursuant to the SCRA because the consumer enters military service, § 226.55(b)(6) permits the card issuer to reinstate the pre-existing rate for that balance once the consumer leaves military service. For example, if a card issuer reduced a consumer's rate on a $1,000 balance from 30% to 6% pursuant to the SCRA, § 226.55(b)(6) would permit the card issuer to increase the rate on any remaining portion of the $1,000 balance to 30% once the consumer leaves military service and the SCRA no longer applies.

Accordingly, when a consumer obtains a § 226.55(b)(4)(ii) reduction during a workout or temporary hardship arrangement or while in military service, it is unclear whether § 226.55(b)(5) or (b)(6) would permit the card issuer to negate that reduction by returning existing balances to the rate that applied prior to commencement of the arrangement or military service. Because § 226.55(b)(4)(ii) implements a specific statutory requirement that a rate increase based on a delinquency of more than 60 days be terminated if the consumer makes the next six required minimum payments on time, the Board believes it would be inconsistent with the intent of that requirement to interpret the exceptions in § 226.55(b)(5) and (b)(6) as overriding the reduction in rate. Thus, the Board proposed revisions to comment 55(b)–1 clarifying that, if § 226.55(b)(4)(ii) requires a card issuer to decrease the rate, fee, or charge that applies to a balance while the account is subject to a workout or temporary hardship arrangement or subject to the SCRA or a similar Federal or State statute or regulation, the card issuer may not impose a higher rate, fee, or charge on that balance pursuant to § 226.55(b)(5) or (b)(6).

The Board also proposed the following illustrative example: Assume that, on January 1, the annual percentage rate that applies to a $1,000 balance is increased from 12% to 30% pursuant to § 226.55(b)(4). On February 1, the rate on that balance is decreased from 30% to 15% consistent with § 226.55(b)(5) as a part of a workout or temporary hardship arrangement. On July 1, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $1,000 balance from 15% to 12%. If the consumer subsequently completes or fails to comply with the terms of the workout or temporary hardship arrangement, the card issuer may not increase the 12% rate on any remaining portion of the $1,000 balance pursuant to § 226.55(b)(5).

Consumer group commenters supported this aspect of the proposal, while one industry commenter argued that the proposed amendments would make card issuers less inclined to provide workout or temporary hardship arrangements. Because workout and temporary hardship arrangements can provide important benefits to card issuers as well as consumers by reducing the likelihood that a delinquent account will become a loss, the Board does not believe that the proposed revisions to comment 55(b)–1 will result in a significant reduction in the availability of such arrangements. Accordingly, for the reasons discussed above, the Board is adopting this aspect of the proposal.

55(b)(1) Temporary Rate, Fee, or Charge Exception

Section 226.55(b)(1) implements TILA Section 171(b)(1), which permits a card issuer to increase a temporary or promotional rate upon expiration of a period of at least six months, provided that the card issuer discloses in advance the length of the period and the rate that will apply after expiration. However, neither § 226.55(b)(1) nor TILA Section 171(b)(1) addresses circumstances in which an annual fee or other fee or charge subject to § 226.55 increases after a specified period of time. As discussed above, the Board declined to adopt a specific exception for temporary or promotional fee programs in the February 2010 Final Rule because the Credit Card Act did not contain such an exception and because an exception did not appear to be necessary. *See* 75 FR 7734 n. 48; *see also id.* 7699, 7706–7707. Indeed, the Board noted that nothing in the February 2010 Final Rule prohibited a creditor from providing notice of an increase in a fee at the same time it temporarily reduces the fee, provided that information regarding the reduction is not interspersed with the content required to be disclosed pursuant to § 226.9(c)(2)(iv). *See* 75 FR 7699; *see also* comment 5a(b)(2)–4.

Nevertheless, as discussed above with respect to § 226.9(c)(2)(v)(B), the Board believes that, upon further review, it is appropriate to use its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to specifically address temporary or promotional programs for fees or charges subject to § 226.55 in order to encourage issuers to disclose and structure such programs in a consistent manner that enables consumers to understand the associated costs. Accordingly, the Board proposed to amend § 226.55(b)(1) to apply to temporary or promotional programs for fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). Thus, § 226.55(b)(1), as amended, would permit a card issuer to, for example, increase an annual fee after a specified period of time if the card issuer provides the consumer in advance with a clear and conspicuous written disclosure of the length of the period and the fee or charge that will apply after expiration of the period.

In addition, the Board proposed to amend comments 55(b)(1)–2–4 for consistency with the proposed revisions to § 226.55(b)(1), to provide additional illustrative examples, and to make other non-substantive clarifications. The Board also proposed a new comment 55(b)(1)–5 to clarify that, although the limitations in § 226.55(b)(1)(ii) on applying an increased rate to certain types of transactions would also apply to increased fees or charges subject to § 226.55, card issuers generally are not prohibited from increasing a fee or charge that applies to the account as whole (to the extent consistent with the notice requirements in §§ 226.9 and 226.55(b)(3)). Finally, the Board proposed to add an additional example to comment 55(b)–3 to clarify the application of § 226.55 when the specified time periods for temporary rates overlap.

Commenters generally supported the proposed revisions, although several industry commenters argued that promotional fee reductions should be exempted from the requirement in § 226.55(b)(1) that promotional reductions last at least six months. In support of this argument, these commenters noted that § 226.55(b)(1)'s six-month requirement implements TILA Section 172(b), which applies only to promotional reductions in rates. *See* Credit Card Act § 101(d). However, as discussed above and in the February 2010 Final Rule, the Credit Card Act does not contain *any* exception for promotional fee reductions. Thus, in using its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to establish such an exception, the Board believes that it is important to ensure that consumers receive the same protections with respect to promotional fee reductions that they receive with respect to promotional rate reductions. Accordingly, the Board adopts the revisions to § 226.55(b)(1) and its commentary as proposed.

55(b)(3) Advance Notice Exception

Section 226.55(b)(3) provides that a card issuer may generally increase the rate, fee, or charge that will apply to new transactions after complying with the notice requirements in § 226.9. However, § 226.55(b)(3)(iii) further provides that a card issuer cannot use this exception to increase a rate, fee, or charge during the first year after account opening.

The Board understands that there has been some confusion regarding the circumstances under which an increased fee or charge applies to an existing balance (as opposed to the account as a whole) and therefore does not qualify for the exception in § 226.55(b)(3). In particular, there has been uncertainty as to whether an increased fee or charge can be applied to a closed account or an account on which transaction privileges have been suspended. Because an account cannot be used for new transactions in these circumstances, an increased fee or charge subject to § 226.55 could only be applied to the account's existing balance. In addition, §§ 226.52(b)(2)(i)(B)(*3*) and 226.55(d)(1) generally prohibit a card issuer from applying a new or increased fee or charge to a closed account. Accordingly, to provide greater clarity, the Board proposed to amend § 226.55(b)(3)(iii) to state that § 226.55(b)(3) does not permit a card issuer to increase a rate, fee, or charge subject to § 226.55 while an account is closed or while the card issuer does not permit the consumer to use the account for new transactions.

Consumer group commenters supported the proposed revisions, but industry commenters raised concerns regarding the burden of determining whether an account is closed or transaction privileges are suspended before increasing a rate, fee, or charge. These commenters noted that transaction privileges on an account may be temporarily suspended because the consumer has exceeded his or her credit limit, because the account is more than 60 days' delinquent, because the account is subject to a workout or temporary hardship agreement, or because the issuer is investigating potential fraudulent use of the account. They also noted that an account may be open and transactions may be permitted when the card issuer provides 45 days' advance notice of the increase consistent with § 226.9, but the account may be closed or transaction privileges may be suspended by the time the card issuer is permitted to implement the increase.

Industry commenters argued that issuers should be permitted to increase rates, fees, and charges on closed accounts and accounts where transaction privileges have been suspended, noting that § 226.55 would still prevent issuers from applying increased rates to existing balances and that consumers would still have the right to reject an increased fee or charge under § 226.9(h). However, when an account cannot be used for new transactions, the Board believes that it would be inconsistent with the purpose of the Credit Card Act to permit increases that can only be applied to the account's existing balance. Furthermore, with respect to increases in fees and charges, the Board is concerned that consumers will be less likely to notice changes to a closed account and therefore less likely to exercise their right to reject. Accordingly, the Board is adopting the proposed amendment to § 226.55(b)(3)(iii) clarifying that issuers are prohibited from increasing rates and fees and charges subject to § 226.55 when an account is closed or while the card issuer does not permit the consumer to use the account for new transactions.

However, the Board recognizes that certain suspensions of transaction privileges (particularly those related to potential fraudulent use of the account) may last for relatively short periods of time. In these circumstances, the Board does not believe that, as a general matter, it is necessary for the card issuer to provide an additional § 226.9 notice simply because transaction privileges may have been suspended on the date the original notice was sent, the date the increase was scheduled to go into effect, or some date in between. Accordingly, the Board has adopted a new comment 55(b)(3)–6, which clarifies that, if § 226.9 permits a card issuer to apply an increased rate, fee, or charge on a particular date and the account is closed on that date or transaction privileges are suspended on that date, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge. This guidance is consistent with the guidance provided by the Board in comment 55(b)–2.iii for mid-cycle increases. However, comment 55(b)(3)–6 would further clarify that, if the account is closed or the card issuer does not permit the consumer to use the account for new transactions on the first day of the following billing cycle, then the card issuer must provide a new notice of the increased rate, fee, or charge consistent with § 226.9.

Finally, consistent with the amendments to § 226.52(a)(1), the Board has clarified that, for purposes of § 226.55(b)(3)(iii), an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. In addition, the Board has adopted a new comment 55(b)(3)–7, which clarifies that an account is considered open for purposes of § 226.55(b)(3)(iii) on any date that the card issuer may consider the account open for purposes of § 226.52(a)(1).

55(b)(6) Servicemembers Civil Relief Act Exception

Section 226.55(b)(6) provides that, when a card issuer is required by the SCRA to reduce the annual percentage rate for an account to 6% when the consumer enters military service, the card issuer may increase the rate once the SCRA no longer applies, subject to certain limitations. However, § 226.55(b)(6) does not address circumstances in which the SCRA's broad definition of "interest" requires the card issuer to reduce not only the annual percentage rate but also fees or charges while the consumer is in military service. *See* 50 U.S.C. app. 527(d)(1) (defining "interest" as including "service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability"). Accordingly, the Board proposed to amend § 226.55(b)(6) and the relevant commentary to clarify that, to the extent the SCRA also requires the card issuer to reduce a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii), the card issuer is generally permitted to increase that fee or charge once the SCRA no longer applies.

The Board also understands that many states have enacted statutes that—like the SCRA—require creditors to reduce rates, fees, and charges while a consumer is in military service. *See, e.g.,* La. Rev. Stat. Ann. § 29:312; N.Y. Mil. Law art. 13 § 323–a; R.I. Gen. Laws § 30–7–10; Utah Code Ann. § 39–7–111. Accordingly, in order to clarify that § 226.55 does not prevent a card issuer from increasing a rate, fee, or charge to the pre-existing amount once a state law requirement no longer applies, the Board proposed to amend the exception in § 226.55(b)(6) to apply to decreases imposed pursuant to the SCRA or "a similar federal or state statute or regulation." The Board also proposed corresponding amendments to the relevant commentary.

Finally, the Board noted in the proposal that, while the SCRA and some similar state statutes only require creditors to reduce the rates, fees, and charges that apply to obligations incurred *before* the consumer enters military service, some card issuers voluntarily apply the reduced rate, fee, or charge to transactions that occur *after* the consumer has entered military service. Accordingly, the Board proposed to adopt a new comment 55(b)(6)–2 clarifying that, if a card issuer decreases all rates, fees, and charges to amounts that are consistent with the SCRA or a similar Federal or State statute or regulation (including rates, fees, and charges that apply to new transactions), the card issuer may increase those rates, fees, and charges consistent with § 226.55(b)(6). The Board also proposed to revise the example in current comment 55(b)(6)–2 to illustrate the application of this guidance and redesignate that example as comment 55(b)(6)–3.

Commenters generally supported the proposed revisions. However, consumer group commenters expressed concern that the guidance in new comment 55(b)(6)–2 could be construed to permit increases in rates, fee, or charges that are unrelated to a consumer leaving military service. Because this was not the Board's intent, the proposed comment has been revised to clarify that the guidance applies only when other rates, fees, or charges have been reduced pursuant to the SCRA or a similar Federal or State statute or regulation. Otherwise, the revisions to § 226.55(b)(6) and its commentary are adopted as proposed.

55(c) Treatment of Protected Balances

Section 226.55(c) addresses the treatment of "protected balances," which are the existing balances to which a card issuer may not apply an increased rate, fee, or charge under § 226.55. Comment 55(c)(1)–3 provides guidance regarding the application of increased fees or charges to protected balances. In particular, this comment clarifies that, while a card issuer is prohibited from applying an increased fee or charge that is subject to § 226.55 to a protected balance, a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. The Board has revised this comment to clarify that a card issuer's ability to increase a fee or charge is also subject to the limitations in § 226.55(b)(3)(iii) on increasing fees during the first year after account opening, while an account is closed, or while transaction privileges are suspended.

The Board also proposed to add a new comment 55(c)(1)–4 clarifying that nothing in § 226.55 prohibits a card issuer from changing the balance computation method that applies to new transactions as well as protected balances. The Board did not receive any significant comment on this guidance, which is adopted as proposed. However, the Board notes that, before changing the balance computation method, a card issuer must comply with the notice requirements in § 226.9(c)(2).

55(e) Promotional Waivers or Rebates of Interest, Fees, and Other Charges

Some card issuers offer promotional programs under which interest charges or fees will be waived or rebated so long as the consumer pays on time and otherwise complies with the account terms. For example, a card issuer might offer a promotion under which interest accrues on purchases at an annual percentage rate of 15% but will be waived for six months if the consumer pays on time each billing cycle. While this type of promotional program may be intended to encourage timely payment, a consumer who relies on the promotion when making transactions and then, for example, inadvertently pays one day late will experience a significant and potentially unexpected increase in the cost of those transactions. In contrast, if a consumer relies on a promotional rate when making transactions, TILA Section 171(b)(1) and § 226.55(b)(1) do not permit the card issuer to increase the cost of those transactions by revoking the promotional rate unless the account becomes more than 60 days past due. Thus, the Board is concerned that the revocation of promotional waiver or rebate programs based on so-called "hair trigger" violations of the account terms may be inconsistent with the purposes of the Credit Card Act.

In order to address these concerns, the Board proposed to use its authority under TILA Section 105(a) and Section 2 of the Credit Card Act to add a new § 226.55(e), which clarified that, if a card issuer promotes the waiver or rebate of interest, fees, or other charges subject to § 226.55, any cessation of the waiver or rebate constitutes an increase in a rate, fee, or charge for purposes of § 226.55. Thus, for example, if a card issuer promotes an interest waiver program, the card issuer must comply with § 226.55(b)(1) by disclosing the length of the promotion and the rate that will apply after the promotion expires. Furthermore, the card issuer would be prohibited from effectively increasing the interest charges for existing balances by ceasing or terminating the waiver during the promotional period, unless the account becomes more than 60 days delinquent consistent with § 226.55(b)(4).

Comments from a member of Congress, consumer groups, and a credit card issuer supported § 226.55(e) on the grounds that it is necessary to prevent evasion of the Credit Card Act's limitations on card issuers' ability to increase the costs associated with existing balances. In contrast, some industry commenters opposed § 226.55(e), arguing that it would unnecessarily restrict issuers' ability to offer waivers and rebates that benefit consumers. However, because § 226.55(e) permits card issuers to offer waiver or rebate programs that are consistent with the Credit Card Act's limitations and generally does not restrict issuers' ability to waive or rebate interest, fee, and other charges on an individualized basis (as discussed below), the Board does not believe that it will result in a substantial reduction in benefits for consumers. Accordingly, in order to ensure that consumers' existing credit card balances receive the protections in the Credit Card Act and § 226.55, the Board is adopting § 226.55(e) as proposed.

As discussed in the proposal, § 226.55(e) is intended to address *promotional* programs involving waivers or rebates of interest, fees, and charges. The Board does not intend to restrict a card issuer's ability to waive or rebate interest, fees, or other charges in order to resolve disputes, address compliance concerns, or retain customers. Accordingly, proposed comment 55(e)–1 clarified that nothing in § 226.55 prohibits a card issuer from waiving or rebating finance charges due to a periodic interest rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). This proposed comment also provided examples of promotional waiver or rebate programs that would comply with § 226.55. In order to address concerns raised by consumer group commenters, the Board has revised this comment to clarify that § 226.55(e) applies to both temporary and permanent terminations of waivers or rebates as well as to both partial and full terminations. Otherwise, this comment is adopted as proposed.

Proposed comment 55(e)–2 clarified the circumstances under which a card issuer would be considered to promote a waiver or rebate program for purposes of § 226.55(e). As a general matter, this comment followed the existing guidance regarding advertisements in § 226.2(a)(2) and the accompanying commentary. Thus, under the proposed guidance, a card issuer promotes a waiver or rebate program for purposes of § 226.55(e) if, for example, it discloses the waiver or rebate in a newspaper, magazine, leaflet, promotional flyer, catalog, sign, or point-of-sale display. Similarly, a card issuer promotes a waiver or rebate program for purposes of § 226.55(e) if it discloses the waiver or rebate on radio or television or through electronic advertisements (such as on the Internet). *See* comment 2(a)(2)–1.i. In contrast, a card issuer generally does not promote a program for purposes of § 226.55(e) if it discloses the waiver or rebate in a communication that is not an advertisement for purposes of § 226.2(a)(2), such as in educational materials that do not solicit business. *See* comment 2(a)(2)–1.ii.

However, the proposed comment deviated from the guidance in comment 2(a)(2)–1 in one important respect. Comments 2(a)(2)–1.ii.A and F provide, respectively, as examples of communications that are not advertisements "direct personal contacts" and "[c]ommunications about an existing credit account (for example, a promotion encouraging additional or different uses of an existing credit card account)." While these exclusions are appropriate for purposes of § 226.2(a)(2), the Board believes that it would be inconsistent with the purpose of § 226.55(e) to exclude from coverage direct personal contacts regarding waiver or rebate programs or the promotion of waiver or rebate programs to existing accountholders. Accordingly, proposed comment 55(e)–2 clarified that programs disclosed to existing accountholders through direct personal contacts or otherwise are generally subject to § 226.55(e), unless the disclosure is either provided in relation to an inquiry or dispute about a specific charge or occurs after the card issuer has waived or rebated the interest, fees, or other charges. Thus, the comment clarified that a card issuer is not promoting a waiver or rebate for purposes of § 226.55(e) if, for example, a consumer calls the issuer to dispute a fee that appears on his or her periodic statement and the issuer offers to waive the fee in order to resolve the dispute. Similarly, a card issuer is not promoting a waiver or rebate if it waives interest charges that were erroneously imposed and then discloses that waiver on a periodic statement or in a letter. This guidance is consistent with the Board's desire to avoid restricting card issuers' ability to waive or rebate interest, fees, or other charges in order to resolve disputes, address compliance concerns, or retain customers.

Proposed comment 55(e)–2 also provided a number of additional examples of circumstances in which a waiver or rebate is not promoted for purposes of § 226.55(e), including when a card issuer communicates with a consumer about a waiver or rebate in relation to an inquiry or dispute about a specific charge, when a card issuer waives or rebates interest, fees, or other charges in order to comply with a legal requirement (such as the fee limitations in § 226.52(a)), when a card issuer discloses a grace period, and when a card issuer provides an undisclosed period after the payment due date during which interest, fees, or other charges are waived or rebated even if a payment has not been received. The Board solicited comment on other examples of circumstances in which a card issuer may waive or rebate interest, fees, or charges subject to § 226.55 without promoting the waiver or rebate.

Industry commenters argued that a number of additional categories of communications should not be considered promotion under § 226.55(e), including any offer of a waiver or rebate in connection with a "customer accommodation" or "customer service policy," an offer of a waiver or rebate made to "maintain a relationship," or "actions or conditions outside the credit card account relationship." The Board is concerned that these exclusions would be too vague to accomplish the purposes of § 226.55(e) or to provide clear guidance to card issuers. Furthermore, as noted above, comment 55(e)–2 clarifies that § 226.55(e) does not interfere with a card issuer's ability to accommodate customers or maintain customer relationships by, for example, disclosing a waiver in relation to a consumer's inquiry or dispute about a specific charge or disclosing a waiver after the fact. In addition, although industry commenters suggested that communications regarding waivers or rebates offered in relation to workout or temporary hardship arrangements not be considered promotions for purposes of § 226.55(e), the Board does not believe that such an exclusion is necessary because, consistent with § 226.55(b)(5), a card issuer may waive or rebate fees and charges subject to § 226.55 during a workout or temporary hardship arrangement and then return the fee or charge to its previous amount once the arrangement ends.

Consumer group commenters argued that, for purposes of § 226.55(e), promotion should include any disclosure of a prospective waiver or rebate unless the waiver or rebate is provided in response to a consumer inquiry or dispute. The Board is concerned, however, that this definition of promotion may be overbroad.

Consumer group commenters also objected to the guidance in proposed comment 55(e)–2 clarifying that a card issuer is not promoting a waiver or rebate for purposes of § 226.55(e) if it provides benefits (such as rewards points or cash back based on purchases or finance charges) that can be applied to the account as credits, provided that the benefits are not promoted as reducing interest, fees, or other charges subject to § 226.55. These commenters argued that such programs are sufficiently similar to promotional waiver or rebate programs that they should be subject to the same requirements. The Board disagrees, provided that—as stated in comment 55(e)–2—the card issuer does not promote the rewards as reducing interest, fees, or other charges.

In the proposal, the Board noted that many card issuers promote rewards programs under which consumers can earn points, cash back, or similar benefits based on purchases, interest charges, or other factors. The Board further noted that some card issuers condition these benefits on the consumer making timely payments and otherwise complying with the account terms. Because TILA Sections 171 and 172 do not address these types of benefits, the loss of rewards generally does not raise the same concerns regarding circumvention as the loss of a waiver or rebate of interest, fees, or other charges subject to § 226.55. Accordingly, although the Board has made certain non-substantive revisions to comment 55(e)–2, it is otherwise adopted as proposed.

Finally, proposed comment 55(e)–3 provided guidance regarding the relationship between § 226.55(e) and a grace period. Specifically, this comment clarified that § 226.55(e) does not apply to the waiver of finance charges due to a periodic rate consistent with a grace period, as defined in § 226.5(b)(2)(ii)(*3*). The Board did not receive any significant comment on this guidance, which is adopted as proposed.

Section 226.58 Internet Posting of Credit Card Agreements

58(b) Definitions

58(b)(1) Agreement

Section 226.58(b)(1) defines "agreement" or "credit card agreement" as a written document or documents evidencing the terms of the legal obligation or the prospective legal obligation between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan, as defined in § 226.2(a)(15). The Board did not propose any changes to § 226.58(b)(1). One commenter asked the Board to exclude from the scope of § 226.58 lines of credit accessed by debit cards that can be used only at automated teller machines. These products are credit card accounts under an open-end (not home-secured) consumer credit plan, as defined in § 226.2(a)(15), and agreements related to these products therefore fall within the § 226.58(b)(1) definition. The commenter argued that these products do not function like other credit cards and that including agreements for these products in the Board's database would not facilitate comparison shopping by consumers.

The Board is not adopting this suggested change. When adopting the February 2010 Final Rule, the Board considered several comments requesting that the Board exclude lines of credit accessed by a debit card that can be used only at automated teller machines from the requirements of the Credit Card Act generally. The Board declined to exclude these products, citing Congress's apparent intent that the Credit Card Act apply broadly and the lack of an alternative regulatory regime for these products. *See* 75 FR 7664. Consistent with the approach the Board has taken in implementing other sections of the Credit Card Act, lines of credit accessed by debit cards that can be used only at automated teller machines remain subject to § 226.58.

58(b)(4) Card Issuer

The Board proposed to add new § 226.58(b)(4) to define the term "card issuer" solely for purposes of § 226.58. The proposed definition provided that, solely for purposes of § 226.58, card issuer or issuer means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement. The Board also proposed to add new comment 58(b)(4)–1 to provide an example of how the definition of card issuer would apply.

One commenter objected to the addition of the definition of card issuer. This commenter stated that, given the complex nature of the relationships between institutions that partner to issue credit cards, the Board should not mandate which institution must make quarterly submissions to the Board or post agreements on its Web site under § 226.58. This commenter also argued that the Board should not adopt the proposed definition unless the Board is aware of actual confusion regarding the allocation of responsibilities under § 226.58.

The Board continues to believe that it is appropriate to adopt the definition of card issuer as proposed. It is precisely because of the complex nature of relationships between institutions that partner to issue credit cards that the Board believes it is beneficial to adopt the proposed definition. The Board understands that these relationships can vary, for example, with respect to which institution uses its name and brand in marketing materials, develops and implements underwriting criteria, sets interest rates and other terms, approves applications, provides monthly statements and other disclosures to consumers, collects payments, and absorbs the risk of default or fraud. Without a bright-line rule defining which institution is the issuer, institutions may find it difficult to determine their obligations under § 226.58. Indeed, the Board understands that there is significant uncertainty regarding the application of § 226.58 where institutions partner to issue credit cards. For example:

- The de minimis exception in § 226.58(c)(5) provides that an issuer is not required to submit agreements to the Board under § 226.58(c)(1) if the issuer has fewer than 10,000 open credit card accounts as of the last business day of the calendar quarter. If two institutions are involved in issuing a credit card, one institution may have fewer than 10,000 open accounts while the other has more than 10,000 open accounts. It may be difficult to determine whether the de minimis exception applies in such a case.
- Section 226.58(d) requires an issuer to post and maintain on its publicly available Web site the credit card agreements the issuer is required to submit to the Board. Where two institutions are involved in issuing a credit card, it may be unclear which institution should post and maintain the agreements on its Web site.
- Similarly, § 226.58(e)(2) provides that an issuer that does not maintain an interactive Web site is permitted to allow individual cardholders to request copies of their agreements solely by calling a readily available telephone line, rather than both by using the issuer's Web site and by calling a readily available telephone line. If two institutions are involved in issuing a credit card, one institution may maintain a Web site from which cardholders can access specific information about their accounts while the other does not. In such cases, it may be difficult to determine whether the § 226.58(e)(2) special rule applies.

The Board is adopting the § 226.58(b)(4) definition of card issuer and comment 58(b)(4)–1 as proposed. The definition would apply solely with respect to § 226.58 and would not change the definition of card issuer for purposes of other provisions of Regulation Z. Also as proposed, the Board is renumbering § 226.58(b)(4), (b)(5), (b)(6), and (b)(7) as § 226.58(b)(5), (b)(6), (b)(7), and (b)(8), respectively, and is making conforming changes to references to these subsections.

Based on its review of the comments and further analysis, the final rule also includes new comments 58(b)(4)–2 and 58(b)(4)–3, which provide additional clarification regarding the application of § 226.58 to institutions that partner to issue credit cards. Comment 58(b)(4)–2 provides that an institution that is the card issuer as defined in § 226.58(b)(4) has a legal obligation to comply with the requirements of § 226.58. However, the comment clarifies that a card issuer generally may use a third-party service provider to satisfy its obligations under § 226.58, provided that the issuer acts in accordance with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance. In some cases, an issuer may wish to arrange for the institution with which it partners to issue credit cards to fulfill the requirements of § 226.58 on the issuer's behalf.

For example, a retailer and a bank work together to issue credit cards. Under § 226.58(b)(4), the bank is the issuer of these credit cards for purposes of § 226.58. However, the retailer services the credit card accounts, including mailing account opening materials and periodic statements to cardholders. While the bank is responsible for ensuring compliance with § 226.58, the bank may arrange for the retailer (or another appropriate third-party service provider) to submit credit card agreements to the Board under § 226.58 on the bank's behalf. The bank must comply with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance.

Comment 58(b)(4)–3 provides additional information regarding the posting of agreements on issuer Web sites when institutions partner to issue credit cards. As explained in comments 58(d)–2 and 58(e)–3, discussed below, if an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is deemed to maintain that Web site for purposes of § 226.58. Such a Web site is deemed to be maintained by the issuer for purposes of § 226.58 even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. A partner institution's Web site is an example of a third-party Web site that may be deemed to be maintained by the issuer for purposes of § 226.58.

For example, a retailer and a bank work together to issue credit cards. Under § 226.58(b)(4), the bank is the issuer of these credit cards for purposes of § 226.58. The bank does not have a Web site. However, cardholders can access information about their individual accounts, such as balance information and copies of statements, through a Web site maintained by the retailer. The retailer designs the Web site and owns and maintains the information technology infrastructure that supports the Web site. The Web site is branded and held out to the public as belonging to the retailer. Because cardholders can access information about their individual accounts through this Web site, the Web site is deemed to be maintained by the bank for purposes of § 226.58. The bank therefore may comply with § 226.58(d) by ensuring that agreements offered to the public are posted on the retailer's Web site in accordance with § 226.58(d). The bank may comply with § 226.58(e) by ensuring that cardholders can request copies of their individual agreements through the retailer's Web site in accordance with § 226.58(e)(1). The bank need not create and maintain a Web site branded and held out to the public as belonging to the bank in order to comply with § 226.58(d) and (e) as long as the bank ensures that the retailer's Web site complies with these sections.

Comment 58(b)(4)–3 also notes that § 226.58(d)(1) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, an issuer may comply with § 226.58(d) by posting the agreement on the publicly available Web site of at least one of the merchants at which credit cards issued under each private label credit card plan with 10,000 or more open accounts may be used. The comment clarifies that this rule is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.

58(b)(6) Pricing Information

The Board proposed to amend the § 226.58(b)(6) definition of "pricing information" to omit the information listed in § 226.6(b)(4). The Board solicited comment on whether the definition of pricing information should continue to include some or all of the additional disclosure regarding rates specified in § 226.6(b)(4), or whether the Board should omit this disclosure from the definition. Commenters generally supported this revision, which is adopted as proposed.

58(c) Submission of Agreements to Board

58(c)(1) Quarterly Submissions

Quarterly Submission Deadlines. The Board proposed to amend § 226.58(c)(1) to state that quarterly submissions must be sent to the Board no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. These quarterly submission deadlines were inadvertently omitted from the February 2010 Final Rule. The Board received no comments objecting to this change and is adopting the amendment to § 226.58(c)(1) as proposed.

Submission of Amended Agreements. The Board proposed to revise § 226.58(c)(1)(iii) to clarify that an issuer is required to submit an amended agreement to the Board only if the issuer offered the amended agreement to the public as of the last business day of the preceding calendar quarter. Amended agreements that the issuer no longer offered to the public as of the last business day of the preceding calendar quarter are not required to be submitted to the Board.

The Board received no comments objecting to this change and is adopting the proposed revision to § 226.58(c)(1)(iii). The Board also is adopting the corresponding revisions to § 226.58(c)(3), as discussed below.

Notice of Withdrawal of Agreements. The Board proposed to amend § 226.58(c)(1)(iv) to include cross references to § 226.58(c)(6) and (c)(7), in addition to § 226.58(c)(4) and (c)(5). These cross references were unintentionally omitted from the February 2010 Final Rule. The Board received no comments objecting to this change and is adopting the amendment to § 226.58(c)(1)(iv) as proposed.

58(c)(2) Timing of First Two Submissions

The Board proposed to delete the special rules in § 226.58(c)(2) for the initial and second submissions to the Board and to reserve § 226.58(c)(2). Section 226.58(c)(2) provided special rules for the timing and contents of submissions required to be sent to the Board by February 22, 2010, and August 2, 2010. Because the February 22, 2010, and August 2, 2010, deadlines have passed, § 226.58(c)(2) has no prospective relevance. The Board received no comments objecting to this change. As proposed, the special rules are deleted and § 226.58(c)(2) is reserved.

58(c)(3) Amended Agreements

The Board proposed to amend § 226.58(c)(3) to clarify that an issuer is required to submit an amended agreement to the Board only if the issuer offered the amended agreement to the public as of the last business day of the preceding calendar quarter. Amended agreements that the issuer no longer offered to the public as of the last business day of the calendar quarter should not be submitted to the Board. The Board also proposed to revise comment 58(c)(3)–2 to reflect this clarification and to add new comment 58(c)(3)–3, which provides an example of the application of revised § 226.58(c)(3). The Board also proposed to renumber existing comment 58(c)(3)–3, regarding change-in-terms notices, as 58(c)(3)–4. The Board received no comments objecting to these changes and is adopting them as proposed.

58(c)(8) Form and Content of Agreements Submitted to the Board

The Board proposed to revise § 226.58(c)(8)(i)(C)(*1*) to clarify that billing rights notices are not deemed to be part of the agreement for purposes of § 226.58 and therefore are not required to be included in agreements submitted to the Board. As the Board noted in its proposal, § 226.58(c)(8)(i)(C)(*1*) is not intended to provide an exhaustive list of the State and Federal law disclosures that are not deemed to be part of an agreement under § 226.58. As indicated by the use of the phrase "such as," the listed disclosures are merely examples of "disclosures required by state or federal law." The Board does not believe it is feasible to include in § 226.58(c)(8)(i)(C)(*1*) a comprehensive list of all such disclosures, as such a list would be extensive and would change as State and Federal laws and regulations are amended. However, because billing rights notices appear to be a specific source of confusion for card issuers and others, the Board proposed to address their treatment by amending § 226.58(c)(8)(i)(C)(*1*).

Two commenters expressed their support for this change. No commenters objected. The Board is adopting the revision to § 226.58(c)(8)(i)(C)(*1*) as proposed.

Section 226.58(c)(8)(ii)(A) states that pricing information must be set forth in a single addendum that contains only the pricing information. The Board did not propose any changes to § 226.58(c)(8)(ii)(A). However, one commenter asked the Board to allow creditors submitting agreements to the Board to include additional disclosures in the addendum. The commenter stated that some creditors use complex automated systems to prepare the addenda that are submitted to the Board. Removing information that is not required therefore may impose burdensome programming costs on some issuers.

Section 226.58(c)(8)(i)(C) specifies that certain items, such as disclosures required by State or Federal law, are not deemed to be part of an agreement for purposes of § 226.58 and therefore are not required to be included in submissions to the Board. The Board notes, however, that issuers are not prohibited by this or any other provision of § 226.58 from including these items in submitted agreements if an issuer chooses to do so. The Board believes it is appropriate to provide similar flexibility with respect to information included in the pricing information addendum under § 226.58(c)(8)(ii) and therefore is amending this section.

As amended, § 226.58(c)(8)(ii)(A) continues to provide that pricing information must be set forth in a single addendum to the agreement. However, under amended § 226.58(c)(8)(ii)(A), issuers are permitted, but not required, to include in this addendum any other information listed in § 226.6(b) regarding account-opening disclosures for open-end (not home-secured) plans, provided that the information is complete and accurate as of the applicable date under § 226.58.

The Board continues to believe that certain information listed in § 226.6(b) is unlikely to substantially assist consumers in shopping for a credit card, and therefore should not be required in agreements submitted to the Board under § 226.58. For example, the Board continues to believe that the Web site reference and billing error rights reference required to be included in account-opening disclosures by §§ 226.6(b)(2)(xiv) and (b)(2)(xv) are not useful bases for comparison shopping because they do not vary, and therefore are not necessary in agreements submitted to the Board under § 226.58. However, it appears that amending § 226.58(c)(8)(ii)(A) to permit the inclusion of other information listed in

§ 226.6(b) will reduce the compliance burden for some issuers without undermining the usefulness of the agreements provided pursuant to § 226.58.

58(d) Posting of Agreements Offered to the Public

Section 226.58(d) requires card issuers to post and maintain on their publicly available Web site the credit card agreements that the issuer submits to the Board under § 226.58(c). As discussed above, the Board understands that there has been some confusion regarding the application of § 226.58 where institutions partner to issue credit cards. In order to provide additional information regarding the application of § 226.58 to these relationships, the Board is adopting new § 226.58(b)(4), defining card issuer for purposes of § 226.58, and new comments 58(b)(4)–1, 58(b)(4)–2, and 58(b)(4)–3, discussed above. The Board also is revising comment 58(e)–3 to clarify the application of § 226.58(e) to institutions that provide cardholders with access to account-specific information through Web sites maintained by third parties, as discussed below. Because the Board believes it also would be beneficial to provide similar clarification regarding § 226.58(d), the final rule includes corresponding revisions to comment 58(d)–2.

Comment 58(d)–2 explains that, unlike § 226.58(e), § 226.58(d) does not include a special rule for card issuers that do not otherwise maintain a Web site. If a card issuer is required to submit one or more agreements to the Board under § 226.58(c), that card issuer must post those agreements on a publicly available Web site it maintains (or, with respect to a private label credit card, on the publicly available Web site of at least one of the merchants at which the card may be used, as provided in § 226.58(d)(1)). As revised, comment 58(d)–2 clarifies that if an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is deemed to maintain that Web site for purposes of § 226.58. Such a Web site is deemed to be maintained by the issuer for purposes of § 226.58 even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. Therefore, issuers that provide cardholders with access to account-specific information through a third-party Web site can comply with § 226.58(d) by ensuring that the agreements the issuer submits to the Board are posted on the third-party Web site in accordance with § 226.58(d). To avoid potential confusion, revised comment 58(d)–2 also notes that, in contrast, the § 226.58(d)(1) rule regarding agreements for private label credit cards is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.

58(e) Agreements for All Open Accounts

58(e)(2) Special Rule for Issuers Without Interactive Web Sites

The Board proposed to revise comment 58(e)–3 to clarify the application of § 226.58(e)(2) to issuers that provide online access to individual account information through third-party interactive Web sites. Section 226.58(e)(2) provides that an issuer that does not maintain an interactive Web site (*i.e.,* a Web site from which a cardholder can access specific information about his or her individual account) may provide cardholders with the ability to request a copy of their agreements by calling a readily available telephone line, the number for which is: (1) Displayed on the issuer's Web site and clearly identified as to purpose; or (2) included on each periodic statement sent to the cardholder and clearly identified as to purpose.

The Board understands that some issuers provide cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party interactive Web site. As revised, comment 58(e)–3 clarifies that, in these circumstances, an issuer is considered to maintain an interactive Web site for purposes of the § 226.58(e)(2) special rule. Such a Web site is deemed to be maintained by the issuer for purposes of § 226.58(e)(2) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. An issuer that provides cardholders with access to specific information about their individual accounts through such a Web site is not permitted to use the procedures described in the § 226.58(e)(2) special rule. Instead, such an issuer must comply with § 226.58(e)(1).

The Board did not receive any comments objecting to the proposed revision of comment 58(e)–3. The comment is revised as proposed.

Section 226.59 Reevaluation of Rate Increases

59(a) General Rule

Section 226.59 implements TILA Section 148, which was added by the Credit Card Act. TILA Section 148, as implemented in § 226.59(a), generally requires card issuers that increase an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, to evaluate factors described in the rule no less frequently than once every six months and, as appropriate based upon that review, reduce the annual percentage rate applicable to the consumer's account. Consistent with TILA Section 148, § 226.59 generally applies to rate increases made on or after January 1, 2009.

Since publication of the June 2010 Final Rule, several issuers requested additional clarification regarding what constitutes a rate increase for purposes of § 226.59. In particular, issuers requested additional guidance regarding the circumstances in which a change in the type of rate—for example, from a non-variable rate to a variable rate—is considered to be a rate increase triggering review obligations under § 226.59.

The Board proposed new comment 59(a)(1)–3 to clarify the applicability of the rate reevaluation requirements when a card issuer changes the type of rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan.[26] Proposed comment 59(a)(1)–3.i provided that a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate generally is not a rate increase for purposes of § 226.59, if the rate in effect immediately prior to the change in the type of rate is equal to or greater than to the rate in effect immediately after the change. The proposed comment stated that, for example, a change from a variable rate of 15.99% to a non-variable rate of 15.99% is not a rate increase for purposes of § 226.59 at the time of the change. Proposed comment 59(a)(1)–3.i

[26] The proposal would have renumbered existing comments 59(a)(1)–3 and 59(a)(1)–4 accordingly.

also cross-referenced § 226.55 for limitations on the permissibility of changing from a non-variable rate to a variable rate.

Proposed comment 59(a)(1)–3.ii set forth special guidance regarding a change from a non-variable to a variable rate. Proposed comment 59(a)(1)–3.ii stated that a change from a non-variable to a variable rate constitutes a rate increase for purposes of § 226.59 if the variable rate exceeds the non-variable rate that would have applied if the change in type of rate had not occurred. The proposed comment illustrated the applicability of § 226.59 to a change from a non-variable to a variable rate with the following example: assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a non-variable annual percentage rate of 12% applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 226.9(c)(2), the rate on all new transactions is changed to a variable rate that is currently 12% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. The change from the 12% non-variable rate to the 12% variable rate is not a rate increase for purposes of § 226.59(a). On April 1 of year 2, the value of the variable rate increases to 12.5%. The increase in the variable rate from 12% to 12.5% is a rate increase for purposes of § 226.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 226.59.

Similarly, proposed comment 59(a)(1)–3.iii stated that a change from a variable to a non-variable rate constitutes a rate increase for purposes of § 226.59 if the non-variable rate exceeds the variable rate that would have applied if the change in the type of rate had not occurred. The proposed comment set forth the following illustrative example: assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a variable annual percentage rate that is currently 15% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 226.9(c)(2), the rate on all existing balances and new transactions is changed to a non-variable rate that is currently 15%. The change from the 15% variable rate to the 15% non-variable rate on January 1 of year 2 is not a rate increase for purposes of § 226.59(a). On April 1 of year 2, the value of the variable rate that would have applied to the account decreases to 12.5%. Accordingly, on April 1 of year 2, the non-variable rate of 15% exceeds the 12.5% variable rate that would have applied but for the change in type of rate. At this time, the change to the non-variable rate of 15% constitutes a rate increase for purposes of § 226.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 226.59.

One credit union trade association supported proposed comment 59(a)(1)–3. Other industry commenters generally supported the portion of the proposal that clarified that a change to the type of rate is not a rate increase for purposes of § 226.59 if the rate following the change is equal or less than to the rate prior to the change. However, industry commenters opposed the proposed commentary to § 226.59(a) that provided that such a change in type of rate does constitute a rate increase for purposes of § 226.59 at the point in time when the rate that applies (whether variable or non-variable) exceeds the rate that would have applied if the change in the type of rate had not occurred. Several of these commenters argued that reevaluation of a rate increase due to a change in a predisclosed index that is beyond the control of the issuer is not necessary and that TILA Section 148 was not intended to cover rate increases where the change is due to an increase in an index beyond the issuer's control. These commenters urged the Board to modify the proposal to provide that issuers must conduct a rate reevaluation under § 226.59 only if the rate that applies immediately after the change in type of rate exceeds the rate that applied prior to the change. One commenter raised particular concerns regarding portfolio-wide changes to variable rate structures, such as the removal of rate floors or conversions from non-variable to variable rates, that were implemented in order to facilitate compliance with the Credit Card Act.

Consumer group commenters, on the other hand, opposed the portion of proposed comment 59(a)(1)–3 that would provide that a change in type of rate is not an increase when, at the time of the change, the result is an equal or lower rate. These commenters expressed particular concern regarding changes from non-variable to variable rates and urged the Board to treat the change in type of rate as triggering review requirements under § 226.59, in all cases, at the time of the change. Consumer groups were particularly concerned that, as proposed, comment 59(a)(1)–3 could permit an issuer to review only the increase in the index used to compute the variable rate, and would not require consideration of the margin selected for determination of the new variable rate at the time of the change. These commenters raised an example of a consumer's rate being changed from a non-variable rate of 15% to a rate determined by adding a margin of 10% to a prime rate. As proposed, these commenters were concerned that § 226.59 and comment 59(a)(1)–3 would not require the issuer to review the decision to impose a margin of 10% on the consumer's account.

The Board is generally adopting comment 59(a)(1)–3 as proposed. The Board believes, as stated in the supplementary information to the June 2010 Final Rule, that the rate reevaluation requirements of TILA Section 148 as implemented in § 226.59 should not apply to an increase in a variable rate due to fluctuations in the index on which that rate is based. *See* 75 FR 37549. Accordingly, the Board used its authority under TILA Section 105(a) to provide that § 226.59(a) applies only to those rate increases for which 45 days' advance notice is required under § 226.9(c)(2) or (g). For example, if a card issuer discloses at account-opening a variable rate applicable to purchases, currently 15.99%, that will vary based on an index outside the issuer's control, there is no review requirement when that variable rate increases to 16.99% due to fluctuations in the index. However, the Board believes that it would be inconsistent with the intent of TILA Section 148 to create an exception to the review requirements of § 226.59 in the circumstances where the rate increase would not have occurred but for the issuer changing the type of rate. In those circumstances, from the consumer's perspective, the change in type of rate resulted in a rate increase relative to the rate that would otherwise have applied to the account.

For example, assume that a consumer opens an account on January 1 of year one where the disclosed rate applicable to purchases is a non-variable rate of 12%. On June 1 of year 2, after providing 45 days' advance notice pursuant to § 226.9(c)(2), the issuer changes the rate applicable to the consumer's new purchases to a variable rate that is currently 12%. On September 1 of year 2, the variable rate increases to 12.99% due to fluctuations in an index outside of the control of the issuer. Given that the rate now exceeds the 12% rate disclosed to the consumer at account opening, the Board believes that a rate increase has occurred and that it would be inappropriate to except this rate increase from § 226.59. The Board believes that it would be reasonable for a consumer in this situation to expect that purchases would continue to be subject to a 12% non-variable rate and that, accordingly, the subsequent increase in the rate to 12.99%, based on fluctuations in the value of the index, constitutes a rate increase from the perspective of that consumer. The Board believes that this situation is distinguishable from the situation where a consumer opens an account that is subject to a variable rate and, thus, is on notice from the time of account opening that the rate is subject to change in accordance with the relevant index.

As discussed in the proposal, the Board notes that in several other contexts, Regulation Z treats a change in a type of rate as equivalent to a rate increase. For example, comments 9(c)(2)(iv)–3 and 9(c)(2)(iv)–4 clarify that 45 days' advance notice is generally required under § 226.9(c)(2) when the annual percentage rate on an open-end (not home-secured) consumer credit plan is changed from a variable to a non-variable rate or from a non-variable to a variable rate. In addition, comment 55(b)(2)–4 treats changing a non-variable rate to a variable rate as equivalent to a rate increase for purposes of § 226.55.

The Board believes that this clarification regarding changes in types of rates is appropriate to effectuate the purposes of TILA Section 148. As discussed in the supplementary information to its final rule published on January 29, 2009, a change from one type of rate to another (*e.g.,* variable or non-variable) may, over time, result in the new rate being higher than the rate that would have applied but for the change, even if at the time of the change the prior rate exceeded the new rate. *See* 74 FR 5345. For this reason, as discussed above, comments 9(c)(2)(iv)–3 and 9(c)(2)(iv)–4 clarify that 45 days' advance notice is generally required under § 226.9(c)(2) when the annual percentage rate on an open-end (not home-secured) consumer credit plan is changed from a variable to a non-variable rate or from a non-variable to a variable rate. The Board believes that consistent treatment is generally appropriate under § 226.59, because a change in type of rate may, over time, result in a rate increase on a consumer's account; however, the Board is applying the review requirement under § 226.59 only if and when the new rate exceeds the rate that would have applied if the change in type of rate had not occurred. For example, a consumer who has an existing account with a non-variable rate may have an expectation that the rate generally will not change. However, if the issuer changes the non-variable rate to a variable rate, an increase in the index value may result in the rate applicable to the consumer's account increasing, and exceeding the non-variable rate that previously applied. Accordingly, the Board believes that in such circumstances a rate increase has occurred and must be reviewed under § 226.59.

The Board notes that the removal of variable rate floors would not, by itself, give rise to review requirements pursuant to § 226.59. The removal of a variable rate floor, in the absence of other changes, can only result in a reduction in the annual percentage rate imposed on a consumer's account. *See* 75 FR 37550. However, to the extent that an issuer concurrently removed the floor applicable to a consumer's account and increased the margin at the same time, the Board believes that the change should be subject to the review requirements of § 226.59, if the rate following the change exceeds the rate in effect prior to the change.

In addition, industry commenters indicated that developing and maintaining a system to track rate increases that are tied to an index over time would be burdensome. These commenters noted that because index values may continue to rise and fall over a period of months or years, the proposal would in effect require issuers to track the new rate and rate in effect prior to the change in type of rate indefinitely. Several commenters requested that the final rule permit an issuer to cease reviewing the change in the index after a single review. The Board is aware that new comment 59(a)(1)–3 does impose an ongoing review requirement; however, the Board believes that this is consistent with the intent of TILA Section 148. In the June 2010 Final Rule, the Board expressly declined to adopt a specific time limit for the review obligation under § 226.59. *See* 75 FR 37559. The Board noted that TILA Section 148 does not expressly create such a time limit. The Board continues to believe that many issuers will implement automated systems to perform the periodic reevaluation of rate increases and, accordingly, once these systems are in place, there should not be undue burden associated with the ongoing review of accounts subject to § 226.59.

The Board has modified comments 59(a)(1)–3.ii and 59(a)(1)–3.iii from the proposal to address consumer groups' concerns that, as proposed, § 226.59 would require only that the issuer review changes in the index on which a variable rate is based rather than the margin applicable to the consumer's account, when the rate increase results from a change in type of rate. As adopted, the examples in comments 59(a)(1)–3.ii and 59(a)(1)–3.iii clarify that the relevant rate increase for purposes of the reevaluation under § 226.59 is the increase from the rate (variable or non-variable) that would have applied if the change in type of rate had not occurred to the rate (variable or non-variable) that applies after the rate increase. For example, assume the consumer's account was subject to a non-variable rate of 8% prior to the change and was converted to a variable rate (index plus margin) that was also 8% on the effective date of the change. After six months, the consumer's rate increases—based on an increase in the index value—to a variable rate of 10%. The increase that must be evaluated for purposes of § 226.59 is the increase from the non-variable rate of 8% to a variable rate of 10%. In other words, the issuer may not review just the increase in the index value, *i.e.,* the change from a variable rate of 8% to a variable rate of 10%, but must also review the original rate conversion.

Several industry commenters indicated that it was unclear how an issuer must conduct the review required by § 226.59, for rate increases resulting from a change in type of rate, and urged the Board to clarify that § 226.59 does not require issuers to revert to the type of rate that applied to the account prior to the change. For example, if an issuer converted an account from a non-variable rate to a variable rate, these commenters urged the Board to provide that § 226.59 should under no circumstances require the issuer to convert the account back to a non-variable rate. The Board agrees that § 226.59 is not intended to dictate the type of rate that an issuer must apply to a consumer's account. Accordingly, the Board is renumbering existing comment 59(a)(1)–5 as comment 59(a)(1)–5.i and adopting a new comment 59(a)(1)–5.ii which would provide that if a rate increase subject to § 226.59 involves a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate, § 226.59 does not require that the issuer reinstate the same type of rate that applied prior to the change. However, the comment would explain that the amount of any rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 226.59(b) for consideration of factors described in § 226.59(a) and (d).

59(d) Factors

Section 226.59(d) sets forth guidance regarding the factors that an issuer must consider when conducting reviews of a rate increase pursuant to § 226.59. Section 226.59(d)(1) sets forth the general rule and states that, except as provided in § 226.59(d)(2) (which is discussed below), a card issuer must review either: (1) the factors on which the increase in an annual percentage rate was originally based; or (2) the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts. Section 226.59(d)(2) sets forth a special rule for certain rate increases imposed between January 1, 2009 and February 21, 2010. Section 226.59(d)(2) provides that, when conducting the first two reviews required under § 226.59(a) for rate increases imposed between January 1, 2009 and February 21, 2010, an issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, unless the rate increase was based solely upon factors specific to the consumer, such as a decline in the consumer's credit risk, the consumer's delinquency or default, or a violation of the terms of the account.

As discussed in the supplementary information to the June 2010 Final Rule, § 226.59(d)(2) was adopted to address the Board's concerns regarding portfolio-wide rate increases made following the enactment of the Credit Card Act but prior to the effective date of many of the substantive protections contained in the statute. Some rate increases that occurred prior to February 22, 2010 resulted from adjustments in issuers' pricing practices to take into account the limitations that the Credit Card Act imposed on rate increases on existing balances. The Board was concerned that permitting card issuers to review the factors on which the rate increase was based may not result in a meaningful review in these circumstances, because the legal restrictions imposed by the Credit Card Act have continuing application. In other words, if a card issuer were to consider the factors on which the rate increase was based—*i.e.,* the enactment of the Credit Card Act's legal restrictions regarding rate increases—it might determine that a rate decrease is not required.

Accordingly, the Board adopted § 226.59(d)(2) to require card issuers to consider, for a brief transition period, the factors that they use when setting the rates applicable to similar new accounts for rate increases imposed prior to February 22, 2010, if the rate increase was not based on consumer-specific factors. For the reasons discussed in the supplementary information to the June 2010 Final Rule, the requirement to consider the factors that an issuer evaluates when setting the rates applicable to similar new accounts applies only during the first two review periods following the effective date of § 226.59 and only for rate increases imposed between January 1, 2009 and February 21, 2010.

For rate increases based solely on consumer behavior or other consumer-specific factors, § 226.59(d) does not distinguish between rate increases imposed prior to or after February 22, 2010. Accordingly, for such rate increases an issuer may consider either the factors on which the increase in an annual percentage rate was originally based or the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts. Consumer-specific factors, such as a consumer's credit score or payment history on the account, can and do change over time. Accordingly, the Board noted in the supplementary information to the June 2010 Final Rule that it believes consideration of the consumer-specific factors that an issuer considered when imposing the rate increase would result in a meaningful review and, where appropriate, rate decreases, for rate increases imposed between January 1, 2009 and February 21, 2010.

As discussed in the supplementary information to the November 2010 Proposed Rule, the Board understands that some confusion has arisen regarding compliance with the special rule set forth in § 226.59(d)(2) in the case where two rate increases occurred between January 1, 2009 and February 21, 2010, one of which was based on conditions that are not specific to the consumer and one of which was based on consumer-specific behavior. The Board understands that there is particular concern regarding the application of the rule if the issuer made a market-based rate increase and subsequently increased the rate to a penalty rate, due to a late payment or other consumer behavior that violates the terms of the account. The Board proposed a new comment 59(d)–6 to clarify the application of the rule in these circumstances. Proposed comment 59(d)–6 noted that § 226.59(d)(2) applies if an issuer increased the rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. The proposed comment further noted that in some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. The proposed comment clarified that in such circumstances, when conducting the first two reviews required under § 226.59, the card issuer may separately review: (A) rate increases imposed based on factors not specific to the consumer, using the factors described in § 226.59(d)(1)(ii) (as required by § 226.59(d)(2)); and (B) rate increases imposed based on consumer-specific factors, using the factors described in § 226.59(d)(1)(i). If the review of factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty rate to the account as a result of the consumer's payment history or other behavior on the account, proposed comment 59(d)–6 clarified that § 226.59 permits the card issuer to continue to impose the penalty rate, even if the review of the factors described in § 226.59(d)(1)(ii) would otherwise require a rate decrease.

Proposed comment 59(d)–6.ii set forth the following example: Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under § 226.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in § 226.59(d)(1)(ii) (as required by § 226.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph § 226.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in § 226.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 226.59 permits the rate on the account to remain at 25%.

The Board noted in the proposal that the intent of the special rule in § 226.59(d)(2) was not to require card issuers to reduce penalty rates, if the consumer's credit risk or behavior on the account justifies the maintenance of a penalty rate in order to account for the additional risk of nonpayment posed by the consumer. The Board indicated that the clarification in proposed comment 59(d)–6 would be appropriate in order to ensure that § 226.59(d)(2) does not lead to unintended consequences in cases where a market-based rate increase and a rate increase due to the imposition of a penalty rate both occurred between January 1, 2009 and February 21, 2010.

The Board received no significant comment opposing comment 59(d)–6. Two industry commenters supported proposed comment 59(d)–6 and stated that it was prudent in light of safe and sound underwriting considerations. One of these commenters stated that the Board should clarify that comment 59(d)–6 applies to any rate increase based on factors specific to the consumer and not just to penalty rates. The Board is adopting comment 59(d)–6 generally as proposed, with several modifications to clarify that the comment applies to rates increased based on factors specific to the consumer, regardless of whether those rates are penalty rates. In particular, the last sentence of comment 59(d)–6.i as adopted states that if the review of factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, § 226.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in § 226.59(d)(1)(ii) would otherwise require a rate decrease.

59(f) Termination of Obligation To Review Factors

Section 226.59(f) generally provides that the obligation to conduct periodic reevaluations of a rate increase ceases to apply if the issuer reduces the annual percentage rate applicable to the account to a rate equal to or lower than the rate that was in effect immediately prior to the increase. The Board noted in the November 2010 Proposed Rule that some confusion had arisen regarding the relationship between the general rule in § 226.59(a) and the termination provision in § 226.59(f). For example, a card issuer may periodically review a consumer's account on which the rate has been increased, consistent with § 226.59(d)(1)(ii), by evaluating the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts. In the course of conducting such a review, the card issuer may determine that it would offer a lower rate on a new account than the rate that applied, prior to the rate increase, to the existing account being reviewed. In these circumstances, issuers have asked the Board for guidance regarding the amount of the rate reduction required under § 226.59.

The Board proposed to clarify that in these circumstances, § 226.59 requires that the rate on the existing account be reduced to the rate that was in effect prior to the rate increase, not to the lower rate that would be offered to a comparable new consumer. To clarify the relationship between § 226.59(a) and (f), the Board proposed to adopt a new comment 59(f)–2, which set forth the following illustrative example: Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under § 226.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with § 226.59 on January 1, 2013 and July 1, 2013, based on the factors described in § 226.59(d)(1)(ii). Based on the January 1, 2013 review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with § 226.59(f), § 226.59(a) requires that the card issuer reduce the rate on the existing account to the 15% rate that was in effect prior to the September 1, 2012 rate increase.

Commenters who addressed proposed comment 59(f)–2 supported this aspect of the proposal and, accordingly, comment 59(f)–2 is adopted as proposed. As noted in the supplementary information to the November 2010 Proposed Rule, the review requirements of TILA Section 148 are triggered only if an annual percentage rate applicable to a credit card account is increased. The Board believes that if Congress had intended for all annual percentage rates on all credit card accounts to be reviewed indefinitely, regardless of whether the account is subject to a rate increase, it would have so provided in the Credit Card Act. Accordingly, the Board continues to believe that it would be inappropriate to require card issuers to reduce a rate on a credit card account to a rate that is lower than the rate that applied to the account prior to the increase.

Appendix M1—Repayment Disclosures

As discussed in the section-by-section analysis to § 226.7(b)(12), Appendix M1 contains guidance for how to calculate the repayment disclosures required to be disclosed under § 226.7(b)(12). Specifically, § 226.7(b)(12)(i) generally requires card issuers to disclose the following repayment disclosures on each periodic statement: (1) A "warning" statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the length of time it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and no further advances are made; (3) the total cost to the consumer of paying the balance in full if the consumer pays only the required minimum monthly payments and no further advances are made; (4) the minimum payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made; (5) the total cost to the consumer of paying the balance in full if the consumer pays the balance over 36 months; (6) the total savings of paying the balance in 36 months (rather than making only minimum payments); and (7) a toll-free telephone number at which the consumer may receive information about accessing consumer credit counseling.

Section 226.7(b)(12)(i) and (ii) provides that card issuers must round the following disclosures to the nearest whole dollar when disclosing them on the periodic statement: (1) The minimum payment total cost estimate, (2) the estimated minimum payment for repayment in 36 months, (3) the total cost estimate for repayment in 36 months, and (4) the savings estimate for repayment in 36 months. *See* 226.7(b)(12)(i)(C), (b)(12)(i)(F)(*1*)(*i*), (b)(12)(i)(F)(*1*)(*iii*), (b)(12)(i)(F)(*1*)(*iv*) and (b)(12)(ii)(C). For the reasons discussed in the section-by-section analysis to § 226.7(b)(12), in the November 2010 Proposed Rule, the Board proposed to revise § 226.7(b)(12)(i) and (ii) to allow card issuers to round these disclosures to either the nearest whole dollar or to the nearest cent when disclosing them on the periodic statement. Currently, paragraph (f) of Appendix M1 references rounding disclosures to the nearest whole dollar when calculating the total saving estimate for repayment in 36 months. Specifically, paragraph (f) of Appendix M1 states that when calculating the savings estimate for repayment in 36 months, a card issuer must subtract the total cost estimate for repayment in 36 months calculated under paragraph (e) of Appendix M1 (rounded to the nearest whole dollar as set forth in § 226.7(b)(12)(i)(F)(*1*)(*iii*)) from the minimum payment total cost estimate calculated under paragraph (c) of Appendix M1 (rounded to the nearest whole dollar as set forth in § 226.7(b)(12)(i)(C)).

Consistent with the proposed changes to § 226.7(b)(12), in the November 2010 Proposed Rule, the Board proposed to revise paragraph (f) of Appendix M1 to indicate that a card issuer, at its option, may round the disclosures either to the nearest whole dollar or to the nearest cent in calculating the savings estimate for repayment in 36 months. Under the proposal, if a card issuer chose under § 226.7(b)(12) to round the disclosures to the nearest whole dollar, the card issuer would have been required to calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of Appendix M1 (rounded to the nearest whole dollar) from the minimum payment total cost estimate calculated under paragraph (c) of Appendix M1 (rounded to the nearest whole dollar). If a card issuer chose, however, to round the disclosures to the nearest cent, the card issuer would have been required to calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of Appendix M1 (rounded to the nearest cent) from the minimum payment total cost estimate calculated under paragraph (c) of Appendix M1 (rounded to the nearest cent). The Board believed that this would ensure that the savings estimate for repayment in 36 months would be calculated consistent with how the other disclosures would be shown on the periodic statement.

The Board received several comments supporting the proposed changes to Appendix M1, and no comments opposing them. For the reasons discussed above, the Board adopts these changes as proposed.

IV. Mandatory Compliance Dates

A. *Mandatory compliance date.* Consistent with TILA Section 105(d), this final rule is effective and compliance is mandatory on October 1, 2011. However, creditors may, at their option, comply with this rule prior to that date.

Most commenters requested an October 1, 2011 effective date. Although some industry commenters requested additional time to comply, the Board believes that, given the largely technical nature of this final rule, an October 1, 2011 effective date provides creditors with sufficient time to bring their systems and practices into compliance.

B. *Prospective application.* This final rule is prospective in application. The following paragraphs set forth additional guidance and examples as to how a creditor must comply with the final rule by the mandatory compliance date. Except as otherwise stated, the final rule applies to existing as well as new accounts and balances.

C. *Tabular summaries that accompany applications or solicitations (§ 226.5a).* Credit and charge card applications provided or made available to consumers on or after October 1, 2011 must comply with the final rule, including format and terminology requirements. For example, if a direct-mail application or solicitation is mailed to a consumer on September 30, 2011, it is not required to comply with the new requirements, even if the consumer does not receive it until October 7, 2011. In contrast, a direct-mail application or solicitation that is mailed to consumers on or after October 1, 2011 must comply with the final rule. If a creditor makes an application or solicitation available to the general public (such as "take-one" applications), any new applications or solicitations issued by the creditor on or after October 1, 2011 must comply with the new rule. However, if a creditor issues an application or solicitation by making it available to the public prior to October 1, 2011 (for example, by restocking an in-store display of "take-one" applications on September 15, 2011), those applications need not comply with the new rule, even if a consumer may pick up one of the applications from the display after October 1, 2011. Any "take-one" applications that the creditor uses to restock the display on or after October 1, 2011, however, must comply with the final rule.

D. *Account-opening disclosures (§ 226.6).* Account-opening disclosures furnished on or after October 1, 2011 must comply with the final rule, including format and terminology requirements. The relevant date for purposes of this requirement is the date on which the disclosures are furnished, not when the consumer applies for the account. For example, if a consumer applies for an account on September 30, 2011 but the account-opening disclosures are not mailed until October 2, 2011, those disclosures must comply with the final rule. In addition, if the disclosures are furnished by mail, the relevant date is the day on which the disclosures were sent, not the day on which the consumer receives the disclosures. Thus, if a creditor mails the account-opening disclosures on September 30, 2011, the disclosures are not required to comply with the final rule, even if the consumer receives those disclosures on October 7, 2011.

E. *Periodic statements (§§ 226.5(b)(2) and 226.7).* Periodic statements mailed or delivered on or after October 1, 2011 must comply with §§ 226.5(b)(2) and 226.7, as revised by the final rule. For example, if a creditor mails a periodic statement to the consumer on September 30, 2011, that statement is not required to comply with the final rule, even if the consumer does not receive the statement until October 7, 2011. However, a statement mailed on October 1, 2011 must comply with the final rule.

F. *Checks that access a credit card account (§ 226.9(b)).* A creditor must comply with the disclosure requirements of § 226.9(b)(3) (as revised by the final rule) for checks that access a credit account that are provided on or after October 1, 2011. Thus, for example, if a creditor mails access checks to a consumer on September 30, 2011, these checks are not required to comply with new § 226.9(b)(3), even if the consumer receives them on October 7, 2011. However, checks mailed on October 1, 2011 must comply with the final rule.

G. *Notices of changes in terms and penalty rate increases (§ 226.9(c)(2)).*

In general. The relevant date for determining whether a change-in-terms notice must comply with the new requirements of revised § 226.9(c)(2) is the date on which the notice is provided, not the effective date of the change. Thus, the requirements of the final rule apply to notices mailed or delivered on or after October 1, 2011. For example, if a creditor provides a notice on September 30, 2011, the notice is not required to comply with new § 226.9(c)(2), even if the consumer receives the notice on October 7, 2011 and the change disclosed in the notice is effective on November 15, 2011.

Promotional fees. The final rule applies the existing requirements for promotional rate programs in § 226.9(c)(2)(v)(B) to promotional programs under which a fee will increase after a specified period of time. Some creditors may have outstanding promotional fee programs that were in place before the effective date of this final rule, but under which the promotional fee will not expire until after October 1, 2011. For example, on January 1, 2010, a creditor may have opened an account with annual fee of $0 for the first year and a $50 annual fee thereafter. These creditors may have concerns about whether the disclosures that they have provided to consumers regarding these promotional programs are sufficient to qualify for the exception in revised § 226.9(c)(2)(v)(B). In order to address these concerns, the Board is providing the following guidance, which is modeled after the guidance provided with respect to promotional rates in the July 2009 Interim Final Rule and the February 2010 Final Rule. *See* 74 FR 36091–36092; 75 FR 7783–7784.

The Board notes that, as revised by this final rule, § 226.9(c)(2)(v)(B) requires written disclosures of the term of the promotional fee and the fee that will apply when the promotional fee expires. The final rule further requires that the term of the promotional fee and the fee that will apply when the promotional fee expires be disclosed in close proximity and equally prominent to the disclosure of the promotional fee. The Board anticipates that many creditors offering such a promotional fee program may already have complied with these advance notice requirements in connection with offering the promotional program.

The Board is nonetheless aware that some other creditors may be uncertain as to whether written disclosures provided at the time an existing promotional fee program was offered are sufficient to comply with the exception in § 226.9(c)(2)(v)(B). For example, for promotional fee offers provided after October 1, 2011, the disclosure under § 226.9(c)(2)(v)(B)(*1*) must include the fee that will apply after the expiration of the promotional period. For an existing promotional fee program, a creditor might instead have disclosed this fee narratively—for example, by stating that the annual fee would be reduced to $0 for one year and that the "standard" or "pre-existing" annual fee would apply thereafter. The Board does not believe that it is appropriate to require a creditor to provide 45 days' advance notice before expiration of the promotional period when the creditor provided disclosures that were generally consistent with § 226.9(c)(2)(v)(B) but were not technically compliant because they described the post-promotional fee narratively. This would have the impact of imposing the requirements of this final rule retroactively, to disclosures given prior to the October 1, 2011 effective date. Therefore, a creditor that made disclosures prior to October 1, 2011 that generally complied with § 226.9(c)(2)(v)(B) but that described the type of post-promotional fee rather than disclosing the actual fee is not required to provide an additional notice pursuant to § 226.9(c)(2) before expiration of the promotional fee in order to use the exception.

Similarly, the Board acknowledges that there may be some creditors with outstanding promotional fee programs that did not make—or, without conducting extensive research, are not aware if they made—written disclosures of the length of the promotional period and the post-promotional fee. For example, some creditors may have made these disclosures orally. For the same reasons described in the foregoing paragraph, the Board believes that it would be inappropriate to preclude use of the § 226.9(c)(2)(v)(B) exception by creditors offering these promotional fee programs. That interpretation of the rule would in effect require creditors to comply with the precise requirements of the exception before issuance of this final rule or its October 1, 2011 effective date.

However, the Board believes at the same time that it would be inconsistent with the final rule for creditors that provided no advance notice of the term of the promotion and the post-promotional fee to receive an exemption from the general notice requirements of § 229.9(c)(2). Consequently, any creditor that, prior to October 1, 2011, provides a written disclosure to consumers subject to an existing promotional fee program stating the length of the promotional period and the fee that will apply after the promotional fee expires is not required to provide an additional notice pursuant to § 226.9(c)(2) prior to applying the post-promotional fee. In addition, any creditor that provided, prior to October 1, 2011, oral disclosures of the length of the promotional period and the fee that will apply after the promotional period also need not provide an additional notice under § 226.9(c)(2). However, any creditor subject to § 226.9(c)(2) that has not provided advance notice of the term of a promotion and the fee that will apply upon expiration of that promotion in the manner described above prior to October 1, 2011 will be required to provide 45 days' advance notice containing the content set forth in this final rule before raising the fee.

H. *Advertising rules (§ 226.16).* Advertisements occurring on or after October 1, 2011, such as an advertisement broadcast on the radio, published in a newspaper, or mailed on October 1, 2011 or later, must comply with revised § 226.16.

I. *Ability to pay rules (§ 226.51).* The revisions to § 226.51 apply to the opening of new accounts on or after October 1, 2011 as well as to credit line increases on existing accounts on or after October 1, 2011. However, consistent with the February 2010 Final Rule, revised § 226.51 does not apply to accounts opened in response to firm offers of credit made consistent with the Fair Credit Reporting Act before October 1, 2011, provided that the income requirements established by the creditor as specific criteria prior to prescreening were consistent with the version of § 226.51 in effect at that time. *See* 75 FR 7785; *see also* 15 U.S.C. 1681(l)(1)(A).

In addition, if an application is required to comply with the revised disclosure requirements in § 226.5a (as discussed above), the application must also request income information in a manner consistent with revised § 226.51 if the card issuer intends to rely on the information to comply with § 226.51. For example, if direct-mail applications requesting that consumers age 21 or older provide their "household income" are mailed to consumers on September 30, 2011, the card issuer may rely on the income information provided by consumers on the applications for purposes of § 226.51, even if the applications were not received by consumers until October 7, 2011. However, if the same applications are mailed to consumers on or after October 1, 2011, the card issuer cannot rely solely on the income information provided by consumers on the applications.

Similarly, if a card issuer makes applications available to the general public (such as "take-one" applications), any new applications issued by the card issuer on or after October 1, 2011 must request income information in a manner consistent with revised § 226.51 if the card issuer intends to rely on the information to comply with § 226.51. For example, if a card issuer restocks an in-store display of "take-one" applications requesting that consumers age 21 or older provide their "household income" on September 15, 2011, the card issuer may rely on the income information provided by consumers on the applications for purposes of § 226.51, even though a consumer may pick up one of the applications from the display after October 1, 2011. However, any "take-one" applications that the card issuer uses to restock the display on or after October 1, 2011 must request income information in a manner consistent with revised § 226.51 if the card issuer intends to rely on the information to comply with § 226.51.

J. *Limitations on fees (§ 226.52).*

Limitations on fees imposed prior to or during first year (§ 226.52(a)). The revisions to § 226.52(a) are effective on October 1, 2011. Accordingly, the revised limitations on the imposition of fees in § 226.52(a) apply to accounts opened and fees imposed on or after October 1, 2011. However, revised § 226.52(a) does not require card issuers to waive or rebate fees imposed prior to October 1, 2011. For example, assume that a card issuer imposes a $50 application fee on August 1, 2011, the account is opened on August 2 with a $400 credit limit, and $100 in account-opening fees are imposed on August 3. Revised § 226.52(a) does not require the card issuer to waive or rebate $50 in fees on October 1, 2011. However, beginning on October 1, 2011, revised § 226.52(a) prohibits the card issuer from imposing any additional non-exempt fees with respect to the account until August 2, 2012.

The revised definition of account opening in § 226.52(a) applies only to accounts opened on or after October 1, 2011. Because many card issuers currently track only the date that accounts are opened on their systems, it would be difficult for card issuers to determine the account-opening date consistent with revised § 226.52(a) for accounts opened prior to October 1.

Limitations on penalty fees (§ 226.52(b)). The revisions to § 226.52(b) are effective on October 1, 2011. However, the final rule does not require card issuers to waive or rebate fees imposed prior to October 1, 2011. For example, assume that a card issuer does not impose a late payment fee when a consumer pays late in August 2011, but imposes a $35 late payment when the consumer pays late in September 2011. Revised § 226.52(b)(1)(ii)(B) does not require the issuer to waive or rebate $10 on October 1, 2011, nor does it prevent the card issuer from imposing a $35 fee if the consumer pays late again in November 2011.

K. *Limitations on increasing annual percentage rates, fees, and charges (§ 226.55).* The revisions to § 226.55 are effective on October 1, 2011.

Temporary fees (§ 226.55(b)(1)). See the transition guidance provided above regarding § 226.9(c)(2)(v)(B) for guidance regarding application of the disclosure requirements in § 226.55(b)(1)(i) to promotional fee programs established prior to October 1, 2011. The requirement in § 226.55(b)(1) that temporary fees expire after a period of no less than six months applies to temporary fees offered on or after October 1, 2011. Thus, for example, if a card issuer offered a temporary fee on September 1, 2011 that applied until January 1, 2012, § 226.55(b)(1) would not prohibit the card issuer from applying an increased fee on January 1 so long as the card issuer previously disclosed the period during which the temporary fee would apply and the increased fee that would apply thereafter.

Increases in rates and certain fees and charges that apply to new transactions (§ 226.55(b)(3)); treatment of protected balances (§ 226.55(c)). The revisions to § 226.55(b)(3)(iii) regarding the circumstances under which an increased fee or charge that is subject to § 226.55 applies to an existing balance (as opposed to the account as a whole) apply to any increase in a fee or charge on or after October 1, 2011. However, a card issuer is not required to waive, rebate, or reduce any fee or charge imposed consistent with Regulation Z prior to October 1, 2011. Furthermore, as discussed above with respect to § 226.52(a), the revised definition of account opening under § 226.55(b)(3)(iii) applies only to accounts opened on or after October 1, 2011.

Promotional waivers or rebates of interest, fees, and charges (§ 226.55(e)). New § 226.55(e) applies to any waiver or rebate of interest, fees, or charges subject to § 226.55 that is promoted by a card issuer and applied to an account on or after October 1, 2011. If a card issuer waives or rebates interest, fees, or charges subject to § 226.55 prior to October 1, 2011, § 226.55(e) does not prohibit the issuer from ceasing to waive or rebate such interest, fees, or charges on or after October 1 unless the card issuer promotes the waiver or rebate on or after October 1.

L. *Internet posting of credit card agreements (§ 226.58).* Because the final rule becomes effective on October 1, 2011, the submissions that issuers must send to the Board by May 2, 2011 (reflecting agreements offered to the public as of the end of the first calendar quarter, March 31, 2011) and by August 1, 2011 (reflecting agreements offered to the public as of the end of the second calendar quarter, June 30, 2011) are not subject to the final rule. Compliance with the final rule is required for submissions that issuers must send to the Board by October 31, 2011 (reflecting agreements offered as of the end of the third calendar quarter, September 30, 2011) and to subsequent submissions.

V. Regulatory Analysis

This final rule clarifies aspects of the Board's February and June 2010 Final Rules implementing the Credit Card Act. Section VI of the supplementary information to the February 2010 Final Rule and section VII of the supplementary information to the June 2010 Final Rule set forth the Board's analyses and determinations under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) with respect to those rules. *See* 75 FR 7789–7791, 75 FR 37565–37567. In addition, section VII of the supplementary information to the February 2010 Final Rule and section VIII of the supplementary information to the June 2010 Final Rule set forth the Board's analyses and determinations under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1) with respect to those rules. *See* 75 FR 7791, 75 FR 37567–37568. Because the final rule's amendments are clarifications and do not alter the substance of these analyses and determinations, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.[27]

RFA. The Small Business Administration's Office of Advocacy (SBA) submitted a comment on the initial regulatory flexibility analysis (IRFA) in the Board's proposed rule. Otherwise, the Board did not receive substantive comments specifically addressing this analysis. Section 1601 of the Small Business Jobs Act of 2010 and Executive Order 13272 generally require Federal agencies to respond in a final rule to written comments submitted by the SBA on a proposed rule, unless the public interest is not served by doing so. The Board's response to the SBA's comment letter is set forth below.

The SBA expressed concern that the Board's IRFA did not adequately assess the impact of the proposed rule on small entities. The SBA encouraged the Board

[27] In the proposal, the Board noted that the amendments to § 226.9(c)(2)(v)(B) permit a card issuer to provide the consumer in advance with certain written disclosures of a fee increase upon expiration of a specified period of time, without providing 45 days' advance notice pursuant to § 226.9(c)(2). The Board anticipated that the proposed rule would impose no additional burden on card issuers that are small entities because the clarification provides an alternative means of complying with disclosures that are otherwise required by § 226.9(c)(2). The Board did not receive any significant comment on this preliminary determination, which is adopted in this final rule.

to issue a second IRFA to determine the impact on small entities and to consider alternatives that meet the Board's objectives while minimizing the impact on small entities. For the reasons stated below, the Board believes the analysis in its IRFA complied with the requirements of the RFA. Accordingly, the Board is proceeding with a final rule.

This rulemaking is part of a series of rules that have extensively revised and expanded the regulatory requirements for entities that offer open-end (not home-secured) consumer credit, particularly credit card accounts. In January 2009, the Board adopted a final rule that comprehensively amended the requirements of Regulation Z that apply to credit card accounts and other open-end (not home-secured) consumer credit. *See* 74 FR 5244 (Jan. 29, 2009). In that rule, the Board performed a RFA analysis and determined that the amendments would have a significant economic impact on a substantial number of small entities. *See id.* at 5390–5392.

In May 2009, the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (Credit Card Act) was signed in to law, which required the Board to extensively revise the January 2009 final rule and to issue three stages of additional rules. *See* Pub. L. No. 111–24, 123 Stat. 1734 (2009); *see also* 75 FR 37526 (describing rulemaking requirements of the Credit Card Act). Consistent with the requirements of the Credit Card Act, the Board issued an interim final rule in July 2009 and final rules in February and June 2010. *See* 74 FR 36077 (July 22, 2009); 75 FR 7658 (Feb. 22, 2010); 75 FR 37526 (June 29, 2010). In each of these rules, the Board conducted an RFA analysis and determined that the amendments to Regulation Z would have a significant economic impact on a substantial number of small entities, relying in part on the RFA analyses and determinations in the Board's prior credit card rules. *See* 74 FR 36092–36093; 75 FR 7789–7791; 75 FR 37565–37567. These analyses and determinations were not challenged by the SBA or other commenters.

Most recently, the Board issued a proposed rule in November 2010 to clarify aspects of the February and June 2010 credit card rules in order to facilitate compliance. *See* 75 FR 67459 (Nov. 2, 2010). In that proposal, the Board stated that it would continue to rely on the RFA analyses and determinations in its prior credit card rulemakings because the proposed clarifications would not, if adopted, alter the substance of those analyses and determinations. *See id.* 67486.

The SBA suggested in its comment letter that the Board's reliance on the RFA analyses and determinations in prior credit card rulemakings was not appropriate. However, the RFA specifically provides that, "[i]n order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of [the RFA analysis]." 5 U.S.C. 605(c). Thus, the Board has met or exceeded the requirements of the RFA by performing separate analyses for each of the credit card rulemakings preceding the November 2010 proposed clarifications.

The SBA also commented that the Board failed to consider updated information about the number of small entities that may be impacted by the proposed clarifications. Although the total number of small entities likely to be affected by the Board's regulations is unknown because the open-end credit provisions of Regulation Z have broad applicability to individuals and businesses that extend even small amounts of consumer credit, the Board estimated in prior rulemakings that, based on data from Reports of Condition and Income (call reports), there were approximately 4,100 card issuers with assets of $175 million or less. *See* 74 FR 5391 (citing June 2008 call report data). Based on the most recent final call report data (from September 2010), the Board estimates that there are approximately 3,700 such issuers. Notwithstanding this reduction in the number of affected small entities, the Board continues to believe that its credit card regulations (including this final rule) will have a significant economic impact on a substantial number of small entities.

Finally, the SBA suggested that the Board did not sufficiently address alternatives to the proposed rule which would minimize the impact on small entities. However, the Board solicited comment on alternatives to several of the proposed requirements. *See, e.g.,* 75 FR 67474. Furthermore, as discussed above in III. Section-by-Section Analysis, the Board has provided specific model language and transition guidance based on the comments in order to ease compliance and operational burden on small entities.

PRA. The Board has a continuing interest in the public's opinion of the collection of information. Comments on the collection of information should be sent to Cynthia Ayouch, Acting Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

VI. List of Revisions to Official Staff Interpretations

For clarity, the following is a list of revisions made by this final rule to the Official Staff Interpretations:

Section 226.2—Definitions and Rules of Construction, 2(a)(15) Credit card: Paragraphs 2. and 3. are revised and paragraph 4. is added.

Section 226.5—General Disclosure Requirements, 5(b)(2) Periodic statements:

(1) *Paragraph 5(b)(2)(ii):* Paragraphs 1. through 4. are revised; and

(2) The heading *Paragraph 5(b)(2)(iii)* and paragraph 1. under that heading are deleted.

Section 226.5a—Credit and Charge Card Applications and Solicitations, 5a(b) Required disclosures:

(1) *5a(b)(1) Annual percentage rate:* Paragraph 5. is revised;

(2) *5a(b)(2) Fees for issuance or availability:* paragraph 4. is revised;

(3) *5a(b)(5) Grace period:* Paragraph 1. is revised and paragraph 4. is deleted; and

(4) *5a(b)(6) Balance computation method:* Paragraph 1. is revised.

Section 226.6—Account-Opening Disclosures, 6(b) Rules affecting open-end (not home-secured) plans, 6(b)(2) Required disclosures for account-opening table for open-end (not home-secured) plans:

(1) *6(b)(2)(v) Grace period:* Paragraphs 1. and 3. are revised and paragraph 4. is deleted; and

(2) *6(b)(2)(vi) Balance computation method:* Paragraph 1. is revised and paragraph 2. is added.

Section 226.7—Periodic Statement, 7(b) Rules affecting open-end (not home-secured) plans:

(1) Paragraph 1. is revised;

(2) *7(b)(5) Balance on which finance charge computed:* Paragraphs 7. and 8. are revised;

(3) *7(b)(6) Charges imposed:* Paragraph 3. is revised;

(4) *7(b)(8) Grace period:* Paragraph 3. is revised; and

(5) *7(b)(12) Repayment disclosures:* Paragraph 1. is added.

Section 226.9–Subsequent Disclosure Requirements:

(1) *9(b) Disclosures for supplemental credit access devices and additional features, 9(b)(3) Checks that access a credit card account:*

(i) *9(b)(3)(i) Disclosures:* Paragraph 2. is added; and

(ii) *9(b)(3)(i)(D):* Paragraph 1. is revised;

(2) *9(c) Change in terms, 9(c)(2) Rules affecting open-end (not home-secured) plans:*

(i) Paragraph 1. is revised;

(ii) *9(c)(2)(iii) Charges not covered by § 226.6(b)(1) and (b)(2):* Paragraph 1. is revised;

(iii) *9(c)(2)(iv) Disclosure requirements:* Paragraphs 3. and 4. are revised;

(iv) *9(c)(2)(v) Notice not required:* Paragraphs 2., 3., 4., 5., 6., 7., 10., 11., and 12. are revised and paragraph 13. is added; and

(v) *9(e) Disclosures upon renewal of credit or charge card:* Paragraph 10. is revised.

Section 226.10—Payments:

(1) *10(b) Specific requirements for payments:* Paragraph 2. is revised;

(2) *10(e) Limitations on fees related to method of payment:* Paragraph 4. is added; and

(3) *10(f) Changes by card issuer:* Paragraph 3. is revised.

Section 226.12—Special Credit Card Provisions, 12(c) Right of cardholder to assert claims or defenses against card issuer: Paragraph 4. is revised.

Section 226.13—Billing Error Resolution, 13(c) Time for resolution; general procedures, Paragraph 13(c)(2): Paragraph 2. is revised.

Section 226.14—Determination of Annual Percentage Rate, 14(a) General rule: Paragraph 6. is added.

Section 226.16—Advertising:

(1) Paragraphs 1. and 2. are revised; and

(2) *16(g) Promotional rates:* Paragraphs 2., 3., and 4. are revised.

Section 226.30—Limitation on Rates: Paragraph 8. is revised.

Section 226.51—Ability to Pay:

(1) *51(a) General rule, 51(a)(1) Consideration of ability to pay:* Paragraphs 1., 2., 4. and 6. are revised;

(2) *51(a)(2) Minimum periodic payments:* Paragraph 3. is revised; and

(3) *51(b) Rules affecting young consumers, 51(b)(1) Applications from young consumers:* Paragraph 2. is revised.

Section 226.52—Limitations on Fees:

(1) *52(a) Limitations during first year after account opening:*

(i) The subheading *52(a) Limitations during first year after account opening* is revised to read *52(a) Limitations prior to account opening and during first year after account opening;*

(ii) *52(a)(1) General rule:* Paragraphs 1., 2., and 3. are revised and paragraph 4. is added; and

(iii) *52(a)(2) Fees not subject to limitations:* Paragraph 1. is revised;

(2) *52(b) Limitations on penalty fees:*

(i) *52(b)(1)(ii) Safe harbors:* Paragraph 1. is revised; and

(ii) *52(b)(2) Prohibited fees:*

(A) *52(b)(2)(i) Fees that exceed dollar amount associated with violation:* paragraph 5. is revised; and

(B) *52(b)(2)(ii) Multiple fees based on single event or transaction:* Paragraph 1. is revised.

Section 226.53—Allocation of Payments:

(1) Paragraphs 4. and 5. are revised; and

(2) The subheading *53(b) Special rule for accounts with balances subject to deferred interest or similar programs* is revised to read *53(b) Special rules* and, under that subheading, paragraphs 1., 2., and 3. are revised.

Section 226.55— Limitations on Increasing Annual Percentage Rates, Fees, and Charges:

(1) *55(a) General rule:* Paragraph 1. is revised;

(2) *55(b) Exceptions:* Paragraphs 1. and 3. are revised;

(3) The subheading *55(b)(1) Temporary rate exception* is revised to read *55(b)(1) Temporary rate, fee, or charge exception* and, under that subheading, paragraphs 2. and 4. are revised and paragraph 5. is added;

(4) *55(b)(3) Advance notice exception:* Paragraphs 6. and 7. are added;

(5) *55(b)(6) Servicemembers Civil Relief Act exception:* Paragraphs 1. and 2. are revised and paragraph 3. is added;

(6) *55(c) Treatment of protected balances, 55(c)(1) Definition of protected balance:* Paragraph 3. is revised and paragraph 4. is added; and

(7) The subheading *55(e) Promotional waivers or rebates of interest, fees, and other charges* is added and, under that subheading, paragraphs 1., 2., and 3. are added.

Section 226.58—Internet Posting of Credit Card Agreements:

(1) *58(b) Definitions:*

(i) *58(b)(1) Agreement:* Paragraph 1. is revised;

(ii) *58(b)(2) Amends:* Paragraph 1. is revised;

(iii) The subheading *58(b)(4) Card issuer* is added and paragraphs 1., 2., and 3. are added under that subheading;

(iv) The subheading *58(b)(4) Offers* is revised to read 5*8(b)(5) Offers;*

(v) The subheading *58(b)(5) Open account* is revised to read *58(b)(6) Open account;* and

(vi) The subheading *58(b)(7) Private label credit card account and private label credit card plan* is revised to read *58(b)(8) Private label credit card account and private label credit card plan* and, under that subheading, paragraphs 2. and 4. are revised;

(2) *58(c) Submission of agreements to Board, 58(c)(3) Amended agreements:* Paragraph 2. is revised, paragraph 3. is renumbered as paragraph 4., and a new paragraph 3. is added;

(3) *58(d) Posting of agreements offered to the public:* Paragraph 2. is revised; and

(4) *58(e) Agreements for all open accounts:* Paragraph 3. is revised.

Section 226.59—Reevaluation of Rate Increases:

(1) *59(a) General rule, 59(a)(1) Evaluation of increased rate:* Paragraphs 3. and 4. are renumbered as paragraphs 4. and 5. and a new paragraph 3. is added;

(2) *59(d) Factors:* Paragraph 6. is added; and

(3) *59(f) Termination of obligation to review factors:* Paragraph 2. is added.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l); Pub. L. No. 111–24 § 2, 123 Stat. 1734; Pub. L. No. 111–203, 124 Stat. 1376.

Subpart B—Open-End Credit

■ 2. Section 226.2(a)(15)(ii) is revised to read as follows:

§ 226.2 Definitions and rules of construction.

(a) * * *

(15) * * *

(ii) *Credit card account under an open-end (not home-secured) consumer credit plan* means any open-end credit account that is accessed by a credit card, except:

(A) A home-equity plan subject to the requirements of § 226.5b that is accessed by a credit card; or

(B) An overdraft line of credit that is accessed by a debit card or an account number.

* * * * *

■ 3. Section 226.5 is amended by revising the heading for paragraph (b)(2)(ii)(A) and revising paragraph (b)(2)(ii)(B) to read as follows:

§ 226.5 General disclosure requirements.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(A) *Credit card accounts under an open-end (not home-secured) consumer credit plan.* * * *

* * * * *

(B) *Open-end consumer credit plans.* For accounts under an open-end consumer credit plan, a creditor must adopt reasonable procedures designed to ensure that:

(*1*) If a grace period applies to the account:

(*i*) Periodic statements are mailed or delivered at least 21 days prior to the date on which the grace period expires; and

(*ii*) The creditor does not impose finance charges as a result of the loss of the grace period if a payment that satisfies the terms of the grace period is received by the creditor within 21 days after mailing or delivery of the periodic statement.

(*2*) Regardless of whether a grace period applies to the account:

(*i*) Periodic statements are mailed or delivered at least 14 days prior to the date on which the required minimum periodic payment must be received in order to avoid being treated as late for any purpose; and

(*ii*) The creditor does not treat as late for any purpose a required minimum periodic payment received by the creditor within 14 days after mailing or delivery of the periodic statement.

(*3*) For purposes of paragraph (b)(2)(ii)(B) of this section, "grace period" means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate.[10]

* * * * *

■ 4. Section 226.5a is amended by revising paragraphs (a)(2)(iii), (b)(1)(i), and (b)(1)(iv) to read as follows:

§ 226.5a Credit and charge card applications and solicitations.

(a) * * *

(2) * * *

(iii) Disclosures required by paragraphs (b)(1)(iv)(B), (b)(1)(iv)(C) and (b)(6) of this section must be placed directly beneath the table.

* * * * *

(b) * * *

(1) * * *

(i) *Variable rate information.* If a rate disclosed under paragraph (b)(1) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases shall not be included in the table.

* * * * *

(iv) *Penalty rates.* (A) *In general.* Except as provided in paragraph (b)(1)(iv)(B) and (C) of this section, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose pursuant to this paragraph (b)(1) the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect.

(B) *Introductory rates.* If the issuer discloses an introductory rate, as that term is defined in § 226.16(g)(2)(ii), in the table or in any written or electronic promotional materials accompanying applications or solicitations subject to paragraph (c) or (e) of this section, the issuer must briefly disclose directly beneath the table the circumstances, if any, under which the introductory rate may be revoked, and the type of rate that will apply after the introductory rate is revoked.

(C) *Employee preferential rates.* If a card issuer discloses in the table a preferential annual percentage rate for which only employees of the card issuer, employees of a third party, or other individuals with similar affiliations with the card issuer or third party, such as executive officers, directors, or principal shareholders are eligible, the card issuer must briefly disclose directly beneath the table the circumstances under which such preferential rate may be revoked, and the rate that will apply after such preferential rate is revoked.

* * * * *

■ 5. Section 226.6 is amended by revising paragraphs (b)(1)(ii), (b)(2)(i)(B), and (b)(2)(i)(D) to read as follows:

§ 226.6 Account-opening disclosures.

* * * * *

(b) * * *

(1) * * *

(ii) *Location.* Only the information required or permitted by paragraphs (b)(2)(i) through (v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (xiv) of this section shall be in the table. Disclosures required by paragraphs (b)(2)(i)(D)(*2*), (b)(2)(i)(D)(*3*), (b)(2)(vi), and (b)(2)(xv) of this section shall be placed directly below the table. Disclosures required by paragraphs (b)(3) through (5) of this section that are not otherwise required to be in the table and other information may be presented with the account agreement or account-opening disclosure statement, provided such information appears outside the required table.

* * * * *

(2) * * *

(i) * * *

(B) *Discounted initial rates.* If the initial rate is an introductory rate, as that term is defined in § 226.16(g)(2)(ii), the creditor must disclose the rate that would otherwise apply to the account pursuant to paragraph (b)(2)(i) of this section. Where the rate is not tied to an index or formula, the creditor must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the creditor must disclose a rate based on the applicable index or formula in accordance with the accuracy requirements of paragraph (b)(4)(ii)(G) of this section. Except as provided in paragraph (b)(2)(i)(F) of this section, the creditor is not required to, but may disclose in the table the introductory rate along with the rate that would otherwise apply to the account if the creditor also discloses the time period during which the introductory rate will remain in effect, and uses the term "introductory" or "intro" in immediate proximity to the introductory rate.

* * * * *

(D) *Penalty rates.* (*1*) *In general.* Except as provided in paragraph (b)(2)(i)(D)(*2*) and (b)(2)(i)(D)(*3*) of this section, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose pursuant to paragraph (b)(2)(i) of this section the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. If more than one penalty rate may apply, the creditor at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.

(*2*) *Introductory rates.* If the creditor discloses in the table an introductory rate, as that term is defined in § 226.16(g)(2)(ii), creditors must briefly disclose directly beneath the table the circumstances under which the introductory rate may be revoked, and

[10] [Reserved]

the rate that will apply after the introductory rate is revoked.

(*3*) *Employee preferential rates.* If a creditor discloses in the table a preferential annual percentage rate for which only employees of the creditor, employees of a third party, or other individuals with similar affiliations with the creditor or third party, such as executive officers, directors, or principal shareholders are eligible, the creditor must briefly disclose directly beneath the table the circumstances under which such preferential rate may be revoked, and the rate that will apply after such preferential rate is revoked.

* * * * *

■ 6. Section 226.7 is amended by revising paragraphs (b)(12) and (b)(14) to read as follows:

§ 226.7 Periodic statement.

* * * * *

(b) * * *

(12) *Repayment disclosures.* (i) *In general.* Except as provided in paragraphs (b)(12)(ii) and (b)(12)(v) of this section, for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide the following disclosures on each periodic statement:

(A) The following statement with a bold heading: "Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance;"

(B) The minimum payment repayment estimate, as described in Appendix M1 to this part. If the minimum payment repayment estimate is less than 2 years, the card issuer must disclose the estimate in months. Otherwise, the estimate must be disclosed in years and rounded to the nearest whole year;

(C) The minimum payment total cost estimate, as described in Appendix M1 to this part. The minimum payment total cost estimate must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option;

(D) A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement. A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance;

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section; and

(F)(*1*) Except as provided in paragraph (b)(12)(i)(F)(2) of this section, the following disclosures:

(*i*) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option;

(*ii*) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years;

(*iii*) The total cost estimate for repayment in 36 months, as described in Appendix M1 to this part. The total cost estimate for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option; and

(*iv*) The savings estimate for repayment in 36 months, as described in Appendix M1 to this part. The savings estimate for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option.

(*2*) The requirements of paragraph (b)(12)(i)(F)(*1*) of this section do not apply to a periodic statement in any of the following circumstances:

(*i*) The minimum payment repayment estimate that is disclosed on the periodic statement pursuant to paragraph (b)(12)(i)(B) of this section after rounding is three years or less;

(*ii*) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part, after rounding as set forth in paragraph (b)(12)(f)(*1*)(*i*) of this section that is calculated for a particular billing cycle is less than the minimum payment required for the plan for that billing cycle; and

(*iii*) A billing cycle where an account has both a balance in a revolving feature where the required minimum payments for this feature will not amortize that balance in a fixed amount of time specified in the account agreement and a balance in a fixed repayment feature where the required minimum payment for this fixed repayment feature will amortize that balance in a fixed amount of time specified in the account agreement which is less than 36 months.

(ii) *Negative or no amortization.* If negative or no amortization occurs when calculating the minimum payment repayment estimate as described in Appendix M1 of this part, a card issuer must provide the following disclosures on the periodic statement instead of the disclosures set forth in paragraph (b)(12)(i) of this section:

(A) The following statement: "Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate you will never pay off the balance shown on this statement because your payment will be less than the interest charged each month";

(B) The following statement: "If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner";

(C) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the issuer's option;

(D) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section.

* * * * *

(14) *Deferred interest or similar transactions.* For accounts with an outstanding balance subject to a deferred interest or similar program, the date by which that outstanding balance must be paid in full in order to avoid the obligation to pay finance charges on such balance must be disclosed on the front of any page of each periodic statement issued during the deferred interest period beginning with the first periodic statement issued during the deferred interest period that reflects the deferred interest or similar transaction. The disclosure provided pursuant to this paragraph must be substantially similar to Sample G–18(H) in Appendix G to this part.

■ 7. Section 226.9 is amended by adding paragraph (b)(3)(ii) and by revising paragraphs (c)(2)(i)(A), (c)(2)(ii), (c)(2)(iii), (c)(2)(iv)(A)(1), (c)(2)(iv)(B), (c)(2)(iv)(D), (c)(2)(v)(B)(1) through (3), (c)(2)(v)(C), and (c)(2)(v)(D).

The additions and revisions read as follows:

§ 226.9 Subsequent disclosure requirements.

* * * * *

(b) * * *

(3) * * *

(iii) *Variable rates.* If any annual percentage rate required to be disclosed pursuant to paragraph (b)(3)(i) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases shall not be included in the table.

(c) * * *

(2) * * *

(i) * * *

(A) *General.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraphs (c)(2)(i)(B), (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change as described in paragraph (c)(2)(i)(B) of this section; for such changes, notice must be given in accordance with the timing requirements of paragraph (c)(2)(i)(B) of this section. Increases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

* * * * *

(ii) *Significant changes in account terms.* For purposes of this section, a "significant change in account terms" means a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 226.6(b)(4), or the acquisition of a security interest.

(iii) *Charges not covered by § 226.6(b)(1) and (b)(2).* Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 226.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor must either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) * * *

(A) * * *

(*1*) A summary of the changes made to terms required by § 226.6(b)(1) and (b)(2) or § 226.6(b)(4), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;

* * * * *

(B) *Right to reject for credit card accounts under an open-end (not home-secured) consumer credit plan.* In addition to the disclosures in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, an increase in a fee as a result of a reevaluation of a determination made under § 226.52(b)(1)(i) or an adjustment to the safe harbors in § 226.52(b)(1)(ii) to reflect changes in the Consumer Price Index, a change in an annual percentage rate applicable to a consumer's account, an increase in a fee previously reduced consistent with 50 U.S.C. app. 527 or a similar Federal or State statute or regulation if the amount of the increased fee does not exceed the amount of that fee prior to the reduction, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

* * * * *

(D) *Format requirements.* (*1*) *Tabular format.* The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment, a summary of a term required to be disclosed under § 226.6(b)(4) that is not required to be disclosed under § 226.6(b)(1) and (b)(2), or a description of any security interest being acquired by the creditor), with headings and format substantially similar to any of the account-opening tables found in G–17 in appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 226.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 226.6(b)(2).

* * * * *

(v) * * *

(B) When the change is an increase in an annual percentage rate or fee upon the expiration of a specified period of time, provided that:

(*1*) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate or fee that would apply after expiration of the period;

(*2*) The disclosure of the length of the period and the annual percentage rate or fee that would apply after expiration of the period are set forth in close proximity and in equal prominence to the first listing of the disclosure of the rate or fee that applies during the specified period of time; and

(*3*) The annual percentage rate or fee that applies after that period does not exceed the rate or fee disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate, a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(ix) or (b)(2)(xii), or the required minimum periodic payment due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

* * * * *

■ 8. Section 226.10 is amending by revising paragraphs (b)(4) and (e) to read as follows:

§ 226.10 Payments.

* * * * *

(b) * * *

(4) *Nonconforming payments.* (i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, if a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments as permitted under this § 226.10, but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt.

(ii) *Payment methods promoted by creditor.* If a creditor promotes a method for making payments, such payments shall be considered conforming payments in accordance with this paragraph (b) and shall be credited to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge.

* * * * *

(e) *Limitations on fees related to method of payment.* For credit card accounts under an open-end (not home-secured) consumer credit plan, a creditor may not impose a separate fee to allow consumers to make a payment by any method, such as mail, electronic, or telephone payments, unless such payment method involves an expedited service by a customer service representative of the creditor. For purposes of paragraph (e) of this section, the term "creditor" includes a third party that collects, receives, or processes payments on behalf of a creditor.

* * * * *

■ 9. Section 226.16(g) is revised to read as follows:

§ 226.16 Advertising.

* * * * *

(g) *Promotional rates and fees.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end (not home-secured) plan, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) *Definitions.* (i) *Promotional rate* means any annual percentage rate applicable to one or more balances or transactions on an open-end (not home-secured) plan for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period on such balances or transactions.

(ii) *Introductory rate* means a promotional rate offered in connection with the opening of an account.

(iii) *Promotional period* means the maximum time period for which a promotional rate or promotional fee may be applicable.

(iv) *Promotional fee* means a fee required to be disclosed under § 226.6(b)(1) and (2) applicable to an open-end (not home-secured) plan, or to one or more balances or transactions on an open-end (not home-secured) plan, for a specified period of time that is lower than the fee that will be in effect at the end of that period for such plan or types of balances or transactions.

(v) *Introductory fee* means a promotional fee offered in connection with the opening of an account.

(3) *Stating the term "introductory".* If any annual percentage rate or fee that may be applied to the account is an introductory rate or introductory fee, the term *introductory* or *intro* must be in immediate proximity to each listing of the introductory rate or introductory fee in a written or electronic advertisement.

(4) *Stating the promotional period and post-promotional rate or fee.* If any annual percentage rate that may be applied to the account is a promotional rate under paragraph (g)(2)(i) of this section or any fee that may be applied to the account is a promotional fee under paragraph (g)(2)(iv) of this section, the information in paragraphs (g)(4)(i) and, as applicable, (g)(4)(ii) or (iii) of this section must be stated in a clear and conspicuous manner in the advertisement. If the rate or fee is stated in a written or electronic advertisement, the information in paragraphs (g)(4)(i) and, as applicable, (g)(4)(ii) or (iii) of this section must also be stated in a prominent location closely proximate to the first listing of the promotional rate or promotional fee.

(i) When the promotional rate or promotional fee will end;

(ii) The annual percentage rate that will apply after the end of the promotional period. If such rate is variable, the annual percentage rate must comply with the accuracy standards in §§ 226.5a(c)(2), 226.5a(d)(3), 226.5a(e)(4), or 226.16(b)(1)(ii), as applicable. If such rate cannot be determined at the time disclosures are given because the rate depends at least in part on a later determination of the consumer's creditworthiness, the advertisement must disclose the specific rates or the range of rates that might apply; and

(iii) The fee that will apply after the end of the promotional period.

(5) *Envelope excluded.* The requirements in paragraph (g)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement, linked to an application or solicitation provided electronically.

* * * * *

■ 10. Section 226.51 is amended by revising paragraphs (a)(1) and(b)(1)(ii)(B) to read as follows:

§ 226.51 Ability to pay.

(a) *General rule.* (1)(i) *Consideration of ability to pay.* A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the consumer's independent ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations.

(ii) *Reasonable policies and procedures.* Card issuers must establish and maintain reasonable written policies and procedures to consider a consumer's independent income or assets and current obligations. Reasonable policies and procedures to consider a consumer's independent ability to make the required payments include the consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. It would be unreasonable for a card issuer to not review any information about a consumer's income, assets, or current obligations, or to issue a credit card to a consumer who does not have any independent income or assets.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(B) Financial information indicating such cosigner, guarantor, or joint applicant has the independent ability to make the required minimum periodic payments on such debts, consistent with paragraph (a) of this section.

* * * * *

■ 11. Section 226.52 is amended by revising the heading to paragraph (a) and by revising paragraphs (a)(1), (a)(3), and (b)(1)(ii) to read as follows:

§ 226.52 Limitations on fees.

(a) *Limitations prior to account opening and during first year after account opening.* (1) *General rule.* Except as provided in paragraph (a)(2) of this section, the total amount of fees a consumer is required to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan prior to account opening and during the first year after account opening must not exceed 25 percent of the credit limit in effect when the account is opened. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

* * * * *

(3) *Rule of construction.* Paragraph (a) of this section does not authorize the imposition or payment of fees or charges otherwise prohibited by law.

(b) * * *

(1) * * *

(ii) *Safe harbors.* A card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable:

(A) $25.00;

(B) $35.00 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or

(C) Three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles.

(D) The amounts in paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section will be adjusted annually by the Board to reflect changes in the Consumer Price Index.

* * * * *

■ 12. Section 226.53 is amended by revising paragraph (b) to read as follows:

§ 226.53 Allocation of payments.

* * * * *

(b) *Special rules.* (1) *Accounts with balances subject to deferred interest or similar program.* When a balance on a credit card account under an open-end (not home-secured) consumer credit plan is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time:

(i) *Last two billing cycles.* The card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment consistent with paragraph (a) of this section, except that, during the two billing cycles immediately preceding expiration of the specified period, the excess amount must be allocated first to the balance subject to the deferred interest or similar program and any remaining portion allocated to any other balances consistent with paragraph (a) of this section; or

(ii) *Consumer request.* The card issuer may at its option allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances on the account in the manner requested by the consumer.

(2) *Accounts with secured balances.* When a balance on a credit card account under an open-end (not home-secured) consumer credit plan is secured, the card issuer may at its option allocate any amount paid by the consumer in excess of the required minimum periodic payment to that balance if requested by the consumer.

■ 13. Section 226.55 is amended by revising paragraphs (b)(1), (b)(3)(iii), and (b)(6), and by adding paragraph (e) to read as follows:

§ 226.55 Limitations on increasing annual percentage rates, fees, and charges.

* * * * *

(b) * * *

(1) *Temporary rate, fee, or charge exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) upon the expiration of a specified period of six months or longer, provided that:

(i) Prior to the commencement of that period, the card issuer disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate, fee, or charge that would apply after expiration of the period; and

(ii) Upon expiration of the specified period:

(A) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred prior to the period that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the period;

(B) If the disclosures required by paragraph (b)(1)(i) of this section are provided pursuant to § 226.9(c), the card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred within 14 days after provision of the notice that exceeds the annual percentage rate, fee, or charge that applied to that category of transactions prior to provision of the notice; and

(C) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred during the period that exceeds the increased annual percentage rate, fee, or charge disclosed pursuant to paragraph (b)(1)(i) of this section.

* * * * *

(3) * * *

(iii) This exception does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (iii), or (xii) during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

* * * * *

(6) *Servicemembers Civil Relief Act exception.* If an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (iii), or (xii) has been decreased pursuant to 50 U.S.C. app. 527 or a similar Federal or State statute or regulation, a card issuer may increase that annual percentage rate, fee, or charge once 50 U.S.C. app. 527 or the similar statute or regulation no longer applies, provided that the card issuer must not apply to any transactions that occurred prior to the decrease an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the decrease.

* * * * *

(e) *Promotional waivers or rebates of interest, fees, and other charges.* If a card issuer promotes the waiver or rebate of finance charges due to a periodic interest rate or fees or charges required to be disclosed under § 226.6(b)(2)(ii), (iii), or (xii) and applies the waiver or rebate to a credit card account under an open-end (not home-secured) consumer credit plan, any cessation of the waiver or rebate on that account constitutes an increase in an annual percentage rate, fee, or charge for purposes of this section.

■ 14. Section 226.58 is amended by:

■ A. Revising paragraphs (b)(1) and (2);

■ B. Redesignating paragraphs (b)(4) through (7) as paragraphs (b)(5) through (8);

■ C. Adding a new paragraph (b)(4); and

■ D. Revising paragraphs (c)(1) and (3), removing and reserving paragraph (c)(2), and revising paragraph (c)(8) to read as follows:

§ 226.58 Internet posting of credit card agreements.

* * * * *

(b) *Definitions.* (1) *Agreement.* For purposes of this section, "agreement" or "credit card agreement" means the written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. "Agreement" or "credit card agreement" also includes the pricing information, as defined in § 226.58(b)(7).

(2) *Amends.* For purposes of this section, an issuer "amends" an agreement if it makes a substantive change (an "amendment") to the agreement. A change is substantive if it alters the rights or obligations of the card issuer or the consumer under the agreement. Any change in the pricing information, as defined in § 226.58(b)(7), is deemed to be substantive.

* * * * *

(4) *Card issuer.* For purposes of this section, "card issuer" or "issuer" means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement.

* * * * *

(c) *Submission of agreements to Board.* (1) *Quarterly submissions.* A card issuer must make quarterly submissions to the Board, in the form and manner specified by the Board. Quarterly submissions must be sent to the Board no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. Each submission must contain:

(i) Identifying information about the card issuer and the agreements submitted, including the issuer's name, address, and identifying number (such as an RSSD ID number or tax identification number);

(ii) The credit card agreements that the card issuer offered to the public as of the last business day of the preceding calendar quarter that the card issuer has not previously submitted to the Board;

(iii) Any credit card agreement previously submitted to the Board that was amended during the preceding calendar quarter and that the card issuer offered to the public as of the last business day of the preceding calendar quarter, as described in § 226.58(c)(3); and

(iv) Notification regarding any credit card agreement previously submitted to the Board that the issuer is withdrawing, as described in § 226.58(c)(4), (c)(5), (c)(6), and (c)(7).

(2) [Reserved].

(3) *Amended agreements.* If a credit card agreement has been submitted to the Board, the agreement has not been amended and the card issuer continues to offer the agreement to the public, no additional submission regarding that agreement is required. If a credit card agreement that previously has been submitted to the Board is amended and the card issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the change became effective, the card issuer must submit the entire amended agreement to the Board, in the form and manner specified by the Board, by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective.

* * * * *

(8) *Form and content of agreements submitted to the Board.* (i) *Form and content generally.* (A) Each agreement must contain the provisions of the agreement and the pricing information in effect as of the last business day of the preceding calendar quarter.

(B) Agreements must not include any personally identifiable information relating to any cardholder, such as name, address, telephone number, or account number.

(C) The following are not deemed to be part of the agreement for purposes of § 226.58, and therefore are not required to be included in submissions to the Board:

(*1*) Disclosures required by State or Federal law, such as affiliate marketing notices, privacy policies, billing rights notices, or disclosures under the E-Sign Act;

(*2*) Solicitation materials;

(*3*) Periodic statements;

(*4*) Ancillary agreements between the issuer and the consumer, such as debt cancellation contracts or debt suspension agreements;

(*5*) Offers for credit insurance or other optional products and other similar advertisements; and

(*6*) Documents that may be sent to the consumer along with the credit card or credit card agreement such as a cover letter, a validation sticker on the card, or other information about card security.

(D) Agreements must be presented in a clear and legible font.

(ii) *Pricing information.* (A) Pricing information must be set forth in a single addendum to the agreement. The addendum must contain all of the pricing information, as defined by § 226.58(b)(7). The addendum may, but is not required to, contain any other information listed in § 226.6(b), provided that information is complete and accurate as of the applicable date under § 226.58. The addendum may not contain any other information.

(B) Pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors must be disclosed either by setting forth all the possible variations (such as purchase APRs of 13 percent, 15 percent, 17 percent, and 19 percent) or by providing a range of possible variations (such as purchase APRs ranging from 13 percent to 19 percent).

(C) If a rate included in the pricing information is a variable rate, the issuer must identify the index or formula used in setting the rate and the margin. Rates that may vary from one cardholder to another must be disclosed by providing the index and the possible margins (such as the prime rate plus 5 percent, 8 percent, 10 percent, or 12 percent) or range of margins (such as the prime rate plus from 5 to 12 percent). The value of the rate and the value of the index are not required to be disclosed.

(iii) *Optional variable terms addendum.* Provisions of the agreement other than the pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors may be set forth in a single addendum to the agreement separate from the pricing information addendum.

(iv) *Integrated agreement.* Issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the pricing information addendum and the optional variable terms addendum). Changes in provisions or pricing information must be integrated into the text of the agreement, the pricing information addendum or the optional variable terms addendum, as appropriate.

* * * * *

■ 15. Appendix M1 to part 226 is amended by revising paragraph (f) to read as follows:

Appendix M1 to Part 226—Repayment Disclosures

* * * * *

(f) *Calculating the savings estimate for repayment in 36 months.* When calculating the savings estimate for repayment in 36 months, if a card issuer chooses under § 226.7(b)(12)(i) to round the disclosures to the nearest whole dollar when disclosing them on the periodic statement, the card issuer must calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of this appendix (rounded to the nearest whole dollar) from the minimum payment total cost estimate calculated under paragraph (c) of this appendix (rounded to the nearest whole dollar). If a card issuer chooses under § 227.7(b)(12)(i), however, to round the disclosures to the nearest cent when disclosing them on the periodic statement, the card issuer must calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of this appendix (rounded to the nearest cent) from the minimum payment total cost estimate calculated under paragraph (c) of this appendix (rounded to the nearest cent). The savings estimate for repayment in 36 months shall be considered accurate if it is based on the total cost estimate for repayment in 36 months that is calculated in accordance with paragraph (e) of this appendix and the minimum payment total cost estimate calculated under paragraph (c) of this appendix.

■ 16. In Supplement I to Part 226:
■ A. Under *Section 226.2—Definitions and Rules of Construction,* subheading *2(a)(15) Credit card,* paragraphs 2. and 3. are revised and paragraph 4. is added.
■ B. Under *Section 226.5—General Disclosure Requirements,* subheading *5(b)(2) Periodic statements:*
■ i. Under *Paragraph 5(b)(2)(ii),* paragraphs 1. through 4. are revised; and
■ ii. The heading *Paragraph 5(b)(2)(iii)* and paragraph 1. under that heading are removed.
■ C. Under *Section 226.5a—Credit and Charge Card Applications and Solicitations, 5a(b) Required disclosures* is revised.
■ D. Under *Section 226.6—Account-Opening Disclosures,* subheading *6(b) Rules affecting open-end (not home-secured) plans, 6(b)(2) Required disclosures for account-opening table for open-end (not home-secured) plans* is revised.
■ E. Under *Section 226.7—Periodic Statement, 7(b) Rules affecting open-end (not home-secured) plans* is revised.
■ F. Under *Section 226.9–Subsequent Disclosure Requirements:*
■ i. Under *9(b) Disclosures for supplemental credit access devices and additional features, 9(b)(3) Checks that access a credit card account* is revised;
■ ii. Under *9(c) Change in terms, 9(c)(2) Rules affecting open-end (not home-secured) plans* is revised;
■ iii. Under *9(e) Disclosures upon renewal of credit or charge card,* paragraph 10. is revised.
■ G. Under *Section 226.10—Payments:*
■ i. Under *10(b) Specific requirements for payments,* paragraph 2. is revised;
■ ii. Under *10(e) Limitations on fees related to method of payment,* paragraph 4. is added; and
■ iii. Under *10(f) Changes by card issuer,* paragraph 3. is revised.
■ H. Under *Section 226.12—Special Credit Card Provisions,* subheading *12(c) Right of cardholder to assert claims or defenses against card issuer,* paragraph 4. is revised.
■ I. Under *Section 226.13—Billing Error Resolution,* subheading *13(c) Time for resolution; general procedures,* subheading *Paragraph 13(c)(2),* paragraph 2. is revised.
■ J. Under *Section 226.14—Determination of Annual Percentage Rate,* subheading *14(a) General rule,* paragraph 6. is added.
■ K. Under *Section 226.16—Advertising:*
■ i. Paragraphs 1. and 2. are revised; and
■ ii. *16(g) Promotional rates* is revised.
■ L. Under *Section 226.30—Limitation on Rates,* paragraph 8. is revised.
■ M. *Section 226.51—Ability to Pay* is revised.
■ N. *Section 226.52—Limitations on Fees* is revised.
■ O. Under *Section 226.53— Allocation of Payments:*
■ i. Paragraphs 4. and 5. are revised; and
■ ii. *53(b) is* revised.
■ P. Under *Section 226.55— Limitations on Increasing Annual Percentage Rates, Fees, and Charges:*
■ i. *55(a) General rule* is revised;
■ ii. Under *55(b) Exceptions,* paragraphs 1. and 3. are revised;
■ iii. *55(b)(1) Temporary rate exception* is revised;
■ iv. Under *55(b)(3) Advance notice exception,* paragraphs 6. and 7. are added;
■ v. *55(b)(6) Servicemembers Civil Relief Act exception* is revised;
■ vi. Under *55(c) Treatment of protected balances, 55(c)(1) Definition of protected balance* is revised; and
■ vii. *55(e) Promotional waivers or rebates of interest, fees, and other charges* is added.
■ Q. Under *Section 226.58—Internet Posting of Credit Card Agreements:*
■ i. *58(b) Definitions* is revised;
■ ii. Under *58(c) Submission of agreements to Board, 58(c)(3) Amended agreements* is revised;
■ iii. *58(d) Posting of agreements offered to the public* is revised; and
■ iv. *58(e) Agreements for all open accounts* is revised.
■ R. Under *Section 226.59–Reevaluation of Rate Increases:*
■ i. Under *59(a) General rule, 59(a)(1) Evaluation of increased rate* is revised;
■ ii. Under *59(d) Factors,* paragraph 6. is added; and
■ iii. *59(f) Termination of obligation to review factors* is revised.

The revisions and additions read as follows:

Supplement I to Part 226—Official Staff Interpretations

* * * * *

Subpart A—General

* * * * *

§ 226.2—Definitions and Rules of Construction

* * * * *

2(a)(15) Credit card.

* * * * *

2. *Examples.* i. Examples of credit cards include:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit.

B. A card that accesses both a credit and an asset account (that is, a debit-credit card).

C. An identification card that permits the consumer to defer payment on a purchase.

D. An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension.

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.

ii. In contrast, credit card does not include, for example:

A. A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.

B. Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

C. An account number that accesses a credit account, unless the account number can access an open-end line of credit to purchase goods or services. For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of § 226.2(a)(15)(i). However, if the account number can also access the line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the Internet), the account number is a credit card for purposes of § 226.2(a)(15)(i), regardless of whether the creditor treats such transactions as purchases, cash advances, or some other type of transaction. Furthermore, if the line of credit can also be accessed by a card (such as a debit card), that card is a credit card for purposes of § 226.2(a)(15)(i).

3. *Charge card.* Generally, charge cards are cards used in connection with an account on which outstanding balances cannot be carried from one billing cycle to another and are payable when a periodic statement is received. Under the regulation, a reference to credit cards generally includes charge cards. In particular, references to credit card accounts under an open-end (not home-secured) consumer credit plan in Subparts B and G generally include charge cards. The term *charge card* is, however, distinguished from *credit card* or *credit card account under an open-end (not home-secured) consumer credit plan* in §§ 226.5a, 226.6(b)(2)(xiv), 226.7(b)(11), 226.7(b)(12), 226.9(e), 226.9(f), 226.28(d), 226.52(b)(1)(ii)(C), and appendices G–10 through G–13.

4. *Credit card account under an open-end (not home-secured) consumer credit plan.* An

open-end consumer credit account is a credit card account under an open-end (not home-secured) consumer credit plan for purposes of § 226.2(a)(15)(ii) if:

i. The account is accessed by a credit card, as defined in § 226.2(a)(15)(i); and

ii. The account is not excluded under § 226.2(a)(15)(ii)(A) or (a)(15)(ii)(B).

* * * * *

Subpart B—Open-End Credit

§ 226.5—General Disclosure Requirements

* * * * *

5(b)(2) Periodic statements.

* * * * *

Paragraph 5(b)(2)(ii).

1. *Mailing or delivery of periodic statements.* A creditor is not required to determine the specific date on which a periodic statement is mailed or delivered to an individual consumer for purposes of § 226.5(b)(2)(ii). A creditor complies with § 226.5(b)(2)(ii) if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than a certain number of days after the closing date of the billing cycle and adds that number of days to the 21-day or 14-day period required by § 226.5(b)(2)(ii) when determining, as applicable, the payment due date for purposes of § 226.5(b)(2)(ii)(A), the date on which any grace period expires for purposes of § 226.5(b)(2)(ii)(B)(*1*), or the date after which the payment will be treated as late for purposes of § 226.5(b)(2)(ii)(B)(*2*). For example:

A. If a creditor has adopted reasonable procedures designed to ensure that periodic statements for a credit card account under an open-end (not home-secured) consumer credit plan or an account under an open-end consumer credit plan that provides a grace period are mailed or delivered to consumers no later than three days after the closing date of the billing cycle, the payment due date for purposes of § 226.5(b)(2)(ii)(A) and the date on which any grace period expires for purposes of § 226.5(b)(2)(ii)(B)(*1*) must be no less than 24 days after the closing date of the billing cycle. Similarly, in these circumstances, the limitations in § 226.5(b)(2)(ii)(A) and (b)(2)(ii)(B)(*1*) on treating a payment as late and imposing finance charges apply for 24 days after the closing date of the billing cycle.

B. If a creditor has adopted reasonable procedures designed to ensure that periodic statements for an account under an open-end consumer credit plan that does not provide a grace period are mailed or delivered to consumers no later than five days after the closing date of the billing cycle, the date on which a payment must be received in order to avoid being treated as late for purposes of § 226.5(b)(2)(ii)(B)(*2*) must be no less than 19 days after the closing date of the billing cycle. Similarly, in these circumstances, the limitation in § 226.5(b)(2)(ii)(B)(*2*) on treating a payment as late for any purpose applies for 19 days after the closing date of the billing cycle.

2. *Treating a payment as late for any purpose.* Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, assessing a late fee or any other fee, initiating collection activities, or terminating benefits (such as rewards on purchases) based on the consumer's failure to make a payment within a specified amount of time or by a specified date. The prohibitions in § 226.5(b)(2)(ii)(A)(*2*) and (b)(2)(B)(*2*)(*ii*) on treating a payment as late for any purpose apply only during the 21-day or 14-day period (as applicable) following mailing or delivery of the periodic statement stating the due date for that payment and only if the required minimum periodic payment is received within that period. For example:

i. Assume that, for a credit card account under an open-end (not home-secured) consumer credit plan, a periodic statement mailed on April 4 states that a required minimum periodic payment of $50 is due on April 25. If the card issuer does not receive any payment on or before April 25, § 226.5(b)(2)(ii)(A)(*2*) does not prohibit the card issuer from treating the required minimum periodic payment as late.

ii. Same facts as in paragraph i. above. On April 20, the card issuer receives a payment of $30 and no additional payment is received on or before April 25. Section 226.5(b)(2)(ii)(A)(*2*) does not prohibit the card issuer from treating the required minimum periodic payment as late.

iii. Same facts as in paragraph i. above. On May 4, the card issuer has not received the $50 required minimum periodic payment that was due on April 25. The periodic statement mailed on May 4 states that a required minimum periodic payment of $150 is due on May 25. Section 226.5(b)(2)(ii)(A)(*2*) does not permit the card issuer to treat the $150 required minimum periodic payment as late until April 26. However, the card issuer may continue to treat the $50 required minimum periodic payment as late during this period.

iv. Assume that, for an account under an open-end consumer credit plan that does not provide a grace period, a periodic statement mailed on September 10 states that a required minimum periodic payment of $100 is due on September 24. If the creditor does not receive any payment on or before September 24, § 226.5(b)(2)(ii)(B)(*2*)(*ii*) does not prohibit the creditor from treating the required minimum periodic payment as late.

3. *Grace periods.* i. *Definition of grace period.* For purposes of § 226.5(b)(2)(ii)(B), "grace period" means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. A deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time is not a grace period for purposes of § 226.5(b)(2)(ii)(B). Similarly, a period following the payment due date during which a late payment fee will not be imposed is not a grace period for purposes of § 226.5(b)(2)(ii)(B). *See* comments 7(b)(11)–1, 7(b)(11)–2, and 54(a)(1)–2.

ii. *Applicability of § 226.5(b)(2)(ii)(B)(1).* Section 226.5(b)(2)(ii)(B)(*1*) applies if an account is eligible for a grace period when the periodic statement is mailed or delivered. Section 226.5(b)(2)(ii)(B)(*1*) does not require the creditor to provide a grace period or prohibit the creditor from placing limitations and conditions on a grace period to the extent consistent with § 226.5(b)(2)(ii)(B) and § 226.54. *See* comment 54(a)(1)–1. Furthermore, the prohibition in § 226.5(b)(2)(ii)(B)(*1*)(*ii*) applies only during the 21-day period following mailing or delivery of the periodic statement and applies only when the creditor receives a payment within that 21-day period that satisfies the terms of the grace period.

iii. *Example.* Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth of the month. Assume also that, under the terms of the account, the balance at the end of a billing cycle must be paid in full by the following payment due date in order for the account to remain eligible for the grace period. At the end of the April billing cycle, the balance on the account is $500. The grace period applies to the $500 balance because the balance for the March billing cycle was paid in full on April 25. Accordingly, § 226.5(b)(2)(ii)(B)(*1*)(*i*) requires the creditor to have reasonable procedures designed to ensure that the periodic statement reflecting the $500 balance is mailed or delivered on or before May 4. Furthermore, § 226.5(b)(2)(ii)(B)(*1*)(*ii*) requires the creditor to have reasonable procedures designed to ensure that the creditor does not impose finance charges as a result of the loss of the grace period if a $500 payment is received on or before May 25. However, if the creditor receives a payment of $300 on April 25, § 226.5(b)(2)(ii)(B)(*1*)(*ii*) would not prohibit the creditor from imposing finance charges as a result of the loss of the grace period (to the extent permitted by § 226.54).

4. *Application of § 226.5(b)(2)(ii) to charge card and charged-off accounts.* i. *Charge card accounts.* For purposes of § 226.5(b)(2)(ii)(A)(*1*), the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan is the date the card issuer is required to disclose on the periodic statement pursuant to § 226.7(b)(11)(i)(A). Because § 226.7(b)(11)(ii) provides that § 226.7(b)(11)(i) does not apply to periodic statements provided solely for charge card accounts, § 226.5(b)(2)(ii)(A)(*1*) also does not apply to the mailing or delivery of periodic statements provided solely for such accounts. However, in these circumstances, § 226.5(b)(2)(ii)(A)(*2*) requires the card issuer to have reasonable procedures designed to ensure that a payment is not treated as late for any purpose during the 21-day period following mailing or delivery of the statement. A card issuer that complies with § 226.5(b)(2)(ii)(A) as discussed above with respect to a charge card account has also complied with § 226.5(b)(2)(ii)(B)(*2*). Section 226.5(b)(2)(ii)(B)(*1*) does not apply to charge card accounts because, for purposes of § 226.5(b)(2)(ii)(B), a grace period is a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate and, consistent

with § 226.2(a)(15)(iii), charge card accounts do not impose a finance charge based on a periodic rate.

ii. *Charged-off accounts.* For purposes of § 226.5(b)(2)(ii)(A)(*1*), the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan is the date the card issuer is required to disclose on the periodic statement pursuant to § 226.7(b)(11)(i)(A). Because § 226.7(b)(11)(ii) provides that § 226.7(b)(11)(i) does not apply to periodic statements provided for charged-off accounts where full payment of the entire account balance is due immediately, § 226.5(b)(2)(ii)(A)(*1*) also does not apply to the mailing or delivery of periodic statements provided solely for such accounts. Furthermore, although § 226.5(b)(2)(ii)(A)(*2*) requires the card issuer to have reasonable procedures designed to ensure that a payment is not treated as late for any purpose during the 21-day period following mailing or delivery of the statement, § 226.5(b)(2)(ii)(A)(*2*) does not prohibit a card issuer from continuing to treat prior payments as late during that period. *See* comment 5(b)(2)(ii)–2. Similarly, although § 226.5(b)(2)(ii)(B)(*2*) applies to open-end consumer credit accounts in these circumstances, § 226.5(b)(2)(ii)(B)(*2*)(*ii*) does not prohibit a creditor from continuing treating prior payments as late during the 14-day period following mailing or delivery of a periodic statement. Section 226.5(b)(2)(ii)(B)(*1*) does not apply to charged-off accounts where full payment of the entire account balance is due immediately because such accounts do not provide a grace period.

* * * * *

§ 226.5a—Credit and Charge Card Applications and Solicitations

* * * * *

5a(b) Required disclosures.

1. *Tabular format.* Provisions in § 226.5a(b) and its commentary provide that certain information must appear or is permitted to appear in a table. The tabular format is required for § 226.5a(b) disclosures given pursuant to § 226.5a(c), (d)(2), (e)(1) and (f). The tabular format does not apply to oral disclosures given pursuant to § 226.5a(d)(1). (See § 226.5a(a)(2).)

2. *Accuracy.* Rules concerning accuracy of the disclosures required by § 226.5a(b), including variable rate disclosures, are stated in § 226.5a(c)(2), (d)(3), and (e)(4), as applicable.

5a(b)(1) Annual percentage rate.

1. *Variable-rate accounts—definition.* For purposes of § 226.5a(b)(1), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (*See* the commentary to § 226.6(b)(4)(ii) for examples of variable-rate plans.)

2. *Variable-rate accounts—fact that rate varies and how the rate will be determined.* In describing how the applicable rate will be determined, the card issuer must identify in the table the type of index or formula used, such as the prime rate. In describing the index, the issuer may not include in the table details about the index. For example, if the issuer uses a prime rate, the issuer must disclose the rate as a "prime rate" and may not disclose in the table other details about the prime rate, such as the fact that it is the highest prime rate published in the *Wall Street Journal* two business days before the closing date of the statement for each billing period. The issuer may not disclose in the table the current value of the index (such as that the prime rate is currently 7.5 percent) or the amount of the margin or spread added to the index or formula in setting the applicable rate. A card issuer may not disclose any applicable limitations on rate increases or decreases in the table, such as describing that the rate will not go below a certain rate or higher than a certain rate. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose the fact that the applicable rate varies and how it is determined.)

3. *Discounted initial rates.* i. *Immediate proximity.* If the term "introductory" is in the same phrase as the introductory rate, as that term is defined in § 226.16(g)(2)(ii), it will be deemed to be in immediate proximity of the listing. For example, an issuer that uses the phrase "introductory balance transfer APR X percent" has used the word "introductory" within the same phrase as the rate. (*See* Sample G–10(C) for guidance on how to disclose clearly and conspicuously the expiration date of the introductory rate and the rate that will apply after the introductory rate expires, if an introductory rate is disclosed in the table.)

ii. *Subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 226.9(c) and the limitations in § 226.55, does not, by itself, make that rate an introductory rate. For example, assume an issuer discloses an annual percentage rate for purchases of 12.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently increases the annual percentage rate for purchases to 15.99%, pursuant to a change-in-terms notice provided under § 226.9(c), the 12.99% is not an introductory rate.

iii. *More than one introductory rate.* If more than one introductory rate may apply to a particular balance in succeeding periods, the term "introductory" need only be used to describe the first introductory rate. For example, if an issuer offers a rate of 8.99% on purchases for six months, 10.99% on purchases for the following six months, and 14.99% on purchases after the first year, the term "introductory" need only be used to describe the 8.99% rate.

4. *Premium initial rates—subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 226.9(c) and the limitations in § 226.55 (as applicable), does not, by itself, make that rate a premium initial rate. For example, assume an issuer discloses an annual percentage rate for purchases of 18.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently reduces the annual percentage rate for purchases to 15.99%, the 18.99% is not a premium initial rate. If the rate decrease is the result of a change from a non-variable rate to a variable rate or from a variable rate to a non-variable rate, see comments 9(c)(2)(v)–3 and 9(c)(2)(v)–4 for guidance on the notice requirements under § 226.9(c).

5. *Increased penalty rates.* i. *In general.* For rates that are not introductory rates or employee preferential rates, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose the increased rate that would apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. The description of the specific event or events that may result in an increased rate should be brief. For example, if an issuer may increase a rate to the penalty rate because the consumer does not make the minimum payment by 5 p.m., Eastern Time, on its payment due date, the issuer should describe this circumstance in the table as "make a late payment." Similarly, if an issuer may increase a rate that applies to a particular balance because the account is more than 60 days late, the issuer should describe this circumstance in the table as "make a late payment." An issuer may not distinguish between the events that may result in an increased rate for existing balances and the events that may result in an increased rate for new transactions. (*See* Samples G–10(B) and G–10(C) (in the row labeled "Penalty APR and When it Applies") for additional guidance on the level of detail in which the specific event or events should be described.) The description of how long the increased rate will remain in effect also should be brief. If a card issuer reserves the right to apply the increased rate to any balances indefinitely, to the extent permitted by §§ 226.55(b)(4) and 226.59, the issuer should disclose that the penalty rate may apply indefinitely. The card issuer may not disclose in the table any limitations imposed by §§ 226.55(b)(4) and 226.59 on the duration of increased rates. For example, if the issuer generally provides that the increased rate will apply until the consumer makes twelve timely consecutive required minimum periodic payments, except to the extent that §§ 226.55(b)(4) and 226.59 apply, the issuer should disclose that the penalty rate will apply until the consumer makes twelve consecutive timely minimum payments. (*See* Samples G–10(B) and G–10(C) (in the row labeled "Penalty APR and When it Applies") for additional guidance on the level of detail which the issuer should use to describe how long the increased rate will remain in effect.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by § 226.5a(b)(1)(iv)(A) if the issuer uses the format shown in Samples G–10(B) and G–10(C) (in the row labeled "Penalty APR and When it Applies") to disclose this information.

ii. *Introductory rates—general.* An issuer is required to disclose directly beneath the table the circumstances under which an introductory rate, as that term is defined in § 226.16(g)(2)(ii), may be revoked, and the rate that will apply after the revocation. This information about revocation of an introductory rate and the rate that will apply after revocation must be provided even if the rate that will apply after the introductory rate is revoked is the rate that would have applied at the end of the promotional period. In a variable-rate account, the rate that would have applied at the end of the promotional period is a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in § 226.5a(c)(2) or (e)(4). In describing the rate that will apply after revocation of the introductory rate, if the rate that will apply after revocation of the introductory rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an introductory rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as "standard APRs," the issuer may refer to the "standard APR" when describing the rate that will apply after revocation of an introductory rate. (*See* Sample G–10(C) in the disclosure labeled "Loss of Introductory APR" directly beneath the table.) The description of the circumstances in which an introductory rate could be revoked should be brief. For example, if an issuer may increase an introductory rate because the account is more than 60 days late, the issuer should describe this circumstance directly beneath the table as "make a late payment." In addition, if the circumstances in which an introductory rate could be revoked are already listed elsewhere in the table, the issuer is not required to repeat the circumstances again, but may refer to those circumstances in a clear and conspicuous manner. For example, if the circumstances in which an introductory rate could be revoked are the same as the event or events that may trigger a "penalty rate" as described in § 226.5a(b)(1)(iv)(A), the issuer may refer to the actions listed in the Penalty APR row, in describing the circumstances in which the introductory rate could be revoked. (*See* Sample G–10(C) in the disclosure labeled "Loss of Introductory APR" directly beneath the table for additional guidance on the level of detail in which to describe the circumstances in which an introductory rate could be revoked.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by § 226.5a(b)(1)(iv)(B) if the issuer uses the format shown in Sample G–10(C) to disclose this information.

iii. *Introductory rates—limitations on revocation.* Issuers that are disclosing an introductory rate are prohibited by § 226.55 from increasing or revoking the introductory rate before it expires unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for the payment. In making the required disclosure pursuant to § 226.5a(b)(1)(iv)(B), issuers should describe this circumstance directly beneath the table as "make a late payment."

iv. *Employee preferential rates.* An issuer is required to disclose directly beneath the table the circumstances under which an employee preferential rate may be revoked, and the rate that will apply after the revocation. In describing the rate that will apply after revocation of the employee preferential rate, if the rate that will apply after revocation of the employee preferential rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an employee preferential rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as "standard APRs," the issuer may refer to the "standard APR" when describing the rate that will apply after revocation of an employee preferential rate. The description of the circumstances in which an employee preferential rate could be revoked should be brief. For example, if an issuer may increase an employee preferential rate based upon termination of the employee's employment relationship with the issuer or a third party, issuers may describe this circumstance as "if your employment with [issuer or third party] ends."

6. *Rates that depend on consumer's creditworthiness.* i. *In general.* The card issuer, at its option, may disclose the possible rates that may apply as either specific rates, or a range of rates. For example, if there are three possible rates that may apply (9.99, 12.99 or 17.99 percent), an issuer may disclose specific rates (9.99, 12.99 or 17.99 percent) or a range of rates (9.99 to 17.99 percent). The card issuer may not disclose only the lowest, highest or median rate that could apply. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose a range of rates.)

ii. *Penalty rates.* If the rate is a penalty rate, as described in § 226.5a(b)(1)(iv), the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply. For example, if the penalty rate could be up to 28.99 percent, but the issuer may impose a penalty rate that is less than that rate depending on factors at the time the penalty rate is imposed, the issuer may disclose the penalty rate as "up to" 28.99 percent. The issuer also must include a statement that the penalty rate for which the consumer may qualify will depend on the consumer's creditworthiness, and other factors if applicable.

iii. *Other factors.* Section 226.5a(b)(1)(v) applies even if other factors are used in combination with a consumer's creditworthiness to determine the rate for which a consumer may qualify at account opening. For example, § 226.5a(b)(1)(v) would apply if the issuer considers the type of purchase the consumer is making at the time the consumer opens the account, in combination with the consumer's creditworthiness, to determine the rate for which the consumer may qualify at account opening. If other factors are considered, the issuer should amend the statement about creditworthiness, to indicate that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness and other factors. Nonetheless, § 226.5a(b)(1)(v) does not apply if a consumer's creditworthiness is not one of the factors that will determine the rate for which the consumer may qualify at account opening (for example, if the rate is based solely on the type of purchase that the consumer is making at the time the consumer opens the account, or is based solely on whether the consumer has other banking relationships with the card issuer).

7. *Rate based on another rate on the account.* In some cases, one rate may be based on another rate on the account. For example, assume that a penalty rate as described in § 226.5a(b)(1)(iv)(A) is determined by adding 5 percentage points to the current purchase rate, which is 10 percent. In this example, the card issuer in disclosing the penalty rate must disclose 15 percent as the current penalty rate. If the purchase rate is a variable rate, then the penalty rate also is a variable rate. In that case, the card issuer also must disclose the fact that the penalty rate may vary and how the rate is determined, such as "This APR may vary with the market based on the Prime Rate." In describing the penalty rate, the issuer shall not disclose in the table the amount of the margin or spread added to the current purchase rate to determine the penalty rate, such as describing that the penalty rate is determined by adding 5 percentage points to the purchase rate. (*See* § 226.5a(b)(1)(i) and comment 5a(b)(1)–2 for further guidance on describing a variable rate.)

8. *Rates.* The only rates that shall be disclosed in the table are annual percentage rates determined under § 226.14(b). Periodic rates shall not be disclosed in the table.

9. *Deferred interest or similar transactions.* An issuer offering a deferred interest or similar plan, such as a promotional program that provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, may not disclose a 0% rate as the rate applicable to deferred interest or similar transactions if there are any circumstances under which the consumer will be obligated for interest on such transactions for the deferred interest or similar period.

5a(b)(2) Fees for issuance or availability.

1. *Membership fees.* Membership fees for opening an account must be disclosed under this paragraph. A membership fee to join an organization that provides a credit or charge card as a privilege of membership must be disclosed only if the card is issued automatically upon membership. Such a fee shall not be disclosed in the table if membership results merely in eligibility to apply for an account.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) shall not be disclosed in the table if the basic account may be opened without paying such fees. Issuing a card to each primary cardholder (not authorized users) is considered a basic membership privilege and fees for additional cards, beyond the first card on the account, must be disclosed as a fee for issuance or availability.

Thus, a fee to obtain an additional card on the account beyond the first card (so that each cardholder would have his or her own card) must be disclosed in the table as a fee for issuance or availability under § 226.5a(b)(2). This fee must be disclosed even if the fee is optional; that is, if the fee is charged only if the cardholder requests one or more additional cards. (*See* the available credit disclosure in § 226.5a(b)(14).)

3. *One-time fees.* Disclosure of non-periodic fees is limited to fees related to opening the account, such as one-time membership or participation fees, or an application fee that is excludable from the finance charge under § 226.4(c)(1). The following are examples of fees that shall not be disclosed in the table:

i. Fees for reissuing a lost or stolen card.

ii. Statement reproduction fees.

4. *Waived or reduced fees.* If fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be disclosed in the table in addition to the required fees if the card issuer also discloses how long the reduced fees or waivers will remain in effect in accordance with the requirements of §§ 226.9(c)(2)(v)(B) and 226.55(b)(1).

5. *Periodic fees and one-time fees.* A card issuer disclosing a periodic fee must disclose the amount of the fee, how frequently it will be imposed, and the annualized amount of the fee. A card issuer disclosing a non-periodic fee must disclose that the fee is a one-time fee. (*See* Sample G–10(C) for guidance on how to meet these requirements.)

5a(b)(3) Fixed finance charge; minimum interest charge.

1. *Example of brief statement. See* Samples G–10(B) and G–10(C) for guidance on how to provide a brief description of a minimum interest charge.

2. *Adjustment of $1.00 threshold amount.* Consistent with § 226.5a(b)(3), the Board will publish adjustments to the $1.00 threshold amount, as appropriate.

5a(b)(4) Transaction charges.

1. *Charges imposed by person other than card issuer.* Charges imposed by a third party, such as a seller of goods, shall not be disclosed in the table under this section; the third party would be responsible for disclosing the charge under § 226.9(d)(1).

2. *Foreign transaction fees.* A transaction charge imposed by the card issuer for the use of the card for purchases includes any fee imposed by the issuer for purchases in a foreign currency or that take place outside the United States or with a foreign merchant. (See comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency, or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and G–10(C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and G–10(C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

5a(b)(5) Grace period.

1. *How grace period disclosure is made.* The card issuer must state any conditions on the applicability of the grace period. An issuer, however, may not disclose under § 226.5a(b)(5) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period. Some issuers may offer a grace period on all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 226.5a(b)(5) requires that the issuer disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month." However, other issuers may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 226.5a(b)(5) requires the issuer to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

2. *No grace period.* The issuer may use the following language to describe that no grace period on any purchases is offered, as applicable: "We will begin charging interest on purchases on the transaction date."

3. *Grace period on some purchases.* If the issuer provides a grace period on some types of purchases but no grace period on others, the issuer may combine and revise the language in comments 5a(b)(5)–1 and –2 as appropriate to describe to which types of purchases a grace period applies and to which types of purchases no grace period is offered.

5a(b)(6) Balance computation method.

1. *Form of disclosure.* In cases where the card issuer uses a balance computation method that is identified by name in § 226.5a(g), the card issuer must disclose below the table only the name of the method. In cases where the card issuer uses a balance computation method that is not identified by name in § 226.5a(g), the disclosure below the table must clearly explain the method in as much detail as set forth in the descriptions of balance methods in § 226.5a(g). The explanation need not be as detailed as that required for the disclosures under § 226.6(b)(4)(i)(D).

2. *Determining the method.* In determining which balance computation method to disclose for purchases, the card issuer must assume that a purchase balance will exist at the end of any grace period. Thus, for example, if the average daily balance method will include new purchases only if purchase balances are not paid within the grace period, the card issuer would disclose the name of the average daily balance method that includes new purchases. The card issuer must not assume the existence of a purchase balance, however, in making other disclosures under § 226.5a(b).

5a(b)(7) Statement on charge card payments.

1. *Applicability and content.* The disclosure that charges are payable upon receipt of the periodic statement is applicable only to charge card accounts. In making this disclosure, the card issuer may make such modifications as are necessary to more accurately reflect the circumstances of repayment under the account. For example, the disclosure might read, "Charges are due and payable upon receipt of the periodic statement and must be paid no later than 15 days after receipt of such statement."

5a(b)(8) Cash advance fee.

1. *Content. See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the cash advance fee.

2. *Foreign cash advances.* Cash advance fees required to be disclosed under § 226.5a(b)(8) include any charge imposed by the card issuer for cash advances in a foreign currency or that take place outside the United States or with a foreign merchant. (*See* comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and (C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and (C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

3. *ATM fees.* An issuer is not required to disclose pursuant to § 226.5a(b)(8) any charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system.

5a(b)(9) Late payment fee.

1. *Applicability.* The disclosure of the fee for a late payment includes only those fees that will be imposed for actual, unanticipated late payments. (*See* the commentary to § 226.4(c)(2) for additional guidance on late payment fees. *See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the late payment fee.)

5a(b)(10) Over-the-limit fee.

1. *Applicability.* The disclosure of fees for exceeding a credit limit does not include fees for other types of default or for services related to exceeding the limit. For example, no disclosure is required of fees for reinstating credit privileges or fees for the dishonor of checks on an account that, if paid, would cause the credit limit to be exceeded. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the over-the-limit fee.)

5a(b)(13) Required insurance, debt cancellation, or debt suspension coverage.

1. *Content. See* Sample G–10(B) for guidance on how to comply with the requirements in § 226.5a(b)(13).

5a(b)(14) Available credit.

1. *Calculating available credit.* If the 15 percent threshold test is met, the issuer must disclose the available credit excluding optional fees, and the available credit including optional fees. In calculating the available credit to disclose in the table, the issuer must consider all fees for the issuance or availability of credit described in § 226.5a(b)(2), and any security deposit, that will be imposed and charged to the account when the account is opened, such as one-time issuance and set-up fees. For example, in calculating the available credit, issuers must consider the first year's annual fee and the first month's maintenance fee (as applicable) if they are charged to the account on the first billing statement. In calculating the amount of the available credit including optional fees, if optional fees could be charged multiple times, the issuer shall assume that the optional fee is only imposed once. For example, if an issuer charges a fee for each additional card issued on the account, the issuer in calculating the amount of the available credit including optional fees may assume that the cardholder requests only one additional card. In disclosing the available credit, the issuer shall round down the available credit amount to the nearest whole dollar.

2. *Content. See* Sample G–10(C) for guidance on how to provide the disclosure required by § 226.5a(b)(14) clearly and conspicuously.

5a(b)(15) Web site reference.

1. *Content. See* Samples G–10(B) and G–10(C) for guidance on disclosing a reference to the Web site established by the Board and a statement that consumers may obtain on the Web site information about shopping for and using credit card accounts.

* * * * *

§ 226.6—Account-Opening Disclosures

* * * * *

6(b) Rules affecting open-end (not home-secured) plans.

* * * * *

6(b)(2) Required disclosures for account-opening table for open-end (not home-secured) plans.

6(b)(2)(iii) Fixed finance charge; minimum interest charge.

1. *Example of brief statement. See* Samples G–17(B), G–17(C), and G–17(D) for guidance on how to provide a brief description of a minimum interest charge.

6(b)(2)(v) Grace period.

1. *Grace period.* Creditors must state any conditions on the applicability of the grace period. A creditor, however, may not disclose under § 226.6(b)(2)(v) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. Some creditors may offer a grace period on all types of transactions under which interest will not be charged on transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 226.6(b)(2)(v) requires that the creditor disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on your account if you pay your entire balance by the due date each month." However, other creditors may offer a grace period on all types of transactions under which interest may be charged on transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 226.6(b)(2)(v) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

2. *No grace period.* Creditors may use the following language to describe that no grace period is offered, as applicable: "We will begin charging interest on [applicable transactions] on the transaction date."

3. *Grace period on some features.* Some creditors do not offer a grace period on cash advances and balance transfers, but offer a grace period for all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 226.6(b)(2)(v) requires that the creditor disclose the grace period for purchases and the conditions for its applicability, and the lack of a grace period for cash advances and balance transfers using the following language, or substantially similar language, as applicable: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date." However, other creditors may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 226.6(a)(2)(v) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period. Also, some creditors may not offer a grace period on cash advances and balance transfers, and will begin charging interest on these transactions from a date other than the transaction date, such as the posting date. In these circumstances, § 226.6(a)(2)(v) requires the creditor to amend the above disclosure language to be accurate.

6(b)(2)(vi) Balance computation method.

1. *Use of same balance computation method for all features.* In cases where the balance for each feature is computed using the same balance computation method, a single identification of the name of the balance computation method is sufficient. In this case, a creditor may use an appropriate name listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") to satisfy the requirement to disclose the name of the method for all features on the account, even though the name only refers to purchases. For example, if a creditor uses the average daily balance method including new transactions for all features, a creditor may use the name "*average daily balance (including new purchases)*" listed in § 226.5a(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, in this situation, a creditor may revise the balance computation names listed in § 226.5a(g) to refer more broadly to all new credit transactions, such as using the language "new transactions" or "current transactions" (*e.g.,* "*average daily balance (including new transactions)*"), rather than simply referring to new purchases when the same method is used to calculate the balances for all features of the account. *See* Samples G–17(B) and G–17(C) for guidance on how to disclose the balance computation method where the same method is used for all features on the account.

2. *Use of balance computation names in § 226.5a(g) for balances other than purchases.* The names of the balance computation methods listed in § 226.5a(g) describe balance computation methods for purchases. When a creditor is disclosing the name of the balance computation methods separately for each feature, in using the names listed in § 226.5a(g) to satisfy the requirements of § 226.6(b)(2)(vi) for features other than purchases, a creditor must revise the names listed in § 226.5a(g) to refer to the other features. For example, when disclosing the name of the balance computation method applicable to cash advances, a creditor must revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, a creditor must revise the name listed in § 226.5a(g)(ii) to disclose it as "*average daily balance (excluding new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. *See* comment 6(b)(2)(vi)–1 for guidance on the use of one balance computation name when the same balance computation method is used for all features on the account.

6(b)(2)(xiii) Available credit.

1. *Right to reject the plan.* Creditors may use the following language to describe consumers' right to reject a plan after receiving account-opening disclosures: "You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges."

* * * * *

§ 226.7—Periodic Statement

* * * * *

7(b) Rules affecting open-end (not home-secured) plans.

1. *Deferred interest or similar transactions.* Creditors offer a variety of payment plans for purchases that permit consumers to avoid interest charges if the purchase balance is paid in full by a certain date. "Deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary. The following provides guidance for a deferred interest or similar plan where, for example, no interest charge is imposed on a $500 purchase made in January if the $500 balance is paid by July 31.

i. *Annual percentage rates.* Under § 226.7(b)(4), creditors must disclose each annual percentage rate that may be used to compute the interest charge. Under some plans with a deferred interest or similar feature, if the deferred interest balance is not paid by a certain date, July 31 in this example, interest charges applicable to the billing cycles between the date of purchase in January and July 31 may be imposed. Annual percentage rates that may apply to the deferred interest balance ($500 in this example) if the balance is not paid in full by July 31 must appear on periodic statements for the billing cycles between the date of purchase and July 31. However, if the consumer does not pay the deferred interest balance by July 31, the creditor is not required to identify, on the periodic statement disclosing the interest charge for the deferred interest balance, annual percentage rates that have been disclosed in previous billing cycles between the date of purchase and July 31.

ii. *Balances subject to periodic rates.* Under § 226.7(b)(5), creditors must disclose the balances subject to interest during a billing cycle. The deferred interest balance ($500 in this example) is not subject to interest for billing cycles between the date of purchase and July 31 in this example. Periodic statements sent for those billing cycles should not include the deferred interest balance in the balance disclosed under § 226.7(b)(5). This amount must be separately disclosed on periodic statements and identified by a term other than the term used to identify the balance disclosed under § 226.7(b)(5) (such as "deferred interest balance"). During any billing cycle in which an interest charge on the deferred interest balance is debited to the account, the balance disclosed under § 226.7(b)(5) should include the deferred interest balance for that billing cycle.

iii. *Amount of interest charge.* Under § 226.7(b)(6)(ii), creditors must disclose interest charges imposed during a billing cycle. For some deferred interest purchases, the creditor may impose interest from the date of purchase if the deferred interest balance ($500 in this example) is not paid in full by July 31 in this example, but otherwise will not impose interest for billing cycles between the date of purchase and July 31. Periodic statements for billing cycles preceding July 31 in this example should not include in the interest charge disclosed under § 226.7(b)(6)(ii) the amounts a consumer may owe if the deferred interest balance is not paid in full by July 31. In this example, the February periodic statement should not identify as interest charges interest attributable to the $500 January purchase. This amount must be separately disclosed on periodic statements and identified by a term other than "interest charge" (such as "contingent interest charge" or "deferred interest charge"). The interest charge on a deferred interest balance should be reflected on the periodic statement under § 226.7(b)(6)(ii) for the billing cycle in which the interest charge is debited to the account.

iv. *Due date to avoid obligation for finance charges under a deferred interest or similar program.* Section 226.7(b)(14) requires disclosure on periodic statements of the date by which any outstanding balance subject to a deferred interest or similar program must be paid in full in order to avoid the obligation for finance charges on such balance. This disclosure must appear on the front of any page of each periodic statement issued during the deferred interest period beginning with the first periodic statement issued during the deferred interest period that reflects the deferred interest or similar transaction.

7(b)(1) Previous balance.

1. *Credit balances.* If the previous balance is a credit balance, it must be disclosed in such a way so as to inform the consumer that it is a credit balance, rather than a debit balance.

2. *Multifeatured plans.* In a multifeatured plan, the previous balance may be disclosed either as an aggregate balance for the account or as separate balances for each feature (for example, a previous balance for purchases and a previous balance for cash advances). If separate balances are disclosed, a total previous balance is optional.

3. *Accrued finance charges allocated from payments.* Some open-end credit plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and reflected as an increase in the obligation. In such a plan, the previous balance need not reflect finance charges accrued since the last payment.

7(b)(2) Identification of transactions.

1. *Multifeatured plans.* Creditors may, but are not required to, arrange transactions by feature (such as disclosing purchase transactions separately from cash advance transactions). Pursuant to § 226.7(b)(6), however, creditors must group all fees and all interest separately from transactions and may not disclose any fees or interest charges with transactions.

2. *Automated teller machine (ATM) charges imposed by other institutions in shared or interchange systems.* A charge imposed on the cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system and included by the terminal-operating institution in the amount of the transaction need not be separately disclosed on the periodic statement.

7(b)(3) Credits.

1. *Identification—sufficiency.* The creditor need not describe each credit by type (returned merchandise, rebate of finance charge, *etc.*)—"credit" would suffice—except if the creditor is using the periodic statement to satisfy the billing-error correction notice requirement. (*See* the commentary to § 226.13(e) and (f).) Credits may be distinguished from transactions in any way that is clear and conspicuous, for example, by use of debit and credit columns or by use of plus signs and/or minus signs.

2. *Date.* If only one date is disclosed (that is, the crediting date as required by the regulation), no further identification of that date is necessary. More than one date may be disclosed for a single entry, as long as it is clear which date represents the date on which credit was given.

3. *Totals.* A total of amounts credited during the billing cycle is not required.

7(b)(4) Periodic rates.

1. *Disclosure of periodic interest rates—whether or not actually applied.* Except as provided in § 226.7(b)(4)(ii), any periodic interest rate that may be used to compute finance charges, expressed as and labeled "Annual Percentage Rate," must be disclosed whether or not it is applied during the billing cycle. For example:

i. If the consumer's account has both a purchase feature and a cash advance feature, the creditor must disclose the annual percentage rate for each, even if the consumer only makes purchases on the account during the billing cycle.

ii. If the annual percentage rate varies (such as when it is tied to a particular index), the creditor must disclose each annual percentage rate in effect during the cycle for which the statement was issued.

2. *Disclosure of periodic interest rates required only if imposition possible.* With regard to the periodic interest rate disclosure (and its corresponding annual percentage rate), only rates that could have been imposed during the billing cycle reflected on the periodic statement need to be disclosed. For example:

i. If the creditor is changing annual percentage rates effective during the next billing cycle (either because it is changing terms or because of a variable-rate plan), the annual percentage rates required to be disclosed under § 226.7(b)(4) are only those in effect during the billing cycle reflected on the periodic statement. For example, if the annual percentage rate applied during May was 18%, but the creditor will increase the rate to 21% effective June 1, 18% is the only required disclosure under § 226.7(b)(4) for the periodic statement reflecting the May account activity.

ii. If the consumer has an overdraft line that might later be expanded upon the consumer's request to include secured advances, the rates for the secured advance feature need not be given until such time as the consumer has requested and received access to the additional feature.

iii. If annual percentage rates applicable to a particular type of transaction changed after a certain date and the old rate is only being applied to transactions that took place prior to that date, the creditor need not continue to disclose the old rate for those consumers that have no outstanding balances to which that rate could be applied.

3. *Multiple rates—same transaction.* If two or more periodic rates are applied to the same balance for the same type of transaction (for example, if the interest charge consists of a monthly periodic interest rate of 1.5%

applied to the outstanding balance and a required credit life insurance component calculated at 0.1% per month on the same outstanding balance), creditors must disclose the periodic interest rate, expressed as an 18% annual percentage rate and the range of balances to which it is applicable. Costs attributable to the credit life insurance component must be disclosed as a fee under § 226.7(b)(6)(iii).

4. *Fees.* Creditors that identify fees in accordance with § 226.7(b)(6)(iii) need not identify the periodic rate at which a fee would accrue if the fee remains unpaid. For example, assume a fee is imposed for a late payment in the previous cycle and that the fee, unpaid, would be included in the purchases balance and accrue interest at the rate for purchases. The creditor need not separately disclose that the purchase rate applies to the portion of the purchases balance attributable to the unpaid fee.

5. *Ranges of balances. See* comment 6(b)(4)(i)(B)–1. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

6. *Deferred interest transactions. See* comment 7(b)–1.i.

7(b)(5) Balance on which finance charge computed.

1. *Split rates applied to balance ranges.* If split rates were applied to a balance because different portions of the balance fall within two or more balance ranges, the creditor need not separately disclose the portions of the balance subject to such different rates since the range of balances to which the rates apply has been separately disclosed. For example, a creditor could disclose a balance of $700 for purchases even though a monthly periodic rate of 1.5% applied to the first $500, and a monthly periodic rate of 1% to the remainder. This option to disclose a combined balance does not apply when the interest charge is computed by applying the split rates to each day's balance (in contrast, for example, to applying the rates to the average daily balance). In that case, the balances must be disclosed using any of the options that are available if two or more daily rates are imposed. (*See* comment 7(b)(5)–4.)

2. *Monthly rate on average daily balance.* Creditors may apply a monthly periodic rate to an average daily balance.

3. *Multifeatured plans.* In a multifeatured plan, the creditor must disclose a separate balance (or balances, as applicable) to which a periodic rate was applied for each feature. Separate balances are not required, however, merely because a grace period is available for some features but not others. A total balance for the entire plan is optional. This does not affect how many balances the creditor must disclose—or may disclose—within each feature. (See, for example, comments 7(b)(5)–4 and 7(b)(4)–5.)

4. *Daily rate on daily balance.* i. If a finance charge is computed on the balance each day by application of one or more daily periodic interest rates, the balance on which the interest charge was computed may be disclosed in any of the following ways for each feature:

ii. If a single daily periodic interest rate is imposed, the balance to which it is applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. The sum of the daily balances during the billing cycle.

D. The average daily balance during the billing cycle, in which case the creditor may, at its option, explain that the average daily balance is or can be multiplied by the number of days in the billing cycle and the periodic rate applied to the product to determine the amount of interest.

iii. If two or more daily periodic interest rates may be imposed, the balances to which the rates are applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. Two or more average daily balances, each applicable to the daily periodic interest rates imposed for the time that those rates were in effect. The creditor may, at its option, explain that interest is or may be determined by (*1*) multiplying each of the average balances by the number of days in the billing cycle (or if the daily rate varied during the cycle, by multiplying by the number of days the applicable rate was in effect), (*2*) multiplying each of the results by the applicable daily periodic rate, and (*3*) adding these products together.

5. *Information to compute balance.* In connection with disclosing the interest charge balance, the creditor need not give the consumer all of the information necessary to compute the balance if that information is not otherwise required to be disclosed. For example, if current purchases are included from the date they are posted to the account, the posting date need not be disclosed.

6. *Non-deduction of credits.* The creditor need not specifically identify the total dollar amount of credits not deducted in computing the finance charge balance. Disclosure of the amount of credits not deducted is accomplished by listing the credits (§ 226.7(b)(3)) and indicating which credits will not be deducted in determining the balance (for example, "credits after the 15th of the month are not deducted in computing the interest charge.").

7. *Use of one balance computation method explanation when multiple balances disclosed.* Sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation or a single identification of the name of the balance computation method is sufficient. Sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(b)(5)–1. In these cases, one explanation or a single identification of the name of the balance computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method). In these cases, a creditor may use an appropriate name listed in § 226.5a(g) (*e.g.,* "*average daily balance (including new purchases)*") as the single identification of the name of the balance computation method applicable to all features, even though the name only refers to purchases. For example, if a creditor uses the average daily balance method including new transactions for all features, a creditor may use the name "*average daily balance (including new purchases)*" listed in § 226.5a(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, in this situation, a creditor may revise the balance computation names listed in § 226.5a(g) to refer more broadly to all new credit transactions, such as using the language "new transactions" or "current transactions" (*e.g.,* "*average daily balance (including new transactions)*"), rather than simply referring to new purchases, when the same method is used to calculate the balances for all features of the account.

8. *Use of balance computation names in § 226.5a(g) for balances other than purchases.* The names of the balance computation methods listed in § 226.5a(g) describe balance computation methods for purchases. When a creditor is disclosing the name of the balance computation methods separately for each feature, in using the names listed in § 226.5a(g) to satisfy the requirements of § 226.7(b)(5) for features other than purchases, a creditor must revise the names listed in § 226.5a(g) to refer to the other features. For example, when disclosing the name of the balance computation method applicable to cash advances, a creditor must revise the name listed in § 226.5a(g)(i) to disclose it as "*average daily balance (including new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, a creditor must revise the name listed in § 226.5a(g)(ii) to disclose it as "*average daily balance (excluding new cash advances)*" when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. *See* comment 7(b)(5)–7 for guidance on the use of one balance computation method explanation or name when multiple balances are disclosed.

7(b)(6) Charges imposed.

1. *Examples of charges. See* commentary to § 226.6(b)(3).

2. *Fees.* Costs attributable to periodic rates other than interest charges shall be disclosed as a fee. For example, if a consumer obtains credit life insurance that is calculated at 0.1% per month on an outstanding balance and a monthly interest rate of 1.5% applies to the same balance, the creditor must

disclose the dollar cost attributable to interest as an "interest charge" and the credit insurance cost as a "fee."

3. *Total fees and interest charged for calendar year to date.*

i. *Monthly statements.* Some creditors send monthly statements but the statement periods do not coincide with the calendar month. For creditors sending monthly statements, the following comply with the requirement to provide calendar year-to-date totals.

A. A creditor may disclose calendar-year-to-date totals at the end of the calendar year by separately aggregating finance charges attributable to periodic interest rates and fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2011 through January 9, 2012, may disclose the separate year-to-date totals for interest charged and fees imposed from January 10, 2011, through January 9, 2012. Alternatively, the creditor could provide a statement for the cycle ending January 9, 2012, showing the separate year-to-date totals for interest charged and fees imposed January 1, 2011, through December 31, 2011.

B. A creditor may disclose calendar-year-to-date totals at the end of the calendar year by separately aggregating finance charges attributable to periodic interest rates and fees for 12 monthly cycles, starting with the period that begins during December and finishing with the period that begins during November. For example, if statement periods begin on the 10th day of each month, the statement covering November 10, 2011 through December 9, 2011, may disclose the separate year-to-date totals for interest charged and fees imposed from December 10, 2010, through December 9, 2011.

ii. *Quarterly statements.* Creditors issuing quarterly statements may apply the guidance set forth for monthly statements to comply with the requirement to provide calendar year-to-date totals on quarterly statements.

4. *Minimum charge in lieu of interest.* A minimum charge imposed if a charge would otherwise have been determined by applying a periodic rate to a balance except for the fact that such charge is smaller than the minimum must be disclosed as a fee. For example, assume a creditor imposes a minimum charge of $1.50 in lieu of interest if the calculated interest for a billing period is less than that minimum charge. If the interest calculated on a consumer's account for a particular billing period is 50 cents, the minimum charge of $1.50 would apply. In this case, the entire $1.50 would be disclosed as a fee; the periodic statement would reflect the $1.50 as a fee, and $0 in interest.

5. *Adjustments to year-to-date totals.* In some cases, a creditor may provide a statement for the current period reflecting that fees or interest charges imposed during a previous period were waived or reversed and credited to the account. Creditors may, but are not required to, reflect the adjustment in the year-to-date totals, nor, if an adjustment is made, to provide an explanation about the reason for the adjustment. Such adjustments should not affect the total fees or interest charges imposed for the current statement period.

6. *Acquired accounts.* An institution that acquires an account or plan must include, as applicable, fees and charges imposed on the account or plan prior to the acquisition in the aggregate disclosures provided under § 226.7(b)(6) for the acquired account or plan. Alternatively, the institution may provide separate totals reflecting activity prior and subsequent to the account or plan acquisition. For example, a creditor that acquires an account or plan on August 12 of a given calendar year may provide one total for the period from January 1 to August 11 and a separate total for the period beginning on August 12.

7. *Account upgrades.* A creditor that upgrades, or otherwise changes, a consumer's plan to a different open-end credit plan must include, as applicable, fees and charges imposed for that portion of the calendar year prior to the upgrade or change in the consumer's plan in the aggregate disclosures provided pursuant to § 226.7(b)(6) for the new plan. For example, assume a consumer has incurred $125 in fees for the calendar year to date for a retail credit card account, which is then replaced by a cobranded credit card account also issued by the creditor. In this case, the creditor must reflect the $125 in fees incurred prior to the replacement of the retail credit card account in the calendar year-to-date totals provided for the cobranded credit card account. Alternatively, the institution may provide two separate totals reflecting activity prior and subsequent to the plan upgrade or change.

7(b)(7) Change-in-terms and increased penalty rate summary for open-end (not home-secured) plans.

1. *Location of summary tables.* If a change-in-terms notice required by § 226.9(c)(2) is provided on or with a periodic statement, a tabular summary of key changes must appear on the front of the statement. Similarly, if a notice of a rate increase due to delinquency or default or as a penalty required by § 226.9(g)(1) is provided on or with a periodic statement, information required to be provided about the increase, presented in a table, must appear on the front of the statement.

7(b)(8) Grace period.

1. *Terminology.* In describing the grace period, the language used must be consistent with that used on the account-opening disclosure statement. (*See* § 226.5(a)(2)(i).)

2. *Deferred interest transactions. See* comment 7(b)–1.iv.

3. *Limitation on the imposition of finance charges in § 226.54.* Section 226.7(b)(8) does not require a card issuer to disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period.

7(b)(9) Address for notice of billing errors.

1. *Terminology.* The periodic statement should indicate the general purpose for the address for billing-error inquiries, although a detailed explanation or particular wording is not required.

2. *Telephone number.* A telephone number, e-mail address, or Web site location may be included, but the mailing address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. The address is deemed to be clear and conspicuous if a precautionary instruction is included that telephoning or notifying the creditor by e-mail or Web site will not preserve the consumer's billing rights, unless the creditor has agreed to treat billing error notices provided by electronic means as written notices, in which case the precautionary instruction is required only for telephoning.

7(b)(10) Closing date of billing cycle; new balance.

1. *Credit balances. See* comment 7(b)(1)–1.

2. *Multifeatured plans.* In a multifeatured plan, the new balance may be disclosed for each feature or for the plan as a whole. If separate new balances are disclosed, a total new balance is optional.

3. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, the new balance need not reflect finance charges accrued since the last payment.

7(b)(11) Due date; late payment costs.

1. *Informal periods affecting late payments.* Although the terms of the account agreement may provide that a card issuer may assess a late payment fee if a payment is not received by a certain date, the card issuer may have an informal policy or practice that delays the assessment of the late payment fee for payments received a brief period of time after the date upon which a card issuer has the contractual right to impose the fee. A card issuer must disclose the due date according to the legal obligation between the parties, and need not consider the end of an informal "courtesy period" as the due date under § 226.7(b)(11).

2. *Assessment of late payment fees.* Some state or other laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. In addition, a card issuer may be restricted by the terms of the account agreement from imposing a late payment fee until a payment is late for a certain number of days following a due date. For example, assume a payment is due on March 10 and the account agreement or state law provides that a late payment fee cannot be assessed before March 21. A card issuer must disclose the due date under the terms of the legal obligation (March 10 in this example), and not a date different than the due date, such as when the card issuer is restricted by the account agreement or state or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date (March 21 in this example). Consumers' rights under state law to avoid the imposition of late payment fees during a specified period following a due date are unaffected by the disclosure requirement. In this example, the card issuer would disclose March 10 as the due date for purposes of § 226.7(b)(11), but could not, under state law, assess a late payment fee before March 21.

3. *Fee or rate triggered by multiple events.* If a late payment fee or penalty rate is triggered after multiple events, such as two late payments in six months, the card issuer may, but is not required to, disclose the late payment and penalty rate disclosure each month. The disclosures must be included on any periodic statement for which a late payment could trigger the late payment fee or penalty rate, such as after the consumer made one late payment in this example. For example, if a cardholder has already made one late payment, the disclosure must be on each statement for the following five billing cycles.

4. *Range of late fees or penalty rates.* A card issuer that imposes a range of late payment fees or rates on a credit card account under an open-end (not home-secured) consumer credit plan may state the highest fee or rate along with an indication lower fees or rates could be imposed. For example, a phrase indicating the late payment fee could be "up to $29" complies with this requirement.

5. *Penalty rate in effect.* If the highest penalty rate has previously been triggered on an account, the card issuer may, but is not required to, delete the amount of the penalty rate and the warning that the rate may be imposed for an untimely payment, as not applicable. Alternatively, the card issuer may, but is not required to, modify the language to indicate that the penalty rate has been increased due to previous late payments (if applicable).

6. *Same day each month.* The requirement that the due date be the same day each month means that the due date must generally be the same numerical date. For example, a consumer's due date could be the 25th of every month. In contrast, a due date that is the same relative date but not numerical date each month, such as the third Tuesday of the month, generally would not comply with this requirement. However, a consumer's due date may be the last day of each month, even though that date will not be the same numerical date. For example, if a consumer's due date is the last day of each month, it will fall on February 28th (or February 29th in a leap year) and on August 31st.

7. *Change in due date.* A creditor may adjust a consumer's due date from time to time provided that the new due date will be the same numerical date each month on an ongoing basis. For example, a creditor may choose to honor a consumer's request to change from a due date that is the 20th of each month to the 5th of each month, or may choose to change a consumer's due date from time to time for operational reasons. See comment 2(a)(4)–3 for guidance on transitional billing cycles.

8. *Billing cycles longer than one month.* The requirement that the due date be the same day each month does not prohibit billing cycles that are two or three months, provided that the due date for each billing cycle is on the same numerical date of the month. For example, a creditor that establishes two-month billing cycles could send a consumer periodic statements disclosing due dates of January 25, March 25, and May 25.

9. *Payment due date when the creditor does not accept or receive payments by mail.* If the due date in a given month falls on a day on which the creditor does not receive or accept payments by mail and the creditor is required to treat a payment received the next business day as timely pursuant to § 226.10(d), the creditor must disclose the due date according to the legal obligation between the parties, not the date as of which the creditor is permitted to treat the payment as late. For example, assume that the consumer's due date is the 4th of every month and the creditor does not accept or receive payments by mail on Thursday, July 4. Pursuant to § 226.10(d), the creditor may not treat a mailed payment received on the following business day, Friday, July 5, as late for any purpose. The creditor must nonetheless disclose July 4 as the due date on the periodic statement and may not disclose a July 5 due date.

7(b)(12) Repayment disclosures.

1. *Rounding.* In disclosing on the periodic statement the minimum payment total cost estimate, the estimated monthly payment for repayment in 36 months, the total cost estimate for repayment in 36 months, and the savings estimate for repayment in 36 months under § 226.7(b)(12)(i) or (b)(12)(ii) as applicable, a card issuer, at its option, must either round these disclosures to the nearest whole dollar or to the nearest cent. Nonetheless, an issuer's rounding for all of these disclosures must be consistent. An issuer may round all of these disclosures to the nearest whole dollar when disclosing them on the periodic statement, or may round all of these disclosures to the nearest cent. An issuer may not, however, round some of the disclosures to the nearest whole dollar, while rounding other disclosures to the nearest cent.

Paragraph 7(b)(12)(i)(F).

1. *Minimum payment repayment estimate disclosed on the periodic statement is three years or less.* Section 226.7(b)(12)(i)(F)(*2*)(i) provides that a credit card issuer is not required to provide the disclosures related to repayment in 36 months if the minimum payment repayment estimate disclosed under § 226.7(b)(12)(i)(B) after rounding is 3 years or less. For example, if the minimum payment repayment estimate is 2 years 6 months to 3 years 5 months, issuers would be required under § 226.7(b)(12)(i)(B) to disclose that it would take 3 years to pay off the balance in full if making only the minimum payment. In these cases, an issuer would not be required to disclose the 36-month disclosures on the periodic statement because the minimum payment repayment estimate disclosed to the consumer on the periodic statement (after rounding) is 3 years or less.

7(b)(12)(iv) Provision of information about credit counseling services.

1. *Approved organizations.* Section 226.7(b)(12)(iv)(A) requires card issuers to provide information regarding at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in, at the card issuer's option, either the state in which the billing address for the account is located or the state specified by the consumer. A card issuer does not satisfy the requirements in § 226.7(b)(12)(iv)(A) by providing information regarding providers that have been approved pursuant to 11 U.S.C. 111(a)(2) to offer personal financial management courses.

2. *Information regarding approved organizations.* i. *Provision of information obtained from United States Trustee or bankruptcy administrator.* A card issuer complies with the requirements of § 226.7(b)(12)(iv)(A) if, through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii), it provides the consumer with information obtained from the United States Trustee or a bankruptcy administrator, such as information obtained from the Web site operated by the United States Trustee. Section 226.7(b)(12)(iv)(A) does not require a card issuer to provide information that is not available from the United States Trustee or a bankruptcy administrator. If, for example, the Web site address for an organization approved by the United States Trustee is not available from the Web site operated by the United States Trustee, a card issuer is not required to provide a Web site address for that organization. However, § 226.7(b)(12)(iv)(B) requires the card issuer to, at least annually, update the information it provides for consistency with the information provided by the United States Trustee or a bankruptcy administrator.

ii. *Provision of information consistent with request of approved organization.* If requested by an approved organization, a card issuer may at its option provide, in addition to the name of the organization obtained from the United States Trustee or a bankruptcy administrator, another name used by that organization through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii). In addition, if requested by an approved organization, a card issuer may at its option provide through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii) a street address, telephone number, or Web site address for the organization that is different than the street address, telephone number, or Web site address obtained from the United States Trustee or a bankruptcy administrator. However, if requested by an approved organization, a card issuer must not provide information regarding that organization through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii).

iii. *Information regarding approved organizations that provide credit counseling services in a language other than English.* A card issuer may at its option provide through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii) information regarding approved organizations that provide credit counseling services in languages other than English. In the alternative, a card issuer may at its option state that such information is available from the Web site operated by the United States Trustee. Disclosing this Web site address does not by itself constitute a statement that organizations have been approved by the United States Trustee for purposes of comment 7(b)(12)(iv)–2.iv.

iv. *Statements regarding approval by the United States Trustee or a bankruptcy* *administrator.* Section 226.7(b)(12)(iv) does not require a card issuer to disclose through the toll-free number disclosed pursuant to § 226.7(b)(12)(i) or (b)(12)(ii) that organizations have been approved by the United States Trustee or a bankruptcy administrator. However, if a card issuer chooses to make such a disclosure, § 226.7(b)(12)(iv) requires that the card issuer also disclose that:

A. The United States Trustee or a bankruptcy administrator has determined that the organizations meet the minimum requirements for nonprofit pre-bankruptcy budget and credit counseling;

B. The organizations may provide other credit counseling services that have not been reviewed by the United States Trustee or a bankruptcy administrator; and

C. The United States Trustee or the bankruptcy administrator does not endorse or recommend any particular organization.

3. *Automated response systems or devices.* At their option, card issuers may use toll-free telephone numbers that connect consumers to automated systems, such as an interactive voice response system, through which consumers may obtain the information required by § 226.7(b)(12)(iv) by inputting information using a touch-tone telephone or similar device.

4. *Toll-free telephone number.* A card issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer. For automated systems, the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer if it is listed as one of the options in the first menu of options given to the consumer, such as "Press or say '3' if you would like information about credit counseling services." If the automated system permits callers to select the language in which the call is conducted and in which information is provided, the menu to select the language may precede the menu with the option to receive information about accessing credit counseling services.

5. *Third parties.* At their option, card issuers may use a third party to establish and maintain a toll-free telephone number for use by the issuer to provide the information required by § 226.7(b)(12)(iv).

6. *Web site address.* When making the repayment disclosures on the periodic statement pursuant to § 226.7(b)(12), a card issuer at its option may also include a reference to a Web site address (in addition to the toll-free telephone number) where its customers may obtain the information required by § 226.7(b)(12)(iv), so long as the information provided on the Web site complies with § 226.7(b)(12)(iv). The Web site address disclosed must take consumers directly to the Web page where information about accessing credit counseling may be obtained. In the alternative, the card issuer may disclose the Web site address for the Web page operated by the United States Trustee where consumers may obtain information about approved credit counseling organizations. Disclosing this Web site address does not by itself constitute a statement that organizations have been approved by the United States Trustee for purposes of comment 7(b)(12)(iv)–2.iv.

7. *Advertising or marketing information.* If a consumer requests information about credit counseling services, the card issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the information required by § 226.7(b)(12)(iv). Educational materials that do not solicit business are not considered advertisements or marketing materials for this purpose. Examples:

i. *Toll-free telephone number.* As described in comment 7(b)(12)(iv)–4, an issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 226.7(b)(12)(iv) through that toll-free telephone number is prominently disclosed to the consumer. Once the consumer selects the option to receive the information required by § 226.7(b)(12)(iv), the issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the required information.

ii. *Web page.* If the issuer discloses a link to a Web site address as part of the disclosures pursuant to comment 7(b)(12)(iv)–6, the issuer may not provide advertisements or marketing materials (except for providing the name of the issuer) on the Web page accessed by the address prior to providing the information required by § 226.7(b)(12)(iv).

7(b)(12)(v) Exemptions.

1. *Billing cycle where paying the minimum payment due for that billing cycle will pay the outstanding balance on the account for that billing cycle.* Under § 226.7(b)(12)(v)(C), a card issuer is exempt from the repayment disclosure requirements set forth in § 226.7(b)(12) for a particular billing cycle where paying the minimum payment due for that billing cycle will pay the outstanding balance on the account for that billing cycle. For example, if the entire outstanding balance on an account for a particular billing cycle is $20 and the minimum payment is $20, an issuer would not need to comply with the repayment disclosure requirements for that particular billing cycle. In addition, this exemption would apply to a charged-off account where payment of the entire account balance is due immediately.

7(b)(13) Format requirements.

1. *Combined deposit account and credit account statements.* Some financial institutions provide information about deposit account and open-end credit account activity on one periodic statement. For purposes of providing disclosures on the front of the first page of the periodic statement pursuant to § 226.7(b)(13), the first page of such a combined statement shall be the page on which credit transactions first appear.

* * * * *

§ 226.9—Subsequent Disclosure Requirements

* * * * *

9(b) Disclosures for supplemental credit access devices and additional features.

* * * * *

9(b)(3) Checks that access a credit card account.

9(b)(3)(i) Disclosures.

1. *Front of the page containing the checks.* The following would comply with the requirement that the tabular disclosures provided pursuant to § 226.9(b)(3) appear on the front of the page containing the checks:

i. Providing the tabular disclosure on the front of the first page on which checks appear, for an offer where checks are provided on multiple pages;

ii. Providing the tabular disclosure on the front of a mini-book or accordion booklet containing the checks; or

iii. Providing the tabular disclosure on the front of the solicitation letter, when the checks are printed on the front of the same page as the solicitation letter even if the checks can be separated by the consumer from the solicitation letter using perforations.

2. *Combined disclosures for checks and other transactions subject to the same terms.* A card issuer may include in the tabular disclosure provided pursuant to § 226.9(b)(3) disclosures regarding the terms offered on non-check transactions, provided that such transactions are subject to the same terms that are required to be disclosed pursuant to § 226.9(b)(3)(i) for the checks that access a credit card account. However, a card issuer may not include in the table information regarding additional terms that are not required disclosures for checks that access a credit card account pursuant to § 226.9(b)(3).

Paragraph 9(b)(3)(i)(D).

1. *Grace period.* A creditor may not disclose under § 226.9(b)(3)(i)(D) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 226.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. Some creditors may offer a grace period on credit extended by the use of an access check under which interest will not be charged on the check transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 226.9(b)(3)(i)(D) requires that the creditor disclose the grace period using the following language, or substantially similar language, as applicable: "Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on check transactions if you pay your entire balance by the due date each month." However, other creditors may offer a grace period on check transactions under which interest may be charged on check transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 226.9(b)(3)(i)(D) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period. Creditors may use the following language to describe that no grace period on check transactions is offered, as applicable: "We will begin

charging interest on these checks on the transaction date.”

9(c) Change in terms.

* * * * *

9(c)(2) Rules affecting open-end (not home-secured) plans.

1. *Changes initially disclosed.* Except as provided in § 226.9(g)(1), no notice of a change in terms need be given if the specific change is set forth initially consistent with any applicable requirements, such as rate or fee increases upon expiration of a specific period of time that were disclosed in accordance with § 226.9(c)(2)(v)(B) or rate increases under a properly disclosed variable-rate plan in accordance with § 226.9(c)(2)(v)(C). In contrast, notice must be given if the contract allows the creditor to increase a rate or fee at its discretion.

2. *State law issues.* Some issues are not addressed by § 226.9(c)(2) because they are controlled by state or other applicable laws. These issues include the types of changes a creditor may make, to the extent otherwise permitted by this regulation.

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change affects any of the terms described in § 226.9(c)(2)(i), unless an exception under § 226.9(c)(2)(v) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 28-day grace period on purchases and the consumer will have fewer days during the billing cycle change. *See also* § 226.7(b)(11)(i)(A) regarding the general requirement that the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan must be the same day each month.

4. *Relationship to § 226.9(b).* If a creditor adds a feature to the account on the type of terms otherwise required to be disclosed under § 226.6, the creditor must satisfy: The requirement to provide the finance charge disclosures for the added feature under § 226.9(b); and any applicable requirement to provide a change-in-terms notice under § 226.9(c), including any advance notice that must be provided. For example, if a creditor adds a balance transfer feature to an account more than 30 days after account-opening disclosures are provided, it must give the finance charge disclosures for the balance transfer feature under § 226.9(b) as well as comply with the change-in-terms notice requirements under § 226.9(c), including providing notice of the change at least 45 days prior to the effective date of the change. Similarly, if a creditor makes a balance transfer offer on finance charge terms that are higher than those previously disclosed for balance transfers, it would also generally be required to provide a change-in-terms notice at least 45 days in advance of the effective date of the change. A creditor may provide a single notice under § 226.9(c) to satisfy the notice requirements of both paragraphs (b) and (c) of § 226.9. For checks that access a credit card account subject to the disclosure requirements in § 226.9(b)(3), a creditor is not subject to the notice requirements under § 226.9(c) even if the applicable rate or fee is higher than those previously disclosed for such checks. Thus, for example, the creditor need not wait 45 days before applying the new rate or fee for transactions made using such checks, but the creditor must make the required disclosures on or with the checks in accordance with § 226.9(b)(3).

9(c)(2)(i) Changes where written advance notice is required.

1. *Affected consumers.* Change-in-terms notices need only go to those consumers who may be affected by the change. For example, a change in the periodic rate for check overdraft credit need not be disclosed to consumers who do not have that feature on their accounts. If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 226.5(d) to determine the number of notices that must be given.

2. *Timing—effective date of change.* The rule that the notice of the change in terms be provided at least 45 days before the change takes effect permits mid-cycle changes when there is clearly no retroactive effect, such as the imposition of a transaction fee. Any change in the balance computation method, in contrast, would need to be disclosed at least 45 days prior to the billing cycle in which the change is to be implemented.

3. *Changes agreed to by the consumer. See also* comment 5(b)(1)(i)–6.

4. *Form of change-in-terms notice.* Except if § 226.9(c)(2)(iv) applies, a complete new set of the initial disclosures containing the changed term complies with § 226.9(c)(2)(i) if the change is highlighted on the disclosure statement, or if the disclosure statement is accompanied by a letter or some other insert that indicates or draws attention to the term being changed.

5. *Security interest change—form of notice.* A creditor must provide a description of any security interest it is acquiring under § 226.9(c)(2)(iv). A copy of the security agreement that describes the collateral securing the consumer's account may also be used as the notice, when the term change is the addition of a security interest or the addition or substitution of collateral.

6. *Examples. See* comment 55(a)–1 and 55(b)–3 for examples of how a card issuer that is subject to § 226.55 may comply with the timing requirements for notices required by § 226.9(c)(2)(i).

9(c)(2)(iii) Charges not covered by § 226.6(b)(1) and (b)(2).

1. *Applicability.* Generally, if a creditor increases any component of a charge, or introduces a new charge, that is imposed as part of the plan under § 226.6(b)(3) but is not required to be disclosed as part of the account-opening summary table under § 226.6(b)(1) and (b)(2), the creditor must either, at its option (i) provide at least 45 days' written advance notice before the change becomes effective to comply with the requirements of § 226.9(c)(2)(i), or (ii) provide notice orally or in writing, or electronically if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure. (*See* the commentary under § 226.5(a)(1)(iii) regarding disclosure of such changes in electronic form.) For example, a fee for expedited delivery of a credit card is a charge imposed as part of the plan under § 226.6(b)(3) but is not required to be disclosed in the account-opening summary table under § 226.6(b)(1) and (b)(2). If a creditor changes the amount of that expedited delivery fee, the creditor may provide written advance notice of the change to affected consumers at least 45 days before the change becomes effective. Alternatively, the creditor may provide oral or written notice, or electronic notice if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that the consumer would be likely to notice the disclosure. (*See* comment 5(b)(1)(ii)–1 for examples of disclosures given at a time and in a manner that the consumer would be likely to notice them.)

9(c)(2)(iv) Disclosure requirements.

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 226.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 226.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor generally must provide a notice as otherwise required under § 226.9(c) even if the variable rate at the time of the change is higher than the non-variable rate. However, a creditor is not required to provide a notice under § 226.9(c) if the creditor provides the disclosures required by § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a variable rate to a lower non-variable rate. Similarly, a creditor is not required to provide a notice under § 226.9(c) when changing a variable rate to a lower non-variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or State statute or regulation. Finally, a creditor is not required to provide a notice under § 226.9(c) when changing a variable rate to a lower non-variable rate in order to comply with § 226.55(b)(4).

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a

non-variable rate to a variable rate, the creditor generally must provide a notice as otherwise required under § 226.9(c) even if the non-variable rate is higher than the variable rate at the time of the change. However, a creditor is not required to provide a notice under § 226.9(c) if the creditor provides the disclosures required by § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a non-variable rate to a lower variable rate. Similarly, a creditor is not required to provide a notice under § 226.9(c) when changing a non-variable rate to a lower variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or State statute or regulation. Finally, a creditor is not required to provide a notice under § 226.9(c) when changing a non-variable rate to a lower variable rate in order to comply with § 226.55(b)(4). *See* comment 55(b)(2)–4 regarding the limitations in § 226.55(b)(2) on changing the rate that applies to a protected balance from a non-variable rate to a variable rate.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 226.6(b)(1) and (b)(2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of "Either $5 or 3% of the transaction amount, whichever is greater. (Max: $100)," and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: "Either $10 or 3% of the transaction amount, whichever is greater. (Max: $100)."

7. *Combining a notice described in § 226.9(c)(2)(iv) with a notice described in § 226.9(g)(3).* If a creditor is required to provide a notice described in § 226.9(c)(2)(iv) and a notice described in § 226.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when the late payment fee on a credit card account is being increased, and the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 226.9(h).

9. *Clear and conspicuous standard. See* comment 5(a)(1)-1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

10. *Terminology. See* § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* i. *In general.* Section 226.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 226.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to "a decline in your creditworthiness" or "a decline in your credit score." Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as "a change in market conditions." In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. However, § 226.9(c)(2)(iv)(A)(*8*) requires that the notice specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase.

ii. *Example.* Assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed. However, the late payment on the credit card account on which the rate increase is being imposed must be specifically disclosed even if that late payment also contributed to the decline in the consumer's credit score.

9(c)(2)(v) Notice not required.

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit except as otherwise required by § 226.9(c)(2)(vi).

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges.

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* i. *Skipped or reduced payments.* If a credit program allows consumers to skip or reduce one or more payments during the year, no notice of the change in terms is required either prior to the reduction in payments or upon resumption of the higher payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original payment schedule, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the skip feature may also be used to notify the consumer of the resumption of the original payment schedule, either by stating explicitly when the higher resumes or by indicating the duration of the skip option. Language such as "You may skip your October payment" may serve as the change-in-terms notice.

ii. *Temporary reductions in interest rates or fees.* If a credit program involves temporary reductions in an interest rate or fee, no notice of the change in terms is required either prior to the reduction or upon resumption of the original rate or fee if these features are disclosed in advance in accordance with the requirements of § 226.9(c)(2)(v)(B). Otherwise, the creditor must give notice prior to resuming the original rate or fee, even though no notice is required prior to the reduction. The notice provided prior to resuming the original rate or fee must comply with the timing requirements of § 226.9(c)(2)(i) and the content and format requirements of § 226.9(c)(2)(iv)(A), (B) (if applicable), (C) (if applicable), and (D). *See* comment 55(b)–3 for guidance regarding the application of § 226.55 in these circumstances.

3. *Changing from a variable rate to a non-variable rate. See* comment 9(c)(2)(iv)–3.

4. *Changing from a non-variable rate to a variable rate. See* comment 9(c)(2)(iv)–4.

5. *Temporary rate or fee reductions offered by telephone.* The timing requirements of § 226.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 226.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) or the imposition of a fee that will be in effect for a specified period of time (a temporary fee) if:

i. The consumer accepts the offer of the temporary rate or temporary fee by telephone;

ii. The creditor permits the consumer to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's balances reinstated for 45 days after the creditor mails or delivers the written disclosures required by § 226.9(c)(2)(v)(B), except that the creditor need not permit the consumer to reject a temporary rate or temporary fee offer if the rate or rates or fee that will apply following expiration of the temporary rate do not exceed the rate or rates or fee that applied immediately prior to commencement of the temporary rate or temporary fee; and

iii. The disclosures required by § 226.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's account reinstated, if applicable, are disclosed to the consumer as part of the temporary rate or temporary fee offer.

6. *First listing.* The disclosures required by § 226.9(c)(2)(v)(B)(*1*) are only required to be provided in close proximity and in equal prominence to the first listing of the temporary rate or fee in the disclosure provided to the consumer. For purposes of § 226.9(c)(2)(v)(B), the first statement of the temporary rate or fee is the most prominent listing on the front side of the first page of the disclosure. If the temporary rate or fee does not appear on the front side of the first page of the disclosure, then the first listing of the temporary rate or fee is the most prominent listing of the temporary rate on the subsequent pages of the disclosure. For advertising requirements for promotional rates, see § 226.16(g).

7. *Close proximity—point of sale.* Creditors providing the disclosures required by § 226.9(c)(2)(v)(B) of this section in person in connection with financing the purchase of goods or services may, at the creditor's option, disclose the annual percentage rate or fee that would apply after expiration of the period on a separate page or document from the temporary rate or fee and the length of the period, provided that the disclosure of the annual percentage rate or fee that would apply after the expiration of the period is equally prominent to, and is provided at the same time as, the disclosure of the temporary rate or fee and length of the period.

8. *Disclosure of annual percentage rates.* If a rate disclosed pursuant to § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) is a variable rate, the creditor must disclose the fact that the rate may vary and how the rate is determined. For example, a creditor could state "After October 1, 2009, your APR will be 14.99%. This APR will vary with the market based on the Prime Rate."

9. *Deferred interest or similar programs.* If the applicable conditions are met, the exception in § 226.9(c)(2)(v)(B) applies to deferred interest or similar promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of this comment and § 226.9(c)(2)(v)(B), "deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary. For such programs, a creditor must disclose pursuant to § 226.9(c)(2)(v)(B)(*1*) the length of the deferred interest period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. Examples of language that a creditor may use to make the required disclosures under § 226.9(c)(2)(v)(B)(*1*) include:

i. "No interest if paid in full in 6 months. If the balance is not paid in full in 6 months, interest will be imposed from the date of purchase at a rate of 15.99%."

ii. "No interest if paid in full by December 31, 2010. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 15%."

10. *Relationship between §§ 226.9(c)(2)(v)(B) and 226.6(b).* A disclosure of the information described in § 226.9(c)(2)(v)(B)(*1*) provided in the account-opening table in accordance with § 226.6(b) complies with the requirements of § 226.9(c)(2)(v)(B)(*2*), if the listing of the introductory rate in such tabular disclosure also is the first listing as described in comment 9(c)(2)(v)–6.

11. *Disclosure of the terms of a workout or temporary hardship arrangement.* In order for the exception in § 226.9(c)(2)(v)(D) to apply, the disclosure provided to the consumer pursuant to § 226.9(c)(2)(v)(D)(*2*) must set forth:

i. The annual percentage rate that will apply to balances subject to the workout or temporary hardship arrangement;

ii. The annual percentage rate that will apply to such balances if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement;

iii. Any reduced fee or charge of a type required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(xi), or (b)(2)(xii) that will apply to balances subject to the workout or temporary hardship arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement;

iv. Any reduced minimum periodic payment that will apply to balances subject to the workout or temporary hardship arrangement, as well as the minimum periodic payment that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement; and

v. If applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement.

12. *Index not under creditor's control. See* comment 55(b)(2)–2 for guidance on when an index is deemed to be under a creditor's control.

13. *Temporary rates—relationship to § 226.59.* i. *General.* Section 226.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 226.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 226.59, a creditor reinstates a temporary rate that had been revoked, the card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 226.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. *See* § 226.55 and the associated commentary for guidance on the permissibility and applicability of rate increases.

ii. *Example.* A consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1, 2011. The annual percentage rate applicable to purchases is 18%. The card issuer offers the consumer a 15% rate on purchases made between January 1, 2012 and January 1, 2014. Prior to January 1, 2012, the card issuer discloses, in accordance with § 226.9(c)(2)(v)(B), that the rate on purchases made during that period will increase to the standard 18% rate on January 1, 2014. In March 2012, the consumer makes a payment that is ten days late. The card issuer, upon providing 45 days' advance notice of the change under § 226.9(g), increases the rate on new purchases to 18% effective as of June 1, 2012. On December 1, 2012, the issuer performs a review of the consumer's account in accordance with § 226.59. Based on that review, the card issuer is required to reduce the rate to the original 15% temporary rate as of January 15, 2013. On January 1, 2014, the card issuer may increase the rate on purchases to 18%, as previously disclosed prior to January 1, 2012, without providing an additional notice to the consumer.

* * * * *

9(e) Disclosures upon renewal of credit or charge card.

* * * * *

10. *Disclosure of changes in terms required to be disclosed pursuant to § 226.6(b)(1) and (b)(2).* Clear and conspicuous disclosure of a changed term on a periodic statement provided to a consumer prior to renewal of the consumer's account constitutes prior disclosure of that term for purposes of § 226.9(e)(1). Card issuers should refer to § 226.9(c)(2) for additional timing, content, and formatting requirements that apply to certain changes in terms under that paragraph.

* * * * *

§ 226.10—Payments

* * * * *

10(b) Specific requirements for payments.

* * * * *

2. *Payment methods promoted by creditor.* If a creditor promotes a specific payment method, any payments made via that method (prior to any cut-off time specified by the creditor, to the extent permitted by § 226.10(b)(2)) are generally conforming payments for purposes of § 226.10(b). For example:

i. If a creditor promotes electronic payment via its Web site (such as by disclosing on the Web site itself that payments may be made via the Web site), any payments made via the creditor's Web site prior to the creditor's specified cut-off time, if any, would generally be conforming payments for purposes of § 226.10(b).

ii. If a creditor promotes payment by telephone (for example, by including the option to pay by telephone in a menu of options provided to consumers at a toll-free number disclosed on its periodic statement), payments made by telephone would generally be conforming payments for purposes of § 226.10(b).

iii. If a creditor promotes in-person payments, for example by stating in an advertisement that payments may be made in person at its branch locations, such in-person payments made at a branch or office of the creditor generally would be conforming payments for purposes of § 226.10(b).

iv. If a creditor promotes that payments may be made through an unaffiliated third party, such as by disclosing the Web site address of that third party on the periodic statement, payments made via that third party's Web site generally would be conforming payments for purposes of § 226.10(b). In contrast, if a customer service representative of the creditor confirms to a consumer that payments may be made via an unaffiliated third party, but the creditor does not otherwise promote that method of payment, § 226.10(b) permits the creditor to treat payments made via such third party as nonconforming payments in accordance with § 226.10(b)(4).

* * * * *

10(e) Limitations on fees related to method of payment.

* * * * *

4. *Creditor.* For purposes of § 226.10(e), the term "creditor" includes a third party that collects, receives, or processes payments on behalf of a creditor. For example:

i. Assume that a creditor uses a service provider to receive, collect, or process on the creditor's behalf payments made through the creditor's Web site or made through an automated telephone payment service. In these circumstances, the service provider would be considered a creditor for purposes of paragraph (e).

ii. Assume that a consumer pays a fee to a money transfer or payment service in order to transmit a payment to the creditor on the consumer's behalf. In these circumstances, the money transfer or payment service would not be considered a creditor for purposes of paragraph (e).

iii. Assume that a consumer has a checking account at a depository institution. The consumer makes a payment to the creditor from the checking account using a bill payment service provided by the depository institution. In these circumstances, the depository institution would not be considered a creditor for purposes of paragraph (e).

* * * * *

10(f) Changes by card issuer.

* * * * *

3. *Safe harbor.* i. *General.* A card issuer may elect not to impose a late fee or finance charge on a consumer's account for the 60-day period following a change in address for receiving payment or procedures for handling cardholder payments which could reasonably be expected to cause a material delay in crediting of a payment to the consumer's account. For purposes of § 226.10(f), a late fee or finance charge is not imposed if the fee or charge is waived or removed, or an amount equal to the fee or charge is credited to the account.

ii. *Retail location.* For a material change in the address of a retail location or procedures for handling cardholder payments at a retail location, a card issuer may impose a late fee or finance charge on a consumer's account for a late payment during the 60-day period following the date on which the change took effect. However, if a card issuer is notified by a consumer no later than 60 days after the card issuer transmitted the first periodic statement that reflects the late fee or finance charge for a late payment that the late payment was caused by such change, the card issuer must waive or remove any late fee or finance charge, or credit an amount equal to any late fee or finance charge, imposed on the account during the 60-day period following the date on which the change took effect.

* * * * *

§ 226.12—Special Credit Card Provisions

* * * * *

12(c) Right of cardholder to assert claims or defenses against card issuer.

* * * * *

4. *Method of calculating the amount of credit outstanding.* The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. However, when a consumer has asserted a claim or defense against a creditor pursuant to § 226.12(c), the creditor must apply any payment or other credit in a manner that avoids or minimizes any reduction in the amount subject to that claim or defense. Accordingly, to determine the amount of credit outstanding for purposes of this section, payments and other credits must be applied first to amounts other than the disputed transaction.

i. For examples of how to comply with §§ 226.12 and 226.53 for credit card accounts under an open-end (not home-secured) consumer credit plan, see comment 53–3.

ii. For other types of credit card accounts, creditors may, at their option, apply payments consistent with § 226.53 and comment 53–3. In the alternative, payments and other credits may be applied to: Late charges in the order of entry to the account; then to finance charges in the order of entry to the account; and then to any debits other than the transaction subject to the claim or defense in the order of entry to the account. In these circumstances, if more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

* * * * *

§ 226.13—Billing Error Resolution

* * * * *

13(c) Time for resolution; general procedures.

* * * * *

Paragraph 13(c)(2).

* * * * *

2. *Finality of error resolution procedure.* A creditor must comply with the error resolution procedures and complete its investigation to determine whether an error occurred within two complete billing cycles as set forth in § 226.13(c)(2). Thus, for example, § 226.13(c)(2) prohibits a creditor from reversing amounts previously credited for an alleged billing error even if the creditor obtains evidence after the error resolution time period has passed indicating that the billing error did not occur as asserted by the consumer. Similarly, if a creditor fails to mail or deliver a written explanation setting forth the reason why the billing error did not occur as asserted, or otherwise fails to comply with the error resolution procedures set forth in § 226.13(f), the creditor generally must credit the disputed amount and related finance or other charges, as applicable, to the consumer's account. However, if a consumer receives more than one credit to correct the same billing error, § 226.13 does not prevent a creditor from reversing amounts it has previously credited to correct that error, provided that the total amount of the remaining credits is equal to or more than the amount of the error and that the consumer does not incur any fees or other charges as a result of the timing of the creditor's reversal. For example, assume that a consumer asserts a billing error with respect to a $100 transaction and that the creditor posts a $100 credit to the consumer's account to correct that error during the time period set forth in § 226.13(c)(2). However, following that time period, a merchant or other person honoring the credit card issues a $100 credit to the consumer to correct the same error. In these circumstances, § 226.13(c)(2) does not prohibit the creditor from reversing its $100 credit once the $100 credit from the merchant or other person has posted to the consumer's account.

* * * * *

§ 226.14—Determination of Annual Percentage Rate

14(a) General rule.

* * * * *

6. *Effect of leap year.* Any variance in the annual percentage rate that occurs solely by reason of the addition of February 29 in a leap year, may be disregarded, and such a rate may be disclosed without regard to such variance.

* * * * *

§ 226.16—Advertising

1. *Clear and conspicuous standard—general.* Section 226.16 is subject to the general "clear and conspicuous" standard for subpart B (*see* § 226.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the disclosure of a promotional rate or payment under § 226.16(d)(6), a promotional rate or promotional fee under § 226.16(g), or a deferred interest or similar offer under § 226.16(h). Other than the disclosure of certain terms described in §§ 226.16(d)(6), (g), or (h), the credit terms need not be

printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Clear and conspicuous standard—promotional rates or payments; deferred interest or similar offers.* i. For purposes of § 226.16(d)(6), a clear and conspicuous disclosure means that the required information in § 226.16(d)(6)(ii)(A)–(C) is disclosed with equal prominence and in close proximity to the promotional rate or payment to which it applies. If the information in § 226.16(d)(6)(ii)(A)–(C) is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Notwithstanding the above, for electronic advertisements that disclose promotional rates or payments, compliance with the requirements of § 226.16(c) is deemed to satisfy the clear and conspicuous standard.

ii. For purposes of § 226.16(g)(4) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(g)(4)(i) and, as applicable, (g)(4)(ii) and (g)(4)(iii) must be equally prominent to the promotional rate or promotional fee to which it applies. If the information in § 226.16(g)(4)(i) and, as applicable, (g)(4)(ii) and (g)(4)(iii) is the same type size as the promotional rate or promotional fee to which it applies, the disclosures would be deemed to be equally prominent. For purposes of § 226.16(h)(3) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(h)(3) must be equally prominent to each statement of "no interest," "no payments," "deferred interest," "same as cash," or similar term regarding interest or payments during the deferred interest period. If the information required to be disclosed under § 226.16(h)(3) is the same type size as the statement of "no interest," "no payments," "deferred interest," "same as cash," or similar term regarding interest or payments during the deferred interest period, the disclosure would be deemed to be equally prominent.

*   *   *   *   *

16(g) Promotional rates.

1. *Rate in effect at the end of the promotional period.* If the annual percentage rate that will be in effect at the end of the promotional period (*i.e.,* the post-promotional rate) is a variable rate, the post-promotional rate for purposes of § 226.16(g)(2)(i) is the rate that would have applied at the time the promotional rate was advertised if the promotional rate was not offered, consistent with the accuracy requirements in § 226.5a(c)(2) and (e)(4), as applicable.

2. *Immediate proximity.* For written or electronic advertisements, including the term "introductory" or "intro" in the same phrase as the listing of the introductory rate or introductory fee is deemed to be in immediate proximity of the listing.

3. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 226.16(g)(4)(i) and, as applicable, (g)(4)(ii) and (g)(4)(iii) that is in the same paragraph as the first listing of the promotional rate or promotional fee is deemed to be in a prominent location closely proximate to the listing. Information disclosed in a footnote will not be considered in a prominent location closely proximate to the listing.

4. *First listing.* For purposes of § 226.16(g)(4) as it applies to written or electronic advertisements, the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If the promotional rate or promotional fee does not appear on the front side of the first page of the principal promotional document, then the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the subsequent pages of the principal promotional document. If the promotional rate or promotional fee is not listed on the principal promotional document or there is no principal promotional document, the first listing is the most prominent listing of the rate or fee on the front side of the first page of each document listing the promotional rate or promotional fee. If the promotional rate or promotional fee does not appear on the front side of the first page of a document, then the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the subsequent pages of the document. If the listing of the promotional rate or promotional fee with the largest type size on the front side of the first page (or subsequent pages if the promotional rate or promotional fee is not listed on the front side of the first page) of the principal promotional document (or each document listing the promotional rate or promotional fee if the promotional rate or promotional fee is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 226.16(g)(4).

5. *Post-promotional rate depends on consumer's creditworthiness.* For purposes of disclosing the rate that may apply after the end of the promotional rate period, at the advertiser's option, the advertisement may disclose the rates that may apply as either specific rates, or a range of rates. For example, if there are three rates that may apply (9.99%, 12.99% or 17.99%), an issuer may disclose these three rates as specific rates (9.99%, 12.99% or 17.99%) or as a range of rates (9.99%–17.99%).

*   *   *   *   *

§ 226.30—Limitation on Rates

*   *   *   *   *

8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation.

i. For example, the following statements would be sufficiently specific:

A. The maximum interest rate will not exceed X%.

B. The interest rate will never be higher than X percentage points above the initial rate of Y%.

C. The interest rate will not exceed X%, or X percentage points above [a rate to be determined at some future point in time], whichever is less.

D. The maximum interest rate will not exceed X%, or the state usury ceiling, whichever is less.

ii. The following statements would not comply with this section:

A. The interest rate will never be higher than X percentage points over the prevailing market rate.

B. The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].

C. The interest rate will not exceed the state usury ceiling which is currently X%.

iii. A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (*See* generally § 226.6(a)(1)(ii) and (b)(4)(i)(A).)

*   *   *   *   *

§ 226.51—Ability To Pay

51(a) General rule.

51(a)(1) Consideration of ability to pay.

1. *Consideration of additional factors.* Section 226.51(a) requires a card issuer to consider a consumer's independent ability to make the required minimum periodic payments under the terms of an account based on the consumer's independent income or assets and current obligations. The card issuer may also consider consumer reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 202).

2. *Ability to pay as of application or consideration of increase.* A card issuer complies with § 226.51(a) if it bases its determination regarding a consumer's independent ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

3. *Credit line increase.* When a card issuer considers increasing the credit line on an existing account, § 226.51(a) applies whether the consideration is based upon a request of the consumer or is initiated by the card issuer.

4. *Income and assets.* i. *Sources of information.* For purposes of § 226.51(a), a card issuer may consider the consumer's income and assets based on:

A. Information provided by the consumer in connection with the credit card account under an open-end (not home-secured) consumer credit plan;

B. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules);

C. Information obtained through third parties (subject to any applicable information-sharing rules); and

D. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income and assets.

ii. *Income and assets of persons liable for debts incurred on account.* For purposes of § 226.51(a), a card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are applying for a new account and will be liable for debts incurred on that account. Similarly, when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are accountholders and are liable for debts incurred on that account. A card issuer may also consider any current or reasonably expected income and assets of a cosigner or guarantor who is or will be liable for debts incurred on the account. However, a card issuer may not use the income and assets of an authorized user or other person who is not liable for debts incurred on the account to satisfy the requirements of § 226.51, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets. Information about current or reasonably expected income and assets includes, for example, information about current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends, retirement benefits, public assistance, alimony, child support, or separate maintenance payments. A card issuer may also take into account assets such as savings accounts or investments.

iii. *Household income and assets.* Consideration of information regarding a consumer's household income does not by itself satisfy the requirement in § 226.51(a) to consider the consumer's independent ability to pay. For example, if a card issuer requests on its application forms that applicants provide their "household income," the card issuer may not rely solely on the information provided by applicants to satisfy the requirements of § 226.51(a). Instead, the card issuer would need to obtain additional information about an applicant's independent income (such as by contacting the applicant). However, if a card issuer requests on its application forms that applicants provide their income without reference to household income (such as by requesting "income" or "salary"), the card issuer may rely on the information provided by applicants to satisfy the requirements of § 226.51(a).

5. *Current obligations.* A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized.

6. *Joint applicants and joint accountholders.* With respect to the opening of a joint account for two or more consumers or a credit line increase on such an account, the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments.

51(a)(2) Minimum periodic payments.

1. *Applicable minimum payment formula.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 226.51(a)(2)(ii), if the account has or may have a promotional program, such as a deferred payment or similar program, where there is no applicable minimum payment formula during the promotional period, the issuer must estimate the required minimum periodic payment based on the minimum payment formula that will apply when the promotion ends.

2. *Interest rate for purchases.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 226.51(a)(2)(ii), if the interest rate for purchases is or may be a promotional rate, the issuer must use the post-promotional rate to estimate interest charges.

3. *Mandatory fees.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 226.51(a)(2)(ii), mandatory fees that must be assumed to be charged include those fees the card issuer knows the consumer will be required to pay under the terms of the account if the account is opened, such as an annual fee. If a mandatory fee is a promotional fee (as defined in § 226.16(g)), the issuer must use the post-promotional fee amount for purposes of § 226.51(a)(2)(ii).

51(b) Rules affecting young consumers.

1. *Age as of date of application or consideration of credit line increase.* Sections 226.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 226.51(b)(1) or the date the credit line increase is requested by the consumer (or if no request has been made, the date the credit line increase is considered by the card issuer) under § 226.51(b)(2).

2. *Liability of cosigner, guarantor, or joint accountholder.* Sections 226.51(b)(1)(ii) and (b)(2) require the signature or written consent of a cosigner, guarantor, or joint accountholder agreeing either to be secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or to be jointly liable with the consumer for any debt on the account. Sections 226.51(b)(1)(ii) and (b)(2) do not prohibit a card issuer from also requiring the cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21, consistent with any agreement made between the parties.

3. *Authorized users exempt.* If a consumer who has not attained the age of 21 is being added to another person's account as an authorized user and has no liability for debts incurred on the account, § 226.51(b)(1) and (b)(2) do not apply.

4. *Electronic application.* Consistent with § 226.5(a)(1)(iii), an application may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) in the circumstances set forth in § 226.5a. The electronic submission of an application from a consumer or a consent to a credit line increase from a cosigner, guarantor, or joint accountholder to a card issuer would constitute a written application or consent for purposes of § 226.51(b) and would not be considered a consumer disclosure for purposes of the E-Sign Act.

51(b)(1) Applications from young consumers.

1. *Relation to Regulation B.* In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, creditors must comply with the applicable rules in Regulation B (12 CFR part 202).

2. *Financial information.* Information regarding income and assets that satisfies the requirements of § 226.51(a) also satisfies the requirements of § 226.51(b)(1). *See* comment 51(a)(1)–4.

51(b)(2) Credit line increases for young consumers.

1. *Relation to Regulation B.* In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, creditors must comply with the applicable rules in Regulation B (12 CFR part 202).

§ 226.52—Limitations on Fees

52(a) Limitations prior to account opening and during first year after account opening.

52(a)(1) General rule.

1. *Application.* The 25 percent limit in § 226.52(a)(1) applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer's asset account to the card issuer or from another credit account provided by the card issuer). For example:

i. Assume that, under the terms of a credit card account, a consumer is required to pay $120 in fees for the issuance or availability of credit at account opening. The consumer is also required to pay a cash advance fee that is equal to five percent of the cash advance and a late payment fee of $15 if the required minimum periodic payment is not received by the payment due date (which is the twenty-fifth of the month). At account opening on January 1 of year one, the credit limit for the account is $500. Section 226.52(a)(1) permits the card issuer to charge to the account the $120 in fees for the issuance or availability of credit at account opening. On February 1 of year one, the consumer uses the account for a $100 cash advance. Section 226.52(a)(1) permits the card issuer to charge a $5 cash-advance fee to the account. On March 26 of year one, the card issuer has not received the consumer's required minimum periodic payment. Section 226.52(a)(2) permits the card issuer to charge a $15 late payment fee to the account. On July 15 of year one, the consumer uses the account for a $50 cash advance. Section 226.52(a)(1) does not permit the card issuer to charge a $2.50 cash advance fee to the account. Furthermore, § 225.52(a)(1) prohibits the card issuer from collecting the $2.50 cash advance fee from the consumer by other means.

ii. Assume that, under the terms of a credit card account, a consumer is required to pay $125 in fees for the issuance or availability of credit during the first year after account opening. At account opening on January 1 of year one, the credit limit for the account is $500. Section 226.52(a)(1) permits the card issuer to charge the $125 in fees to the account. However, § 226.52(a)(1) prohibits the card issuer from requiring the consumer to make payments to the card issuer for additional non-exempt fees with respect to the account prior to account opening or during the first year after account opening. Section 226.52(a)(1) also prohibits the card issuer from requiring the consumer to open a separate credit account with the card issuer to fund the payment of additional non-exempt fees prior to the opening of the credit card account or during the first year after the credit card account is opened.

iii. Assume that, on January 1 of year one, a consumer is required to pay a $100 fee in order to apply for a credit card account. On January 5, the card issuer approves the consumer's application, assigns the account a credit limit of $1,000, and provides the consumer with account-opening disclosures consistent with § 226.6. The date on which the account may first be used by the consumer to engage in transactions is January 5. The consumer is required to pay $150 in fees for the issuance or availability of credit, which § 226.52(a)(1) permits the card issuer to charge to the account on January 5. However, because the $100 application fee is subject to the 25 percent limit in § 226.52(a)(1), the card issuer is prohibited from requiring the consumer to pay any additional non-exempt fees with respect to the account until January 5 of year two.

2. *Fees that exceed 25 percent limit.* A card issuer that charges a fee to a credit card account that exceeds the 25 percent limit complies with § 226.52(a)(1) if the card issuer waives or removes the fee and any associated interest charges or credits the account for an amount equal to the fee and any associated interest charges within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. For example, assuming the facts in the example in comment 52(a)(1)–1.i. above, the card issuer complies with § 226.52(a)(1) if the card issuer charged the $2.50 cash advance fee to the account on July 15 of year one but waived or removed the fee or credited the account for $2.50 (plus any interest charges on that $2.50) at the end of the billing cycle.

3. *Changes in credit limit during first year.* i. *Increases in credit limit.* If a card issuer increases the credit limit during the first year after the account is opened, § 226.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). For example, assume that, at account opening on January 1, the credit limit for a credit card account is $400 and the consumer is required to pay $100 in fees for the issuance or availability of credit. On July 1, the card issuer increases the credit limit for the account to $600. Section 226.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees based on the increased credit limit.

ii. *Decreases in credit limit.* If a card issuer decreases the credit limit during the first year after the account is opened, § 226.52(a)(1) requires the card issuer to waive or remove any fees charged to the account that exceed 25 percent of the reduced credit limit or to credit the account for an amount equal to any fees the consumer was required to pay with respect to the account that exceed 25 percent of the reduced credit limit within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the credit limit was reduced. For example:

A. Assume that, at account opening on January 1, the credit limit for a credit card account is $1,000 and the consumer is required to pay $250 in fees for the issuance or availability of credit. The billing cycles for the account begin on the first day of the month and end on the last day of the month. On July 30, the card issuer decreases the credit limit for the account to $500. Section 226.52(a)(1) requires the card issuer to waive or remove $175 in fees from the account or to credit the account for an amount equal to $175 within a reasonable amount of time but no later than August 31.

B. Assume that, on June 25 of year one, a consumer is required to pay a $75 fee in order to apply for a credit card account. At account opening on July 1 of year one, the credit limit for the account is $500 and the consumer is required to pay $50 in fees for the issuance or availability of credit. The billing cycles for the account begin on the first day of the month and end on the last day of the month. On February 15 of year two, the card issuer decreases the credit limit for the account to $250. Section 226.52(a)(1) requires the card issuer to waive or remove fees from the account or to credit the account for an amount equal to $62.50 within a reasonable amount of time but no later than March 31 of year two.

4. *Date on which account may first be used by consumer to engage in transactions.*

i. *Methods of compliance.* For purposes of § 226.52(a)(1), an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. A card issuer may consider an account open for purposes of § 226.52(a)(1) on any of the following dates:

A. The date the account is first used by the consumer for a transaction (such as when an account is established in connection with financing the purchase of goods or services).

B. The date the consumer complies with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of a new account (such as requiring the consumer to provide information that verifies his or her identity), provided that the account may be used for transactions on that date.

C. The date that is seven days after the card issuer mails or delivers to the consumer account-opening disclosures that comply with § 226.6, provided that the consumer may use the account for transactions after complying with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of the new account (such as requiring the consumer to provide information that verifies his or her identity). If a card issuer has reasonable procedures designed to ensure that account-opening disclosures that comply with § 226.6 are mailed or delivered to consumers no later than a certain number of days after the card issuer establishes the account, the card issuer may add that number of days to the seven-day period for purposes of determining the date on which the account was opened.

ii. *Examples.*

A. Assume that, on July 1 of year one, a credit card account under an open-end (not home-secured) consumer credit plan is established in connection with financing the purchase of goods or services and a $500 transaction is charged to the account by the consumer. The card issuer may consider the account open on July 1 of year one for purposes of § 226.52(a)(1). Accordingly, § 226.52(a)(1) ceases to apply to the account on July 1 of year two.

B. Assume that, on July 1 of year one, a card issuer approves a consumer's application for a credit card account under an open-end (not home-secured) consumer credit plan and establishes the account on its internal systems. On July 5, the card issuer mails or delivers to the consumer account-opening disclosures that comply with § 226.6. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 12 of year one for purposes of § 226.52(a)(1). Accordingly, § 226.52(a)(1) ceases to apply to the account on July 12 of year two.

C. Same facts as in paragraph B above except that the card issuer has adopted reasonable procedures designed to ensure that account-opening disclosures that comply with § 226.6 are mailed or delivered to consumers no later than three days after an account is established on its systems. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 11 of year one for purposes of § 226.52(a)(1). Accordingly, § 226.52(a)(1) ceases to apply to the account on July 11 of year two. However, if the consumer uses the account for a transaction or complies with the card issuer's reasonable procedures for preventing fraud or unauthorized use on July 8 of year one, the card issuer may, at its option, consider the account open on that date for purposes of § 226.52(a)(1) and § 226.52(a)(1) therefore ceases to apply to the account on July 8 of year two.

52(a)(2) Fees not subject to limitations.

1. *Covered fees.* Except as provided in § 226.52(a)(2), § 226.52(a) applies to any fees or other charges that a card issuer will or may require the consumer to pay with respect to a credit card account prior to account

opening and during the first year after account opening, other than charges attributable to periodic interest rates. For example, § 226.52(a) applies to:

i. Fees that the consumer is required to pay for the issuance or availability of credit described in § 226.5a(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit;

ii. Fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account;

iii. Fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and fees for using the account for purchases);

iv. Fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 226.52(a)(2)(i));

v. Fixed finance charges; and

vi. Minimum charges imposed if a charge would otherwise have been determined by applying a periodic interest rate to a balance except for the fact that such charge is smaller than the minimum.

2. *Fees the consumer is not required to pay.* Section 226.52(a)(2)(ii) provides that § 226.52(a) does not apply to fees that the consumer is not required to pay with respect to the account. For example, § 226.52(a) generally does not apply to fees for making an expedited payment (to the extent permitted by § 226.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, or statement reproduction fees.

3. *Security deposits.* A security deposit that is charged to a credit card account is a fee for purposes of § 226.52(a). In contrast, however, a security deposit is not subject to the 25 percent limit in § 226.52(a)(1) if it is not charged to the account. For example, § 226.52(a)(1) does not prohibit a card issuer from requiring a consumer to provide funds at account opening pledged as security for the account that exceed 25 percent of the credit limit at account opening so long as those funds are not obtained from the account.

52(a)(3) Rule of construction.

1. *Fees or charges otherwise prohibited by law.* Section 226.52(a) does not authorize the imposition or payment of fees or charges otherwise prohibited by law. For example, see 16 CFR 310.4(a)(4).

52(b) Limitations on penalty fees.

1. *Fees for violating the account terms or other requirements.* For purposes of § 226.52(b), a fee includes any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. Accordingly, for purposes of § 226.52(b), a fee does not include charges attributable to an increase in an annual percentage rate based on an act or omission that violates the terms or other requirements of an account.

i. The following are examples of fees that are subject to the limitations in § 226.52(b) or are prohibited by § 226.52(b):

A. Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date.

B. Returned payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned.

C. Any fee or charge for an over-the-limit transaction as defined in § 226.56(a), to the extent the imposition of such a fee or charge is permitted by § 226.56.

D. Any fee imposed by a card issuer if payment on a check that accesses a credit card account is declined.

E. Any fee or charge for a transaction that the card issuer declines to authorize. *See* § 226.52(b)(2)(i)(B).

F. Any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). *See* § 226.52(b)(2)(i)(B).

G. Any fee imposed by a card issuer based on the closure or termination of an account. *See* § 226.52(b)(2)(i)(B).

ii. The following are examples of fees to which § 226.52(b) does not apply:

A. Balance transfer fees.

B. Cash advance fees.

C. Foreign transaction fees.

D. Annual fees and other fees for the issuance or availability of credit described in § 226.5a(b)(2), except to the extent that such fees are based on account inactivity. *See* § 226.52(b)(2)(i)(B).

E. Fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements of an account.

F. Fees for making an expedited payment (to the extent permitted by § 226.10(e)).

G. Fees for optional services (such as travel insurance).

H. Fees for reissuing a lost or stolen card.

2. *Rounding to nearest whole dollar.* A card issuer may round any fee that complies with § 226.52(b) to the nearest whole dollar. For example, if § 226.52(b) permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the late payment fee permitted by § 226.52(b) were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

52(b)(1) General rule.

1. *Relationship between § 226.52(b)(1)(i), (b)(1)(ii), and (b)(2).*

i. *Relationship between § 226.52(b)(1)(i) and (b)(1)(ii).* A card issuer may impose a fee for violating the terms or other requirements of an account pursuant to either § 226.52(b)(1)(i) or (b)(1)(ii).

A. A card issuer that complies with the safe harbors in § 226.52(b)(1)(ii) is not required to determine that its fees represent a reasonable proportion of the total costs incurred by the card issuer as a result of a type of violation under § 226.52(b)(1)(i).

B. A card issuer may impose a fee for one type of violation pursuant to § 226.52(b)(1)(i) and may impose a fee for a different type of violation pursuant to § 226.52(b)(1)(ii). For example, a card issuer may impose a late payment fee of $30 based on a cost determination pursuant to § 226.52(b)(1)(i) but impose returned payment and over-the-limit fees of $25 or $35 pursuant to the safe harbors in § 226.52(b)(1)(ii).

C. A card issuer that previously based the amount of a penalty fee for a particular type of violation on a cost determination pursuant to § 226.52(b)(1)(i) may begin to impose a penalty fee for that type of violation that is consistent with § 226.52(b)(1)(ii) at any time (subject to the notice requirements in § 226.9), provided that the first fee imposed pursuant to § 226.52(b)(1)(ii) is consistent with § 226.52(b)(1)(ii)(A). For example, assume that a late payment occurs on January 15 and that, based on a cost determination pursuant to § 226.52(b)(1)(i), the card issuer imposes a $30 late payment fee. Another late payment occurs on July 15. The card issuer may impose another $30 late payment fee pursuant to § 226.52(b)(1)(i) or may impose a $25 late payment fee pursuant to § 226.52(b)(1)(ii)(A). However, the card issuer may not impose a $35 late payment fee pursuant to § 226.52(b)(1)(ii)(B). If the card issuer imposes a $25 fee pursuant to § 226.52(b)(1)(ii)(A) for the July 15 late payment and another late payment occurs on September 15, the card issuer may impose a $35 fee for the September 15 late payment pursuant to § 226.52(b)(1)(ii)(B).

ii. *Relationship between § 226.52(b)(1) and (b)(2).* Section 226.52(b)(1) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 226.52(b)(2). For example, if § 226.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, § 226.52(b)(1)(ii) does not permit the card issuer to impose a higher late payment fee.

52(b)(1)(i) Fees based on costs.

1. *Costs incurred as a result of violations.* Section 226.52(b)(1)(i) does not require a card issuer to base a fee on the costs incurred as a result of a specific violation of the terms or other requirements of an account. Instead, for purposes of § 226.52(b)(1)(i), a card issuer must have determined that a fee for violating the terms or other requirements of an account represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. A card issuer may make a single determination for all of its credit card portfolios or may make separate determinations for each portfolio. The factors relevant to this determination include:

i. The number of violations of a particular type experienced by the card issuer during a prior period of reasonable length (for example, a period of twelve months).

ii. The costs incurred by the card issuer during that period as a result of those violations.

iii. At the card issuer's option, the number of fees imposed by the card issuer as a result of those violations during that period that the card issuer reasonably estimates it will be unable to collect. *See* comment 52(b)(1)(i)–5.

iv. At the card issuer's option, reasonable estimates for an upcoming period of changes in the number of violations of that type, the resulting costs, and the number of fees that the card issuer will be unable to collect. *See* illustrative examples in comments 52(b)(1)(i)–6 through –9.

2. *Amounts excluded from cost analysis.* The following amounts are not costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 226.52(b)(1)(i):

i. Losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts).

ii. Costs associated with evaluating whether consumers who have not violated the terms or other requirements of an account are likely to do so in the future (such as the costs associated with underwriting new accounts). However, once a violation of the terms or other requirements of an account has occurred, the costs associated with preventing additional violations for a reasonable period of time are costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 226.52(b)(1)(i).

3. *Third party charges.* As a general matter, amounts charged to the card issuer by a third party as a result of a violation of the terms or other requirements of an account are costs incurred by the card issuer for purposes of § 226.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined that the charge represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer on delinquent accounts, the card issuer must have determined that the amounts charged to the card issuer by the affiliate for such services represent a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

4. *Amounts charged by other card issuers.* The fact that a card issuer's fees for violating the terms or other requirements of an account are comparable to fees assessed by other card issuers does not satisfy the requirements of § 226.52(b)(1)(i).

5. *Uncollected fees.* For purposes of § 226.52(b)(1)(i), a card issuer may consider fees that it is unable to collect when determining the appropriate fee amount. Fees that the card issuer is unable to collect include fees imposed on accounts that have been charged off by the card issuer, fees that have been discharged in bankruptcy, and fees that the card issuer is required to waive in order to comply with a legal requirement (such as a requirement imposed by 12 CFR part 226 or 50 U.S.C. app. 527). However, fees that the card issuer chooses not to impose or chooses not to collect (such as fees the card issuer chooses to waive at the request of the consumer or under a workout or temporary hardship arrangement) are not relevant for purposes of this determination. *See* illustrative examples in comments 52(b)(2)(i)–6 through –9.

6. *Late payment fees.* i. *Costs incurred as a result of late payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements).

ii. *Examples.*

A. Late payment fee based on past delinquencies and costs. Assume that, during year one, a card issuer experienced 1 million delinquencies and incurred $26 million in costs as a result of those delinquencies. For purposes of § 226.52(b)(1)(i), a $26 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

B. Adjustment based on fees card issuer is unable to collect. Same facts as above except that the card issuer imposed a late payment fee for each of the 1 million delinquencies experienced during year one but was unable to collect 25% of those fees (in other words, the card issuer was unable to collect 250,000 fees, leaving a total of 750,000 late payments for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), a late payment fee of $35 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

C. Adjustment based on reasonable estimate of future changes. Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past delinquency rates and other factors relevant to potential delinquency rates for year two—it will experience a 2% decrease in delinquencies during year two (in other words, 20,000 fewer delinquencies for a total of 980,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (25%) during year two as during year one (in other words, the card issuer will be unable to collect 245,000 fees, leaving a total of 735,000 late payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of delinquencies and other factors relevant to potential costs for year two—it will experience a 5% increase in costs during year two (in other words, $1.3 million in additional costs for a total of $27.3 million). For purposes of § 226.52(b)(1)(i), a $37 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

7. *Returned payment fees.* i. *Costs incurred as a result of returned payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include:

A. Costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments;

B. Costs associated with investigating potential fraud with respect to returned payments; and

C. Costs associated with notifying the consumer of the returned payment and arranging for a new payment.

ii. *Examples.*

A. Returned payment fee based on past returns and costs. Assume that, during year one, a card issuer experienced 150,000 returned payments and incurred $3.1 million in costs as a result of those returned payments. For purposes of § 226.52(b)(1)(i), a $21 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

B. Adjustment based on fees card issuer is unable to collect. Same facts as above except that the card issuer imposed a returned payment fee for each of the 150,000 returned payments experienced during year one but was unable to collect 15% of those fees (in other words, the card issuer was unable to collect 22,500 fees, leaving a total of 127,500 returned payments for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), a returned payment fee of $24 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

C. Adjustment based on reasonable estimate of future changes. Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past returned payment rates and other factors relevant to potential returned payment rates for year two—it will experience a 2% increase in returned payments during year two (in other words, 3,000 additional returned payments for a total of 153,000). The card issuer also reasonably estimates that it will be unable to collect 25% of returned payment fees during year two (in other words, the card issuer will be unable to collect 38,250 fees, leaving a total of 114,750 returned payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of returned payments and other factors relevant to potential costs for year two—it will experience a 1% decrease in costs during year two (in other words, a $31,000 reduction in costs for a total of $3.069 million). For purposes of § 226.52(b)(1)(i), a $27 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

8. *Over-the-limit fees.* i. *Costs incurred as a result of over-the-limit transactions.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include:

A. Costs associated with determining whether to authorize over-the-limit transactions; and

B. Costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit.

ii. *Costs not incurred as a result of over-the-limit transactions.* For purposes of

§ 226.52(b)(1)(i), costs associated with obtaining the affirmative consent of consumers to the card issuer's payment of transactions that exceed the credit limit consistent with § 226.56 are not costs incurred by a card issuer as a result of over-the-limit transactions.

iii. *Examples.*

A. Over-the-limit fee based on past fees and costs. Assume that, during year one, a card issuer authorized 600,000 over-the-limit transactions and incurred $4.5 million in costs as a result of those over-the-limit transactions. However, because of the affirmative consent requirements in § 226.56, the card issuer was only permitted to impose 200,000 over-the-limit fees during year one. For purposes of § 226.52(b)(1)(i), a $23 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

B. Adjustment based on fees card issuer is unable to collect. Same facts as above except that the card issuer was unable to collect 30% of the 200,000 over-the-limit fees imposed during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(2)(i), an over-the-limit fee of $32 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

C. Adjustment based on reasonable estimate of future changes. Same facts as paragraphs A. and B. above except the card issuer reasonably estimates that—based on past over-the-limit transaction rates, the percentages of over-the-limit transactions that resulted in an over-the-limit fee in the past (consistent with § 226.56), and factors relevant to potential changes in those rates and percentages for year two—it will authorize approximately the same number of over-the-limit transactions during year two (600,000) and impose approximately the same number of over-the-limit fees (200,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (30%) during year two as during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of over-the-limit transactions and other factors relevant to potential costs for year two—it will experience a 6% decrease in costs during year two (in other words, a $270,000 reduction in costs for a total of $4.23 million). For purposes of § 226.52(b)(1)(i), a $30 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

9. *Declined access check fees.* i. *Costs incurred as a result of declined access checks.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of declining payment on a check that accesses a credit card account include:

A. Costs associated with determining whether to decline payment on access checks;

B. Costs associated with processing declined access checks and reconciling the card issuer's systems and accounts to reflect declined access checks;

C. Costs associated with investigating potential fraud with respect to declined access checks; and

D. Costs associated with notifying the consumer and the merchant or other party that accepted the access check that payment on the check has been declined.

ii. *Example.* Assume that, during year one, a card issuer declined 100,000 access checks and incurred $2 million in costs as a result of those declined checks. The card issuer imposed a fee for each declined access check but was unable to collect 10% of those fees (in other words, the card issuer was unable to collect 10,000 fees, leaving a total of 90,000 declined access checks for which the card issuer did collect or could have collected a fee). For purposes of § 226.52(b)(1)(i), a $22 declined access check fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of declined access checks during year two.

52(b)(1)(ii) Safe harbors.

1. *Multiple violations of same type.*

i. *Same billing cycle or next six billing cycles.* A card issuer cannot impose a fee for a violation pursuant to § 226.52(b)(1)(ii)(B) unless a fee has previously been imposed for the same type of violation pursuant to § 226.52(b)(1)(ii)(A). Once a fee has been imposed for a violation pursuant to § 226.52(b)(1)(ii)(A), the card issuer may impose a fee pursuant to § 226.52(b)(1)(ii)(B) for any subsequent violation of the same type until that type of violation has not occurred for a period of six consecutive complete billing cycles. A fee has been imposed for purposes of § 226.52(b)(1)(ii) even if the card issuer waives or rebates all or part of the fee.

A. *Late payments.* For purposes of § 226.52(b)(1)(ii), a late payment occurs during the billing cycle in which the payment may first be treated as late consistent with the requirements of 12 CFR Part 226 and the terms or other requirements of the account.

B. *Returned payments.* For purposes of § 226.52(b)(1)(ii), a returned payment occurs during the billing cycle in which the payment is returned to the card issuer.

C. *Transactions that exceed the credit limit.* For purposes of § 226.52(b)(1)(ii), a transaction that exceeds the credit limit for an account occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer.

D. *Declined access checks.* For purposes of § 226.52(b)(1)(ii), a check that accesses a credit card account is declined during the billing cycle in which the card issuer declines payment on the check.

ii. *Relationship to §§ 226.52(b)(2)(ii) and 226.56(j)(1).* If multiple violations are based on the same event or transaction such that § 226.52(b)(2)(ii) prohibits the card issuer from imposing more than one fee, the event or transaction constitutes a single violation for purposes of § 226.52(b)(1)(ii). Furthermore, consistent with § 226.56(j)(1)(i), no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 226.52(b)(1)(ii). However, § 226.52(b)(2)(ii) does not prohibit a card issuer from imposing fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction to the extent permitted by § 226.56(j)(1). In these circumstances, the second and third over-the-limit fees permitted by § 226.56(j)(1) may be imposed pursuant to § 226.52(b)(1)(ii)(B). *See* comment 52(b)(2)(ii)–1.

iii. *Examples.* The following examples illustrate the application of § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) with respect to credit card accounts under an open-end (not home-secured) consumer credit plan that are not charge card accounts. For purposes of these examples, assume that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

A. *Violations of same type (late payments).* A required minimum periodic payment of $50 is due on March 25. On March 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on March 26. In order for the card issuer to impose a $35 late payment fee pursuant to § 226.52(b)(1)(ii)(B), a second late payment must occur during the April, May, June, July, August, or September billing cycles.

(1) The card issuer does not receive any payment during the March billing cycle. A required minimum periodic payment of $100 is due on April 25. On April 20, the card issuer receives a $50 payment. No further payment is received during the April billing cycle. Accordingly, consistent with § 226.52(b)(1)(ii)(B), the card issuer may impose a $35 late payment fee on April 26. Furthermore, the card issuer may impose a $35 late payment fee for any late payment that occurs during the May, June, July, August, September, or October billing cycles.

(2) Same facts as in paragraph A. above. On March 30, the card issuer receives a $50 payment and the required minimum periodic payments for the April, May, June, July, August, and September billing cycles are received on or before the payment due date. A required minimum periodic payment of $60 is due on October 25. On October 26, a late payment has occurred because the required minimum periodic payment due on October 25 has not been received. However, because this late payment did not occur during the six billing cycles following the March billing cycle, § 226.52(b)(1)(ii) only permits the card issuer to impose a late payment fee of $25.

B. *Violations of different types (late payment and over the credit limit).* The credit limit for an account is $1,000. Consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. A required minimum periodic payment of $30 is due on August 25. On August 26, a late payment has occurred because no payment has been received.

Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on August 26. On August 30, the card issuer receives a $30 payment. On September 10, a transaction causes the account balance to increase to $1,150, which exceeds the account's $1,000 credit limit. On September 11, a second transaction increases the account balance to $1,350. On September 23, the card issuer receives the $50 required minimum periodic payment due on September 25, which reduces the account balance to $1,300. On September 30, the card issuer imposes a $25 over-the-limit fee, consistent with § 226.52(b)(1)(ii)(A). On October 26, a late payment has occurred because the $60 required minimum periodic payment due on October 25 has not been received. Accordingly, consistent with § 226.52(b)(1)(ii)(B), the card issuer imposes a $35 late payment fee on October 26.

C. *Violations of different types (late payment and returned payment).* A required minimum periodic payment of $50 is due on July 25. On July 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 226.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on July 26. On July 30, the card issuer receives a $50 payment. A required minimum periodic payment of $50 is due on August 25. On August 24, a $50 payment is received. On August 27, the $50 payment is returned to the card issuer for insufficient funds. In these circumstances, § 226.52(b)(2)(ii) permits the card issuer to impose either a late payment fee or a returned payment fee but not both because the late payment and the returned payment result from the same event or transaction. Accordingly, for purposes of § 226.52(b)(1)(ii), the event or transaction constitutes a single violation. However, if the card issuer imposes a late payment fee, § 226.52(b)(1)(ii)(B) permits the issuer to impose a fee of $35 because the late payment occurred during the six billing cycles following the July billing cycle. In contrast, if the card issuer imposes a returned payment fee, the amount of the fee may be no more than $25 pursuant to § 226.52(b)(1)(ii)(A).

2. *Adjustments based on Consumer Price Index.* For purposes of § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Board shall calculate each year price level adjusted amounts using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has decreased by a whole dollar, those amounts will be decreased by $1.00. The Board will publish adjustments to the amounts in § 226.52(b)(1)(ii)(A) and (b)(1)(ii)(B).

3. *Delinquent balance for charge card accounts.* Section 226.52(b)(1)(ii)(C) provides that, when a charge card issuer that requires payment of outstanding balances in full at the end of each billing cycle has not received the required payment for two or more consecutive billing cycles, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. For purposes of § 226.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 226.52(b)(1)(ii)(C). Consistent with § 226.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 226.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 226.52(b)(1)(ii)(B) with respect to the same late payment. The following examples illustrate the application of § 226.52(b)(1)(ii)(C):

i. Assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of $1,000. On July 5, the card issuer provides a periodic statement disclosing the $1,000 balance consistent with § 226.7. During the July billing cycle, the account is used for $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with § 226.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with § 226.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. At the end of the August billing cycle, no payment has been received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $40, which is 3% of the $1,325 balance that was due at the end of the August billing cycle. Section 226.52(b)(1)(ii)(C) does not permit the card issuer to include the $200 in transactions that occurred during the August billing cycle.

ii. Same facts as above except that, on August 25, a $100 payment is received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $37, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,225).

iii. Same facts as in paragraph A. above except that, on August 25, a $200 payment is received. Consistent with § 226.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $34, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,125). In the alternative, the card issuer may impose a late payment fee of $35 consistent with § 226.52(b)(1)(ii)(B). However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees.

52(b)(2) Prohibited fees.

1. *Relationship to § 226.52(b)(1).* A card issuer does not comply with § 226.52(b) if it imposes a fee that is inconsistent with the prohibitions in § 226.52(b)(2). Thus, the prohibitions in § 226.52(b)(2) apply even if a fee is consistent with § 226.52(b)(1)(i) or (b)(1)(ii). For example, even if a card issuer has determined for purposes of § 226.52(b)(1)(i) that a $27 fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of a particular type of violation, § 226.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $27. Similarly, even if § 226.52(b)(1)(ii) permits a card issuer to impose a $25 fee, § 226.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $25.

52(b)(2)(i) Fees that exceed dollar amount associated with violation.

1. *Late payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment due immediately prior to assessment of the late payment fee. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the amount of that required minimum periodic payment. For example:

i. Assume that a $15 required minimum periodic payment is due on September 25. The card issuer does not receive any payment on or before September 25. On September 26, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on September 25 ($15). Thus, under § 226.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

ii. Same facts as above except that, on September 25, the card issuer receives a $10 payment. No further payments are received. On September 26, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the full amount of the required minimum periodic payment due on September 25 ($15), rather than the unpaid portion of that payment ($5). Thus, under § 226.52(b)(2)(i)(A), the amount of the late payment fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

iii. Assume that a $15 required minimum periodic payment is due on October 28 and the billing cycle for the account closes on October 31. The card issuer does not receive any payment on or before November 3. On November 3, the card issuer determines that the required minimum periodic payment due on November 28 is $50. On November 5, the card issuer imposes a late payment fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on October 28 ($15), rather than the amount of the required minimum periodic payment due on November 28 ($50). Thus, under § 226.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

2. *Returned payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due immediately prior to the date on which the

payment is returned to the card issuer. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned payment fee that exceeds the amount of that required minimum periodic payment. However, if a payment has been returned and is submitted again for payment by the card issuer, there is no additional dollar amount associated with a subsequent return of that payment and § 226.52(b)(2)(i)(B) prohibits the card issuer from imposing an additional returned payment fee. For example:

i. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on March 25. The card issuer receives a check for $100 on March 23, which is returned to the card issuer for insufficient funds on March 26. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)). Furthermore, § 226.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

ii. Same facts as above except that the card issuer receives the $100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $30. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15), rather than the amount of the required minimum periodic payment due on April 25 ($30). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)). Furthermore, § 226.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

iii. Same facts as paragraph i. above except that, on March 28, the card issuer presents the $100 check for payment a second time. On April 1, the check is again returned for insufficient funds. Section 226.52(b)(2)(i)(B) prohibits the card issuer from imposing a returned payment fee based on the return of the payment on April 1.

iv. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on August 25. The card issuer receives a check for $15 on August 23, which is not returned. The card issuer receives a check for $50 on September 5, which is returned to the card issuer for insufficient funds on September 7. Section 226.52(b)(2)(i)(B) does not prohibit the card issuer from imposing a returned payment fee in these circumstances. Instead, for purposes of § 226.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on August 25 ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

3. *Over-the-limit fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit during the billing cycle in which the over-the-limit fee is imposed. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing an over-the-limit fee that exceeds that amount. Nothing in § 226.52(b) permits a card issuer to impose an over-the-limit fee if imposition of the fee is inconsistent with § 226.56. The following examples illustrate the application of § 226.52(b)(2)(i)(A) to over-the-limit fees:

i. Assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a $4,950 balance. On March 6, a $60 transaction is charged to the account, increasing the balance to $5,010. On March 25, a $5 transaction is charged to the account, increasing the balance to $5,015. On the last day of the billing cycle (March 31), the card issuer imposes an over-the-limit fee. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1)).

ii. Same facts as above except that, on March 26, the card issuer receives a payment of $20, reducing the balance below the credit limit to $4,995. Nevertheless, for purposes of § 226.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, consistent with § 226.52(b)(2)(i)(A), the card issuer may impose an over-the-limit fee of $15.

4. *Declined access check fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with declining payment on a check that accesses a credit card account is the amount of the check. Thus, when a check that accesses a credit card account is declined, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee that exceeds the amount of that check. For example, assume that a check that accesses a credit card account is used as payment for a $50 transaction, but payment on the check is declined by the card issuer because the transaction would have exceeded the credit limit for the account. For purposes of § 226.52(b)(2)(i), the dollar amount associated with the declined check is the amount of the check ($50). Thus, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a fee that exceeds $50. However, the amount of this fee must also comply with § 226.52(b)(1)(i) or (b)(1)(ii).

5. *Inactivity fees.* Section 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a fee with respect to a credit card account under an open-end (not home-secured) consumer credit plan based on inactivity on that account (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). For example, § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 fee when a credit card account under an open-end (not home-secured) consumer credit plan is not used for at least $2,000 in purchases over the course of a year. Similarly, § 226.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 annual fee on all accounts of a particular type but waiving the fee on any account that is used for at least $2,000 in purchases over the course of a year if the card issuer promotes the waiver or rebate of the annual fee for purposes of § 226.55(e). However, if the card issuer does not promote the waiver or rebate of the annual fee for purposes of § 226.55(e), § 226.52(b)(2)(i)(B)(*2*) does not prohibit a card issuer from considering account activity along with other factors when deciding whether to waive or rebate annual fees on individual accounts (such as in response to a consumer's request).

6. *Closed account fees.* Section 226.52(b)(2)(i)(B)(*3*) prohibits a card issuer from imposing a fee based on the closure or termination of an account. For example, 226.52(b)(2)(i)(B)(*3*) prohibits a card issuer from:

i. Imposing a one-time fee to consumers who close their accounts.

ii. Imposing a periodic fee (such as an annual fee, a monthly maintenance fee, or a closed account fee) after an account is closed or terminated if that fee was not imposed prior to closure or termination. This prohibition applies even if the fee was disclosed prior to closure or termination. *See also* comment 55(d)–1.

iii. Increasing a periodic fee (such as an annual fee or a monthly maintenance fee) after an account is closed or terminated. However, a card issuer is not prohibited from continuing to impose a periodic fee that was imposed before the account was closed or terminated.

52(b)(2)(ii) Multiple fees based on single event or transaction.

1. *Single event or transaction.* Section 226.52(b)(2)(ii) prohibits a card issuer from imposing more than one fee for violating the terms or other requirements of an account based on a single event or transaction. If § 226.56(j)(1) permits a card issuer to impose fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction, those fees are not based on a single event or transaction for purposes of § 226.52(b)(2)(ii). The following examples illustrate the application of § 226.52(b)(2)(ii). Assume for purposes of these examples that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

i. Assume that the required minimum periodic payment due on March 25 is $20. On March 26, the card issuer has not received any payment and imposes a late payment fee. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i), the card issuer may impose a $20 late payment fee on March 26. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing an additional late payment fee if the $20 minimum payment has not been received by a subsequent date (such as March 31).

A. On April 3, the card issuer provides a periodic statement disclosing that a $70 required minimum periodic payment is due on April 25. This minimum payment includes the $20 minimum payment due on March 25 and the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 payment. No additional payments are received during the April billing cycle. Section 226.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee based on the consumer's failure to make the $70 required minimum periodic payment on or before April 25. Accordingly, consistent with § 226.52(b)(1)(ii)(B) and (b)(2)(i), the card issuer may impose a $35 late payment fee on April 26.

B. On April 3, the card issuer provides a periodic statement disclosing that a $20 required minimum periodic payment is due on April 25. This minimum payment does not include the $20 minimum payment due on March 25 or the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 payment. No additional payments are received during the April billing cycle. Because the card issuer has received the required minimum periodic payment due on April 25 and because § 226.52(b)(2)(ii) prohibits the card issuer from imposing a second late payment fee based on the consumer's failure to make the $20 minimum payment due on March 25, the card issuer cannot impose a late payment fee in these circumstances.

ii. Assume that the required minimum periodic payment due on March 25 is $30.

A. On March 25, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 27. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

B. Same facts as paragraph ii.A. above except that that card issuer receives the $50 check on March 27 and the check is returned for insufficient funds on March 29. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. If no payment is received on or before the next payment due date (April 25), § 226.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee.

iii. Assume that the required minimum periodic payment due on July 25 is $30. On July 10, the card issuer receives a $50 payment, which is not returned. On July 20, the card issuer receives a $100 payment, which is returned for insufficient funds on July 24. Consistent with § 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25. Nothing in § 226.52(b)(2)(ii) prohibits the imposition of this fee.

iv. Assume that the credit limit for an account is $1,000 and that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 31, the balance on the account is $970 and the card issuer has not received the $35 required minimum periodic payment due on March 25. On that same date (March 31), a $70 transaction is charged to the account, which increases the balance to $1,040. Consistent with § 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 and an over-the-limit fee of $25. Section 226.52(b)(2)(ii) does not prohibit the imposition of both fees because those fees are based on different events or transactions. No additional transactions are charged to the account during the March, April, or May billing cycles. If the account balance remains more than $35 above the credit limit on April 26, the card issuer may impose an over-the-limit fee of $35 pursuant to § 226.52(b)(1)(ii)(B), to the extent consistent with § 226.56(j)(1). Furthermore, if the account balance remains more than $35 above the credit limit on May 26, the card issuer may again impose an over-the-limit fee of $35 pursuant to § 226.52(b)(1)(ii)(B), to the extent consistent with § 226.56(j)(1). Thereafter, § 226.56(j)(1) does not permit the card issuer to impose additional over-the-limit fees unless another over-the-limit transaction occurs. However, if an over-the-limit transaction occurs during the six billing cycles following the May billing cycle, the card issuer may impose an over-the-limit fee of $35 pursuant to § 226.52(b)(1)(ii)(B).

v. Assume that the credit limit for an account is $5,000 and that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On July 23, the balance on the account is $4,950. On July 24, the card issuer receives the $100 required minimum periodic payment due on July 25, reducing the balance to $4,850. On July 26, a $75 transaction is charged to the account, which increases the balance to $4,925. On July 27, the $100 payment is returned for insufficient funds, increasing the balance to $5,025. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25 or an over-the-limit fee of $25. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

vi. Assume that the required minimum periodic payment due on March 25 is $50. On March 20, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 22. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25. On March 25, the card issuer receives a second check for $50, but the check is returned for insufficient funds on March 27. Consistent with §§ 226.52(b)(1)(ii)(A), (b)(1)(ii)(B), and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $35. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

vii. Assume that the required minimum periodic payment due on February 25 is $100. On February 25, the card issuer receives a check for $100. On March 3, the card issuer provides a periodic statement disclosing that a $120 required minimum periodic payment is due on March 25. On March 4, the $100 check is returned to the card issuer for insufficient funds. Consistent with §§ 226.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25 with respect to the $100 payment. However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. On March 20, the card issuer receives a $120 check, which is not returned. No additional payments are received during the March billing cycle. Because the card issuer has received the required minimum periodic payment due on March 25 and because § 226.52(b)(2)(ii) prohibits the card issuer from imposing a second fee based on the $100 payment that was returned for insufficient funds, the card issuer cannot impose a late payment fee in these circumstances.

§ 226.53—Allocation of Payments

* * * * *

4. *Balances with the same rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 226.53 generally does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a card issuer may treat the balances with the same rate as a single balance or separate balances. *See* example in comment 53–5.iv. However, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 226.53 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of § 226.53 until July 1. In addition, unless the card issuer allocates amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer pursuant to § 226.53(b)(1)(ii), § 226.53(b)(1)(i) requires the card issuer to apply any excess payments first to the $1,000 purchase balance except during the last two

billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* example in comment 53–5.v.

5. * * *

v. * * *

A. Each month from February through June, the consumer pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the purchases not subject to the deferred interest program is paid by the required minimum periodic payment. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to § 226.53(b)(1)(ii). Thus, § 226.53(b)(1)(i) requires the card issuer to allocate the $400 excess payments received on February 25, March 25, and April 25 consistent with § 226.53(a). In other words, the card issuer must allocate those payments as follows: $200 to pay off the balance not subject to the deferred interest program (which is subject to the 15% rate) and the remaining $200 to the deferred interest balance (which is treated as a balance with a rate of zero). However, § 226.53(b)(1)(i) requires the card issuer to allocate the entire $400 excess payment received on May 25 to the deferred interest balance. Similarly, § 226.53(b)(1)(i) requires the card issuer to allocate the $400 excess payment received on June 25 as follows: $200 to the deferred interest balance (which pays that balance in full) and the remaining $200 to the balance not subject to the deferred interest program.

B. Same facts as above, except that the card issuer does accept requests from consumers regarding the allocation of excess payments pursuant to § 226.53(b)(1)(ii). In addition, on April 25, the card issuer receives an excess payment of $800, which the consumer requests be allocated to pay off the $800 balance subject to the deferred interest program. Section 226.53(b)(1)(ii) permits the card issuer to allocate the $800 excess payment in the manner requested by the consumer.

53(b) Special rules.

1. *Deferred interest and similar programs.* Section 226.53(b)(1) applies to deferred interest or similar programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of § 226.53(b)(1), "deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary. Section 226.53(b)(1) applies regardless of whether the consumer is required to make payments with respect to that balance during the specified period. However, a grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of § 226.53(b)(1). Similarly, a temporary annual percentage rate of zero percent that applies for a specified period of time consistent with § 226.55(b)(1) is not a deferred interest or similar program for purposes of § 226.53(b)(1) unless the consumer may be obligated to pay interest that accrues during the period if a balance is not paid in full prior to expiration of the period.

2. *Expiration of deferred interest or similar program during billing cycle.* For purposes of § 226.53(b)(1)(i), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. For example, assume that a credit card account has a balance subject to a deferred interest program that expires on June 15. Assume also that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payment is due on the twenty-fifth day of the month. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to § 226.53(b)(1)(ii). Because the expiration date for the deferred interest program (June 15) precedes the due date in the June billing cycle (June 25), § 226.53(b)(1)(i) requires the card issuer to allocate first to the deferred interest balance any amount paid by the consumer in excess of the required minimum periodic payment during the April and May billing cycles (as well as any amount paid by the consumer before June 15). However, if the deferred interest program expired on June 25 or on June 30 (or on any day in between), § 226.53(b)(1)(i) would apply only to the May and June billing cycles.

3. *Consumer requests.* i. *Generally.* Section 226.53(b) does not require a card issuer to allocate amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer, provided that the card issuer instead allocates such amounts consistent with § 226.53(a) or (b)(1)(i), as applicable. For example, a card issuer may decline consumer requests regarding payment allocation as a general matter or may decline such requests when a consumer does not comply with requirements set by the card issuer (such as submitting the request in writing or submitting the request prior to or contemporaneously with submission of the payment), provided that amounts paid by the consumer in excess of the required minimum periodic payment are allocated consistent with § 226.53(a) or (b)(1)(i), as applicable. Similarly, a card issuer that accepts requests pursuant to § 226.53(b)(1)(ii) or (b)(2) must allocate amounts paid by a consumer in excess of the required minimum periodic payment consistent with § 226.53(a) or (b)(1)(i), as applicable, if the consumer does not submit a request. Furthermore, a card issuer that accepts requests pursuant to § 226.53(b)(1)(ii) or (b)(2) must allocate consistent with § 226.53(a) or (b)(1)(i), as applicable, if the consumer submits a request with which the card issuer cannot comply (such as a request that contains a mathematical error), unless the consumer submits an additional request with which the card issuer can comply.

ii. *Examples of consumer requests that satisfy § 226.53(b)(1)(ii) or (b)(2).* A consumer has made a request for purposes of § 226.53(b)(1)(ii) or (b)(2) if:

A. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

B. The consumer completes and submits to the card issuer a form or payment coupon provided by the card issuer for the purpose of requesting that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

C. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment that the card issuer has previously allocated consistent with § 226.53(a) or (b)(1)(i), as applicable, instead be allocated in a different manner.

iii. *Examples of consumer requests that do not satisfy § 226.53(b)(1)(ii) or (b)(2).* A consumer has not made a request for purposes of § 226.53(b)(1)(ii) or (b)(2) if:

A. The terms and conditions of the account agreement contain preprinted language stating that by applying to open an account, by using that account for transactions subject to a deferred interest or similar program, or by using the account to purchase property in which the card issuer holds a security interest the consumer requests that payments be allocated in a particular manner.

B. The card issuer's on-line application contains a preselected check box indicating that the consumer requests that payments be allocated in a particular manner and the consumer does not deselect the box.

C. The payment coupon provided by the card issuer contains preprinted language or a preselected check box stating that by submitting a payment the consumer requests that the payment be allocated in a particular manner.

D. The card issuer requires a consumer to accept a particular payment allocation method as a condition of using a deferred interest or similar program, purchasing property in which the card issuer holds a security interest, making a payment, or receiving account services or features.

* * * * *

§ 226.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General rule.

1. *Increase in rate, fee, or charge.* Section 226.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 226.55(b). Except as specifically provided in § 226.55(b), this prohibition applies even if the circumstances under which an increase will occur are disclosed in advance. The following examples illustrate the general application of § 226.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in § 226.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on

January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to § 226.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by § 226.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to § 226.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to § 226.55(b)(2)). On November 16, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to § 226.55(b)(3)). However, § 226.55(b)(3)(ii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to the $2,000 purchase balance. Furthermore, although the $100 purchase occurred more than 14 days after provision of the § 226.9(c) notice, § 226.55(b)(3)(iii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to that purchase because it occurred during the first year after account opening. On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, § 226.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, § 226.55(b)(4)(i) requires the card issuer to first comply with the notice requirements in § 226.9(g). Thus, if the card issuer provided a § 226.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: A non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to § 226.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to § 226.55(b)(1)). Section 226.55 does not permit the card issuer to apply the variable rate determined using the 8-point margin to the $2,200 purchase balance. Furthermore, § 226.55 does not permit the card issuer to subsequently increase the variable rate determined using the 5-point margin that applies to the $2,200 purchase balance (except due to increases in the index pursuant to § 226.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to § 226.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to § 226.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent.* The payment due on June 15 of year two is received on July 2. On July 16, § 226.55(b)(3)(ii) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the § 226.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, § 226.55(b)(3)(ii) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the § 226.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of § 226.9(g) notice.* Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 226.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, § 226.55(b)(4)(i) requires the card issuer to first provide an additional notice pursuant to § 226.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period.* Nothing in § 226.55 prohibits a card issuer from assessing interest due to the loss of a grace

period to the extent consistent with § 226.5(b)(2)(ii)(B) and § 226.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of § 226.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 226.55.

55(b) Exceptions.

1. *Exceptions not mutually exclusive.* A card issuer generally may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 226.55(b) even if that increase would not be permitted under a different exception. For example, although a card issuer cannot increase an annual percentage rate pursuant to § 226.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 226.55(b)(2). Similarly, although § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 226.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date. However, if § 226.55(b)(4)(ii) requires a card issuer to decrease the rate, fee, or charge that applies to a balance while the account is subject to a workout or temporary hardship arrangement or subject to 50 U.S.C. app. 527 or a similar Federal or State statute or regulation, the card issuer may not impose a higher rate, fee, or charge on that balance pursuant to § 226.55(b)(5) or (b)(6) upon completion or failure of the arrangement or once 50 U.S.C. app. 527 or the similar Federal or State statute or regulation no longer applies. For example, assume that, on January 1, the annual percentage rate that applies to a $1,000 balance is increased from 12% to 30% pursuant to § 226.55(b)(4). On February 1, the rate on that balance is decreased from 30% to 15% consistent with § 226.55(b)(5) as a part of a workout or temporary hardship arrangement. On July 1, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $1,000 balance from 15% to 12%. If the consumer subsequently completes or fails to comply with the terms of the workout or temporary hardship arrangement, the card issuer may not increase the 12% rate that applies to any remaining portion of the $1,000 balance pursuant to § 226.55(b)(5).

* * * * *

3. *Application of a lower rate, fee, or charge.* Nothing in § 226.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in § 226.55(b). The following examples illustrate the application of the rule:

i. *Application of lower rate during first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Temporary rate returns to standard rate at expiration.* On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to the 15% non-variable rate disclosed at account opening. The card issuer does not apply the 5% rate to the $1,400 purchase balance. On October 14 of year one, the consumer makes a $300 purchase at the 5% rate. On January 15 of year two, the consumer makes a $150 purchase at the 5% rate. On April 1 of year two, the card issuer may begin accruing interest on the $300 purchase and the $150 purchase at 15% as disclosed in the § 226.9(c) notice (pursuant to § 226.55(b)(1)).

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 226.55 does not permit the card issuer to increase any annual percentage rate on the account at this time. The card issuer may apply the 30% penalty rate to new transactions beginning on April 1 of year two pursuant to § 226.55(b)(3) by providing a § 226.9(g) notice informing the consumer of this increase no later than February 14 of year two. The card issuer may not, however, apply the 30% penalty rate to the $1,400 purchase balance as of September 30 of year one, the $300 purchase on October 15 of year one, or the $150 purchase on January 15 of year two.

ii. *Application of lower rate at end of first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that a non-variable annual percentage rate of 15% will apply to purchases for one year and discloses that, after the first year, the card issuer will apply a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On December 31 of year one, the account has a purchase balance of $3,000.

A. *Notice of extension of existing temporary rate provided consistent with § 226.55(b)(1)(i).* On December 15 of year one, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the existing 15% rate will continue to apply until July 1 of year two. The notice further states that, on July 1 of year two, the variable rate disclosed at account opening will apply. On July 1 of year two, § 226.55(b)(1) permits the card issuer to apply that variable rate to any remaining portion of the $3,000 balance and to new transactions.

B. *Notice of new temporary rate provided consistent with § 226.55(b)(1)(i).* On December 15 of year one, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two that is lower than the variable rate disclosed at account opening. The new variable rate is calculated using the same index and a reduced margin of 8 percentage points. The notice further states that, on July 1 of year two, the margin will increase to the margin disclosed at account opening (10 percentage points). On July 1 of year two, § 226.55(b)(1) permits the card issuer to increase the margin used to determine the variable rate that applies to new purchases to 10 percentage points and to apply that rate to any remaining portion of the $3,000 purchase balance.

C. *No notice provided.* Same facts as in paragraph ii.B. above except that the card issuer does not send a notice on December 15 of year one. Instead, on January 1 of year two, the card issuer lowers the margin used to determine the variable rate to 8 percentage points and applies that rate to the $3,000 purchase balance and to new purchases. Section 226.9 does not require advance notice in these circumstances. However, unless the account becomes more than 60 days' delinquent, § 226.55 does not permit the card issuer to subsequently increase the rate that applies to the $3,000 purchase balance except due to increases in the index (pursuant to § 226.55(b)(2)).

iii. *Application of lower rate after first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Effect of 14-day period.* On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 15 of year two, the consumer makes a $200 purchase. On July 16, the consumer makes a $100 purchase. On January 1 of year three, the card issuer may begin accruing interest on the $100 purchase at 17% (pursuant to

§ 226.55(b)(1)). However, § 226.55(b)(1)(ii)(B) does not permit the card issuer to apply the 17% rate to the $200 purchase because that transaction occurred within 14 days after provision of the § 226.9(c) notice. Instead, the card issuer may apply the 15% rate that applied to purchases prior to provision of the § 226.9(c) notice. In addition, if the card issuer applied the 5% rate to the $1,000 purchase balance, § 226.55(b)(ii)(A) would not permit the card issuer to increase the rate that applies to that balance on January 1 of year three to a rate that is higher than 15% that previously applied to the balance.

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on August 25 is received on August 30. At this time, § 226.55 does not permit the card issuer to increase the annual percentage rates that apply to the $1,000 purchase balance, the $200 purchase, or the $100 purchase. Instead, those rates can only be increased as discussed in paragraph iii.A. above. However, if the card issuer provides a notice pursuant to § 226.9(c) or (g) on September 1, § 226.55(b)(3) permits the card issuer to apply an increased rate (such as the 17% purchase rate or the 30% penalty rate) to transactions that occur on or after September 16 beginning on October 16.

C. *Application of lower temporary rate during specified period.* Same facts as in paragraph iii. above. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% non-variable rate. On July 1, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for the $1,000 balance and new purchases will decrease to a non-variable rate of 12% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On August 15 of year two, the consumer makes a $500 purchase. On October 1, the card issuer provides another notice pursuant to § 226.9(c) informing the consumer that the rate for the $1,000 balance, the $500 purchase, and new purchases will decrease to a non-variable rate of 5% for six months (from October 1 of year two through March 31 of year three) and that, beginning on April 1 of year three, the rate for purchases will increase to a variable rate that is currently 23% and is determined by adding a margin of 13 percentage points to the previously-disclosed index. On November 15 of year two, the consumer makes a $300 purchase. On April 1 of year three, § 226.55 permits the card issuer to begin accruing interest using the following rates for any remaining portion of the following balances: The 15% non-variable rate for the $1,000 balance; the variable rate determined using the 10-point margin for the $500 purchase; and the variable rate determined using the 13-point margin for the $300 purchase.

* * * * *

55(b)(1) Temporary rate, fee, or charge exception.

1. *Relationship to § 226.9(c)(2)(v)(B).* A card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(B) has also complied with the disclosure requirements in § 226.55(b)(1)(i).

2. *Period of six months or longer.* A temporary annual percentage rate, fee, or charge must apply for a specified period of six months or longer before a card issuer can increase that rate, fee, or charge pursuant to § 226.55(b)(1). The specified period must expire no less than six months after the date on which the card issuer provides the consumer with the disclosures required by § 226.55(b)(1)(i) or, if later, the date on which the account can be used for transactions to which the temporary rate, fee, or charge applies. Section 226.55(b)(1) does not prohibit a card issuer from limiting the application of a temporary annual percentage rate, fee, or charge to a particular category of transactions (such as to balance transfers or to purchases over $100). However, in circumstances where the card issuer limits application of the temporary rate, fee, or charge to a single transaction, the specified period must expire no less than six months after the date on which that transaction occurred. The following examples illustrate the application of § 226.55(b)(1):

i. Assume that on January 1 a card issuer offers a consumer a 5% annual percentage rate on purchases made during the months of January through June. A 15% rate will apply thereafter. On February 15, a $500 purchase is charged to the account. On June 15, a $200 purchase is charged to the account. On July 1, the card issuer may begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase (pursuant to § 226.55(b)(1)).

ii. Same facts as above except that on January 1 the card issuer offered the 5% rate on purchases beginning in the month of February. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase until August 1.

iii. Assume that on October 31 of year one the annual percentage rate for purchases is 17%. On November 1, the card issuer offers the consumer a 0% rate for six months on purchases made during the months of November and December. The 17% rate will apply thereafter. On November 15, a $500 purchase is charged to the account. On December 15, a $300 purchase is charged to the account. On January 15 of year two, a $150 purchase is charged to the account. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 17% rate on the $500 purchase and the $300 purchase until May 1 of year two. However, the card issuer may accrue interest at the 17% rate on the $150 purchase beginning on January 15 of year two.

iv. Assume that on June 1 of year one a card issuer offers a consumer a 0% annual percentage rate for six months on the purchase of an appliance. An 18% rate will apply thereafter. On September 1, a $5,000 transaction is charged to the account for the purchase of an appliance. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 18% rate on the $5,000 transaction until March 1 of year two.

v. Assume that on May 31 of year one the annual percentage rate for purchases is 15%. On June 1, the card issuer offers the consumer a 5% rate for six months on a balance transfer of at least $1,000. The 15% rate will apply thereafter. On June 15, a $3,000 balance is transferred to the account. On July 15, a $200 purchase is charged to the account. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $3,000 transferred balance until December 15. However, the card issuer may accrue interest at the 15% rate on the $200 purchase beginning on July 15.

vi. Same facts as in paragraph v. above except that the card issuer offers the 5% rate for six months on all balance transfers of at least $1,000 during the month of June and a $2,000 balance is transferred to the account on June 30 (in addition to the $3,000 balance transfer on June 15). Because the 5% rate is not limited to a particular transaction, § 226.55(b)(1) permits the card issuer to begin accruing interest on the $3,000 and $2,000 transferred balances on December 1.

vii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $0 until January 1 of year two, when the fee will increase to $50. On January 1 of year two, the card issuer may impose the $50 annual fee. However, the issuer must also comply with the notice requirements in § 226.9(e).

viii. Assume that a card issuer discloses at account opening on January 1 of year one that the monthly maintenance fee for the account is $0 until July 1 of year one, when the fee will increase to $10. Beginning on July 1 of year one, the card issuer may impose the $10 monthly maintenance fee (to the extent consistent with § 226.52(a)).

3. *Deferred interest and similar promotional programs.* i. *Application of § 226.55.* The general prohibition in § 226.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. However, the exception in § 226.55(b)(1) also applies to these programs, provided that the specified period is six months or longer and that, prior to the commencement of the period, the card issuer discloses the length of the period and the rate at which interest will accrue on the balance subject to the deferred interest or similar program if that balance is not paid in full prior to expiration of the period. See comment 9(c)(2)(v)–9. For purposes of § 226.55, "deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary.

ii. *Examples.*

A. *Deferred interest offer at account opening.* Assume that, at account opening on January 1 of year one, the card issuer discloses the following with respect to a deferred interest program: "No interest on purchases made in January of year one if paid in full by December 31 of year one. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 20%." On January 15 of year one, the consumer makes a purchase of

$2,000. No other transactions are made on the account. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on April 1 is not received until April 10. Section 226.55 does not permit the card issuer to charge to the account interest that has accrued on the $2,000 purchase at this time. Furthermore, if the consumer pays the $2,000 purchase in full on or before December 31 of year one, § 226.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. If, however, the $2,000 purchase has not been paid in full by January 1 of year two, § 226.55(b)(1) permits the card issuer to charge to the account the interest accrued on that purchase at the 20% rate during year one (to the extent consistent with other applicable law).

B. *Deferred interest offer after account opening.* Assume that a card issuer discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On June 30 of year two, the consumer uses the account for a $1,000 purchase in response to an offer of a deferred interest program. Under the terms of this program, interest on the purchase will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if the purchase is paid in full by December 31 of year three. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on September 1 of year two is not received until September 6. Section 226.55 does not permit the card issuer to charge to the account interest that has accrued on the $1,000 purchase at this time. Furthermore, if the consumer pays the $1,000 purchase in full on or before December 31 of year three, § 226.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. On December 31 of year three, the $1,000 purchase has been paid in full. Under these circumstances, the card issuer may not charge any interest accrued on the $1,000 purchase.

C. *Application of § 226.55(b)(4) to deferred interest programs.* Same facts as in paragraph ii.B. above except that, on November 2 of year two, the card issuer has not received the required minimum periodic payments due on September 1, October 1, or November 1 of year two and sends a § 226.9(c) or (g) notice stating that interest accrued on the $1,000 purchase since June 30 of year two will be charged to the account on December 17 of year two and thereafter interest will be charged on the $1,000 purchase consistent with the variable rate for purchases. On December 17 of year two, § 226.55(b)(4) permits the card issuer to charge to the account interest accrued on the $1,000 purchase since June 30 of year two and § 226.55(b)(3) permits the card issuer to begin charging interest on the $1,000 purchase consistent with the variable rate for purchases. However, if the card issuer receives the required minimum periodic payments due on January 1, February 1, March 1, April 1, May 1, and June 1 of year three, § 226.55(b)(4)(ii) requires the card issuer to cease charging the account for interest on the $1,000 purchase no later than the first day of the next billing cycle. See comment 55(b)(4)–3.iii. However, § 226.55(b)(4)(ii) does not require the card issuer to waive or credit the account for interest accrued on the $1,000 purchase since June 30 of year two. If the $1,000 purchase is paid in full on December 31 of year three, the card issuer is not permitted to charge to the account interest accrued on the $1,000 purchase after June 1 of year three.

4. *Contingent or discretionary increases.* Section 226.55(b)(1) permits a card issuer to increase a temporary annual percentage rate, fee, or charge upon the expiration of a specified period of time. However, § 226.55(b)(1) does not permit a card issuer to apply an increased rate, fee, or charge that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The following examples illustrate rate increases that are not permitted by § 226.55:

i. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% applies to purchases but that all rates on an account may be increased to a non-variable penalty rate of 30% if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. On March 1, the account has a $2,000 purchase balance. The payment due on March 15 is not received until March 20. Section 226.55 does not permit the card issuer to apply the 30% penalty rate to the $2,000 purchase balance. However, pursuant to § 226.55(b)(3), the card issuer could provide a § 226.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 30% rate (or a different rate) will apply to new transactions.

ii. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 5% applies to transferred balances but that this rate will increase to a non-variable rate of 18% if the consumer does not use the account for at least $200 in purchases each billing cycle. On July 1, the consumer transfers a balance of $4,000 to the account. During the October billing cycle, the consumer uses the account for $150 in purchases. Section 226.55 does not permit the card issuer to apply the 18% rate to the $4,000 transferred balance or the $150 in purchases. However, pursuant to § 226.55(b)(3), the card issuer could provide a § 226.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 18% rate (or a different rate) will apply to new transactions.

iii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $10 but may be increased to $50 if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. The payment due on July 15 is not received until July 23. Section 226.55 does not permit the card issuer to impose the $50 annual fee at this time. Furthermore, § 226.55(b)(3) does not permit the card issuer to increase the $10 annual fee during the first year after account opening. However, § 226.55(b)(3) does permit the card issuer to impose the $50 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with § 226.9(c) and the consumer does not reject that increase pursuant to § 226.9(h).

iv. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for a credit card account under an open-end (not home-secured) consumer credit plan is $0 but may be increased to $100 if the consumer's balance in a deposit account provided by the card issuer or its affiliate or subsidiary falls below $5,000. On June 1 of year one, the balance on the deposit account is $4,500. Section 226.55 does not permit the card issuer to impose the $100 annual fee at this time. Furthermore, § 226.55(b)(3) does not permit the card issuer to increase the $0 annual fee during the first year after account opening. However, § 226.55(b)(3) does permit the card issuer to impose the $100 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with § 226.9(c) and the consumer does not reject that increase pursuant to § 226.9(h).

5. *Application of increased fees and charges.* Section 226.55(b)(1)(ii) limits the ability of a card issuer to apply an increased fee or charge to certain transactions. However, to the extent consistent with § 226.55(b)(3), (c), and (d), a card issuer generally is not prohibited from increasing a fee or charge that applies to the account as a whole. *See* comments 55(c)(1)–3 and 55(d)–1.

* * * * *

55(b)(3) Advance notice exception.

* * * * *

6. *Delayed implementation of increase.* Section 226.55(b)(3)(iii) does not prohibit a card issuer from notifying a consumer of an increase in an annual percentage rate, fee, or charge consistent with § 226.9(b), (c), or (g). However, § 226.55(b)(3)(iii) does prohibit application of an increased rate, fee, or charge during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. If § 226.9(b), (c), or (g) permits a card issuer to apply an increased rate, fee, or charge on a particular date and the account is closed on that date or the card issuer does not permit the consumer to use the account for new transactions on that date, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without

relinquishing the ability to apply that rate, fee, or charge (assuming the increase is otherwise consistent with § 226.55). *See* examples in comment 55(b)–2.iii. However, if the account is closed or the card issuer does not permit the consumer to use the account for new transactions on the first day of the following billing cycle, then the card issuer must provide a new notice of the increased rate, fee, or charge consistent with § 226.9(b), (c), or (g).

7. *Date on which account may first be used by consumer to engage in transactions.* For purposes of § 226.55(b)(3)(iii), an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. An account is considered open for purposes of § 226.55(b)(3)(iii) on any date that the card issuer may consider the account open for purposes of § 226.52(a)(1). *See* comment 52(a)(1)–4.

* * * * *

55(c) Treatment of protected balances.

55(c)(1) Definition of protected balance.

1. *Example of protected balance.* Assume that, on March 15 of year two, an account has a purchase balance of $1,000 at a non-variable annual percentage rate of 12% and that, on March 16, the card issuer sends a notice pursuant to § 226.9(c) informing the consumer that the annual percentage rate for new purchases will increase to a non-variable rate of 15% on May 1. The fourteenth day after provision of the notice is March 29. On March 29, the consumer makes a $100 purchase. On March 30, the consumer makes a $150 purchase. On May 1, § 226.55(b)(3)(ii) permits the card issuer to begin accruing interest at 15% on the $150 purchase made on March 30 but does not permit the card issuer to apply that 15% rate to the $1,100 purchase balance as of March 29. Accordingly, the protected balance for purposes of § 226.55(c) is the $1,100 purchase balance as of March 29. The $150 purchase made on March 30 is not part of the protected balance.

2. *First year after account opening.* Section 226.55(c) applies to amounts owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge cannot be applied after the rate, fee, or charge for that category of transactions has been increased pursuant to § 226.55(b)(3). Because § 226.55(b)(3)(iii) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening, § 226.55(c) does not apply to balances during the first year after account opening.

3. *Increased fees and charges.* Except as provided in § 226.55(b)(3)(iii), § 226.55(b)(3) permits a card issuer to increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 226.9(b) or (c), provided that the increased fee or charge is not applied to a protected balance. To the extent consistent with § 226.55(b)(3)(iii), a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, after the first year following account opening, a card issuer generally may add or increase an annual or a monthly maintenance fee for an account after complying with the notice requirements in § 226.9(c), including notifying the consumer of the right to reject the new or increased fee under § 226.9(h). However, except as otherwise provided in § 226.55(b), an increased fee or charge cannot be applied to an account while the account is closed or while the card issuer does not permit the consumer to use the account for new transactions. *See* § 226.55(b)(3)(iii); *see also* §§ 226.52(b)(2)(i)(B)(*3*) and 226.55(d)(1). Furthermore, if the consumer rejects an increase in a fee or charge pursuant to § 226.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. *See* § 226.9(h)(2)(i) and (ii); comment 9(h)(2)(ii)–2.

4. *Changing balance computation method.* Nothing in § 226.55 prohibits a card issuer from changing the balance computation method that applies to new transactions as well as protected balances.

* * * * *

55(e) Promotional waivers or rebates of interest, fees, and other charges.

1. *Generally.* Nothing in § 226.55 prohibits a card issuer from waiving or rebating finance charges due to a periodic interest rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, if a card issuer promotes and applies the waiver or rebate to an account, the card issuer cannot temporarily or permanently cease or terminate any portion of the waiver or rebate on that account unless permitted by one of the exceptions in § 226.55(b). For example:

i. A card issuer applies an annual percentage rate of 15% to balance transfers but promotes a program under which all of the interest accrued on transferred balances will be waived or rebated for one year. If, prior to the commencement of the one-year period, the card issuer discloses the length of the period and the annual percentage rate that will apply to transferred balances after expiration of that period consistent with § 226.55(b)(1)(i), § 226.55(b)(1) permits the card issuer to begin imposing interest charges on transferred balances after one year. Furthermore, if, during the one-year period, a required minimum periodic payment is not received within 60 days of the payment due date, § 226.55(b)(4) permits the card issuer to begin imposing interest charges on transferred balances (after providing a notice consistent with § 226.9(g) and § 226.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, § 226.55 does not permit the card issuer to begin imposing interest charges on transferred balances until the expiration of the one-year period.

ii. A card issuer imposes a monthly maintenance fee of $10 but promotes a program under which the fee will be waived or rebated for the six months following account opening. If, prior to account opening, the card issuer discloses the length of the period and the monthly maintenance fee that will be imposed after expiration of that period consistent with § 226.55(b)(1)(i), § 226.55(b)(1) permits the card issuer to begin imposing the monthly maintenance fee six months after account opening. Furthermore, if, during the six-month period, a required minimum periodic payment is not received within 60 days of the payment due date, § 226.55(b)(4) permits the card issuer to begin imposing the monthly maintenance fee (after providing a notice consistent with § 226.9(c) and § 226.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, § 226.55 does not permit the card issuer to begin imposing the monthly maintenance fee until the expiration of the six-month period.

2. *Promotion of waiver or rebate.* For purposes of § 226.55(e), a card issuer generally promotes a waiver or rebate if the card issuer discloses the waiver or rebate in an advertisement (as defined in § 226.2(a)(2)). *See* comment 2(a)(2)–1. In addition, a card issuer generally promotes a waiver or rebate for purposes of § 226.55(e) if the card issuer discloses the waiver or rebate in communications regarding existing accounts (such as communications regarding a promotion that encourages additional or different uses of an existing account). However, a card issuer does not promote a waiver or rebate for purposes of § 226.55(e) if the advertisement or communication relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

i. *Examples of promotional communications.* The following are examples of circumstances in which a card issuer is promoting a waiver or rebate for purposes of § 226.55(e):

A. A card issuer discloses the waiver or rebate in a newspaper, magazine, leaflet, promotional flyer, catalog, sign, or point-of-sale display, unless the disclosure relates to interest, fees, or charges that have already been waived.

B. A card issuer discloses the waiver or rebate on radio or television or through electronic advertisements (such as on the Internet), unless the disclosure relates to interest, fees, or charges that have already been waived or rebated.

C. A card issuer discloses a waiver or rebate to individual consumers, such as by telephone, letter, or electronic communication, through direct mail literature, or on or with account statements, unless the disclosure relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

ii. *Examples of non-promotional communications.* The following are examples of circumstances in which a card issuer is not promoting a waiver or rebate for purposes of § 226.55(e):

A. After a card issuer has waived or rebated interest, fees, or other charges subject to § 226.55 with respect to an account, the issuer discloses the waiver or rebate to the accountholder on the periodic statement or by telephone, letter, or electronic communication. However, if the card issuer also discloses prospective waivers or rebates in the same communication, the issuer is promoting a waiver or rebate for purposes of § 226.55(e).

B. A card issuer communicates with a consumer about a waiver or rebate of interest, fees, or other charges subject to § 226.55 in relation to an inquiry or dispute about a specific charge, including a dispute under §§ 226.12 or 226.13.

C. A card issuer waives or rebates interest, fees, or other charges subject to § 226.55 in order to comply with a legal requirement (such as the limitations in § 226.52(a)).

D. A card issuer discloses a grace period, as defined in § 226.5(b)(2)(ii)(*3*).

E. A card issuer provides a period after the payment due date during which interest, fees, or other charges subject to § 226.55 are waived or rebated even if a payment has not been received.

F. A card issuer provides benefits (such as rewards points or cash back on purchases or finance charges) that can be applied to the account as credits, provided that the benefits are not promoted as reducing interest, fees, or other charges subject to § 226.55.

3. *Relationship of § 226.55(e) to grace period.* Section 226.55(e) does not apply to the waiver of finance charges due to a periodic rate consistent with a grace period, as defined in § 226.5(b)(2)(ii)(*3*).

* * * * *

§ 226.58—Internet Posting of Credit Card Agreements

58(b) Definitions.

58(b)(1) Agreement.

1. *Inclusion of pricing information.* For purposes of this section, a credit card agreement is deemed to include certain information, such as annual percentage rates and fees, even if the issuer does not otherwise include this information in the basic credit contract. This information is listed under the defined term "pricing information" in § 226.58(b)(7). For example, the basic credit contract may not specify rates, fees and other information that constitutes pricing information as defined in § 226.58(b)(7); instead, such information may be provided to the cardholder in a separate document sent along with the card. However, this information nevertheless constitutes part of the agreement for purposes of § 226.58.

2. *Provisions contained in separate documents included.* A credit card agreement is defined as the written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. An agreement therefore may consist of several documents that, taken together, define the legal obligation between the issuer and consumer. For example, provisions that mandate arbitration or allow an issuer to unilaterally alter the terms of the card issuer's or consumer's obligation are part of the agreement even if they are provided to the consumer in a document separate from the basic credit contract.

58(b)(2) Amends.

1. *Substantive changes.* A change to an agreement is substantive, and therefore is deemed an amendment of the agreement, if it alters the rights or obligations of the parties. Section 226.58(b)(2) provides that any change in the pricing information, as defined in § 226.58(b)(7), is deemed to be substantive. Examples of other changes that generally would be considered substantive include: (i) Addition or deletion of a provision giving the issuer or consumer a right under the agreement, such as a clause that allows an issuer to unilaterally change the terms of an agreement; (ii) addition or deletion of a provision giving the issuer or consumer an obligation under the agreement, such as a clause requiring the consumer to pay an additional fee; (iii) changes that may affect the cost of credit to the consumer, such as changes in a provision describing how the minimum payment will be calculated; (iv) changes that may affect how the terms of the agreement are construed or applied, such as changes in a choice-of-law provision; and (v) changes that may affect the parties to whom the agreement may apply, such as provisions regarding authorized users or assignment of the agreement.

2. *Non-substantive changes.* Changes that generally would not be considered substantive include, for example: (i) Correction of typographical errors that do not affect the meaning of any terms of the agreement; (ii) changes to the card issuer's corporate name, logo, or tagline; (iii) changes to the format of the agreement, such as conversion to a booklet from a full-sheet format, changes in font, or changes in margins; (iv) changes to the name of the credit card to which the program applies; (v) reordering sections of the agreement without affecting the meaning of any terms of the agreement; (vi) adding, removing, or modifying a table of contents or index; and (vii) changes to titles, headings, section numbers, or captions.

58(b)(4) Card issuer.

1. *Card issuer clarified.* Section 226.58(b)(4) provides that, for purposes of § 226.58, card issuer or issuer means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement. For example, Bank X and Bank Y work together to issue credit cards. A consumer that obtains a credit card issued pursuant to this arrangement between Bank X and Bank Y is subject to an agreement that states "This is an agreement between you, the consumer, and Bank X that governs the terms of your Bank Y Credit Card." The card issuer in this example is Bank X, because the agreement creates a legally enforceable obligation between the consumer and Bank X. Bank X is the issuer even if the consumer applied for the card through a link on Bank Y's Web site and the cards prominently feature the Bank Y logo on the front of the card.

2. *Use of third-party service providers.* An institution that is the card issuer as defined in § 226.58(b)(4) has a legal obligation to comply with the requirements of § 226.58. However, a card issuer generally may use a third-party service provider to satisfy its obligations under § 226.58, provided that the issuer acts in accordance with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance. In some cases, an issuer may wish to arrange for the institution with which it partners to issue credit cards to fulfill the requirements of § 226.58 on the issuer's behalf. For example, Retailer and Bank work together to issue credit cards. Under the § 226.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of § 226.58. However, Retailer services the credit card accounts, including mailing account opening materials and periodic statements to cardholders. While Bank is responsible for ensuring compliance with § 226.58, Bank may arrange for Retailer (or another appropriate third-party service provider) to submit credit card agreements to the Board under § 226.58 on Bank's behalf. Bank must comply with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance.

3. *Partner institution Web sites.* As explained in comments 58(d)–2 and 58(e)–3, if an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is deemed to maintain that Web site for purposes of § 226.58. Such a Web site is deemed to be maintained by the issuer for purposes of § 226.58 even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. A partner institution's Web site is an example of a third-party Web site that may be deemed to be maintained by the issuer for purposes of § 226.58. For example, Retailer and Bank work together to issue credit cards. Under the § 226.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of § 226.58. Bank does not have a Web site. However, cardholders can access information about their individual accounts, such as balance information and copies of statements, through a Web site maintained by Retailer. Retailer designs the Web site and owns and maintains the information technology infrastructure that supports the Web site. The Web site is branded and held out to the public as belonging to Retailer. Because cardholders can access information about their individual accounts through this Web site, the Web site is deemed to be maintained by Bank for purposes of § 226.58. Bank therefore may comply with § 226.58(d) by ensuring that agreements offered to the public are posted on Retailer's Web site in accordance with § 226.58(d). Bank may comply with § 226.58(e) by ensuring that cardholders can request copies of their individual agreements through Retailer's Web site in accordance with § 226.58(e)(1). Bank need not create and maintain a Web site branded and held out to the public as belonging to Bank in order to comply with §§ 226.58(d) and (e) as long as Bank ensures that Retailer's Web site complies with these sections.

In addition, § 226.58(d)(1) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, an issuer may comply with § 226.58(d) by posting the agreement on the publicly available Web site of at least one of the merchants at which credit cards issued under each private label credit card plan with 10,000 or more open accounts may be used. This rule is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.

58(b)(5) Offers.

1. *Cards offered to limited groups.* A card issuer is deemed to offer a credit card agreement to the public even if the issuer solicits, or accepts applications from, only a limited group of persons. For example, a card issuer may market affinity cards to students and alumni of a particular educational institution, or may solicit only high-net-worth individuals for a particular card; in these cases, the agreement would be considered to be offered to the public. Similarly, agreements for credit cards issued by a credit union are considered to be offered to the public even though such cards are available only to credit union members.

2. *Individualized agreements.* A card issuer is deemed to offer a credit card agreement to the public even if the terms of the agreement are changed immediately upon opening of an account to terms not offered to the public.

58(b)(6) Open account.

1. *Open account clarified.* The definition of open account includes a credit card account under an open-end (not home-secured) consumer credit plan if either: (i) The cardholder can obtain extensions of credit on the account; or (ii) there is an outstanding balance on the account that has not been charged off. Under this definition, an account that meets either of these criteria is considered to be open even if the account is inactive. Similarly, if an account has been closed for new activity (for example, due to default by the cardholder), but the cardholder is still making payments to pay off the outstanding balance, the account is considered open.

58(b)(8) Private label credit card account and private label credit card plan.

1. *Private label credit card account.* The term private label credit card account means a credit card account under an open-end (not home-secured) consumer credit plan with a credit card that can be used to make purchases only at a single merchant or an affiliated group of merchants. This term applies to any such credit card account, regardless of whether it is issued by the merchant or its affiliate or by an unaffiliated third party.

2. *Co-branded credit cards.* The term private label credit card account does not include accounts with so-called co-branded credit cards. Credit cards that display the name, mark, or logo of a merchant or affiliated group of merchants as well as the mark, logo, or brand of payment network are generally referred to as co-branded cards. While these credit cards may display the brand of the merchant or affiliated group of merchants as the dominant brand on the card, such credit cards are usable at any merchant that participates in the payment network. Because these credit cards can be used at multiple unaffiliated merchants, accounts with such credit cards are not considered private label credit card accounts under § 226.58(b)(8).

3. *Affiliated group of merchants.* The term "affiliated group of merchants" means two or more affiliated merchants or other persons that are related by common ownership or common corporate control. For example, the term would include franchisees that are subject to a common set of corporate policies or practices under the terms of their franchise licenses. The term also applies to two or more merchants or other persons that agree among each other, by contract or otherwise, to accept a credit card bearing the same name, mark, or logo (other than the mark, logo, or brand of a payment network), for the purchase of goods or services solely at such merchants or persons. For example, several local clothing retailers jointly agree to issue credit cards called the "Main Street Fashion Card" that can be used to make purchases only at those retailers. For purposes of this section, these retailers would be considered an affiliated group of merchants.

4. *Private label credit card plan.* Which credit card accounts issued by a particular issuer constitute a private label credit card plan is determined by where the credit cards can be used. All of the private label credit card accounts issued by a particular card issuer with credit cards usable at the same merchant or affiliated group of merchants constitute a single private label credit card plan, regardless of whether the rates, fees, or other terms applicable to the individual credit card accounts differ. For example, a card issuer has 3,000 open private label credit card accounts with credit cards usable only at Merchant A and 5,000 open private label credit card accounts with credit cards usable only at Merchant B and its affiliates. The card issuer has two separate private label credit card plans, as defined by § 226.58(b)(8)—one plan consisting of 3,000 open accounts with credit cards usable only at Merchant A and another plan consisting of 5,000 open accounts with credit cards usable only at Merchant B and its affiliates.

The example above remains the same regardless of whether (or the extent to which) the terms applicable to the individual open accounts differ. For example, assume that, with respect to the card issuer's 3,000 open accounts with credit cards usable only at Merchant A in the example above, 1,000 of the open accounts have a purchase APR of 12 percent, 1,000 of the open accounts have a purchase APR of 15 percent, and 1,000 of the open accounts have a purchase APR of 18 percent. All of the 5,000 open accounts with credit cards usable only at Merchant B and Merchant B's affiliates have the same 15 percent purchase APR. The card issuer still has only two separate private label credit card plans, as defined by § 226.58(b)(8). The open accounts with credit cards usable only at Merchant A do not constitute three separate private label credit card plans under § 226.58(b)(8), even though the accounts are subject to different terms.

58(c) Submission of agreements to Board.

* * * * *

58(c)(3) Amended agreements.

1. *No requirement to resubmit agreements not amended.* Under § 226.58(c)(3), if a credit card agreement has been submitted to the Board, the agreement has not been amended, and the card issuer continues to offer the agreement to the public, no additional submission regarding that agreement is required. For example, a credit card issuer begins offering an agreement in October and submits the agreement to the Board the following January 31, as required by § 226.58(c)(1). As of March 31, the card issuer has not amended the agreement and is still offering the agreement to the public. The card issuer is not required to submit anything to the Board regarding that agreement by April 30.

2. *Submission of amended agreements.* If a card issuer amends a credit card agreement previously submitted to the Board, § 226.58(c)(3) requires the card issuer to submit the entire amended agreement to the Board. The issuer must submit the amended agreement to the Board by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective. However, the issuer is required to submit the amended agreement to the Board only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the change became effective. For example, a card issuer submits an agreement to the Board on October 31. On November 15, the issuer changes the balance computation method used under the agreement. Because an element of the pricing information has changed, the agreement has been amended for purposes of § 226.58(c)(3). On December 31, the last business day of the calendar quarter in which the change in the balance computation method became effective, the issuer still offers the agreement to the public as amended on November 15. The issuer must submit the entire amended agreement to the Board no later than January 31.

3. *Agreements amended but no longer offered to the public.* A card issuer should submit an amended agreement to the Board under § 226.58(c)(3) only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the amendment became effective. Agreements that are not offered to the public as of the last day of the calendar quarter should not be submitted to the Board. For example, on December 31 a card issuer offers two agreements, Agreement A and Agreement B. The issuer submits these agreements to the Board by January 31 as required by § 226.58. On February 15, the issuer amends both Agreement A and Agreement B. On February 28, the issuer stops offering Agreement A to the public. On March 15, the issuer amends Agreement B a second time. As a result, on March 31, the last business day of the calendar quarter, the issuer offers to the public one agreement—Agreement B as amended on March 15. By the April 30 quarterly submission deadline, the issuer must: (1) Notify the Board that it is withdrawing Agreement A because Agreement A is no longer offered to the public; and (2) submit to the Board Agreement B as amended on March 15. The

issuer should not submit to the Board either Agreement A as amended on February 15 or the earlier version of Agreement B (as amended on February 15), as neither was offered to the public on March 31, the last business day of the calendar quarter.

4. *Change-in-terms notices not permissible.* Section 226.58(c)(3) requires that if an agreement previously submitted to the Board is amended, the card issuer must submit the entire revised agreement to the Board. A card issuer may not fulfill this requirement by submitting a change-in-terms or similar notice covering only the terms that have changed. In addition, amendments must be integrated into the text of the agreement (or the addenda described in § 226.58(c)(8)), not provided as separate riders. For example, a card issuer changes the purchase APR associated with an agreement the issuer has previously submitted to the Board. The purchase APR for that agreement was included in the addendum of pricing information, as required by § 226.58(c)(8). The card issuer may not submit a change-in-terms or similar notice reflecting the change in APR, either alone or accompanied by the original text of the agreement and original pricing information addendum. Instead, the card issuer must revise the pricing information addendum to reflect the change in APR and submit to the Board the entire text of the agreement and the entire revised addendum, even though no changes have been made to the provisions of the agreement and only one item on the pricing information addendum has changed.

* * * * *

58(d) Posting of agreements offered to the public.

1. *Requirement applies only to agreements submitted to the Board.* Card issuers are only required to post and maintain on their publicly available Web site the credit card agreements that the card issuer must submit to the Board under § 226.58(c). If, for example, a card issuer is not required to submit any agreements to the Board because the card issuer qualifies for the de minimis exception under § 226.58(c)(5), the card issuer is not required to post and maintain any agreements on its Web site under § 226.58(d). Similarly, if a card issuer is not required to submit a specific agreement to the Board, such as an agreement that qualifies for the private label exception under § 226.58(c)(6), the card issuer is not required to post and maintain that agreement under § 226.58(d) (either on the card issuer's publicly available Web site or on the publicly available Web sites of merchants at which private label credit cards can be used). (The card issuer in both of these cases is still required to provide each individual cardholder with access to his or her specific credit card agreement under § 226.58(e) by posting and maintaining the agreement on the card issuer's Web site or by providing a copy of the agreement upon the cardholder's request.)

2. *Card issuers that do not otherwise maintain Web sites.* Unlike § 226.58(e), § 226.58(d) does not include a special rule for card issuers that do not otherwise maintain a Web site. If a card issuer is required to submit one or more agreements to the Board under § 226.58(c), that card issuer must post those agreements on a publicly available Web site it maintains (or, with respect to an agreement for a private label credit card, on the publicly available Web site of at least one of the merchants at which the card may be used, as provided in § 226.58(d)(1)).

If an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is considered to maintain that Web site for purposes of § 226.58. Such a third-party Web site is deemed to be maintained by the issuer for purposes of § 226.58(d) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. Therefore, issuers that provide cardholders with access to account-specific information through a third-party Web site can comply with § 226.58(d) by ensuring that the agreements the issuer submits to the Board are posted on the third-party Web site in accordance with § 226.58(d). (In contrast, the § 226.58(d)(1) rule regarding agreements for private label credit cards is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.)

3. *Private label credit card plans.* Section 226.58(d) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, a card issuer may comply by posting and maintaining the agreement on the Web site of at least one of the merchants at which the cards issued under each private label credit card plan with 10,000 or more open accounts may be used. For example, a card issuer has 100,000 open private label credit card accounts. Of these, 75,000 open accounts have credit cards usable only at Merchant A and 25,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types of accounts and is not offered for any other type of account.

The card issuer is required to submit the agreement to the Board under § 226.58(c)(1). (The card issuer has more than 10,000 open accounts, so the § 226.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.,* one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but both of these plans have more than 10,000 open accounts, so the § 226.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the § 226.58(c)(7) product test exception does not apply.)

Because the card issuer is required to submit the agreement to the Board under § 226.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under § 226.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with § 226.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of Merchant A *and* the publicly available Web site of at least one of Merchants B, C and D. It would not be sufficient for the card issuer to post the agreement on Merchant A's Web site alone because § 226.58(d) requires the card issuer to post the agreement on the publicly available Web site of "at least one of the merchants at which cards issued under *each* private label credit card plan may be used" (emphasis added).

In contrast, assume that a card issuer has 100,000 open private label credit card accounts. Of these, 5,000 open accounts have credit cards usable only at Merchant A and 95,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types of accounts and is not offered for any other type of account.

The card issuer is required to submit the agreement to the Board under § 226.58(c)(1). (The card issuer has more than 10,000 open accounts, so the § 226.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.,* one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but one of these plans has more than 10,000 open accounts, so the § 226.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the § 226.58(c)(7) product test exception does not apply.)

Because the card issuer is required to submit the agreement to the Board under § 226.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under § 226.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with § 226.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of at least one of Merchants B, C and D. The card issuer is not required to post and maintain the agreement on the publicly available Web site of Merchant A because the card issuer's private label credit card plan consisting of accounts with cards usable only at Merchant A has fewer than 10,000 open accounts.

58(e) Agreements for all open accounts.

1. *Requirement applies to all open accounts.* The requirement to provide access to credit card agreements under § 226.58(e) applies to all open credit card accounts, regardless of whether such agreements are required to be submitted to the Board pursuant to § 226.58(c) (or posted on the card issuer's Web site pursuant to § 226.58(d)). For example, a card issuer that is not required to submit agreements to the Board because it qualifies for the de minimis exception under § 226.58(c)(5)) would still be required to provide cardholders with access to their specific agreements under § 226.58(e). Similarly, an agreement that is no longer offered to the public would not be required to be submitted to the Board under § 226.58(c), but would still need to be provided to the cardholder to whom it applies under § 226.58(e).

2. *Readily available telephone line.* Section 226.58(e) provides that card issuers that provide copies of cardholder agreements upon request must provide the cardholder with the ability to request a copy of their agreement by calling a readily available telephone line. To satisfy the readily available standard, the financial institution must provide enough telephone lines so that consumers get a reasonably prompt response. The institution need only provide telephone service during normal business hours. Within its primary service area, an institution must provide a local or toll-free telephone number. It need not provide a toll-free number or accept collect long-distance calls from outside the area where it normally conducts business.

3. *Issuers without interactive Web sites.* Section 226.58(e)(2) provides that a card issuer that does not maintain a Web site from which cardholders can access specific information about their individual accounts is not required to provide a cardholder with the ability to request a copy of the agreement by using the card issuer's Web site. A card issuer without a Web site of any kind could comply by disclosing the telephone number on each periodic statement; a card issuer with a non-interactive Web site could comply in the same way, or alternatively could comply by displaying the telephone number on the card issuer's Web site. An issuer is considered to maintain an interactive Web site for purposes of the § 226.58(e)(2) special rule if the issuer provide cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party interactive Web site. Such a Web site is deemed to be maintained by the issuer for purposes of § 226.58(e)(2) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. An issuer that provides cardholders with access to specific information about their individual accounts through such a Web site is not permitted to comply with the special rule in § 226.58(e)(2). Instead, such an issuer must comply with § 226.58(e)(1).

4. *Deadline for providing requested agreements clarified.* Sections 226.58(e)(1)(ii) and (e)(2) require that credit card agreements provided upon request must be sent to the cardholder or otherwise made available to the cardholder in electronic or paper form no later than 30 days after the cardholder's request is received. For example, if a card issuer chooses to respond to a cardholder's request by mailing a paper copy of the cardholder's agreement, the card issuer must mail the agreement no later than 30 days after receipt of the cardholder's request. Alternatively, if a card issuer chooses to respond to a cardholder's request by posting the cardholder's agreement on the card issuer's Web site, the card issuer must post the agreement on its Web site no later than 30 days after receipt of the cardholder's request. Section 226.58(e)(3)(v) provides that a card issuer may provide cardholder agreements in either electronic or paper form regardless of the form of the cardholder's request.

§ 226.59—Reevaluation of Rate Increases

59(a) General rule.

59(a)(1) Evaluation of increased rate.

1. *Types of rate increases covered.* Section 226.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on that consumer's credit risk or other circumstances specific to that consumer and to increases in annual percentage rates imposed based on factors that are not specific to the consumer, such as changes in market conditions or the issuer's cost of funds.

2. *Rate increases actually imposed.* Under § 226.59(a), a card issuer must review changes in factors only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate for a credit card account under an open-end (not home-secured) consumer credit plan and the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. However, if the consumer's account later becomes subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(g) and the requirements of § 226.59 begin to apply upon imposition of the penalty rate. Similarly, if a card issuer raises the cash advance rate applicable to a consumer's account but the consumer engages in no cash advance transactions to which that increased rate is applied, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. If the consumer subsequently engages in a cash advance transaction, the requirements of § 226.59 begin to apply at that time.

3. *Change in type of rate.* i. *Generally.* A change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate is not a rate increase for purposes of § 226.59, if the rate in effect immediately prior to the change in type of rate is equal to or greater than the rate in effect immediately after the change. For example, a change from a variable rate of 15.99% to a non-variable rate of 15.99% is not a rate increase for purposes of § 226.59 at the time of the change. *See* § 226.55 for limitations on the permissibility of changing from a non-variable rate to a variable rate.

ii. *Change from non-variable rate to variable rate.* A change from a non-variable to a variable rate constitutes a rate increase for purposes of § 226.59 if the variable rate exceeds the non-variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a non-variable annual percentage rate of 12% applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 226.9(c)(2), the rate on all new transactions is changed to a variable rate that is currently 12% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. The change from the 12% non-variable rate to the 12% variable rate on January 1 of year 2 is not a rate increase for purposes of § 226.59(a). On April 1 of year 2, the value of the variable rate increases to 12.5%. The increase in the rate from 12% to 12.5% is a rate increase for purposes of § 226.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 226.59. The increase that must be evaluated for purposes of § 226.59 is the increase from a non-variable rate of 12% to a variable rate of 12.5%.

iii. *Change from variable rate to non-variable rate.* A change from a variable to a non-variable rate constitutes a rate increase for purposes of § 226.59 if the non-variable rate exceeds the variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a variable annual percentage rate that is currently 15% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 226.9(c)(2), the rate on all existing balances and new transactions is changed to a non-variable rate that is currently 15%. The change from the 15% variable rate to the 15% non-variable rate on January 1 of year 2 is not a rate increase for purposes of § 226.59(a). On April 1 of year 2, the value of the variable rate that would have applied to the account decreases to 12.5%. Accordingly, on April 1 of year 2, the non-variable rate of 15% exceeds the 12.5% variable rate that would have applied but for the change in type of rate. At this time, the change to the non-variable rate of 15% constitutes a rate increase for purposes of § 226.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 226.59. The increase that must be evaluated for purposes of § 226.59 is the increase from a variable rate of 12.5% to a non-variable rate of 15%.

4. *Rate increases prior to effective date of rule.* For increases in annual percentage rates made on or after January 1, 2009, and prior to August 22, 2010, § 226.59(a) requires the card issuer to review the factors described in § 226.59(d) and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 226.9(c)(2) or (g). For example, 45 days' notice is not required under § 226.9(c)(2) if the rate increase results from the increase in the index by which a properly-disclosed variable rate is determined in accordance with § 226.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 226.9(c)(2)(v)(B) have been provided. The requirements of § 226.59 do not apply to such rate increases.

5. *Amount of rate decrease.* i. *General.* Even in circumstances where a rate reduction is required, § 226.59 does not require that a card issuer decrease the rate that applies to a credit card account to the rate that was in effect prior to the rate increase subject to § 226.59(a). The amount of the rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 226.59(b) for consideration of factors described in § 226.59(a) and (d). For example, assume a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer makes all of the payments required on the account on time for the six months following the rate increase. Assume that the card issuer evaluates the account by reviewing the factors on which the increase in an annual percentage rate was originally based, in accordance with § 226.59(d)(1)(i). The card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase. However, the card issuer's policies and procedures for performing the review required by § 226.59(a) must be reasonable, as required by § 226.59(b), and must take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

ii. *Change in type of rate.* If the rate increase subject to § 226.59 involves a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate, § 226.59 does not require that the issuer reinstate the same type of rate that applied prior to the change. However, the amount of any rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 226.59(b) for consideration of factors described in § 226.59(a) and (d).

* * * * *

59(d) Factors.

* * * * *

6. *Multiple rate increases between January 1, 2009 and February 21, 2010.* i. *General.* Section 226.59(d)(2) applies if an issuer increased the rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. In some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. In such circumstances, when conducting the first two reviews required under § 226.59, the card issuer may separately review: (i) Rate increases imposed based on factors not specific to the consumer, using the factors described in § 226.59(d)(1)(ii) (as required by § 226.59(d)(2)); and (ii) rate increases imposed based on consumer-specific factors, using the factors described in § 226.59(d)(1)(i). If the review of factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, § 226.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in § 226.59(d)(1)(ii) would otherwise require a rate decrease.

ii. *Example.* Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under § 226.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in § 226.59(d)(1)(ii) (as required by § 226.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph § 226.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in § 226.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 226.59 permits the rate on the account to remain at 25%.

59(f) Termination of obligation to review factors.

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, § 226.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 226.9(c)(2)(v)(B), the review requirements in § 226.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 226.59(a) apply, § 226.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012 and August 1, 2013 and discloses pursuant to § 226.9(c)(2)(v)(B) that on August 1, 2013 the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under § 226.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under § 226.59(a) at least once each six months during the period from September 1, 2012 to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013 even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013 indicates that a reduction to the original temporary rate of 10% is appropriate. Section 226.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10% for any portion of the period from July 1, 2013, to August 1, 2013, or may continue to impose the 15% rate for that entire period. The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012 the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with § 226.59 on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

2. *Example—relationship to § 226.59(a).* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under § 226.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with § 226.59 on January 1, 2013 and July 1, 2013, based on the factors described in § 226.59(d)(1)(ii). Based on the January 1, 2013 review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with § 226.59(f), § 226.59(a) requires that the card issuer reduce the rate on the existing account to the 15% rate that was in effect prior to the September 1, 2012 rate increase.

* * * * *

By order of the Board of Governors of the Federal Reserve System, April 8, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–8843 Filed 4–22–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL REGISTER

Vol. 76 Monday,

No. 79 April 25, 2011

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 648

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 45; Final Rule and Interim Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100923469–1211–02]

RIN 0648–BA27

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 45

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

ACTION: Final rule.

SUMMARY: This final rule partially approves Framework Adjustment (FW) 45 to the NE Multispecies Fishery Management Plan (FMP) and implements the approved measures. FW 45 was developed by the New England Fishery Management Council (Council) to make adjustments necessary to ensure that conservation and management objectives of the FMP, including preventing overfishing, rebuilding overfished stocks, achieving optimum yield (OY), and minimizing the economic impact of management measures on affected vessels, are being met in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Specifically, this action revises the biological reference points and stock status for pollock, updates annual catch limits (ACLs) for several stocks for fishing years (FYs) 2011–2012, adjusts the rebuilding program for Georges Bank (GB) yellowtail flounder, increases scallop vessel access to the Great South Channel Exemption Area, approves five new sectors, modifies the existing dockside and at-sea monitoring requirements, revises several sector administrative provisions, establishes a Gulf of Maine (GOM) Cod Spawning Protection Area, and refines measures affecting the operations of NE multispecies vessels fishing with handgear. This action approves the Council's proposed FY 2011 U.S./Canada Management Area total allowable catch (TAC), acceptable biological catch (ABC), and ACL for GB yellowtail flounder, but replaces them with new catch limits for this stock through a parallel emergency action, included as part of this final rule, based on the International Fisheries Agreement Clarification Act (IFACA) that provides new flexibility in setting catch limits for this stock. In addition, this action disapproves a measure to delay fishing industry responsibility for paying for at-sea monitoring coverage costs in FY 2012. This action is necessary to ensure that the fishery is managed on the basis of the best available science, to comply with the ABC control rules adopted in Amendment 16 to the FMP, and to enhance the viability of the fishery.

DATES: This rule is effective at 0001 hr on May 1, 2011. The specification of the GB yellowtail flounder ABC and ACL and their distribution are effective May 1, 2011, through October 24, 2011.

ADDRESSES: Copies of FW 45, its Regulatory Impact Review (RIR), a draft of the environmental assessment (EA) prepared for this action, and the draft Initial Regulatory Flexibility Act (IRFA) analysis prepared by the Council are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. A supplemental EA was also prepared for this action that outlines analysis in support of increased FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL implemented by this action. Also, an errata sheet was prepared to augment the FW 45 EA's analysis of the impacts of the proposed action on distinct population segments of Atlantic sturgeon and loggerhead sea turtles. The draft IRFA prepared by the Council was expanded upon in the preamble to the proposed rule for this action. The Final Regulatory Flexibility Act (FRFA) analysis consists of the IRFA, public comments and responses, and the summary of impacts, and alternatives contained in the Classification section of the preamble of this final rule and applicable sections of Framework 45. Copies of the small entity compliance guide, the errata sheet for the FW 45 EA, and the supplemental EA associated with this action are available from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930–2298. The FW 45 EA/RIR/IRFA, errata sheet, supplemental EA prepared for this action, and the relevant analyses for Amendment 16 and other recent actions are also accessible via the Internet at *http://www.nefmc.org/nemulti/index.html* or *http://www.nero.noaa.gov.* Copies of recent stock assessments for stocks managed by the FMP are also accessible via the Internet at *http://www.nefsc.noaa.gov/groundfish.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to the Office of Management and Budget (OMB) by e-mail at *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Douglas W. Christel, Fishery Policy Analyst, *phone:* 978–281–9141, *fax:* 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

Amendment 13 (April 27, 2004; 69 FR 22906) included the establishment of rebuilding programs for stocks managed by the FMP and measures necessary to end overfishing, rebuild overfished stocks, and help mitigate the economic impacts of effort reductions in the fishery to the extent practicable. In addition to revising existing days-at-sea (DAS) measures and substantially expanding sector measures, Amendment 16 (April 9, 2010; 75 FR 18262) established a process for specifying ABCs and ACLs and distributing available catch among components of the fishery that catch regulated species and ocean pout, and also specified accountability measures (AMs) necessary to prevent overfishing on these stocks and address overages of ACLs, as required by the Magnuson-Stevens Act. 16 U.S.C. 1801 *et seq.* In another action, FW 44 (April 9, 2010; 75 FR 18356), NMFS set the ACLs for FYs 2010 through 2012, and distributed such allocations among the various components of the fishery that catch these stocks.

The Council developed FW 45 as part of the established framework adjustment process to revise measures necessary to ensure consistency with the FMP in order to prevent overfishing and rebuild overfished stocks, while achieving OY in the fishery and minimizing economic impact to the extent practicable. Updated stock assessments for pollock and GB yellowtail flounder conducted in 2010 require the ACLs originally established under FW 44 pursuant to the ABC/ACL process established in Amendment 16 to be updated based upon revised stock status for pollock and a revised rebuilding program for GB yellowtail flounder. Further, following the transition to sectors under Amendment 16, the Council realized that several changes to existing measures are necessary to make the Amendment 16 measures work more effectively, as described below.

This rule also implements the parallel, but separate, emergency action that replaces the FW 45 FY 2011 GB yellowtail flounder TAC, ABC, and ACL based on the flexibility to increase catch limits provided by the IFACA, which President Obama signed into law on January 4, 2011. This Act provides authority to the Council and NMFS to increase the FY 2011 U.S./Canada Management Area TAC, ABC, and ACL for GB yellowtail flounder originally proposed by the Council under FW 45 and approved by this action. Specifically, the new statute recognizes the U.S./Canada Resource Sharing Understanding (Understanding) as an international agreement for the purposes of section 304(e)(4)(A)(ii) of the Magnuson-Stevens Act. Based on this recognition, the IFACA provides for additional flexibility regarding the range of catch levels that may be considered for GB yellowtail flounder, and allows for a higher yearly TAC and, therefore, ABC and ACL for this stock in FY 2011, provided that overfishing is ended immediately and that the fishing mortality rate (F) ensures rebuilding consistent with the Understanding. The justification for implementing these increases through emergency action, as provided for in section 305(c) of the Magnuson-Stevens Act, is explained in the preamble to the proposed rule and is not repeated here.

Following the passage of the IFACA, NMFS requested a special meeting of the Transboundary Management Guidance Committee (TMGC), a group that consists of NMFS, Council members and staff, and United States fishing industry representatives and their counterparts in the Department of Fisheries and Ocean of Canada (DFO) that makes recommendations of the yearly TACs for stocks managed by the Understanding, to reconsider the FY 2011 U.S./Canada Management Area TAC for GB yellowtail flounder pursuant to the IFACA and the Understanding. On February 9, 2011, the TMGC held a conference call to consider revising the FY 2011 TAC for this stock, and concluded that the original combined U.S./Canada Management Area TAC for GB yellowtail flounder (1,900 mt) could be increased to 2,650 mt for FY 2011.

A proposed rule to implement measures proposed in FW 45 was published on March 3, 2011 (76 FR 11858), with public comments accepted through March 18, 2011. That proposed rule included a detailed description of the proposed management measures, and other factors that influenced the development of this action. Specifically, that rule indicated that NMFS was considering disapproving the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC adopted by the Council under FW 45, and implementing the increased TAC for this stock agreed to by the TMGC on February 9, 2011, through a parallel, but separate emergency action pursuant to section 305(c) of the Magnuson-Stevens Act. This parallel emergency action was proposed and justified in the same **Federal Register** notice as the proposed rule for this action, and is being promulgated as a final rule in this action as well. NMFS also published, at the same time as and in conjunction with the proposed rule for FW 45, a proposed rule to approve the FY 2011 operations plans and sector contracts for 19 sectors authorized by Amendment 16 and FW 45 (February 28, 2011; 76 FR 10852). Public comments on that rule were accepted through March 15, 2011. If approved, that rule would also specify the annual catch entitlements (ACEs, or sector quotas) for each stock allocated to each sector pursuant to Amendment 16 and sector rosters submitted to NMFS on December 1, 2010. This roster deadline was later extended to allow vessels involved in an ownership change to either join a sector or change its sector affiliation. A final rule implementing approved FY 2011 sector operations plans and ACE is expected to publish in conjunction with this final rule and become effective on May 1, 2011.

Disapproved Measures

Delay in Industry Responsibility for At-Sea Monitoring Coverage

In Amendment 16, the Council established monitoring measures to ensure that sector allocations of the ACLs for particular species could be accurately monitored. These measures included the requirement for sectors to develop and pay for an at-sea monitoring program beginning in FY 2012 that meet a minimum level of coverage based on the precision of bycatch estimates. In the development of these measures, the Council noted that "effective management of sectors requires that catch be accurately known." Thus, the at-sea monitoring provisions were developed to ensure that landings were accurately monitored for each sector.

To reduce monitoring costs to industry, the Council proposed to delay the requirement for the fishing industry to pay for at-sea monitoring coverage in FW 45 by one year. However, without industry funding, NMFS funding would be the sole source for any at-sea or observer monitoring coverage during FY 2012. During the deliberation of this measure, NMFS expressed continued concern about the Council's reliance upon NMFS funding to fully support a provision required by the FMP, particularly the specific at-sea monitoring coverage levels outlined for sector-developed at-sea monitoring programs in Amendment 16 for FY 2012. Because NMFS' funding is not guaranteed and depends upon Congressional appropriations, it is likely that funding levels will fluctuate on a yearly basis and may not be sufficient to fully fund the at-sea monitoring coverage requirements in the FMP. The NMFS budget for FY 2012 has yet to be finalized. Accordingly, NMFS remains uncertain whether sufficient funding will exist in FY 2012 to provide sufficient coverage to accurately monitor sector catch, as required under Amendment 16.

NMFS has determined, therefore, that the proposed delay of industry funding for at-sea monitoring coverage in FY 2012 is inconsistent with the FMP and the requirements of the Magnuson-Stevens Act. First, such a delay, without sufficient federal funding for at-sea monitoring, would likely fail to maintain conservation and management measures that are necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, as required by section 303(a)(1) of the Magnuson-Stevens Act. As noted above, Amendment 16 indicated that sufficient at-sea monitoring coverage is necessary to ensure that catch is accurately known. Without the requirement for the industry to fund at sea monitoring in the absence of sufficient federal funding, it would not likely be possible to obtain sufficient accurate catch information, including information on discards that is most reliably acquired through observer and at-sea monitoring coverage. As a result, it would not likely be possible to effectively estimate F, evaluate whether overfishing is occurring, and develop ACLs and other measures that would prevent overfishing and rebuild overfished stocks. Further, by reducing the likelihood that sufficient funding will be available to provide adequate at-sea monitoring coverage necessary to accurately monitor catch in the fishery, the disapproved measure would have undermined measures in Amendment 16 that helped to ensure that the standardized reporting methodology is capable of assessing the amount and type of bycatch occurring in the fishery, as required in section 303(a)(11). Accordingly, NMFS has disapproved the measure to delay making the industry responsible for the costs associated with at-sea monitoring in FY 2012 to the extent that the federal funds are not available. NMFS intends to pay for at least some level of at-sea monitoring coverage in 2012, as it has done every year, based on the amount of available funding, and will work toward trying to secure the funds necessary to fully support such coverage in 2012. However, industry shall be responsible for that balance of at-sea monitoring coverage costs that are not covered by available Federal funding starting in FY 2012.

Approved Measures

The following summarizes the approved FW 45 measures, based on the order in which applicable provisions appear in the regulations at 50 CFR part 648. These measures build upon the provisions implemented by previous management actions, and are intended to either supplement or replace existing regulations, as described for each measure. This final rule also includes, through authority granted to NMFS by section 305(d) of the Magnuson-Stevens Act, revisions to regulations that are not specifically identified in FW 45, but that are necessary to implement measures to achieve, but not exceed the sub-ACLs available to the common pool fishery during FY 2011 and to correct errors in, or clarify, existing provisions, as described further below. A more detailed explanation of the rationale for each approved measure can be found in the proposed rule for this action.

Although NMFS proposed to disapprove the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL originally adopted by the Council under FW 45, NMFS ultimately decided not to disapprove these measures through this final rule, based upon further review of the FW 45 measures and applicable law. Disapproval of the TAC, ABC, and ACL proposed by FW 45 was not appropriate, because disapproval of a measure is only permissible if it is inconsistent with Magnuson-Stevens Act requirements and other applicable law. In the context of FW 45, these catch limits are consistent with the FMP and the Magnuson-Stevens Act requirements and other applicable law. These catch limits comply with the Magnuson-Stevens Act requirements to end overfishing and rebuild overfished stocks within 10 years. In addition, the FW 45 catch limits comply with the advice of the Council's Scientific and Statistical Committee in setting an ABC for this stock using the ABC control rule specified in the FMP and the best available scientific information. Further, the FW 45 ABC and ACL for GB yellowtail flounder incorporate both scientific and management uncertainty, consistent with the National Standard 1 guidelines. The fact that these proposed specifications for GB yellowtail flounder could be increased pursuant to IFACA does not undermine their approvability in FW 45. Moreover, if the emergency rule increasing the ACL expires before the Council has recommended a new ACL for FY 2012, the approved Framework 45 measure could go into place automatically, thereby avoiding a gap in TACs, ABCs and ACLs for this stock.

Accordingly, this final rule approves the FY 2011 GB yellowtail flounder TAC, ABC, and ACL in FW 45, but temporarily replaces them, through NMFS' emergency action authority provided in section 305(c) of the Magnuson-Stevens Act, with the revised TAC, ABC, and ACL described further below in Item 5 of this preamble.

This parallel emergency action increasing FW 45's specifications of FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC, ABC, and ACL is justifed by, and based on, new legal authority stemming from the January 4, 2011, enactment of the IFACA, as more fully explained in the preamble to the proposed rule for this action. Pursuant to the requirements of IFACA that any new catch levels still prevent overfishing and are consistent with the U.S. Canada Understanding, NMFS held a TMGC conference call. As noted in the preamble of the proposed rule for this action, based on this TMGC conference call, a report was generated that concluded that the higher FY 2011 TAC for this stock specified in the proposed rule for this action and described further in Item 5 of this preamble would still likely prevent overfishing (i.e., result in a F below F at maximum sustainable yield (F_{MSY}, or F_{ref}, as listed in the Understanding)) and result in a 5 percent increase in median biomass from 2011 to 2012. Therefore, the increased TAC is consistent with the provisions of the IFACA and National Standards 1 and 8 of the Magnuson-Stevens Act because it prevents overfishing, is consistent with the F outlined in the Understanding, continues to rebuild this overfished stock, optimizes OY, and minimizes adverse economic impacts to fishing communities through higher catch limits and increased revenues, without compromising conservation objectives of the FMP and applicable law. Further, consistent with National Standard 9 of the Magnuson-Stevens Act, an increased TAC reduces bycatch and associated bycatch mortality in the fishery by increasing the amount of GB yellowtail flounder that can be caught during FY 2011 and minimizing incentives to discard this stock and others caught concurrently. However, this increase in catch limits for GB yellowtail flounder is only valid for the duration of the emergency and one extension (i.e., FY 2011). To justify comparable increases in catch limits for future fishing years, the Council must adjust the FMP to establish a new rebuilding program and timeline consistent with IFACA as more fully discussed below in item 2.

1. Status Determination Criteria for Pollock

Based upon an updated peer-reviewed benchmark stock assessment conducted in July 2010 (Stock Assessment Workshop, or SAW, 50), pollock is not overfished or subject to overfishing. Thus, this species no longer requires the rebuilding program established in Amendment 16. As noted in the preamble of the proposed rule for this action, NMFS implemented an emergency action on July 20, 2010 (75 FR 41996) to incorporate the results of this assessment and update the status determination criteria and the associated FY 2010 ABC and ACL for this species. These increased catch limits were renewed through July 17, 2011, or until replaced by another action through a notice published on December 1, 2010 (75 FR 74661). Therefore, formally integrating the results of the 2010 pollock stock assessment, updated status determination criteria, ABC, and ACLs for this species into the FMP through this final rule is necessary to replace the measures implemented by the emergency action that would expire in July 2011. Table 1 lists the revised status determination criteria, with numerical estimates of these parameters listed in Table 2. The revised biomass target parameter for pollock, where spawning stock biomass is at maximum sustainable yield (SSB*MSY*) or its proxy, is SSB at 40 percent maximum spawning potential (MSP). The maximum F threshold is the F*MSY* proxy, or F*40%MSP*.

TABLE 1—DESCRIPTION OF THE UPDATED POLLOCK STATUS DETERMINATION CRITERIA

Species	Biomass target (B_{target})	Minimum biomass threshold	Maximum fishing mortality threshold
Pollock	SSB_{MSY}: SSB/R (40%MSP)	½ B_{target}	$F_{40\%MSP}$

TABLE 2—NUMERICAL ESTIMATES FOR THE UPDATED POLLOCK STATUS DETERMINATION CRITERIA

Species	Biomass target (SSB_{MSY} or proxy) in mt	Maximum fishing mortality threshold (F_{MSY} or proxy)	MSY in mt
Pollock	91,000	0.41	16,200

2. Rebuilding Program for GB Yellowtail Flounder

Recent estimates of the status of GB yellowtail flounder conducted by the Transboundary Resource Assessment Committee (TRAC) in July 2010 indicate that overfishing is not occurring, but that the stock is still in an overfished condition (TRAC 2010/05). This report concludes that it is not possible to rebuild this stock by 2014, the end of the eight-year rebuilding period originally adopted in FW 42 (October 23, 2006; 71 FR 62156), with a 75 percent probability of success even at F = 0. Accordingly, this action revises the GB yellowtail flounder rebuilding program to rebuild the stock by 2016, with a 50-percent probability of success. This revision extends the rebuilding program for this stock out to a 10-year rebuilding period and lowers the probability of success from 75 percent to 50 percent in order to maximize the amount of GB yellowtail flounder that could be caught while the stock rebuilds.

IFACA allows the Secretary and the Council to extend the rebuilding period for stocks, or portions of stocks, managed by the Understanding. However, because IFACA was enacted after FW 45 was developed and approved by the Council, the extension of the rebuilding period for GB yellowtail flounder was restricted to 10 years. To maintain increases in GB yellowtail flounder catch comparable to the emergency increase for FY 11 after the emergency increase for FY 2011 expires, the Council would need to consider revising the FMP's rebuilding program and timeline for this stock consistent with the flexibility provided by IFACA. This would allow the Council to further mitigate the adverse economic impacts of efforts to rebuild this stock beyond that which was considered by the Council in the development of the revised GB yellowtail flounder rebuilding program included in FW 45. Therefore, NMFS recommends that the Council reevaluate the GB yellowtail flounder rebuilding program approved under FW 45, and consider extending the rebuilding program for this stock consistent with IFACA and implementing, if justified, the higher catch limits for this stock for future FYs.

3. Overfishing Levels and ABCs for Particular Stocks

This action revises the OFLs and ABCs of particular stocks, including GB cod, GB haddock, GB yellowtail flounder, and pollock for FYs 2011 and 2012. Revisions to the OFLs and ABCs for pollock and GB yellowtail flounder are based upon the updated assessments and revised rebuilding strategies for these stocks, as described in Items 1 and 2 of this preamble, respectively, and on the flexibility afforded by IFACA for GB yellowtail flounder, as described in Item 5 of this preamble. Revisions to the OFLs and ABCs for the GB cod and GB haddock stocks are based upon updated TRAC assessments of the eastern components of the stock. It is anticipated that the FY 2012 values of the ABCs for GB cod, GB haddock, and GB yellowtail flounder will be revised during 2011, based on new transboundary stock assessments conducted by the TRAC, and will likely be specified again in conjunction with the FY 2012 U.S./Canada Management Area TAC levels, as further described in Item 5 of this preamble. Table 3 contains the OFLs and ABCs for FYs 2011 and 2012 approved under FW 45, with the exception of GB yellowtail flounder.

For GB yellowtail flounder, the FY 2011 U.S. ABC shown in Table 3 represents a revised shared U.S./Canada Management Area TAC based upon, and consistent with, determinations and decisions about this stock by the TMGC, pursuant to the Understanding and the flexibility afforded by the IFACA. Because the U.S./Canada Management Area represents the entire stock area for GB yellowtail flounder, the shared U.S./Canada Management Area TAC for this stock that is available to the U.S. fishery also represents the ABC for this stock. The revised ABC agreed to by the TMGC is consistent with the provisions of IFACA and the harvest strategy of the Understanding that requires overfishing to be prevented and the facilitation of the rebuilding of overfished stocks. NMFS is implementing the revised FY 2011 ABC for this stock as a separate, but parallel, action to FW 45 pursuant to its emergency action authority specified in section 305(c) of the Magnuson-Stevens Act, as further described in the proposed rule for this action. As noted above, the duration of this proposed revision to the GB yellowtail flounder ABC is limited by the Magnuson-Stevens Act to 180 days (i.e., through October 24, 2011), but may be extended to make the revised ABC and ACL effective for the duration of FY 2011 (through April 30, 2012).

TABLE 3—REVISIONS TO OVERFISHING LEVELS AND ACCEPTABLE BIOLOGICAL CATCHES

Stock	OFL (mt, live weight)		U.S. ABC (mt, live weight)	
	FY 2011	FY 2012	FY 2011	FY 2012
GB cod	7,311	*8,090	4,766	*5,364
GB haddock	59,948	*51,150	34,244	*29,016
GB yellowtail flounder:				
Proposed in FW 45	3,495	*4,335	**1,458	*1,222
Emergency Action	3,495	*4,335	1,099	*1,222
White hake	4,805	5,306	3,295	3,638
Pollock	21,853	19,887	16,900	15,400

* Preliminary estimates that may be revised in 2012 based on TRAC and TMGC considerations.
** This value represents the flexibility afforded by IFACA and described further in Item 5 of this preamble that supersedes the 1,099 mt FY 2011 GB yellowtail flounder U.S. ABC originally adopted by the Council in FW 45.

4. Revisions to ACLs

Similar to adjustments in the OFLs and ABCs described in Item 3 of this preamble, this action revises the ACLs for several stocks, including GB cod, GB haddock, GB yellowtail flounder, white hake, and pollock. Pursuant to Magnuson-Stevens Act requirements and the process specified in Amendment 16, the ACLs adopted in this action are lower than the ABCs listed above for these stocks to account for management uncertainty, as detailed in Appendix II of FW 45 (*see* **ADDRESSES**) and summarized in the proposed rule for this action. For most stocks and components of the fishery (ABC components), the default adjustment (reduction) to the catch level for a fishery component to account for management uncertainty was 5 percent. For stocks with less management uncertainty, the adjustment was 3 percent, and for those stocks or components with more management uncertainty, the adjustment was 7 percent. The total ACL for a stock represents the catch limit for a particular FY, considering both biological and management uncertainty, and the limit includes all sources of catch (landed and discards) and all fisheries (commercial and recreational groundfish fishery, state-waters catch, and non-groundfish fisheries).

The allocation of yellowtail flounder to the scallop fishery is not changed by this action. Thus, the SNE/MA yellowtail flounder allocations to the scallop fishery listed in Tables 5 and 6 are the same amounts implemented under FW 44, with the allocation of SNE/MA yellowtail flounder remaining at 82 and 127 mt, live weight, during FYs 2011 and 2012, respectively; the GB yellowtail flounder allocations to the scallop fishery listed in Tables 11 and 12 remain at 200.8 and 307.5 mt, live weight, during FYs 2011 and 2012, respectively. No specific allocation of Cape Cod (CC)/GOM yellowtail flounder is made to the scallop fishery, because the incidental catches of this stock by the scallop fishery are relatively low. Catches of this stock will be considered part of the "other sub-component" of the ACL.

Current regulations set a cap on the amount of yellowtail flounder that may be harvested from the scallop access areas in the SNE/MA and GB yellowtail flounder stock areas. Specifically, current regulations cap yellowtail flounder harvest from scallop access areas at 10 percent of the "total TAC" for each of the stock areas. In light of the ACL components, "total TAC" means "total ACL." For FY 2011, this means 10 percent of 1,416 mt (141.6 mt) for GB yellowtail flounder, as listed in Table 11.

This action updates the existing allocation of 0.2 percent of the U.S. ABC for GB and GOM haddock to the mid-water trawl fishery based on changes to the GB haddock ABC described above. The values for the allocations to the mid-water trawl fishery listed in Table 5 are slightly less than 0.2 percent, due to the 7-percent reduction of these allocations to account for management uncertainty for this stock. For example, the FY 2011 ABC of 32,244 mt was multiplied by 0.002 (32,244 mt × .002 = 68.5 mt), and then reduced by 4.79 mt (68.5 mt × 0.07 = 4.79 mt) to arrive at the proposed allocation of 64 mt. Because the herring fishery already has AMs associated with this allocation that were developed as part of FW 43 (August 15, 2006; 71 FR 46871), all of the haddock allocations to the mid-water trawl fishery are characterized as sub-ACLs.

Tables 5 through 8 list the distribution of the total ACL for stocks affected by measures in FW 45 to the groundfish fishery, the scallop fishery, the mid-water trawl herring fishery, state waters fisheries, and other fishery sub-components, such as exempted fisheries. A full list of the FY 2011 ACLs will be sent to NE multispecies permit holders and posted on the NMFS Northeast Regional Office Web site (*http://www.nero.noaa.gov*). As noted in the FW 44 final rule, while ACLs are specified through FY 2012 for most stocks, it is likely that the Council will adopt ACLs for FYs 2012 through 2014 though a future Council action. Therefore, ACLs specified through FY 2012 in FW 44 and this action will only be implemented if the anticipated Council action is delayed. In contrast, the pollock ACLs are not expected to be revisited until FY 2013, with any changes effective for FY 2014. The ACL listed in Table 5 for white hake corrects an error published in Table 4 of both the FW 44 proposed (February 1, 2010; 75 FR 5021) and final rules, respectively, that listed the commercial sub-ACL for white hake for FY 2011 as 2,566 mt (the FY 2010 value) instead of the correct value of 2,974 mt.

TABLE 5—TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2011

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
GB cod	4,540	4,301	0	0	48	191

TABLE 5—TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2011—Continued

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
GB haddock	32,616	30,840	0	64	342	1,370
SNE/MA yellowtail flounder	641	524	82	0	0	27
White hake	3,138	2,974	0	0	33	132
Pollock	16,166	13,952	0	0	769	1,445

TABLE 6—TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2012

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
GB cod *	5,109	4,841	0	0	54	215
GB haddock *	27,637	26,132	0	54	290	1,161
SNE/MA Yellowtail flounder	936	759	127	0	0	40
White hake	3,465	3,283	0	0	36	146
Pollock	14,736	12,612	0	0	754	1,370

* Preliminary estimate that may be revised in 2012 based on TRAC and TMGC considerations.

TABLE 7—POLLOCK TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2013

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Pollock	14,927	12,791	0	0	756	1,380

TABLE 8—POLLOCK TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2014

[Mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Pollock	15,308	13,148	0	0	760	1,400

The commercial groundfish sub-ACL is further divided into the non-sector (common pool vessels) sub-ACL and the sector sub-ACL, based on the total vessel/permit enrollment in all sectors and the cumulative Potential Sector Contributions (PSCs) associated with those sectors. Table 9 lists the preliminary distribution of the groundfish sub-ACL between common pool and sectors based on rosters submitted to NMFS as of December 1, 2010. FY 2011 sector rosters will not be finalized until May 1, 2011, because the owners of individual permits signed up to participate in sectors have until April 30, 2011, to drop out of a sector and fish in the common pool and can either join a sector or change its sector affiliation based on an ownership change that occurred after December 1, 2011. Therefore, it is possible that the FY 2011 sector sub-ACL listed in Table 9 and the final rule to approve the FY 2011 sector operations plans will be changed at a later date. Based on the final sector rosters, NMFS intends to publish a rule in early May 2011 to modify these sub-ACLs, and notify the public if these numbers change. In addition, it is almost certain that all of the FY 2012 sub-ACLs for the common pool and sectors will change and be re-specified prior to FY 2012 due to annual changes to the sector rosters and changes to the ABCs for GB cod, GB haddock, and GB yellowtail flounder based on the specification of Canadian TACs for these stocks, as described above in Item 5 of this preamble.

TABLE 9—PRELIMINARY DISTRIBUTION OF GROUNDFISH SUB-ACL BETWEEN COMMON POOL AND SECTOR VESSELS

[Mt, live weight]*

Stock	Groundfish sub-ACL		Common pool sub-ACL		Sector sub-ACL	
	FY 2011	FY 2012	FY 2011	FY 2012	FY 2011	FY 2012
GB cod	4,301	4,841	99	111	4,202	4,730
GB haddock	30,840	26,132	129	109	30,711	26,023
GB yellowtail flounder:						

TABLE 9—PRELIMINARY DISTRIBUTION OF GROUNDFISH SUB-ACL BETWEEN COMMON POOL AND SECTOR VESSELS—Continued

[Mt, live weight]*

Stock	Groundfish sub-ACL		Common pool sub-ACL		Sector sub-ACL	
	FY 2011	FY 2012	FY 2011	FY 2012	FY 2011	FY 2012
Proposed in FW 45 **	790.7	686.3	23.7	20.6	767	665.7
Emergency Action ***	1,142	1,142	17.4	17.4	1,124.6	1,124.6
White hake	2,974	3,283	35	39	2,939	3,244
Pollock	13,952	12,612	138	125	13,814	12,487

* Preliminary estimate that may be revised based on updated sector rosters and TRAC and TMGC considerations.
** These values represent an increase from the ACLs adopted by the Council in FW 45, as described further in Item 5 of this preamble.
*** These values represent an estimate of the ACLs adopted by the Council in FW 45 based upon preliminary sector roster information and do not reflect updated rosters submitted to NMFS.

5. Annual Specifications for the U.S./Canada Management Area

Annual TACs for transboundary stocks jointly managed with Canada as part of the Understanding (Eastern GB cod, Eastern GB haddock, and GB yellowtail flounder) are determined through a process involving the Council, the TMGC, and the U.S./Canada Steering Committee. The recommended FY 2011 TACs for Eastern GB cod and Eastern GB haddock were based on the most recent stock assessments (TRAC Status Reports for 2010), and the fishing mortality strategy shared by NMFS and the DFO. The TMGC concluded that the most appropriate combined U.S./Canada TAC for Eastern GB cod and Eastern GB haddock for FY 2011 is 1,050 mt and 22,000 mt, respectively. The annual allocation shares between countries for FY 2011 are based on a combination of historical catches (10-percent weighting) and resource distribution based on trawl surveys (90-percent weighting). Applying this formula results in an allocation of 19 percent of the shared Eastern GB cod TAC to the U.S. and 81 percent for Canada, or a FY 2011 quota of 200 mt for the U.S. and 850 mt for Canada. Applying the same formula for Eastern GB haddock results in an allocation of 43 percent of the shared TAC to the U.S. and 57 percent to Canada, or a FY 2011 quota of 9,640 mt for the U.S. and 12,540 mt for Canada.

For GB yellowtail flounder, the TMGC originally recommended, the Council adopted, and NMFS approved under FW 45, a combined U.S./Canada Management Area TAC of 1,900 mt, resulting in a FY 2011 quota of 1,045 mt for the U.S. and an 855 mt quota for Canada. However, the TMGC agreed to a revised shared GB yellowtail flounder TAC for FY 2011 of 2,650 mt that is being implemented through a parallel emergency action, based on the new flexibility provided by IFACA for FY 2011, as discussed above in this preamble.

Table 10 lists the FY 2011 U.S./Canada Management Area TACs for all stocks managed by the Understanding, with the FY 2011 GB yellowtail flounder TAC reflecting the increased TAC recommended by the TMGC following its February 9, 2011, conference call.

TABLE 10—2011 U.S./CANADA TACS (MT, LIVE WEIGHT) AND PERCENTAGE SHARES

[In parentheses]

		Eastern GB cod	Eastern GB haddock	GB Yellowtail flounder
Proposed in FW 45	Total Shared TAC	1,050	22,000	1,900
	U.S. TAC	200 (19%)	9,640 (43%)	1,045 (55%)
	Canada TAC	850 (81%)	12,540 (57%)	855 (45%)
Emergency Action	Total Shared TAC	1,050	22,000	2,650
	U.S. TAC	200 (19%)	9,640 (43%)	1,458 (55%)
	Canada TAC	850 (81%)	12,540 (57%)	1,193 (45%)

Because the U.S./Canada Management Area represents the entire stock area for GB yellowtail flounder, the U.S./Canada Management Area TAC that is available to the U.S. fishery also represents the ABC for this stock. After management uncertainty is deducted from the ABC, the amount that is available to the U.S. fishery represents the ACL for this stock. Thus, the revised GB yellowtail flounder TAC specified in this action also requires applicable changes to the ACL, and how the ACL for this stock is distributed to the various components of the fishery that catch this stock that were adopted by the Council in FW 45. The revised GB yellowtail flounder ACL, sub-ACL, and ACL sub-components are specified in Tables 11 and 12 for FYs 2011 and 2012, respectively. The revised U.S./Canada TAC for GB yellowtail flounder does not affect the sub-ACL for the scallop fishery specified by FW 45 as 200.8 mt.

TABLE 11—GB YELLOWTAIL FLOUNDER TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2011

[Mt, live weight]

Action	Total ACL *	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Proposed in FW 45	1,045	790.7	200.8	0	0	53.5

TABLE 11—GB YELLOWTAIL FLOUNDER TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2011—Continued

[Mt, live weight]

Action	Total ACL *	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Emergency Action	1,416	1,142	200.8	0	0	73

TABLE 12—REVISED GB YELLOWTAIL FLOUNDER TOTAL ACL, SUB-ACL, AND ACL-SUBCOMPONENTS FOR FY 2012

[Mt, live weight]

Action	Total ACL	Groundfish sub-ACL	Scallop fishery	Mid-water trawl herring fishery	State waters ACL sub-component	Other ACL sub-components
Proposed in FW 45	1,045	686.3	307.5	0	0	51.2
Emergency Action	1,426	1,046	307.5	0	0	77

* Preliminary estimate that may be revised in 2011 based on TRAC and TMGC considerations.

The regulations related to the Understanding, promulgated by the final rule implementing Amendment 13, state that "any overages of the GB cod, haddock, or yellowtail flounder TACs that occur in a given fishing year will be subtracted from the respective TAC in the following fishing year." Therefore, if an analysis of the catch of the shared stocks by U.S. vessels indicates that an over-harvest occurred during FY 2010, the pertinent components of the ACL would be adjusted downward in order to be consistent with the FMP and Understanding. If an adjustment to one of the FY 2011 TACs of cod, haddock, or yellowtail flounder is necessary, it will be done consistent with the Administrative Procedure Act, and the fishing industry will also be notified.

6. Incidental Catch TACs and Allocations to Special Management Programs

Incidental catch TACs are specified for certain stocks of concern (i.e., stocks that are overfished or subject to overfishing) for common pool vessels fishing in the special management programs (i.e., special access programs (SAPs) and the Regular B DAS Program), in order to limit the amount of catch of these stocks caught under such programs. The incidental catch TACs apply to catch (landings and discards) on trips that end on a Category B DAS (either Regular or Reserve B DAS). Catch of such stocks on trips that start under a Category B DAS and then flip to a Category A DAS do not accrue toward incidental catch TACs, but rather the overall common pool sub-ACL for that stock. Because pollock is no longer considered overfished or subject to overfishing, this action removes this species from the list of stocks of concern, and eliminates the incidental catch TAC for this stock.

This final rule specifies incidental catch TACs applicable to the NE multispecies special management programs for FYs 2011 and 2012, based on the common pool sub-ACLs listed in Item 4 of this preamble (see Tables 13–15). As noted above, FY 2011 sector rosters will not be finalized until May 1, 2011. Therefore, the amount of the common pool sub-ACL may change based upon changes to the number of vessels participating in the common pool during FY 2011. Based on the final rosters, NMFS will publish a rule in early May 2011 to modify these sub-ACLs, and notify the public if these numbers change.

TABLE 13—PRELIMINARY COMMON POOL INCIDENTAL CATCH TACS BY STOCK FOR FY 2011—2012

[Mt, live weight]

Stock	Percentage of sub-ACL	2011 Incidental catch TAC	2012 Incidental catch TAC
GB cod	2	2.0	2.2
GOM cod	1	1.3	1.3
GB yellowtail flounder	2	0.3	0.3
CC/GOM yellowtail flounder	1	0.3	0.4
SNE/MA yellowtail flounder	1	1.1	1.7
American plaice	5	3.9	4.1
Witch flounder	5	1.2	1.2
SNE/MA winter flounder	1	7.3	7.6
GB winter flounder	2	0.3	0.3
White hake	2	0.7	0.8

TABLE 14—DISTRIBUTION OF INCIDENTAL CATCH TACS AMONG SPECIAL MANAGEMENT PROGRAMS

[Mt, live weight]

Stock	Regular B DAS program	Closed area I hook gear haddock SAP (%)	Eastern U.S./Canada haddock SAP (%)
GB cod	50	16	34
GOM cod	100	na	na
GB yellowtail flounder	50	na	50
CC/GOM yellowtail flounder	100	na	na
SNE/MA yellowtail flounder	100	na	na
Plaice	100	na	na
Witch flounder	100	na	na
SNE/MA winter flounder	100	na	na
GB winter flounder	50	na	50
White hake	100	na	na
Pollock	50	16	34

TABLE 15—INCIDENTAL CATCH TACS FOR SPECIAL MANAGEMENT PROGRAMS BY STOCK FOR FY 2011–2012

[Mt, live weight]

Stock	Regular B DAS program		Closed area I hook gear haddock SAP		Eastern U.S./Canada haddock SAP	
	FY 2011	FY 2012	FY 2011	FY 2012	FY 2011	FY 2012
GB cod	1.0	1.1	0.3	0.4	0.7	0.8
GOM cod	1.3	1.3	na	na	na	na
GB yellowtail flounder	0.15	0.15	na	na	0.1	0.1
CC/GOM yellowtail flounder	0.3	0.4	na	na	na	na
SNE/MA yellowtail flounder	1.1	1.7	na	na	na	na
American plaice	3.9	4.1	na	na	na	na
Witch flounder	1.2	1.2	na	na	na	na
SNE/MA winter flounder	7.3	7.6	na	na	na	na
GB winter flounder	0.1	0.2	na	na	0.1	0.2
White hake	0.7	0.8	na	na	na	na

In addition to the incidental catch TAC for GB cod, overall fishing effort by both common pool and sector vessels in the Closed Area I Hook Gear Haddock SAP is also controlled by an overall TAC for GB haddock, the target species for this SAP. For FY 2011, the overall haddock TAC for the Closed Area I Hook Gear Haddock SAP applicable to both common pool and sector vessels participating in this SAP is 3157.5 mt (6,961,096 lb or 3,157,553 kg) based on TACs specified in FW 44. Once this overall haddock TAC is caught, the Closed Area I Hook Gear Haddock SAP will be closed to all groundfish vessels for the remainder of FY 2011.

7. Great South Channel Exemption Area

This action eliminates the yellowtail flounder spawning closure areas within the Great South Channel Exemption Area, and allows all scallop vessels, including limited access general category (LAGC) scallop vessels, to fish within this area throughout the entire year in accordance with applicable scallop regulations. Since the August 31, 2006, rulemaking (71 FR 51779) that created the Great South Channel Exemption Area and the associated yellowtail flounder spawning closure areas, the general category scallop permits have become limited access permits subject to an individual fishing quota (IFQ) that limit the amount of scallops and, therefore, regulated species and ocean pout, particularly yellowtail flounder, caught by these vessels. Thus, the main justification for the spawning protection areas for LAGC scallop vessels is no longer relevant.

8. GOM Cod Spawning Protection Area

To protect spawning aggregations of GOM cod and prevent fishing from interfering with spawning activity, this final rule creates the GOM Cod Spawning Protection Area. This area is rectangular in shape and is located just south of the Isle of Shoals off the New Hampshire coastline, with its long axis oriented in a northwest to southeast direction. All commercial fishing vessels using gear capable of catching groundfish are prohibited from fishing within the proposed area from June 1 through June 30 of each year, while all recreational vessels (private and charter/party vessels) are prohibited from using gear capable of catching groundfish in the area from April 1 through June 30 of each year. For commercial vessels, only vessels fishing with "exempted gear," as defined in the current regulations, are allowed into this area during the closure periods. Exempted gear includes pelagic hook and line gear, pelagic longline gear, spears, rakes, diving gear, cast nets, tongs, harpoons, weirs, dipnets, stop nets, pound nets, pelagic gillnets, pots and traps, shrimp trawls with a properly configured grate, and surfclam and ocean quahog dredges. Therefore, because midwater trawl gear and purse seine gear is not listed as exempted gear, vessels fishing with these gear types may not fish in this area during June of each year. Only pelagic hook-and-line gear, as defined in the current regulations, is allowed to be used in the area by recreational vessels. The catch or possession of any regulated species or ocean pout by vessels using the exempted gear from April 1 through June 30 of each year is prohibited. Both recreational and commercial vessels are allowed to transit the proposed area, provided all gear is stowed according to existing regulations.

9. Handgear A and B Measures

Cod Trip Limit

Through this final rule, the cod trip limits applicable to NE multispecies Handgear A (limited access) and B (open access) vessels are revised to be specific to either the GOM or GB cod stock, including any adjustments to such trip limits. Handgear A vessels are subject to an initial cod limit of 300 lb (135 kg) per trip for both the GOM and GB cod stocks, until NMFS adjusts the cod trip limit applicable to common pool vessels fishing under a NE multispecies DAS for either of these stocks below 300 lb (135 kg) per trip. Once either the GOM or the GB cod trip limit for common pool DAS vessels is reduced below 300 lb (135 kg) per DAS, the applicable cod trip limit for Handgear A vessels will be adjusted to be the same as the daily limit for common pool DAS vessels. For example, if only the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area (i.e., the area specified for the GOM cod trip limit) would also be reduced to 250 lb (113.4 kg) per trip; however, under this example, the cod trip limit for a Handgear A vessel fishing for GB cod south of the GOM Regulated Mesh Area (RMA) (the GB cod stock area is considered the GB, SNE, and MA RMAs) would be maintained at 300 lb (135 kg) per trip.

The initial Handgear B cod limit for both the GOM and GB stocks is maintained at 75 lb (90.7 kg) per trip, but will be adjusted proportional (rounded up to the nearest 25 lb (11.4 kg)) to any changes in the daily GOM or GB cod trip limits for DAS vessels in the future, as necessary. For example, if the GOM cod trip limit was reduced by 50 percent from 800 lb (362.9 kg) per DAS to 400 lb (181.4 kg) per DAS, then the cod trip limit for a Handgear B vessel fishing in the GOM Regulated Mesh Area would also be reduced by 50 percent to 37.5 lb (17 kg), rounded to the nearest 25 lb (11.3 kg), or 50 lb (22.7 kg) per trip. In this example, the cod trip limit for a Handgear B vessel fishing for GB cod south of the GOM RMA would be maintained at 75 lb (90.7 kg) per trip.

To fish for GB cod south of the GOM Regulated Mesh Area for a particular period of time, the owner or operator of a Handgear A or B vessel must obtain and retain on board a paper letter of authorization (LOA) from the Regional Administrator (RA) to fish, unless otherwise noted below. The minimum participation period for this LOA is 7 consecutive days to minimize the administrative burden of this provision, consistent with existing practice for LOAs issued to DAS vessels. Once a vessel owner or operator has obtained a paper LOA to fish south of the GOM RMA, the owner or operator may not fish in the GOM RMA for the duration of the LOA. This requirement is necessary to more effectively enforce this measure. Alternatively, the owner or operator of a Handgear A permitted vessel, who does not obtain the paper LOA, but elects or is required to have a VMS may fish for GB cod south of the GOM RMA by declaring an intent to fish for GB cod south of the GOM RMA prior to each trip via a vessel monitoring system (VMS) (i.e., when fishing in multiple broad stock areas on the same trip). If a vessel declares via VMS instead of obtaining a paper LOA, this VMS declaration is required on a trip-by-trip basis, and no minimum participation period is necessary. These declarations enable at-sea enforcement personnel to identify the applicable cod trip limits and effectively enforce the appropriate regulations during boarding operations.

Access to Seasonal Closure Areas

To ensure that handgear-permitted vessels are provided an opportunity to fish during at least the early part of the FY, this action exempts both Handgear A and B vessels from the GB Seasonal Closure Area defined in § 648.81(g), and allows Handgear A vessels to also fish in the Sector Rolling Closure Areas defined in § 648.81(f)(2)(vi)(A) through (C), and depicted in section 4.3.3 of FW 45. These latter areas represent smaller portions of the GOM Rolling Closure Areas, and enable Handgear A vessels fishing in the GOM a greater chance at catching some of the available sub-ACLs for cod and haddock during a particular FY before such trip limits are reduced to prevent the ACL from being exceeded.

10. Dockside/Roving Monitor Requirements

Delay in Requirement for Industry To Fund Dockside/Roving Monitors

To address concerns regarding the ability of the fishing industry to pay for the costs of a dockside/roving monitoring program, as originally implemented under Amendment 16 in 2010, this action delays the industry's responsibility for paying for dockside/roving monitoring coverage until FY 2013. None of the costs associated with dockside/roving monitors during FYs 2011 and 2012 will be imposed upon the owner or operator of a NE multispecies vessel. NMFS will attempt to provide sufficient dockside/roving monitoring coverage to observe the offloads of up to 100 percent of sector trips and, starting in FY 2012, common pool trips as well, if funds are available. If funds are not available for monitoring 100 percent of commercial groundfish trips, NMFS must first provide dockside/roving monitor coverage to trips that do not have an observer, at-sea monitor, or an approved electronic monitoring program. To enable dockside/roving monitors to more easily identify trips that are assigned an observer or at-sea monitor, vessels must declare whether an observer or at-sea monitor has been assigned to that trip via the trip-start hail report. For FY 2011, NMFS estimates that it has sufficient funding to cover approximately 100 percent of sector trips that are not assigned an observer or at-sea monitor. NMFS will specify coverage levels for FY 2012 based upon available NMFS funding.

Dockside/Roving Monitoring Program Requirements Beginning in FY 2013

Starting in 2013, sectors must develop and pay for a dockside/roving monitoring program as part of their annual operations plans, common pool vessels will be subject to dockside/roving monitoring upon the transition to a trimester TAC AM, vessels must comply with the trip-start and trip-end hail reporting requirements associated with at-sea and dockside monitoring programs, and dockside/roving monitoring service providers must observe the landings of 20 percent of all common pool and sector trips in a statistically random manner. To facilitate administration and compliance with the dockside/roving monitoring operational standards specified at § 648.87(b)(5), this action revises the regulations at § 648.82(n)(2)(iv) to clearly state that the owner or operator of each common pool vessel subject to dockside/roving monitoring requirements must contract for such services with a service provider approved by NMFS by 2013. The need for vessel owners to contract with a specific service provider is necessary in the absence of any NMFS-controlled dockside/roving monitoring program in which NMFS can act as a mediator between the fishing industry and approved service providers. Further, because each individual permit is considered a separate legal entity, NMFS is not inclined to mandate that common pool vessels use a particular service provider in a particular FY in order to increase competition among service providers and potentially decrease costs to the affected vessel owners. Groups of vessel owners, however, may elect to contract with the same service provider to help lower the costs associated with such requirements.

Exemption of the Dockside/Roving Monitor Requirements for Certain Permit Categories

Vessels issued a limited access NE multispecies Handgear A, Handgear B, and Small Vessel category permit are exempt from any dockside/roving monitoring requirements when operating in the common pool. Given this exemption, it is not possible for dockside/roving monitor service providers to provide statistically random coverage of all common pool trips, as required under Amendment 16, because not all common pool trips are subject to dockside/roving monitoring requirements. Therefore, the dockside/roving monitoring coverage regulations have been revised to accommodate this exemption, and specify that service providers must provide random coverage of all trips subject to the dockside/roving monitoring requirements.

Trip-End Hail Requirement

To facilitate dockside intercepts by both state and Federal enforcement personnel, beginning in FY 2011, all sector vessels and common pool vessels fishing under a DAS must submit a trip-end hail report via VMS prior to returning to port on each trip. Vessels subject to dockside monitoring (i.e., sector vessels starting in FY 2010 and common pool vessels starting in FY 2012) are required to submit both a trip-start and a trip-end hail report for that trip, consistent with current practice. The trip-end hail report must contain the same information as the trip-end hail report implemented by Amendment 16.

Inspection of Fish Holds

Amendment 16 established approval requirements for entities providing dockside/roving monitoring services. These standards included hiring individual dockside monitors that were capable of climbing ladders and inspecting fish holds. For FY 2010, NMFS developed operational standards necessary to implement the Amendment 16 dockside monitoring provisions, based on a pilot dockside/roving monitoring program conducted during the summer of 2009. These standards did not require dockside monitors to inspect fish holds for FY 2010. However, based on further evaluation of the performance of the dockside monitoring program and consideration of concerns expressed by enforcement personnel, this action now requires that dockside monitors inspect the fish holds for any trip that is assigned a dockside/roving monitor beginning in FY 2011. This requirement will enhance the enforceability of existing provisions and minimize the incentives to under-report/misreport the amount of regulated species landed.

11. Sector Measures

Distribution of the PSC From Cancelled Permits

As described in Amendment 16, a PSC represents an individual permit's portion of the total historical landings of each regulated species or ocean pout stock during FYs 1996–2006 by all permits, including those in confirmation of permit history (CPH), that were eligible to participate in the NE multispecies fishery as of May 1, 2008. If a permit had been cancelled after May 1, 2008, its historic landings between FYs 1996–2006 have still been used to calculate the total landings by eligible permits.

As noted above, the current regulations calculate the ACL available to sector and common pool vessels based on the cumulative PSCs of each permit participating in each sector. By default, if the owner of a particular permit has not elected to participate in a sector, that permit is considered to be participating in the common pool, and its PSC contributes to the sub-ACL available to the common pool at large. Similarly, if a permit or CPH is permanently cancelled for any reason, that permit or CPH cannot participate in sectors, or any fishery, and the PSC is used to contribute to the sub-ACL available to the common pool. Thus, the PSCs of cancelled permits artificially inflate the PSCs of those permits operating in the common pool and are not equitably distributed among all permits remaining in the fishery.

Beginning in FY 2011, the PSC of all valid permits, including those held in CPH, that are eligible to participate in the fishery must be recalculated as of June 1 of each year, unless another date is specified by the RA, to redistribute the landings histories of cancelled permits to all remaining eligible permits. To do so, the PSCs for each stock calculated pursuant to the process specified in Amendment 16 must be multiplied by a factor of "1/PSC of the remaining permits." These recalculated PSCs shall then be used to calculate ACEs for each sector during the following FY. For FY 2012 and beyond, a PSC that is calculated on June 1, shall affect sector ACE for the FY that begins on May 1, of the following year.

This provision means that each permit's PSC may increase on a yearly basis to reflect its higher portion of the historic landings of each regulated species and ocean pout stock due to the removal of the landings histories of any permits that were cancelled by June 1 of each year. This will ensure that the yearly PSC calculations reflect eligible permits at the beginning of each FY (May 1), and allow NMFS time to process such renewals. On or about July 1 of each year, NMFS will inform permit holders of updated PSCs through a permit holder letter sent to owners of a valid limited access NE multispecies permit or CPH.

The FW 45 proposed rule specified that the RA would recalculate FY 2011 PSCs for each permit using valid permits as of May 1, 2011, to update PSCs for FY 2011 and reflect permits cancelled through FY 2010. However, to ensure that permit owners had sufficient information to make informed decisions about whether or not to participate in sectors before the start of FY 2011 on May 1, 2011, the RA recalculated FY 2011 PSCs for each permit using valid permits as of February 11, 2011, to reflect permits cancelled through that date. This information was sent out to permit holders on February 11, 2011, to facilitate their decision to join a sector based on measures proposed in FW 45. The RA will recalculate PSCs for each permit as of June 1, 2011, to account for permits cancelled through FY 2010 and determine the PSCs that will be used to calculate FY 2012 sector ACE for each stock, consistent with the procedures outlined above.

Operations Plan Requirements

Amendment 16 specified that sectors must submit final rosters, proposed operations plans, including rosters and associated environmental analyses by September 1, so that NMFS could review such documents as part of the process to approve sector operations for the following FY. Based on industry input, this action increases the flexibility of these deadlines by requiring sectors to submit preliminary rosters and proposed operations plans to NMFS by September 1, and final rosters by December 1 of each year. Following further industry input submitted during the public comment period for this action and ongoing discussions with industry participants, NMFS will allow for a limited opportunity for additional changes to FY 2011 sector rosters to accommodate changes in vessel ownership that occurred after the submission of final sector rosters on

December 1, 2010. This window to reopen FY 2011 sector rosters began on March 24, 2011, and will end on April 30, 2011. A sector is not required to accept additional changes to sector rosters during this window; each sector may decide whether or not a member may leave the sector, and whether or not to accept new members. Reopening the rosters is intended to provide additional flexibility to new permit holders without disrupting the organization of sectors. An announcement of this limited opportunity to reopen sector rosters was sent out to all sector managers on March 16, 2011, and to all limited access NE multispecies permit holders on March 23, 2011. In future years, a window for additional sector roster changes would begin with the publication of proposed measures for the common pool for the following year and end on April 30, and would be limited to ownership changes occurring after the December 1 roster deadline. These measures are designed to provide NMFS with the information it needs to review or conduct environmental analyses associated with draft sector operations plans, while allowing vessel owners additional time to decide whether to participate in sectors, or which sector to join during the following FY.

Sector Exemptions

To reduce dockside/roving monitoring costs, especially due to infrequent landings of regulated species in more southerly ports, this action allows sectors to request an exemption from the dockside/roving monitoring requirements implemented under Amendment 16. Therefore, because Amendment 16 specified that sectors cannot request an exemption from the existing reporting requirements, this rule removes dockside/roving monitoring requirements from the list of reporting requirements at § 648.87(c)(2)(i). This enables sectors to request exemptions, or at least partial exemptions, from the dockside/roving monitoring requirements to minimize monitoring costs for sector trips targeting monkfish in southern waters, for example.

12. Authorization of New Sectors

This final rule authorizes the creation of five new sectors, include the State of Maine Permit Banking Sector, the State of Rhode Island Permit Bank Sector, the State of New Hampshire Permit Bank Sector, the Commonwealth of Massachusetts Permit Bank Sector, and the Sustainable Harvest Sector III, as described in Section 4.2.1 of the FW 45 EA. All operational aspects of these sectors are specified in their annual operations plans, as submitted to NMFS. Details of these operations plans were published in a parallel rulemaking, as noted above. Vessels/permits participating in these sectors must comply with the existing sector provisions, unless otherwise exempted by a future action.

13. Measures for FY 2011 Under RA Authority

The FMP provides authority for the RA to implement certain types of inseason management measures for the common pool fishery, the U.S./Canada Management Area, and Special Management Programs, as described further below. Although these measures were not proposed by the Council for implementation through FW 45, this final rule makes the public aware of measures implemented for FY 2011 by the RA. Once effective, the RA may revise these measures, as necessary, to ensure that the objectives of the FMP, including preventing the sub-ACLs from being exceeded, are met during FY 2011. Any necessary adjustments will be implemented through an inseason action consistent with the Administrative Procedures Act and communicated to the affected public.

Initial FY 2011 Common Pool Trip Limits

The current regulations at § 648.86(o) allow the RA to revise trip limits applicable to common pool vessels if the RA projects that the catch of any NE multispecies stock allocated to common pool vessels will exceed the pertinent sub-ACL in order to prevent exceeding the common pool sub-ACL. Table 16 summarizes the initial FY 2011 common pool trip limits as adjusted by the RA. These initial trip limits were developed after considering changes to the FY 2011 common pool sub-ACLs and sector rosters, catch rates of these stocks during FY 2010, price of fish during FY 2010, bycatch considerations, the potential for differential DAS counting during FY 2011, public comment on proposed trip limits, and other available information. Although the slow catch rate of SNE/MA yellowtail flounder by common pool vessels in FY 2010 suggests that the trip limit could be increased substantially to increase the catch of this stock in FY 2011, due to concerns that a potential increased SNE/MA yellowtail flounder trip limit would increase the bycatch and discard of SNE/MA winter flounder (a stock that cannot be possessed by any vessel to help ensure this stock rebuilds according to the approved rebuilding program), only a small increase in the trip limit for this stock is implemented at this time.

TABLE 16—INITIAL FY 2011 TRIP LIMITS FOR THE COMMON POOL

Stock	Initial FY 2011 limit
GOM cod	500 lb (226.8 kg) per DAS, up to 2,000 lb (907.2 kg) per trip.
GB cod	2,000 lb (907.2 kg) per DAS, up to 20,000 lb (9,072 kg) per trip.
GOM haddock	1,000 lb (453.6 kg) per trip.
GB haddock	10,000 lb (4,535.9 kg) per trip.
GOM winter flounder	250 lb (113.4 kg) per trip.
GB winter flounder	1,000 lb (453.6 kg) per trip.
CC/GOM yellowtail flounder	500 lb (226.8 kg) per DAS, up to 2,000 (907.2 kg) per trip.
GB yellowtail flounder	1,500 (680.4 kg) per trip.
SNE/MA yellowtail flounder	500 lb (226.8 kg), up to 2,000 (907.2 kg) per trip.
American plaice	unrestricted.
Pollock	unrestricted.
Witch flounder	250 lb (113.4 kg) per trip.
White hake	1,500 lb (680.4 kg) per trip.
Redfish	unrestricted.

Differential DAS Counting for Common Pool Vessels

Following the implementation of Amendment 16 measures, the FMP requires that the RA implement a differential DAS counting rate for FY 2011 if the catch of the relevant stocks by common pool vessels is projected to exceed the pertinent common pool groundfish sub-ACLs during FY 2010. The differential DAS counting factor that will apply to common pool vessels is based on the proportion of the sub-ACL projected to be caught by common pool vessels during FY 2010, rounded to the nearest tenth. If the RA projects that common pool catch will exceed the sub-ACL for multiple regulated species within a particular area, then the most restrictive differential DAS counting factor will apply.

Catch information available through March 19, 2011, indicates that common pool catch of witch flounder during FY 2010 has exceeded the witch flounder sub-ACL by 32 percent. As defined at § 648.82(n)(1)(i), any differential DAS counting rate to address an overage of the witch flounder sub-ACL shall be applied to Category A DAS used in the Offshore GOM Differential DAS Area, the Offshore GB Differential DAS Area, and the Inshore GB Differential DAS Area. Therefore, beginning on May 1, 2011, any Category A DAS used by common pool vessels in the Offshore GOM Differential DAS Area, the Offshore GB Differential DAS Area, and the Inshore GB Differential DAS Area shall be charged at a rate of 1.3:1, or 31 hours for each 24 hr fished (i.e., 1.3 times 24-hr DAS counting), for the time spent fishing in the applicable DAS counting areas specified above. Differential DAS shall accrue based upon the first VMS position into the applicable differential DAS counting area, and the first VMS position outside of the applicable differential DAS counting area. NMFS provides an estimate of the status of the common pool catch throughout the year at the following address: *http://www.nero.noaa.gov/ro/fso/reports/common_pool/Common_Pool_Summary.html*.

Delayed Opening of the Eastern U.S./Canada Area

The regulations at § 648.85(a)(3)(iv)(D) provide the RA the authority to adjust various measures in order to optimize the harvest of the transboundary stocks managed under the Understanding. Pursuant to this authority, NMFS is postponing the opening of the Eastern U.S./Canada Area for common pool vessels fishing with trawl gear in FY 2011 from May 1, 2011, through July 31, 2011. This measure delays trawl fishing in the Eastern U.S./Canada Area during the time when cod bycatch is likely to be very high, and should prolong access to this area in order to maximize the catch of available cod, haddock, and yellowtail flounder, as well as other valuable stocks such as winter flounder.

Similar to restrictions implemented in FY 2009 and FY 2010, the proposed rule for this action proposed to limit the amount of cod that could be caught by common pool vessels fishing with non-trawl gear in the Eastern U.S./Canada Area prior to August 1, 2011, to 5 percent of the Eastern GB cod TAC available for common pool vessels. This was intended to further constrain fishing mortality on GB cod and prolong access to this area. The proposed rule for this action inaccurately specified this cod bycatch limit as 10 mt, but, inadvertently, that was based upon 5 percent of the Eastern GB cod TAC available to all groundfish vessels, not just common pool vessels as intended. The correct number for cod bycatch for just common pool vessels in FY 2011 is 477 lb (216.4 kg), based on a calculation of vessels that will be in the common pool according to sector rosters submitted to NMFS as of December 1, 2010. Because this bycatch amount is very low and difficult to effectively monitor in a timely manner and because no common pool vessels actually fished in the Eastern U.S./Canada Area during FY 2010, NMFS has not implemented the proposed cod bycatch limitation for common pool vessels fishing with non-trawl gear in the Eastern U.S./Canada Area from May 1, 2011, through July 31, 2011.

Closed Area II Yellowtail Flounder/Haddock SAP

The current regulations provide the RA with the authority to determine the total number of allowed trips by common pool vessels into the Closed Area II Yellowtail Flounder/Haddock SAP to target yellowtail flounder based on several criteria, including the GB yellowtail flounder TAC and the amount of GB yellowtail flounder caught outside of the SAP. As implemented in 2005 by FW 40B (June 1, 2005; 70 FR 31323), no trips to this SAP should be allocated if the available GB yellowtail flounder catch, after considering the amount of catch of this stock that would occur outside of the SAP, is insufficient to support at least 150 trips with a 15,000-lb (6,804-kg) trip limit (i.e., 2,250,000 lb (1,020,600 kg)). The difference between the minimum level of GB yellowtail flounder sub-ACL necessary to allow targeting of yellowtail flounder within the Closed Area II Yellowtail Flounder/Haddock SAP and the updated FY 2011 GB yellowtail flounder sub-ACL of 1,142 mt (2,517,679 lb; or 1,142,019 kg) specified in Table 11 is only 267,679 lb (121,419 kg). Based on past fishing practices, it is likely that catch rates outside of this SAP are more than adequate to fully harvest the FY 2011 GB yellowtail flounder sub-ACL, leaving little, if any, quota available to open this SAP to targeting GB yellowtail flounder. Thus, the FY 2011 GB yellowtail flounder sub-ACL is considered insufficient to warrant opening of this SAP to targeting yellowtail flounder. Therefore, based on existing authority, no trips are allocated by this final rule to target yellowtail flounder within the Closed Area II Yellowtail Flounder/Haddock SAP for FY 2011. Further, as required at § 648.85(a)(3)(iii)(B) and (x)(A), this final rule specifies that the SAP is open from August 1, 2011, through January 31, 2012, and prohibits the use of the flounder net by both common pool and sector vessels in this SAP during FY 2011. All limited access NE multispecies vessels can still fish in this SAP during FY 2011, but must only fish with a haddock separator trawl, a Ruhle trawl, or hook gear while in the SAP area.

14. Corrections and Clarifications

This final rule corrects or clarifies a number of inadvertent errors, omissions, and provisions in existing regulations in order to ensure consistency with, and accurately reflect the intent of previous actions under the FMP, or to more effectively administer and enforce existing provisions pursuant to the authority provided to the Secretary in section 305(d) of the Magnuson-Stevens Act. The following measures are listed in the order in which they appear in the regulations. The proposed rule for this action discusses the reason why such corrections are necessary.

Amendment 16 requires the owner or operator of any vessel issued a limited access NE multispecies permit fishing on either a common pool or a sector trip to declare its intent to fish within one or more of the NE multispecies broad stock areas (BSAs) and provide the vessel trip report (VTR) serial number for the first page of the VTR for that particular trip via VMS or interactive voice response (IVR) system prior to leaving port at the start of a fishing trip and to submit a VMS catch report detailing the amount of each species retained in each BSA for trips that fish in more than one BSA per trip. To eliminate duplicative reporting requirements, this final rule modifies the timing requirements for the submission of the VMS catch report in § 648.10(k)(1) to require all limited access NE multispecies vessels, regardless of the number of broad stock areas fished, to submit the VMS catch report listing the VTR serial number applicable for that trip prior to crossing the VMS demarcation line upon its return to port following each fishing trip on which regulated species were caught.

To further clarify the administration and enforcement of dockside/roving monitoring provisions originally implemented under Amendment 16 and revised by this action, this action adds a prohibition at § 648.14(k)(18)(i)(D) to state that, if the offloads of a particular trip are assigned to be monitored by a dockside/roving monitor, the vessel cannot offload its catch until the assigned dockside/roving monitor arrives at the designated offloading site specified by the vessel owner or operator.

To close a perceived loophole that could have allowed a vessel carrying passengers for hire to possess and land fish smaller than the minimum fish size specified for commercial vessels and to sell their catch from such operations, this action revises the regulations at § 648.82(a)(2) to also state that, in addition to a vessel fishing under a NE multispecies DAS, a vessel issued a NE multispecies limited access permit may not fish under a sector trip or under the limited access NE multispecies Small Vessel Category or Handgear A permits, if such vessel carries passengers for hire for any portion of a fishing trip.

This action modifies the phrase “vessels participating in sectors” to read “vessels/permits participating in sectors” in the regulations at §§ 648.87(b)(1)(i)(A) and 648.90(a)(4)(iii)(E)(*2*) to reflect that vessels issued permits, including those held in CPH, can participate in sectors.

To provide more flexibility to sectors, Amendment 16 allowed the transfer of ACE between sectors, and also permitted carrying over ACE from one FY to the next. To clarify how the ACE carry over provision shall be applied, this action revises the regulations at § 648.87(b)(1)(i)(C) to state that a NE multispecies sector may carry over up to 10 percent of its allocated ACE for each stock, with the exception of GB yellowtail flounder, into the following FY. This provision limits the applicability of ACE carry over to only 10 percent of the ACE allocated to a sector at the start of a FY and not 10 percent of the total ACE available to a sector at the end of the fishing year, which may include any ACE acquired from another sector as part of an ACE transfer. The preamble of the proposed rule for this action included text that could be interpreted to mean that a sector could not carry over any ACE if it had harvested more than 90 percent of its original ACE allocation for that stock by the end of the FY. This interpretation does not reflect the intent of NMFS in clarifying the amount of ACE that can be carried over into the next FY. Consistent with the proposed regulatory text, the intent of NMFS was to merely clarify that the amount of ACE that can be carried over for each stock shall be calculated based upon the amount of ACE originally allocated to that sector. For example, if a sector was originally allocated 100 mt of GOM cod at the beginning of FY 2010, that sector would be allowed to carry over up to 10 mt of GOM cod into FY 2011, even if it had acquired an additional 50 mt from another sector through an ACE transfer. Thus, the amount of ACE that could be carried over into FY 2011 would be based upon the 100 mt originally allocated to that sector for FY 2010, not the 150 mt that the sector had ultimately acquired by the end of FY 2010. Finally, NMFS clarifies that it interprets the term “unused ACE” in the context of the regulations at § 648.87(b)(1)(i)(C) to mean any ACE that has not been fished by the sector originally allocated that ACE, or leased to another sector during that FY.

In addition to the revisions to the calculation of PSCs noted above for cancelled permits, this final rule revises the regulatory text describing the calculation of PSCs at § 648.87(b)(1)(i)(E)(*1*) and (b)(1)(i)(E)(*2*) to clarify and more accurately reflect the processes that were, and continue to be, applied to implement such calculations. Specifically, this rule clarifies that the landings histories of any limited access NE multispecies permit, including those that were put into CPH, and those of an open access NE multispecies handgear permit that eventually qualified for, and resulted in, the issuance of a limited access NE multispecies Handgear A permit during FYs 1996 through 2006 shall be used to calculate the PSCs for each valid permit as of June 1 each year. In addition, these revisions include an example of the landings of regulated species and ocean pout that may not be used to calculate PSC; namely, any landings of yellowtail flounder by scallop vessels operating under a scallop DAS. Finally, this rule clarifies that the PSC that results from such a calculation is considered the PSC for each stock.

The regulations at §§ 648.87(b)(1)(iii)(C) and (viii) allow sectors to transfer ACE for up to 2 weeks into the subsequent FY, and provide NMFS with 61 days to process ACE transfers and determine whether a sector has exceeded its ACE for the previous FY. Such measures are dependent upon the completion of NMFS' evaluation of year-end sector catch, including sector ACE overages, and may not fully account for the timing of NMFS' year-end evaluation process. Therefore, to allow for additional time to complete these tasks, if necessary, the phrase “unless otherwise instructed by NMFS” is being added to reference to the 2-week and 61-day deadlines in the regulatory text.

Comments and Responses on Measures Proposed in the FW 45 Proposed Rule

Twenty-four comments were received during the comment period on the proposed rule for this action from 13 individuals, 4 fishing industry groups (the Northeast Hook Fisherman's Association (NEHFA), the Associated Fisheries of Maine (AFM), the Northeast Seafood Coalition (NSC), and the Northeast Sector Support Network (NSSN)), 4 conservation groups (Center for Biological Diversity (CBD), Oceana, Food and Water Watch (FWW), and PEW Environmental Trusts (PEW)), 1 dockside/roving monitor service provider (AIS, Inc.), 1 community group (Penobscot East Resource Center (PERC)), and the Council. Only comments that were applicable to the proposed measures, including the analyses used to support these measures, are addressed in this preamble. Comments on the overarching sector measures implemented in 2010 by Amendment 16, or the anticipated or realized impacts of those measures, are not addressed in this preamble. Please note in considering the responses to comments below that NMFS may only approve or disapprove measures proposed in a fishery management plan, amendment, or framework adjustment and may not change or substitute any measure in a substantive way, pursuant to section 304(a)(3) of the Magnuson-Stevens Act.

General Comments

Comment 1: The CBD commented that the EAs prepared in support of both FW 45 and the 2011 sector operations plans do not adequately evaluate the impacts on a number of species proposed for listing under the Endangered Species Act (ESA), particularly Atlantic sturgeon and loggerhead sea turtles. The CBD noted that the GOM distinct population segment (DPS) and the New York Bight and Chesapeake Bay DPSs of Atlantic sturgeon were proposed to be listed as threatened and endangered under the ESA, respectively, by NMFS' Northeast Regional Office on October 6, 2010 (75 FR 61872), while the Northwest Atlantic loggerhead sea turtle DPS was proposed to be listed as endangered under the ESA on March 16, 2010 (75 FR 12598). They contend that the FW 45 and FY 2011 sector operations plans EAs rely upon previous assessments of impacts to protected species specified in the Amendment 16 EIS that was completed on October 16, 2009. Therefore, they claimed that the analysis for these actions is not appropriate, given the proposed listings of Atlantic sturgeon and loggerhead sea turtles occurred after previous analysis was completed. Further, they indicated that the FW 45 EA does not consider impacts of eliminating the yellowtail flounder closure areas in the Great South Channel Exemption Area, noting that sea turtles are present in this area at the time that the yellowtail flounder spawning protection areas were in effect.

Response: NMFS agrees that the analysis originally included in the FW 45 EA did not describe the impacts to DPS of Atlantic sturgeon and loggerhead sea turtles. To meet the ESA requirements of § 402.12(a), NMFS has updated the analysis supporting this action in an addendum to the FW 45 EA to include analysis of FW 45 measures on the DPS for these species in light of their proposed listings. This impacts analysis concluded that the measures implemented under this final rule are not likely to jeopardize the continued existence of Atlantic sturgeon between now and the time a final listing determination will be made, and concludes that there will be no significant impact on Atlantic sturgeon or loggerhead sea turtles for the duration of this regulation. It also concluded that a conference, per the ESA regulations, for the proposed loggerhead sea turtle DPS is not required based on the determinations and the incidental take statement in the 2010 Biological Opinion for the Multispecies FMP. For Atlantic sturgeon, NMFS Sustainable Fisheries Division engaged in an informal conference with NMFS Protected Resources per the ESA regulations, and no additional measures were recommended by NMFS Protected Resources. While it is possible that there may be interactions between Atlantic sturgeon or loggerhead sea turtles on the one hand and, on the other, gear used in the NE multispecies fishery, based on prior analyses and current observer bycatch data for the groundfish fishery, the number of interactions that will occur between now and the time a final listing determination will be made is not likely to cause an appreciable reduction in survival and recovery. A final listing determination for the Atlantic sturgeon DPS is expected by October 6, 2011. With the publication of a final listing rule, the existing Section 7 consultation for the NE multispecies fishery would need to be reinitiated, consistent with the requirement to reinitiate formal consultation where discretionary Federal agency involvement or control of the action has been retained and a new species is listed that may be affected by the action. During the reinitiation, the effects of the NE multispecies fishery on the five DPS for Atlantic sturgeon would be fully examined.

Comment 2: Oceana stated that there are no effective AMs for several stocks managed by the FMP, and that FW 45 must include AMs for all stocks managed under the FMP, including stocks not allocated to sectors under Amendment 16 (SNE/MA winter flounder, ocean pout, windowpane flounder, Atlantic halibut, and Atlantic wolffish). Oceana cited the January 21, 2010, letter from NMFS to the Council informing the Council that AMs for these stocks should be implemented as quickly as possible through a future Council action, and stated that the FW 45 final rule is the first opportunity to implement such measures.

Response: Because of the timing needed to more fully account for the bycatch of haddock in the Atlantic herring fishery before herring fishing operations began to increase rapidly during the early fall, the Council elected to develop FW 46 to revise the existing allocations of portions of the GOM and GB haddock ACL to the herring fishery before they worked on any other actions in 2011. Further, because the Council intended to develop an action later on in 2011 that would implement NE multispecies ACLs for FYs 2012–2014, the Council decided to address outstanding issues associated with AMs for ocean pout, windowpane flounder and Atlantic halibut through the next action, or FW 47.

Consistent with the Magnuson-Stevens Act, Amendment 16 implemented AMs that would be sufficient to prevent overfishing of any stock managed by the FMP in FYs 2010 and 2011. However, because Amendment 16 did not provide a specific allocation of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, or Atlantic wolffish to sectors, these stocks are not subject to any sector-specific AMs, which is acknowledged by NMFS in the letter cited in the comment. The ACL available to the commercial NE multispecies fishery for each of these stocks is allocated entirely to common pool vessels, and the only specific AM established for these stocks during FYs 2011 and 2012 is the differential DAS counting AM specified for common pool vessels at § 648.82(n). NMFS has determined there is no immediate need for FW 45 to implement AMs for these stocks, as overfishing is prevented during FYs 2010 and 2011, and any overages of the FY 2010 or 2011 ACLs would be addressed, at least partially, through differential DAS counting applicable to common pool vessels in FY 2011 or 2012, respectively (*see* § 648.90(a)(5)(ii)). In making this determination, NMFS points out that, pursuant to section 304(a)(3) of the Magnuson-Stevens Act, it may only approve or disapprove measures proposed in a fishery management plan, amendment, or framework action, and may not change or substitute any measure in a substantive way. Therefore, since FW 45 does not include any measure to disapprove regarding AMs for these stocks, NMFS finds that it should approve the measures that are consistent with the Magnuson-Stevens Act and other applicable law for all of the other stocks with the understanding that the Council has committed to address the lack of specific AMs for these stocks in FW 47. This leads to the functional equivalence of disapproving and remanding the entire framework to address the lack of a required measure, but without sacrificing the implementation of those measures that are needed to ensure conservation for all of the other stocks.

Comment 3: Oceana suggested that FW 45 must include AMs for yellowtail flounder caught by the Atlantic sea scallop fishery, based on the premise that the FMP must include measures that account for all catches of regulated species and ocean pout stocks by other fisheries. Oceana acknowledged that the Council developed AMs to account for yellowtail flounder catch in the scallop fishery as part of Amendment 15 to the Atlantic Sea Scallop FMP. However, they are concerned that such AMs will not become effective until at least 6 months into FY 2011 for the scallop fishery (the scallop FY begins on March 1 of each year) and may not be adequate to ensure that any overages of the FY 2010 yellowtail flounder sub-ACLs allocated to the scallop fishery are addressed during FY 2011. Further, they claimed that it is unclear how the proposed Amendment 15 yellowtail flounder AMs for the scallop fishery would be implemented in FY 2011, particularly if preliminary data indicate that the yellowtail flounder sub-ACLs for the scallop fishery may be exceeded. They suggested that NMFS should better explain how such AMs would be implemented during FY 2011. In addition, Oceana recommended that NMFS implement an inseason closure provision as an interim measure to prevent excessive harvest of yellowtail flounder until the Amendment 15 AMs become effective, pursuant to the National Standard 1 Guidelines at § 600.310(g)(2).

Response: The AMs applicable to the NE multispecies fishery are consistent with the National Standard 1 Guidelines and sufficient to prevent overfishing on each stock by all components of the fishery that catch regulated species and ocean pout, including yellowtail flounder catch by scallop vessels prior to the implementation of measures proposed in Amendment 15 to the Atlantic Sea Scallop FMP. If these components of the fishery exceed their allocations, and the overall ACL for a particular stock is exceeded, the AMs applicable to the NE multispecies fishery, including those specified for sectors and the common pool, will be triggered to ensure that overfishing does not occur on the stock as a whole (*see* § 648.90(a)(5)(ii)).

The proposed rule for Amendment 15 to the Atlantic Sea Scallop FMP published on April X, 2011 (76 FR XXXXX). This rule, and its associated EIS, contains a complete description of the yellowtail flounder AMs for the scallop fishery, including the closure of specific statistical areas that have the highest bycatch of yellowtail flounder by the scallop fishery if either the GB or SNE/MA yellowtail flounder sub-ACL allocated to the scallop fishery is exceeded in the previous FY. This rule also clarifies the Council proposal that any overage of either the GB or SNE/MA yellowtail flounder sub-ACLs allocated to the scallop fishery for FY 2010 shall have a resulting AM applied as soon as Amendment 15 is implemented during FY 2011, but only if the FY 2010 overall ACL for SNE/MA yellowtail flounder is exceeded.

As explained in the response to Comment 2 above, pursuant to section 304(a)(3) of the Magnuson-Stevens Act, NMFS may only approve or disapprove measures proposed in a fishery management plan or amendment, and may not change or substitute any measure in a substantive way. Therefore, NMFS does not have the legal authority to implement AMs to account for potentially excessive yellowtail flounder bycatch in the scallop fishery through this final rule. Such AMs were not adopted by the Council in FW 45, and the AMs in place for yellowtail flounder stocks for FY 2011 are sufficient to address any excessive catch by the scallop fishery until the AMs proposed in Amendment 15, if approved, become effective. Finally, both the common pool and sector AMs currently in place are adequate to ensure that overfishing does not occur on yellowtail flounder, even if the implementation of Amendment 15 is delayed until later in FY 2011. As of March 22, 2011, available data indicated that the scallop fishery caught 76,508 lb of GB yellowtail flounder and 401,313 lb of SNE/MA yellowtail flounder during FY 2010 in the scallop fishery (March 1, 2010, through February 28, 2011). This represents 24 percent of the GB yellowtail flounder and 135 percent of the SNE/MA yellowtail flounder allocated to the scallop fishery in the FW 44 final rule. It is projected that the common pool will only harvest 7.7 mt (16,976 lb) of its 75-mt (165,347-lb) sub-ACL for SNE/MA yellowtail flounder, leaving 148,371 lb of SNE/MA yellowtail flounder unharvested during FY 2010. In addition, all sectors have cumulatively caught only 42.6 percent (100 mt, or 220, 462 lb) of the overall sub-ACL of this stock allocated to sectors (234.7 mt, or 517,425 lb) through March 12, 2011. Therefore, even after incorporating the 103,689 lb (47 mt) of SNE/MA yellowtail flounder caught by the scallop fishery in excess of the allocation to that fishery during FY 2010, it is highly unlikely that the overall FY 2010 ACL for SNE/MA yellowtail flounder will be exceeded, and that the implementation of any AMs to prevent overfishing of this stock will be necessary. While it is still too early to accurately predict future bycatch rates, based upon available data, it is unlikely that the scallop fishery bycatch of yellowtail flounder during FY 2011 will exceed allocated sub-ACLs before Amendment 15 AMs, if approved, become effective. Thus, the current lack of scallop-specific AMs is not a serious conservation or management problem in the fishery.

Finally, Oceana's recommendation to establish an interim in-season closure AM is not required by applicable law. Neither the Magnuson-Stevens Act nor the National Standard 1 Guidelines mandate the use of fishery closures or the use of in-season controls as AMs. Reactionary AMs similar to the differential DAS counting AM may be used and can be are just as valid as inseason AMs. Although an FMP can include in-season closures, under the cited national standard guideline, neither NMFS nor the Council is obligated to institute such closures. In-season closures are merely one tool that may be used by the Council and NMFS to prevent overfishing and ensure that ACLs are not exceeded. In any event, short of a temporary emergency action or Secretarial amendment, NMFS is not in a position to implement this kind of AM in deciding whether to approve or disapprove FW 45. Accordingly, NMFS has not implemented yellowtail flounder AMs for the scallop fishery through this final rule.

Status Determination Criteria for Pollock

Comment 4: Both PEW and an industry group (NSC) supported revisions to the status determination criteria for pollock and its associated revisions to stock status and ABCs and ACLs. Both groups applauded the rapid incorporation of updated scientific information into the FMP, with the industry group stating that such measures ensure that significant economic benefits of higher catch limits for this species will continue in future FYs.

Response: NMFS agrees that it is appropriate to incorporate updated scientific information into management measures as quickly as possible. Therefore, the proposed revisions to the status determination criteria for pollock and associated ABCs and ACLs are implemented through this action.

Rebuilding Program for GB Yellowtail Flounder

Comment 5: PEW opposed the proposed reduction of the GB yellowtail flounder rebuilding program from the existing 75-percent probability of success to a 50-percent probability of success. PEW stated that a 50-percent probability of success is not adequate because the chance of failure is too high. They further stated that maximizing catch should not be the highest priority when managing the rebuilding of an overfished stock. They suggested that the existing rebuilding program with a minimum 75-percent probability of success should be maintained, noting that typical statistical analyses rely upon a 95-percent probability of success.

Response: The decision to extend the GB yellowtail flounder rebuilding program is based on a number of factors beyond simply increasing catch over the short term. Updated stock assessment conducted by the TRAC indicated that the strength of the 2005 year class was much lower than originally estimated. Therefore, the stock is no longer expected to rebuild by 2014 with a 75-percent probability of success. Although extending the rebuilding timeframe to 10 years reduces the probability of success to 50 percent, the extension is still within the probability limits recognized by courts which have reviewed challenged FMPs. Although a rebuilding program with a higher probability of success would be more likely to rebuild overfished stocks within established rebuilding timeframes than one with a lower probability, based on analysis supporting FW 45, the revised rebuilding program is still capable of rebuilding the stock within the established rebuilding period. Faced with this information, the Council elected, consistent with National Standard 8, to revise the rebuilding program for this stock in way to minimize the adverse economic impacts on fishing communities to the extent practicable, without compromising the conservation requirements of the FMP or the Magnuson-Stevens Act. NMFS agrees with the Council that allowing for increased catch over the short-term, while still ending overfishing and enabling the stock to rebuild more effectively, balances the multiple and somewhat competing objectives of the national standards of the Magnuson-Stevens Act. Further, extending the rebuilding timeframe increases the capacity of the Council to negotiate yearly TACs with Canadian representatives through the TMGC process, as Canadian law does not have a requirement for a defined rebuilding period. Maintaining successful collaborative management with Canada is crucial to ensuring the effective management of this transboundary stock by preventing overfishing and continuing to rebuild this overfished stock. Therefore, NMFS approves and implements the proposed revisions to the GB yellowtail flounder rebuilding program.

ACLs

Comment 6: Oceana recommended that NMFS disapprove the proposed allocation of yellowtail flounder to the scallop fishery because it relies upon an outdated analysis of the expected catch of yellowtail flounder by the scallop fishery and is inconsistent with the use of the best available scientific information mandated by National Standard 2. Instead, they recommend that NMFS implement allocations that are based on updated estimates of actual anticipated yellowtail flounder catch by the scallop fishery during FY 2011.

Response: NMFS recognizes that there are updated estimates of anticipated catch of yellowtail flounder by the scallop fishery. However, as noted in the FW 45 EA, there is uncertainty associated with these estimates. For example, Table 113 of the FW 45 EA illustrates that scallop catches of yellowtail flounder have not shown clear trends, despite the increased abundance of yellowtail flounder in recent years. If the updated estimates of yellowtail flounder bycatch underestimate actual catch by the scallop fishery, as implied in Oceana's comment, then the yellowtail flounder sub-ACLs allocated to the scallop fishery are likely to be exceeded, which could result in overfishing this stock. Overages of the yellowtail flounder sub-ACL, if leading to the overage of the overall ACL for a stock, would trigger AMs for the directed groundfish fishery to account for such an overage and ensure that overfishing does not occur in the future. Any AMs that may be triggered by exceeding this sub-ACL could redistribute either common pool or sector fishing effort, resulting in adverse biological impacts on a wider range of species compared to the existing allocations. In addition, lowering the yellowtail flounder allocations to the scallop fishery based upon this updated information puts much more total revenue and optimum yield at risk than maintaining the existing allocations, particularly if AMs are triggered and the available scallop or yellowtail flounder catch is not fully harvested. Although updated estimates of the expected yellowtail flounder bycatch in the scallop fishery are less than the existing allocations, maintaining the existing allocations to the scallop fishery, on balance, will likely reduce the chance of a derby fishery in the scallop fishery, better achieve the biological targets for both scallops and yellowtail flounder, and place less revenue and optimum yield at risk for both fisheries. Thus, there are potentially substantial adverse economic and biological impacts associated with revising these allocations using the updated bycatch estimates.

As noted above, NMFS may only approve or disapprove measures proposed in a fishery management plan or amendment, and may not change or substitute any measure in a substantive way. The yellowtail flounder allocation to the scallop fishery is a continuation of the allocation implemented by FW 44. NMFS cannot substitute another alternative for this provision as part of this final rule. Even if NMFS could disapprove the FW 45 yellowtail flounder allocation to the scallop fishery, the yellowtail flounder allocation to the scallop fishery for FY 2011 would revert to that implemented by FW 44 which is the same as proposed in FW 45. Therefore, NMFS has not revised the FY 2011 yellowtail flounder allocations to the scallop fishery in this final rule.

Annual Specifications for the U.S./Canada Management Area

Comment 7: One industry group (NSC) strongly supported the proposed action to disapprove the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC and associated ABC and ACLs, and to implement a revised FY 2011 TAC, ABC, and ACL for this stock based upon revised recommendations of the TMGC following the recent adoption of IFACA. They noted that the adoption of IFACA represents new information and unforeseen circumstances that justify the use of emergency Secretarial authority to revise this TAC. They also group suggested that the updated TAC prevents overfishing and rebuilds stock consistent with broader goals of section 304(e) of the Magnuson-Stevens Act, provides very important economic benefits to both the groundfish and scallop fisheries, and results in an increased chance of achieving OY in these fisheries.

Response: NMFS agrees with the substance of this comment, although, as noted above in the background section of this preamble, instead of disapproving the FW 45 TAC for this stock, NMFS has approved it, because the originally proposed TAC is still consistent with the FMP and applicable law. However, NMFS is replacing the FW 45 TAC for this stock with the revised FY 2011 TAC, pursuant to emergency Secretarial authority, for the reasons stated in the preamble of the proposed rule for this action.

GOM Cod Spawning Protection Area

Comment 8: Four individual private recreational anglers opposed the proposed GOM Cod Spawning Protection Area, while one environmental group (PEW) and one community group (PERC) strongly supported the implementation of this area. While one recreational angler was opposed to closure areas in general, the other three anglers indicated that such a closure unnecessarily and unfairly prevents small private recreational vessels from accessing cod closer to shore. Two of these respondents suggested that the GOM cod stock is improving and does not warrant further action to protect spawning aggregations. They indicated that, if further protection for this stock is necessary, they would prefer alternative measures, including possession or size limits. One respondent also claimed that fishing with hook gear does not disturb spawning aggregations. In contrast, both PEW and PERC supported this provision because it was based on a careful analysis of available scientific information. They recommended that the Council and NMFS should continue to identify and protect additional key habitat areas for spawning fish. Further, PERC advised that mid-water trawl gear should not be allowed in this area because they claim that this gear catches large amounts of groundfish stocks and would undermine efforts to rebuild overfished stocks.

Response: NMFS agrees that the GOM cod stock is recovering. The latest stock assessment, the Groundfish Assessment Review Meeting (GARM) III, indicates that the stock is nearly rebuilt (i.e., that SSB is nearly at the level to sustain MSY), but notes that the success of continued rebuilding relies upon the strength of recent year classes, particularly the 2003 and 2005 year classes. Therefore, without continuing high levels of recruitment, the stock may not be able to achieve and maintain a high level of biomass.

Council efforts to specifically protect spawning aggregations of GOM cod date back to the implementation of FW 26 in 1999 (January 15, 1999; 64 FR 2601). That action revised the existing GOM Rolling Closure Areas established under FW 25 (March 31, 1998; 63 FR 15326), and reclassified their designation as "inshore 'cod spawning' closures." The intended purpose of such measures under FW 26 was to protect cod during the spawning season, because cod stocks are "particularly vulnerable to fishing pressure" during spawning periods. Thus, since 1998, commercial fishing vessels have been excluded from areas in which cod are likely to be spawning. However, private recreational and charter/party vessels, including those fishing with gear capable of catching groundfish, have been able to access these areas even during the spawning season for GOM cod.

As noted in the FW 45 EA and the preamble to the proposed rule for this action, the GOM Cod Spawning Protection Area is intended to provide protection to spawning cod by limiting all fishing activities using gear that may catch groundfish in a discrete area and during a time in which cod spawning activity is documented to be occurring. The area and season proposed in FW 45 was based on research conducted by the University of New Hampshire in collaboration with the Northeast Consortium. This research represents the first study in which western Atlantic cod were examined on such a fine scale to determine both temporal and spatial distribution of this species. According to this research, cod spawning within the GOM Cod Spawning Protection Area exhibit site fidelity, congregate in this specific area for the duration of the spawning season, and return to this area each year to spawn. These fish represent a "discrete management unit" that is confirmed by genetic study, and constitute the largest distinctly identified spawning group left in the western Atlantic Ocean. Further, this research documents that trawl-caught fish are affected by fishing activity, requiring several days to resume normal behavioral patterns following capture. Finally, this study reiterated a concern expressed by members of the fishing industry and state resource management agencies that the recreational fishing fleet, particularly charter/party vessels, that continue to be able to access spawning aggregations of cod may decrease the rate at which the GOM cod stock rebuilds. Thus, continued fishing pressure or disruption to spawning activity could adversely affect cod recruitment within the GOM.

As proposed, the GOM Cod Spawning Protection Area prohibits both commercial and recreational vessels fishing with gear considered to be capable of catching groundfish from fishing in this area from April through June of each year. Under this measure, all vessels are treated equally, and neither group has access to this area during this time. This is in contrast to the existing GOM Rolling Closure Areas in that commercial vessels are prohibited from fishing for groundfish in these areas, but recreational vessels can target groundfish in these areas throughout the spawning season. Although the GOM Cod Spawning Protection Area would essentially close some near-shore fishing grounds to recreational vessels during the spawning season, this measure would not eliminate small vessel access to available cod resources. This area is relatively small (roughly 82 square miles, or 212 square km) and represents the only area closure applicable to recreational vessels at all, let alone during the spawning season. Therefore, recreational vessels have access to available cod resources in other locations and throughout the rest of the FY. Finally, while measures such as possession or size limits are capable of affecting fishing mortality, such measures cannot protect or improve recruitment in the same way that area closures can. FW 45 does not propose to further reduce fishing mortality on this stock. Instead, this provision is intended specifically to reduce fishing activity on spawning aggregations and, in turn, preserve opportunities for successful recruitment of this stock in the future. Because the preservation of sufficient levels of recruitment is critical for the continued success of efforts to rebuild GOM cod, possession or size limits would not effectively achieve the objectives for the GOM Cod Spawning Protection Area in FW 45. Existing regulations, including the GOM Seasonal Rolling Closure Areas at § 648.81(f) and the Sector Rolling Closure Areas at § 648.81(f)(2)(vi), already prohibit vessels fishing on either a sector or a common pool trip from targeting regulated species and ocean pout in this area during April and May. For these reasons, NMFS has approved the GOM Cod Spawning Protection Area, including the proposed prohibition of midwater trawl gear fishing in this area during June of each year.

Handgear A and B Measures

Comment 9: Two commercial fishermen strongly supported any measures that would benefit small vessels fishing near shore with handgear. One of these individuals indicated that fishing with handgear has no detrimental effects to stock recovery or bycatch because all fish can be released alive. Because they consider handgear to be a more sustainable gear type, PERC further stated that NMFS should expand opportunities for the use of handgear instead of restricting their trip limits.

Response: NMFS believes the measures implemented by this final rule, including revisions to handgear trip limits, exemption of handgear vessels from common pool dockside monitoring requirements, and access to seasonal closure areas encourage participation in the NE multispecies fishery by handgear vessels, and minimize economic impacts to such vessels, without compromising efforts to end overfishing and rebuild overfished stocks.

Comment 10: The NEHFA and PERC suggested that handgear vessels should be given a specific sub-ACL to avoid being adversely impacted by potentially excessive catch by common pool vessels.

Response: The Council considered specifying a specific sub-ACL for handgear vessels during the development of FW 45, but did not ultimately adopt such a measure due to a concern that allocation decisions cannot be implemented through a FW action. The Council ultimately concluded that such allocations must rather be implemented through an amendment to the FMP because they are considered substantial revisions to existing management measures and require additional public input. NMFS agrees with this interpretation.

Comment 11: The NEHFA and one commercial fisherman supported the proposed revisions to the cod trip limits applicable to handgear vessels. They indicated that such revisions will provide relief from the impacts of the "race to fish" during the early part of the FY in the common pool.

Response: NMFS agrees, and has implemented these revisions through this final rule.

Comment 12: One commercial fisherman, PERC, and the NEHFA expressed support for the proposed requirement for handgear vessels to be issued a LOA to fish south of the GOM RMA for GB cod. NEHFA recommended that vessel owners could request a LOA annually when renewing their NE multispecies permits, declare through the permit renewal application that the vessel would be fishing south of the GOM RMA for the duration of the FY and not have to request a LOA, or be issued a LOA automatically through a Web site similar to the existing NMFS VTR Web site. This group contends that these recommendations would help minimize the burden on fishermen and NMFS. In addition, NEHFA was concerned that the issuance of the LOA would adversely impact the ability of vessel owners to participate in other fisheries.

Response: NMFS implements the requirement for handgear vessels fishing south of the GOM RMA to either obtain a paper LOA or declare their intent to fish south of the GOM via VMS through this final rule. Under the LOA provisions implemented through this final rule and existing protocols, a vessel owner could specify that he/she intends to fish south of the GOM RMA for the entire year and be issued a LOA to reflect that decision during the annual renewal of his/her NE multispecies permit. Automated or web-based declaration and issuance of this LOA would require further consideration by NMFS, including ensuring that such declarations do not compromise the enforceability of the LOA, would not unintentionally restrict the ability of vessel operators to fish in the area of their choosing, and can be technically administered. NMFS has the authority to revise the mechanism by which such LOAs are issued to fishery participants and could implement the recommendations offered by the public in the future if feasible. Any changes to how LOAs are issued will be communicated to all affected stakeholders through a permit holder letter, as appropriate.

Comment 13: The NEHFA supported the proposed exemption of vessels issued a limited access NE multispecies Handgear A permit from the GB Seasonal Closure Area and allowing such vessels to fish in the Sector Rolling Closure Areas in the GOM. The NEHFA noted that Handgear A vessels are currently precluded from fishing in the GOM until June or July based on the existing GOM Rolling Closure Areas. This group stated that, without exemptions, Handgear A vessels will not remain economically viable due to competition with other gear types for available common pool sub-ACLs. They contested that the proposed exemptions would provide needed economic relief through increased access to traditional fishing grounds that are within reach of the small Handgear A vessels. Another commercial fisherman also supported these measures, stating that they would help small vessels compete against larger and more efficient vessels in the common pool. Both PEW and PERC supported promoting the use of handgear through these proposed measures, stating that handgear is the gear type with the least impacts to habitat and the fishery.

Response: NMFS agrees with the comments, and this final rule implements the proposed exemption.

Dockside/Roving Monitoring Requirements

Comment 14: The NSC questioned the utility of dockside/roving monitoring requirements, suggesting that FW 45 should eliminate such requirements completely. The NSC believes the current requirements to be highly inefficient, representing an unsustainable and unjustified cost to the fishing industry. Further, they suggested that NMFS should allow sectors to use dockside monitoring data as a proxy for dealer data in the weekly sector catch reports submitted to NMFS to increase the utility of the dockside/roving monitoring program. Finally, NSC indicated that roving monitors should not have to observe offloads to a truck and also to a dealer, asserting that roving monitors should only be required to observe offloads from the vessel to a truck, to increase the efficiency and reduce costs associated with these provisions.

Response: The Council considered completely eliminating dockside/roving monitoring requirements during the development of FW 45. However, due to lingering concerns over the ability to enforce existing provisions to monitor sector ACE and minimize incentives to misreport catch, the Council retained dockside/roving monitoring requirements in FW 45. NMFS may only approve or disapprove measures proposed in FW 45, and may not change or substitute any measure in a substantive way. Therefore, NMFS cannot eliminate dockside/roving monitoring requirements through this final rule.

During the development of Amendment 16, it was anticipated that sectors would rely upon dockside/roving monitor data to document sector landings immediately following a vessel's offload until the official dealer reports become available approximately a week later. This practice has been discussed with sector managers through several sector workshops held during 2009 and 2010. NMFS recognizes that dockside/roving monitoring data cannot currently be reported as part of the weekly sector catch reports submitted to NMFS based upon existing guidance and database structures. To date, many dockside/roving monitoring data are not systematically collected in a format that can be easily transferred to a catch monitoring database. Instead, they are often merely scanned images of a dockside/roving monitor report. NMFS has the regulatory authority to accept dockside/roving monitoring data in the future and may reconsider the acceptance of dockside/roving monitoring data if such data become available in an acceptable electronic format. Further, dealer landings, as documented through official dealer reports, have been the standard by which landings are monitored for many years, and were used as the basis for the calculation of potential sector contributions and, therefore, sector ACE. Accordingly, even if dockside/roving monitor data could be considered as a proxy for dealer landings in weekly sector catch report, dealer landings data would continue to be the official record of species landed by each federally permitted vessel.

The Council required sectors to develop and implement an independent third-party weighmaster system satisfactory to NMFS for monitoring landings and utilization of ACE. The original intent of dockside/roving monitoring coverage was to verify landings of a vessel at the time it is weighed by a dealer to certify the landing weights are accurate as reported on the official dealer report for compliance purposes. Therefore, NMFS implemented regulations under

Amendment 16 that require that a roving monitor must observe the offloads from a vessel to a truck and again from the truck to a dealer, unless the vessel offloads directly to a dealer. These regulations were based upon a pilot program and existing dockside/roving monitoring programs developed in other regions and in Canada. During sector implementation workshops conducted in 2009 and 2010, and ongoing communications with sector managers, NMFS indicated that it would allow a roving monitor to only observe offloads from a vessel to a truck, provided a representative from the dealer ultimately receiving the fish was present at the time of the offload, and that all fish were weighed at the time of the offload. This ensures that the weight of fish offloaded corresponds to the weight of the fish recorded in the official dealer report, consistent with the intent of Amendment 16. Thus, existing regulations and protocols already allow for the behavior requested by the NSC in their comment.

Comment 15: The NEHFA, PERC, PEW, and one commercial fisherman supported exempting vessels issued a limited access NE multispecies Handgear A or a Small Vessel Exemption permit or an open access NE multispecies Handgear B permit that is fishing in the common pool from the existing dockside/roving monitoring requirements. They stated that dockside/roving monitoring costs may be more than the value of fish landed on a particular trip and would make the operation of such permits economically unviable. The NEHFA also noted that many handgear vessels are launched and retrieved at public boat ramps, thereby creating logistical difficulties for waiting for the dockside/roving monitor to arrive because a boat may be forced to move off of the dock to accommodate the launching of other boats. This group also contended that the current system of monitoring landings is sufficient for these vessels due to the small amount of fish landed on each trip. Finally, PERC suggested that handgear vessels fishing in sectors should also be exempted from the dockside/roving monitoring requirements.

Response: NMFS agrees that the costs associated with the existing dockside/roving monitoring requirements could make fishing with a Handgear A, Handgear B, or Small Vessel Exemption permit uneconomical for the reasons noted above and specified in FW 45. Therefore, NMFS implements the proposed exemption from the common pool dockside/roving monitoring requirements for these permit categories through this final rule. Because the Council did not adopt a provision that would have exempted sector vessels fishing with a handgear permit from the dockside/roving monitoring requirements as part of FW 45, NMFS cannot implement such a provision through this action.

Comment 16: Three commercial fishermen and two commercial fishing industry groups (AFM and NSC) opposed the proposal to require dockside/roving monitors to inspect the fish holds of vessels offloading groundfish. AIS, Inc., a dockside/roving monitoring service provider, also expressed concerns that the proposed requirement for dockside monitors to inspect fish holds presents safety issues. All commenters highlighted the risk of serious injury from having dockside/roving monitors board vessels, climb down ladders into the fish holds, and inspect the holds or other compartments for fish that have not been offloaded. AIS noted that there are no standards in FW 45 that address potentially dangerous conditions in inspecting holds, or requirements for vessels to provide a standardized safe boarding system. AIS also stated that there is no guidance as to how to inspect fish holds, including whether dockside monitors must inspect piles of ice or look for fish in other compartments, giving the impression that dockside/roving monitors may be acting as enforcement personnel instead of data collectors. Several commenters suggested that this potential risk will force vessel owners to buy more insurance to ensure that they are adequately covered for any potential liability lawsuits that might result from this provision. In doing so, they contested that this would contradict the FW 45 economic analysis that indicates that this measure should not impact either vessel owners or service providers. They noted that, even if the dockside/roving monitoring service providers had sufficient insurance coverage, vessel owners might still be sued and face financial liability from the injury claims of individual dockside/roving monitors. Further, they claimed that the proposed rule does not provide any rationale that enhanced enforceability is needed, or that underreporting is occurring. They contested that the existing provisions that require dockside/roving monitors to ask vessel operators if all fish have been offloaded, and classify providing false statements to dockside/roving monitors as a violation, should be sufficient to enforce this provision. They recommended that NMFS Office of Law Enforcement should inspect fish holds, instead of dockside/roving monitors.

Response: As noted throughout the development of Amendment 16 and FW 45 by both fishing industry representatives and NMFS, the transition to expanded sector management and ACLs increases incentives to misreport or under report catch and landings. Dockside/roving monitoring programs established in other regions of the United States and Canada that are managed by harvest quotas are considering, or have required, dockside/roving monitors to inspect fish holds to ensure that all fish are offloaded. The potential for dockside/roving monitors to inspect fish holds was explicitly discussed throughout the development of Amendment 16 as part of both the Council process and parallel meetings to discuss the development of sector measures sponsored by the Gulf of Maine Research Institute. Section 4.2.3.5.4 of the Amendment 16 FEIS documents this discussion and clearly indicates that to be approved as a dockside/roving monitor, a dockside/roving monitor must meet several criteria, including:

> "Physical capacity for carrying out the responsibilities of a dockside/roving monitor pursuant to standards established by NMFS such as being certified by a physician to be physically fit to work as a dockside/roving monitor. The physician must understand the monitor's job and working conditions, including the possibility that a monitor may be required to climb a ladder to inspect fish holds."

Therefore, the general public, including both vessel owners and dockside/roving monitoring service providers, were well aware of the potential that dockside/roving monitors might be required to inspect fish holds and the risks that such activity might incur. However, no comments opposing this practice were raised to NMFS during the public comment period on the Amendment 16 proposed rule.

The final rule implementing Amendment 16 measures did not require dockside/roving monitors to inspect the fish holds based, in part, on a pilot dockside/roving monitoring program conducted in the summer of 2009. Similar to comments received on this action, some safety concerns were identified with inspecting fish holds during the pilot program, even though fish holds were actually inspected as part of that pilot program. As a result, in the Amendment 16 proposed (74 FR 69382; December 31, 2009) and final rules, NMFS intentionally included language in the dockside/roving monitoring program operational standards at § 648.87(b)(5)(ii)(B)(*1*) that allow individual dockside/roving monitors or service providers to inspect fish holds if they elect to do so.

Section 311 of the Magnuson-Stevens Act provides the Secretary of Commerce with the general authority to enforce the provisions of the Magnuson-Stevens Act. NMFS acknowledges that existing dockside/roving monitoring provisions make it a violation for a vessel operator to provide false statements to a dockside/roving monitor about whether all catch is offloaded. However, that is just one of many ways to ensure compliance with existing regulations. NMFS does not agree that such measures are completely sufficient to ensure that all catch is offloaded. The only way to validate statements made by a vessel operator is to actually inspect fish holds. NMFS Office of Law Enforcement personnel already have the authority to board and inspect vessels. However, requiring dockside/roving monitors to also inspect fish holds, as anticipated during the development of Amendment 16, provides another means to ensure that vessel operators are complying with existing requirements, and that all fish that are landed are recorded in dealer databases or other data sources such as dockside/roving monitor reports. Dockside/roving monitors are not enforcement personnel, but their observations, including the reports summarizing the offloads of individual trips, are available to law enforcement personnel, as described in Section 4.2.3.5.4 of the Amendment 16 FEIS and the existing regulations at § 648.87(b)(4). The training provided to dockside/roving monitors by NMFS explicitly states that it is the dockside/roving monitor's responsibility to account for all catch, whether or not it is properly weighed or recorded by other parties. Monitors must record any species that is not weighed in their incident report to facilitate compliance with existing requirements. Therefore, based on the need to ensure that NMFS is accurately monitoring the amount of fish landed, NMFS has retained the requirement that dockside/roving monitors must inspect fish holds as part of this final rule.

NMFS recognizes that dockside/roving monitors must proceed with caution when conducting inspections of fish holds. As part of the dockside/roving monitoring training curriculum and certification process overseen by NMFS, individual dockside/roving monitors are trained and tested for competency in safety procedures, including slips, trips, and falls; electrical safety; climbing stairs and ladders; overhead dangers; unstable items; and fire. In addition, NMFS will likely require all previously certified dockside/roving monitors to attend a refresher safety training session on issues specific to boarding vessels and inspecting fish holds. Based on examples in other U.S. and Canadian fisheries, NMFS is currently developing standardized protocols that outline the major elements that dockside/roving monitors must comply with when inspecting fish holds. These elements include, but are not limited to, requesting permission from the vessel captain to board a vessel, following the instructions of the vessel's captain and crew to safely enter and exit the fish holds, and inspecting only areas of the vessel that would normally be used to store fish. Such standards will be integrated into the dockside/roving monitoring training curriculum developed and conducted by the Northeast Fishery Observer Program.

The dockside/roving monitor service provider approval standards adopted in Amendment 16 explicitly included the requirement for service providers to have adequate insurance to cover injury, liability, or accidental death that might befall dockside/roving monitors. NMFS recognizes that despite such coverage, individual dockside/roving monitors still have the capacity to bring a lawsuit against vessel owners for any injuries incurred while inspecting fish holds. NMFS encourages sectors and dockside/roving monitor service providers to seek agreement on how to best address the issues and problems raised by the comment. As to whether FW 45 sufficiently considers possible increases in cost for liability insurance for inspecting fish holds, NMFS does not have sufficient information to do so. While NMFS has information on the amount and type of insurance dockside/roving monitoring service providers have purchased, it would be difficult for NMFS to speculate on the costs of additional insurance for individual vessels. However, NMFS is committed to reviewing the requirement to inspect fish holds and the costs associated with it over time as more information becomes available.

Comment 17: Two industry groups (AFM and NSC) supported the proposal to delay the industry's responsibility for dockside and at-sea monitoring costs until FY 2013. They stated that this accurately reflects the fishing industry's inability to pay for the high costs of such monitoring at this time. However, the NSC cautioned that the economic viability of the fishing industry is not likely to improve sufficiently to enable sectors to cover such monitoring costs in FY 2013. Accordingly, they recommended that the Council and NMFS should consider further postponing industry responsibility for such costs until the fishing industry is profitable again. In contrast, PEW suggested that sectors should be in a better position to assume monitoring costs in FY 2013. PEW offered that the proposed delay would help ensure the success of the established sector program, arguing that the long-term benefits of fishing under sectors outweigh any potential impacts associated with reduced dockside monitoring in the short term.

Oceana opposed delaying industry responsibility for dockside and at-sea monitoring costs, claiming that NMFS does not have the authority to modify sector monitoring provisions in a FW action because such a measure would be a fundamental change in the FMP and that implementing this delay through a FW action would circumvent the public process. Citing a recent court case (*Oceana, Inc.* v. *Evans,* 384 F. Supp. 2d 203, 255 (D.DC 2005)), they contended that such measures can only be modified through an amendment, with an associated NEPA document. They also suggested that the proposed delay would undermine the Magnuson-Stevens Act requirements to monitor bycatch and implement measures to ensure accountability for ACLs, especially considering the concerns expressed by NMFS in a November 15, 2010, letter to the Council highlighting concerns about the potential limitation of NMFS funding in 2012 to support dockside and at-sea monitoring. FWW echoed this concern, noting that this might cause a "gap in the necessary enforcement required due to increased incentives for high-grading, misreporting, and underreporting." They recommended that delaying or removing monitoring costs should be based on vessel size/capacity, or an individual business's revenue.

Response: NMFS recognizes that the costs of requiring the fishing industry to pay for sufficient at-sea monitoring coverage could reduce profitability. However, a FMP must continue to maintain measures that prevent overfishing and promote the long-term health and stability of the fishery, as required by section 303(a) of the Magnuson-Stevens Act. As noted above, NMFS is concerned that relying exclusively on available NMFS funding for at-sea monitoring coverage during FY 2012 may reduce the amount of at-sea monitoring coverage available during that FY due to the yet uncertain amount of available NMFS funding for FY 2012. NMFS agrees that delaying industry responsibility for paying for at-sea monitoring coverage may reduce the amount of at-sea monitoring coverage during FY 2012 and undermine efforts to obtain accurate information regarding catch in the fishery. Therefore, NMFS has disapproved the proposed measure to delay industry responsibility for the costs at-sea monitoring coverage during FY 2012. NMFS expects at least some funding that will offset at least some of the at-sea monitoring coverage costs during FY 2012. Accordingly, the fishing industry would only be responsible for the costs of at-sea monitoring coverage that is not accounted for by available Federal funding.

As noted in the FW 45 EA, delaying industry responsibility for funding dockside/roving monitoring coverage in FYs 2011 and 2012 will immediately reduce operational costs to industry, without reducing the availability of landings information. This is because the dockside/roving monitoring data are primarily used for enforcement purposes, not catch monitoring. The trip-end hail report, in conjunction with the requirement for dockside/roving monitors to inspect fish holds implemented by this final rule, is intended to provide sufficient information to ensure compliance with existing regulations. Moreover, NMFS is expected to have sufficient funding in FY 2011 to continue the levels of observer and at-sea monitoring coverage for both sector and common pool trips implemented in FY 2010, and to augment that with sufficient dockside/roving monitoring coverage for trips not monitored by observers or at-sea monitors. Even if insufficient funding available to NMFS results in a short-term reduction in dockside/roving monitoring data, NMFS agrees that such reductions in data would likely be offset by long-term benefits of fishing under sectors. Therefore, NMFS is approving the delay in industry responsibility for dockside/roving monitoring costs through this final rule. Further changes could be considered by the Council through a future management action, but because NMFS does not have the authority to revise measures adopted by the Council in FW 45, NMFS cannot unilaterally postpone industry responsibility for such costs beyond FY 2012 through this action.

NMFS disagrees that the proposed postponement of industry responsibility for dockside/roving and at-sea monitoring costs represents a fundamental revision of the FMP and would circumvent the public process. First, the fundamental dockside/roving and at-sea monitoring provisions implemented by Amendment 16 are retained. The only aspect of these provisions that changes through FW 45 is the entity paying for the costs of such monitoring. Although NMFS will pay for at last some of the costs of dockside/roving and at-sea monitoring coverage for FYs 2011 and 2012, and will endeavor to achieve the coverage requirements specified in Amendment 16 for industry-funded dockside/roving and at-sea monitoring coverage, these changes do not constitute a fundamental change to the FMP requiring an amendment to the FMP. Second, the Council fully anticipated that measures adopted under Amendment 16 could be revised in the future through a FW action. This is documented in the Amendment 16 FEIS's executive summary when it states, "The periodic adjustment process is modified so that all measures adopted can be adjusted on a framework action" (see page 10 of that document) and in Section 4.2.8. This was codified in the regulations at § 648.90(a)(2)(iii) and (c)(1)(i). Both the Amendment 16 FEIS and the proposed regulations to implement Amendment 16 measures were made available for extensive public comment. Therefore, because the fundamental aspects of the Amendment 16 sector and common pool monitoring measures are not affected by the proposed delay in responsibility for monitoring costs, and that the public was afforded substantial opportunity to comment on the ability of the Council and NMFS to revise existing management measures through a FW action as part of the Amendment 16 proposed rule, NMFS has not remanded this provision back to the Council for implementation through an amendment to the FMP.

Sector Measures

Comment 18: FWW claimed that it was unfair to distribute the PSCs of cancelled NE multispecies permits to all valid limited access NE multispecies permits, suggesting that it was a poor use of available and "un-owned" quota. Instead, they recommended that the PSC of cancelled permits should be distributed to state-operated permit banks. They contended that this would signify a return to the general public for the use of its resources.

Response: NMFS disagrees that it is unfair to distribute the PSCs of cancelled NE multispecies permits to all valid limited access NE multispecies permits. The National Standard 4 Guidelines state that, if it becomes necessary to allocate or assign fishing privileges among U.S. fishermen, such allocations shall be "fair and equitable to all such fishermen." The proposed distribution to all valid limited access permits is consistent with National Standard 4 because it treats all permits equally and distributes PSCs associated with cancelled permits among all permits that may participate in the NE multispecies fishery. Therefore, NMFS implements this measure through this action.

Comment 19: An individual commercial fisherman recommended that sector rosters should be reopened now that common pool trip limits are proposed. He contended that there was not enough information about potential common pool trip limits to make an informed decision whether to join a sector by either the September or December sector roster deadlines. The Council also suggested that NMFS consider reopening sector rosters for the reasons noted above following public input at the March 17, 2011, Groundfish Oversight Committee meeting.

Response: As highlighted in Item 11 of this preamble and in a March 23, 2011, letter to permit holders, based on industry input, NMFS is allowing for a limited opportunity for additional changes to FY 2011 sector rosters to accommodate changes in vessel ownership that occurred after the submission of final sector rosters on December 1, 2010. This window to reopen FY 2011 sector rosters began on March 23, 2011, and will end on April 30, 2011. In future years, a window for additional sector roster changes would begin with the publication of proposed measures for the common pool for the following year and end on April 30, and would be limited to ownership changes occurring after the December 1 roster deadline. This is intended to provide vessel owners with the information they need to make an informed decision about whether to participate in sectors during the following FY, without undermining public consideration of likely sector operations in the following fishing year by substantially revising sector rosters following an opportunity to comment on proposed sector operations plans.

Comment 20: One industry group (NSSN) and the Council supported the proposed delay of the existing 14-day window for sectors to complete ACE transfers after the end of the FY to ensure that sectors had sufficient time to consider and incorporate final NMFS evaluations of sector catch before they sought to acquire additional ACE to rectify any overages of sector ACE from the previous FY.

Response: NMFS agrees, and implements revisions to the existing regulations at § 648.87(b)(1)(iii)(C) and (b)(1)(viii) to allow for additional time that might be necessary to determine estimates of final sector catch and balance sector overages from the previous FY through this action.

Comment 21: PEW expressed strong support for the approval of new sectors, including state-operated permit banks. They suggested that permit banks offer an important mechanism for preserving fishing opportunities for small-scale fishermen operating out of small ports and helping to protect against excessive consolidation in the fishery.

Response: NMFS agrees and approved the creation of new sectors, including state-operated permit banks through this final rule.

Comment 22: FWW stated that there was some conflicting language about the approval of new sectors as part of FW 45. In the preamble to the FW 45 proposed rule, they state that language suggests that new sectors have not been approved, yet language on page 39 of the FW 45 EA states that they are already approved and will become effective on May 1, 2011. Overall, however, comments by FWW did not outright oppose the implementation of new state-operated permit bank sectors, but rather suggested that such permit banks are indicative of their underlying concern with the privatization that occurs with catch shares. They suggest an alternative approach that would allow catch shares to be rented out to eligible entities. This would avoid the need to fund permit banks with taxpayer dollars and allow the Federal government to control pricing so that cost of fishing is always reasonable and can facilitate participation of small vessels in the fishery, thereby allowing managers to prioritize environmental, economic, and social goals of the fishery.

Response: Five new sectors were adopted by the Council in FW 45. However, to become effective, these sectors must still be approved by the Secretary through proposed and final rulemaking. Therefore, the language in the FW 45 EA incompletely described the process for approving sectors and their operations on a yearly basis. The Council adopted the creation these new sectors as part of FW 45, but they are not officially approved until the Secretary approves measures contained in FW 45 and the regulations implementing such provisions. Because the creation of these sectors is consistent with the FMP and applicable law, they are officially approved through FW 45 and implemented through this final rule. However, to operate on a yearly basis, all sectors must submit an operations plan and contract by specific deadlines. These yearly operations plans must further be approved by the sector through a separate rulemaking from the rulemaking to approve the creation of such sectors.

In their comment, FWW suggested that rather than allocating fishing privileges to fishing entities, fishery managers should require eligible fishing entities to rent fishing rights. As noted above, NMFS cannot substitute existing management measures with FWW's suggested approach through this final rule. However, this approach could be considered by the Council through a future management action. Nevertheless, it should be noted that their proposal would likely increase operational costs to all vessel owners that are interested in actively participating in the NE multispecies fishery, as both small and large vessels would be potentially obligated to purchase catch shares at the beginning of each FY. Depending on other operational costs associated with each particular vessel, it may not be feasible to continue to participate in the fishery given such expenses. This could lead to economic impacts to both these entities and supporting fishing communities that would be beyond those associated with the current management regime. Further, it may not be fair and equitable to impose different costs on different vessels based on size alone. Accordingly, FWW's proposal may not be consistent with National Standards 4 and 8 of the Magnuson-Stevens Act, as summarized in FWW's comment.

Measures for FY 2011 Under RA Authority

Comment 23: One commercial fisherman expressed concern that the proposed initial common pool trip limits for FY 2011 are insufficient to allow vessels to cover operational expenses. He stated that he prefers higher DAS counting rates and proportional increases in trip limits to allow vessel owners/operators to cover expenses and decrease bycatch by turning discards into landings. The Council also suggested that NMFS consider increasing trip limits and DAS counting so common pool trips are profitable and ACLs are not exceeded during FY 2011, following public input at the March 17, 2011, Groundfish Oversight Committee meeting.

Response: Because the realized fishing activity and associated expenses for each vessel may be very different, as documented in the Amendment 16 FEIS, it is very difficult to determine the appropriate combination of trip limits and DAS counting rates that would ensure that all common pool trips are profitable. Some vessel owners/operators may elect to target some species early in the FY based on historic operations and operator knowledge, while others may prefer to operate later in the FY to target other species and capitalize on the generally higher prices during the winter when fish supply is lower. Therefore, any combination of trip limits and DAS rates would likely benefit some, but not all vessels operating in the common pool.

The RA has the authority to revise trip limits and DAS rates to ensure that the common pool achieves, but does not exceed allocated sub-ACLs throughout the FY. Generally, NMFS has endeavored to ensure that the fishery remains open throughout the FY to provide the most flexibility in fishing operations to accommodate seasonal distribution of fish, fluctuations in market price, and operational preferences of vessel owners/operators. This was the approach employed in proposing initial FY 2011 common pool trip limits in the proposed rule for this action. The proposed FY 2011 DAS counting rate was based on a formulaic rate necessary to account for projected overages of specific sub-ACLs by the common pool during FY 2010. Because NMFS has the flexibility to adjust trip limits and DAS counting rates throughout the year, NMFS can adapt to fishing behavior to either increase or decrease trip limits and, to some degree, DAS counting rates. Therefore, NMFS implements the common pool trip limits and DAS counting rates outlined in Item 13 of this preamble for FY 2011. For some stocks, these trip limits reflect the highest trip limit from the range of trip limits considered in Table 16 of the proposed rule for this action to increase the profitability of common pool trips without compromising efforts to ensure that the common pool sub-ACLs are not exceeded during FY 2011. NMFS will continue to monitor catch rates and will adjust such measures as necessary to achieve the goals of the FMP, including increasing the profitability of individual trips, if available data suggest that such an action is warranted.

Corrections and Clarifications

Comment 24: The NEHFA and one commercial fisherman expressed support for the clarification of PSC text to specifically clarify how PSCs will be calculated for handgear permits using landings histories of handgear permits during FYs 1996–2006.

Response: As outlined in the preamble of the proposed rule for this action, NMFS believes these changes are necessary to accurately reflect the intent of the Council in Amendment 16 and the manner in which PSC are actually calculated by NMFS starting in FY 2011. Therefore, these changes have been implemented through this final rule.

Comment 25: One sector manager, commenting on the proposed rule to approve FY 2011 sector operation plans, commented in support of delaying the opening of the Eastern U.S./Canada Area only to common pool vessels until August 1, 2011, and allowing sector vessels to access this area on May 1, 2011. He noted that all sector vessels fish under a hard TAC in all areas, including the Eastern and Western U.S./ Canada Areas. He suggested that access to these offshore fishing areas when the weather is better during the summer months is very important for smaller trawl vessels that are not suitable for fishing in offshore waters during the winter.

Response: As outlined in the preamble of the proposed rule for this action, NMFS proposed applying the delayed opening of the Eastern U.S./ Canada Area only to common pool vessels during FY 2011 for the reasons offered by the sector manager. Therefore, NMFS implements the measures originally proposed in the proposed rule for this action through this final rule.

Comment 26: The NSC expressed support for the proposed change to the regulations at § 648.87(b)(1)(i)(C) to clarify that any sector ACE carried over into the next FY would be calculated based on 10 percent of the ACE originally allocated to the sector at the start of the previous FY. However, the NSC disagreed with the characterization of that proposed change in the preamble of the proposed rule for this action that states "a NE multispecies sector may carry-over up to 10 percent of its allocated ACE for each stock * * * into the following FY, provided the sector has not harvested more than 90 percent of its original allocation for that stock by the end of the FY." They contend that the preamble text suggests that if a sector leases in ACE from another and used more than 90 percent of its allocation, then it would not be able to carry over any ACE into the next FY. In doing so, this interpretation would destroy the utility of carry over provisions and distorts ACE trading system. They recommend that NMFS remove the contested preamble text from the final rule, as it could be used to interpret any ambiguities in the implementation of this provision in the future.

Response: NMFS recognizes that the preamble text referenced in NSC's comment could be interpreted in a way that is counter to the intent of NMFS in proposing this correction. Consistent with the proposed regulatory text, the intent of NMFS was to merely clarify that the amount of ACE that can be carried over for each stock shall be calculated based upon the amount of ACE originally allocated to that sector. To more accurately reflect the intent of NMFS and the Council in originally adopting the original ACE carry-over provision in Amendment 16, NMFS has removed the disputed preamble text and inserted an example clarifying how NMFS will calculate ACE that can be carried over into the next FY into the preamble text for this final rule.

Changes From the Proposed Rule

NMFS has made two changes to the proposed rule, including changes as a result of public comment and the disapproval of the proposed measure to delay industry responsibility for at-sea monitoring costs during FY 2012. In § 648.87(b)(5)(i)(A)(*1*), the phrase "As instructed by the Regional Administrator" was added to the trip-start hail reporting requirements to enable the Regional Administrator to augment the data elements contained in this report to more effectively administer this provision and the associated dockside/roving monitor coverage levels on a yearly basis. This change allows the Regional Administrator to require that vessel operators declare whether an observer or at-sea monitor is assigned for a particular trip to facilitate the appropriate deployment of dockside/ roving monitors in FYs 2011 and 2012 and achieve the desired coverage levels based on available funding, as described in Item 10 above. In addition, the regulations at § 648.87(b)(1)(v)(B)(*2*) were revised to reflect that the fishing industry was responsible for developing and paying for any at-sea monitoring program developed starting in FY 2012.

Classification

The Administrator, Northeast Region, NMFS, determined that FW 45 is necessary for the conservation and management of the NE multispecies fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

There is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after the date of publication for the measures implemented by this final rule. The effective date of this action affects a parallel rulemaking to approve sector operations plans for the start of FY 2011 on May 1, 2011. Therefore, these actions must be in effect at the beginning of FY 2011 to fully capture their environmental and economic benefits of FW 45 measures as well as the FY 2011 sector operations plans. The time available for FW 45 was constrained by multiple factors, preventing such actions from being completed sufficiently in advance of May 1, 2011, to facilitate the 30-day cooling off period. These factors included additional time necessary to fully analyze measures included in this action following revisions to draft measures when the Council adopted final FW 45 measures at its November 2010 meeting, and coordinate a special meeting of the TMGC to evaluate the impacts of the approval of IFACA in January 2011 on measures included in FW 45. Due to these constraints and rationale, this rulemaking could not be completed further in advance of May 1, 2011. Therefore, in order to have this action effective at the beginning of FY 2011, it is necessary to waive a portion of [retain as necessary] the 30-day delay period for this rule.

The waiver of a portion of [retain as necessary] the 30-day delayed effectiveness for this final rule is in the public interest because it is necessary to implement a number of measures by the start of FY 2011 that would benefit the NE multispecies fishery at large. Specifically, this action incorporates the best available scientific information for both pollock and GB yellowtail flounder, specifies and distributes revised ACLs for several stocks, implements a spawning closure area to protect spawning cod in the GOM, delays industry responsibility for costs associated with catch monitoring, increases access to near-shore seasonal closure areas by smaller Handgear-permitted vessels, increases LAGC vessel access to the Great South Channel Exemption Area, and approves the creation of five new sectors, among other measures. This final rule also includes measures that would control fishing effort by common pool vessels to help prevent the premature or excessive harvest of sub-ACLs allocated to the common pool during FY 2011. A May 1, 2011, effective date is necessary in order to specify catch levels and implement management measures necessary to eliminate overfishing and continue stock rebuilding, help mitigate the adverse economic impacts resulting from continued efforts to end overfishing and rebuild overfished stocks, increase the economic efficiency of vessel operations, and prevent industry confusion. Failure to waive the 30-day delay in effectiveness would prevent such measures from being implemented on May 1, 2011, and could result in short-term adverse economic impacts to NE multispecies vessels and associated fishing communities that were neither anticipated by the Council and industry participants, nor analyzed in the FW 45 EA and the associated FY 2011 sector operations plans EA. In particular, access to available fishery resources would be unnecessarily delayed for scallop and Handgear-permitted vessels, and commercial vessels would not be able to benefit from the substantially increased FY 2011 GB yellowtail flounder ACL. This could result in additional economic impacts and reduce the economic efficiency of the fleet until such measures become effective. Without the timely implementation of measures specified in this rule, the risk of excessive catch by common pool vessels would be increased, along with potential that the common pool will once again exceed its sub-ACL for specific stocks. In addition, allowing for a full 30-day delayed effectiveness period would delay the implementation of the GOM Cod Spawning Protection Area for up to an additional 30 days during which cod will continue to spawn. Thus, this delay could potentially jeopardize existing efforts to end overfishing and rebuild overfished stocks. This would be contrary to not only the interest of the fishing communities, but to the public at large, as overfishing and overfished stocks decreases the ability of the public to enjoy that stock for commercial, recreational, aesthetic, or other reasons, and reduces the availability of seafood to the nation. Therefore, delayed implementation of these measures beyond May 1, 2011, is impracticable and contrary to the public interest, and the requirement to delay implementation of this rule for a period of 30 days is hereby waived.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule does not contain policies with federalism or "takings" implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

A FRFA was prepared for this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, a summary of the analyses completed in the FW 45 EA and any supplements thereto to support the action, and this portion of the preamble. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in FW 45 and in the preamble to the proposed and this final rule, and is not repeated here. All of the documents that constitute the FRFA are available from NMFS (*see* **ADDRESSES**). In the FRFA, the baseline (no-action alternative) is the set of measures that were in place during FY 2010 (i.e., the measures implemented under Amendment 16 and FW 44). Tables and sections that are referenced in this FRFA refer to those contained in the EA developed for FW 45. A copy of FW 45 is available from the Council (*see* **ADDRESSES**).

A supplemental EA was developed to analyze the impacts of the emergency action to increase the FY 2011 GB yellowtail flounder TAC for the U.S./Canada Management Area and the associated ABC and ACL for this stock. The economic impact on affected entities resulting from increasing the FY 2011 GB yellowtail flounder TAC, ABC, and ACL is expected to be positive, because it will provide additional fishing opportunity and fishing revenue for vessels participating in NE multispecies fishery and the scallop fishery during FY 2011. Based on historic information, the groundfish fishery is able to land close to the full amount of GB yellowtail flounder allowed. The estimated revenue from the sale of GB yellowtail flounder under the increased catch limits is approximately $2 million, compared with $1.4 million if the original FY 2011 TAC, ABC, and ACL adopted in FW 45 were to be implemented instead. Based on a conservative estimate using FY 2010 data, for every dollar of yellowtail flounder revenue, there is at least $10 of revenue from other species. The additional revenue due to the catch of other species could be worth approximately ten times the difference between the GB yellowtail flounder revenue under the original catch limits and the increased catch limits implemented by this action (10 × $641,272), or approximately $6.4 million (if the total GB yellowtail flounder TAC is caught, and fishing effort on GB ceases consistent with existing regulations).

With respect to the scallop fishery, the increased catch limit implemented by this action will result in a larger cap on the amount of GB yellowtail flounder than can be caught in the scallop access areas. A larger cap may indirectly enable greater scallop revenue for the scallop fishery, particularly if the GB yellowtail flounder cap becomes limiting to the scallop fishery in the Closed Area II Scallop Access Area. It is difficult to predict the amount of GB yellowtail flounder that will be caught in the Closed Area II Scallop Access Area in FY 2011 due to the variability of scallop fishing effort, as well as scallop and yellowtail flounder catch rates. However, a larger cap on the amount of GB yellowtail flounder that can be caught in the scallop access areas enhances the ability of the scallop industry to plan fishing operations, and will minimize disruption to fishing activities.

Summary of the Significant Issues Raised by Public Comments in Response to the IRFA. A Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made From the Proposed Rule as a Result of Such Comments

Comment A: As noted above in Comment 16, several commenters suggested that the proposed requirement for dockside/roving monitors to inspect fish holds will expose vessel owners to a risk of a lawsuit stemming from any potential injury to such monitors when boarding the vessel or inspecting fish holds even if the dockside/roving monitoring service providers had sufficient insurance coverage. These commenters asserted that this potential risk will force vessel owners to buy more insurance to ensure that they are adequately covered for any potential liability lawsuits that might result from this provision. In doing so, they contest that this would contradict the FW 45 economic analysis that indicates that this measure should not impact either vessel owners or service providers.

Response: The existing regulations require dockside/roving monitor service providers to have adequate insurance to cover injury, liability, or accidental death that might befall dockside/roving monitors in the conduct of their duties. However, NMFS recognizes that despite such coverage, individual dockside/roving monitors still have the capacity to file a lawsuit against vessel owners for any injuries incurred while inspecting fish holds. As noted in the response to Comment 16 above, NMFS encourages sectors and dockside/roving monitor service providers to seek agreement on how to best address the issues and problems raised by the comment. NMFS does not have sufficient information to evaluate the potential increase in costs associated with any additional insurance coverage that vessel owners may be inclined to purchase to protect them from any liability associated with dockside/roving monitors inspecting fish holds. The risks associated with the liability for injuries to dockside/roving monitors inspecting fish holds appear to be somewhat similar to those associated with having to accommodate an observer and, therefore, may be instructive on how to consider insurance costs for dockside monitoring. NMFS is committed to reviewing the requirement to inspect fish holds and the costs associated with it over time as more information becomes available.

Description of and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

The measures implemented by this action affect recreational anglers and any vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit (Handgear B permit) or charter/party permit, or a LAGC scallop permit. In addition, because this action affects the dockside/roving and at-sea or electronic monitoring program requirements and require dockside monitors to inspect fish holds, this action also affects any entity intending to provide dockside/roving or at-sea or electronic monitoring services. As of December 20, 2010, the maximum number of small fishing entities (as defined by the Small Business Administration (SBA)) that may be affected by this action is 3,935 entities. These affected entities include 1,144 limited access NE multispecies DAS permit holders; 133 limited access NE multispecies Handgear A (Handgear A) permit holders; 11 limited access NE multispecies Small Vessel Exemption (Category C) permit holders; 1,156 open access NE multispecies Hangear B (Handgear B) permit holders; 824 open access NE multispecies charter/party permits; and 667 Atlantic sea scallop LAGC permits. It is likely that the actual number of small fishing entities affected by this action would be much smaller. For instance, information contained in Section 10.11.2 of the FW 45 EA indicates that only 397 vessels had reported any sales of regulated species and ocean pout as of December 2010, including 18 Handgear A vessels, 50 Handgear B vessels, and 329 other vessels issued limited access NE multispecies DAS permits. Further, according to that analysis, only 18 entities conducted party/charter operations in the GOM Cod Spawning Protection Area implemented by this action. It is difficult to estimate the number of private recreational anglers that may be affected by this action, as the GOM Cod Spawning Protection Area implemented by this action is too small to accurately determine the number of anglers that fish in this area based on available data. Finally, it is expected that the five entities currently providing dockside/roving monitoring and at-sea or electronic monitoring services would continue to do so in FYs 2011 and 2012, and would be affected by this action. As of March 28, 2011, four of these entities have submitted an application to provide dockside/roving monitoring services for FY 2011.

It is important to note that past fishing activity and enrollment in sectors may not be an accurate predictor of future fishing activity. In particular, it is possible that revisions to measures affecting both the Handgear A and Handgear B fisheries may increase participation by vessels issued such permits. As of December 1, 2010, 836 permits had elected to join a sector during FY 2011, as determined through the submission of sector rosters to NMFS, indicating that 452 permits would be enrolled in the common pool during FY 2011. However, vessels may withdraw from sectors through April 30, 2011. Therefore, because participation in sectors is voluntary, the number of vessels that will actually participate in sectors during FY 2011 and future years is likely to fluctuate based upon whether joining a sector or fishing under common pool measures offers the greater economic advantage to each individual vessel.

The SBA considers commercial fishing entities (NAICS code 114111) to be small entities if they have no more than $4 million in annual sales, while the size standard for charter/party operators (part of NAICS cod 487210) is $7 million in sales. Based on 2005–2007 average conditions, median gross sales by commercial fishing vessels were just over $200,000, and no single fishing entity earned more than $2 million. For regulated charter/party operators, the median value of gross receipts from passengers was just over $9,000, and did not exceed $500,000 in any year during 2001 to 2007. The vessels in the Atlantic sea scallop fishery are considered small business entities because all of them grossed less than $3 million according to the dealer's data for FYs 1994 to 2009, consistent with analyses under the RFA for recent scallop actions. Although multiple vessels may be owned by a single owner, available tracking of ownership is not readily available to reliably ascertain affiliated entities. Therefore, for the purposes of this analysis, each permitted vessel is treated as a single small entity and is determined to be a small entity under the RFA. Accordingly, there are no differential impacts between large and small entities under this final rule.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The only reporting and recordkeeping requirements affected by this final rule are the request for a LOA to fish south of the GOM RMA by Handgear A and Handgear B vessels, or a similar declaration via VMS prior to each trip by Handgear A vessels required to use VMS under the existing regulations, and the trip-end hail report already approved as part of Amendment 16. This action does not impose any new reporting or recordkeeping requirements that have not already been in existence. However, it requires additional vessels (handgear-permitted vessels) to comply with the LOA requirements and mandates that common pool vessels submit trip-end hail reports earlier than expected when originally implemented under Amendment 16. Existing reporting and recordkeeping requirements for the dockside/roving and at-sea or electronic monitoring programs approved under Amendment 16 have been included below for reference.

The costs associated with the reporting and recordkeeping requirements supporting measures implemented by this action are detailed in the Paperwork Reduction Act (PRA) analysis associated with Amendment 16 and the permit family of forms for the Northeast Region of NMFS. The time burden associated with a telephone call to request for a LOA to fish south of the GOM RMA is estimated at 5 minutes, with no costs to vessels requesting such a LOA. The cost associated with a similar declaration via VMS is estimated to be $0.50 per submission. For the trip-end hail reports, the yearly cost to each vessel is estimated to be approximately $17, assuming that such reports were made via VMS. Costs would likely be lower if such reports were submitted via another medium. Costs to vessels receiving dockside/roving monitoring services implemented under Amendment 16 include $10 per year for confirming pre-trip hail reports and $13 per year to confirm trip-end hail reports and specify whether a particular trip would be observed by a dockside monitor. Requirements to maintain and enter data into a dockside monitoring database are estimated to cost approximately $4,225 per service provider annually, while submitting dockside monitoring data to NMFS is likely to cost each service provider approximately $36,000 per year. Similar costs to service providers are expected to notify sector vessels of selection for at-sea/electronic monitoring coverage

($3,125 per year) and to submit at-sea or electronic monitoring data to NMFS ($36,000 per year).

This final rule contains a collection-of-information requirement subject to the PRA and which has been approved by OMB under the various OMB control numbers listed below. Public reporting burden for these collections of information are estimated to average, as follows:

1. VTR submissions, OMB# 0648–0605, (5 min/response);
2. Sector operations plan and associated NEPA analysis, OMB# 0648–0605, (640 hr/response);
3. Dockside/at-sea monitoring service provider application, OMB# 0648–0605, (10 hr/response);
4. Dockside/at-sea monitoring service provider response to application disapproval, OMB# 0648–0605, (10 hr/response);
5. Data entry for sector discard monitoring system, OMB# 0648–0605, (3 min/response);
6. Sector weekly catch report, OMB# 0648–0605, (4 hr/response);
7. Sector annual report, OMB# 0648–0605, (12 hr/response);
8. Notification of expulsion from a sector, OMB# 0648–0605, (30 min/response);
9. Request to transfer ACE, OMB# 0648–0605, (5 min/response);
10. VMS certification form, OMB# 0648–0605, (10 min/response);
11. VMS confirmation call, OMB# 0648–0605, (5 min/response);
12. VMS area and DAS declaration, OMB# 0648–0605, (5 min/response);
13. VMS trip-level catch reports, OMB# 0648–0605, (15 min/response);
14. Request for a LOA to participate in the GOM Haddock Gillnet Pilot Program, OMB# 0648–0605, (5 min/response);
15. Request for a LOA to fish in a NE multispecies RGA, OMB# 0648–0605, (5 min/response);
16. VMS declaration to fish in a NE multispecies RGA, OMB# 0648–0605, (5 min/response);
17. Pre-trip hail report to a dockside monitoring service provider, OMB# 0648–0605, (2 min/response);
18. Trip-end hail report to a dockside monitoring service provider, OMB# 0648–0605, (15 min/response);
19. Confirmation of dockside monitoring trip-end hail report, OMB# 0648–0605, (2 min/response);
20. Dockside/roving service provider data entry, OMB# 0648–0605, (3 min/response);
21. Dockside/roving or at-sea monitor deployment report, OMB# 0648–0605, (10 min/response);
22. Dockside/roving or at-sea monitoring service provider catch report to NMFS upon request, OMB# 0648–0605, (5 min/response);
23. Dockside/roving or at-sea monitor report of harassment and other issues, OMB# 0648–0605, (30 min/response);
24. OLE debriefing of dockside/roving or at-sea monitors, OMB# 0648–0605, (2 hr/response);
25. Copy of dockside/roving or at-sea monitoring service provider contract upon request, OMB# 0648–0605, (30 min/response);
26. Copy of dockside/roving or at-sea monitoring service provider information materials upon request, OMB# 0648–0605, (30 min/response);
27. Observer program pre-trip notification, OMB# 0648–0605, (2 min/response);
28. Daily VMS catch reports when fishing in the U.S./Canada Management Area and CA II SAPs, OMB# 0648–0605, (15 min/response);
29. Daily VMS catch reports when fishing in the CA I Hook Gear Haddock SAP, OMB# 0648–0605, (15 min/response);
30. Daily VMS catch reports when fishing in the Regular B DAS Program, OMB# 0648–0605, (15 min/response);
31. Copy of the dealer weigh-out slip or dealer signature of the dockside monitor report, OMB# 0648–0605, (2 min/response);
32. Forward trip start/end hails to NMFS, OMB# 0648–0605 (2 min/response);
33. Notification to vessel/sector/NMFS of monitor emergency, OMB# 0648–0605 (5 min/response);
34. Initial vessel application for a limited access Handgear A permit, OMB Control Number 0648–0202, (10 min/response);
35. DAS Transfer Program application, OMB Control Number 0648–0202, (5 min/response);
36. VMS purchase and installation, OMB Control Number 0648–0202, (1 hr/response);
37. Automated VMS polling of vessel position twice per hour while fishing within the U.S./Canada Area, OMB Control Number 0648–0202, (5 sec/response);
38. VMS proof of installation, OMB Control Number 0648–0202, (5 min/response);
39. Expedited submission of a proposed SAP, OMB Control Number 0648–0202, (20 hr/response);
40. Request to power down VMS for at least 1 month, OMB Control Number 0648–0202, (5 min/response);
41. Request for an LOA to participate in the GOM Cod Landing Exemption, OMB Control Number 0648–0202, (5 min/response);
42. Request for an LOA to participate in the Skate Bait-only Possession Limit Exemption, OMB Control Number 0648–0202, (5 min/response);
43. Submission of a sector allocation proposal, OMB Control Number 0648–0202, (50 hr/response);
44. DAS "flip" notification via VMS for the Regular B DAS pilot program, OMB# 0648–0202 (5 min/response);
45. DAS "flip" notification via VMS for the Eastern U.S./Canada Haddock SAP Pilot Program, OMB# 0648–0202 (5 min/response);
46. NMFS Office of Law Enforcement landings notice requirement for Category 1 herring vessels operating with an observer waiver, OMB# 0648–0521, (5 min/response);
47. Notification and Communication with USCG and Center for Coastal Studies, OMB# 0648–0521, (10 min/response);
48. Written requests to receive a DAS credit for standing by an entangled whale, OMB# 0648–0521, (30 min/response);
49. Vessel baseline downgrade request for the DAS Leasing Program, OMB# 0648–0475, (1 hr/response);
50. Spawning block declaration, OMB# 0648–0202 (2 min/response);
51. Sector Manager daily reports for CA I Hook Gear Haddock SAP, OMB# 0648–0212 (2 hr/response);
52. DAS Leasing Program application, OMB# 0648–0475 (10 min/response); and
53. Declaration of intent to fish inside and outside of the Eastern U.S./Canada Area on the same trip, OMB# 0648–0202 (5 min/response).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Description of Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statues

During the development of Framework 45, NMFS and the Council considered ways to reduce the regulatory burden on and provide flexibility to the regulated community. The approach taken is consistent with the recent Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation (January 18, 2011). The measures implemented by this final rule, in conjunction with the final rule to approve FY 2011 sector operations plans, minimize the long-term economic impacts on small entities to the extent practicable. Overall, long-term impacts of this final rule, as well as the related actions of the FMP, are minimized by ensuring that management measures and catch levels result in fishing mortality rates are sustainable and contribute to rebuilding stocks and, therefore, maximizing yield, as well as providing additional flexibility for fishing operations in the short term. In particular, this final rule implements several measures that directly or indirectly provide small entities with some ability to offset at least some portion of the estimated economic impacts associated with proposed measures. The major mitigating measures include formal recognizing the rebuilt status of pollock; extending the rebuilding period for GB yellowtail flounder; increasing the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC; maintaining existing yellowtail flounder allocations to the scallop fishery; allowing LAGC scallop vessels greater access to the Great South Channel Exemption area; increasing access to the seasonal closure areas for Handgear A and Handgear B permits and exempting vessels issued these permits and limited access Small Vessel Exemption permits from existing dockside/roving monitoring requirements; delaying requiring sectors and common pool vessels to pay for dockside/roving and at-sea or electronic monitoring; redistributing PSC from cancelled permits to all remaining valid limited access NE multispecies permits; and approving new sectors, including state permit banks and a lease-only sector. A complete description of why each measure was selected can be found in the Section 4.0 of the FW 45 EA (*see* **ADDRESSES**).

The specification of ACLs for components of the groundfish and non-groundfish fisheries, as well as additional management measures to ensure that such catch levels are not exceeded, increase the likelihood that the biological objectives of the FMP will be met, resulting greater sustainable revenue over the long term. Specifically, this action formally recognizes that pollock is rebuilt, incorporates updated biological reference points, and specifies higher ACLs for this stock based upon updated stock assessment data first implemented on a temporary basis through a July 20, 2010, emergency action (75 FR 41996). This action also extends the rebuilding program for GB yellowtail flounder and indirectly reduces economic impacts on NE multispecies vessels by allowing higher ACLs to be specified for the remainder of the rebuilding program compared to the existing rebuilding program adopted for this stock. Further, this action substantially increases the FY 2011 GB yellowtail flounder U.S./Canada Management Area TAC and the associated ABC and ACL available to commercial vessels based on the flexibility provided by IFACA. Such increases in available ACL and associated vessel revenue would not be realized if this action was not implemented, as the increased pollock ACL implemented by the July 20, 2010, emergency rule would expire on July 17, 2011, and the GB yellowtail flounder U.S./Canada Management Area TAC and the associated ABC and ACL would expire on April 30, 2011, because this TAC is approved on a yearly basis following annual recommendations by the TMGC. Finally, this action maintains the actual yellowtail flounder allocations to the scallop fishery that were implemented by the FW 44 final rule for FY 2010, instead of updating those allocations to reflect revised estimates of the amount of yellowtail flounder bycatch expected in the scallop fishery during FY 2011. Updated estimates would have lowered the yellowtail allocations to the scallop fishery for FY 2011 and potentially resulted in reduced fishing revenue for the scallop fishery. Together, these provisions increase the amount of these stocks available to commercial vessels without compromising the conservation of objectives of the FMP to prevent overfishing and rebuild overfished stocks, thereby likely increasing vessel revenues from landing these and other stocks by reducing the likelihood that low ACLs for these stocks will unnecessarily restrict vessel operations in FY 2011 and mitigating adverse economic impacts of recent effort controls in the fishery.

This final rule mitigates economic impacts to LAGC scallop vessels by eliminating the yellowtail flounder peak spawning closure areas in the Great South Channel Exemption Area and enabling LAGC scallop vessels greater access to this area. If this measure reduces operational costs by allowing vessels to operate in a more efficient manner, it could increase the economic efficiency of vessel operations and increase the value of the IFQ permits. Not implementing this measure would likely cause fishing operations by LAGC scallop vessels to be less efficient, increasing operational costs by requiring such vessels to steam farther to open fishing grounds. This action does not compromise efforts to protect overfished stocks of yellowtail flounder, as the yellowtail flounder spawning closure areas were first implemented at a time when LAGC scallop vessels were not as restricted in the amount scallop trips that they could take as they are now. Therefore, these closures were necessary to prevent the excessive harvest of yellowtail flounder as bycatch by LAGC scallop vessels, but are now no longer required following the implementation of more restrictive measures to control scallop catch by these vessels in the form of an individual fishing quota system as part of Amendment 11 to the Atlantic Sea Scallop FMP (April 14, 2008; 72 FR 20090).

This action implements several measures that reduce operational costs to vessels, on both a temporary and indefinite basis. Specifically, this action indefinitely exempts NE multispecies Handgear A, Handgear B, and Small Vessel Exemption Category permits from dockside/roving monitoring requirements, delays industry responsibility for paying for dockside/roving monitoring coverage until FY 2013, and delays industry responsibility for paying for a sector at-sea monitoring program until FY 2013. Delaying the fishing industry's responsibility to pay for dockside/roving monitors and exempting handgear and Small Vessel category permits from the dockside/roving monitoring requirements would save approximately $281,000 per year (assuming 20 percent of trips would be covered), while delaying the responsibility for paying for at-sea monitoring would save industry about $5 million per year (assuming 30 percent of trips would be covered). Such cost savings would not be realized if such measures are not implemented. Therefore, this action attempts to minimize operational costs to affected vessels as the fishery continues to adapt to substantial changes to management measures, including ACLs, AMs, and an expansion of sector measures, and overfished stocks continue to rebuild.

Allowing vessels with handgear permits access to at least some of the seasonal closure areas is likely to increase the chance that such permits could increase their catch of regulated species, particularly during the early months of the fishing season before trip limits may be reduced to prevent the overall ACLs from being exceeded. In addition to increasing the operational efficiency of such vessels by increasing catch rates and reducing operational costs (fuel, primarily), because these vessels are small and use relatively inefficient gear to catch fish, these measures allow vessels to fish closer to shore during periods of better weather instead of forcing them to fish farther offshore in areas that are not subject to seasonal closures. Such benefits would not be realized if this action is not implemented.

This action recalculates the PSC for each stock on a yearly basis to reflect the elimination of landings histories from cancelled permits, and redistributes such landings histories to all valid limited access NE multispecies permits. This replaces the previous practice of using the landing histories of cancelled permits to contribute to the sub-ACL specified for the common pool based on the interpretation that if a permit has not signed up to join a sector it is, by default, in the common pool. The magnitude of the impact from this provision is likely to be small, as few permits have been cancelled since the PSCs were calculated using permits valid as of May 1, 2008. Cancelled permits represent only about 72,000 lb (32,659 kg) of all species combined that is divided among the 1,288 valid limited access NE multispecies permits based on each permit's individual fishing history. Thus, this measure, in itself, is unlikely to make an unprofitable fishing operation marginally profitable. Nevertheless, this action provides some positive benefit and increased economic opportunity to all remaining permit holders, and may increase the amount of ACE available on the market to lease.

As noted in the proposed rule for this action, the approval of new sectors, including state permit banks and a lease-only sector, as part of this action is likely to help to reduce vessel operational costs by increasing the amount of DAS and ACE available on the leasing market, reducing market price for such additional fishing opportunities, and increasing competition in the leasing market by providing alternative means to acquire the ACE necessary for to help vessels remain financially solvent. In addition, it is possible that the lease-only sector could reduce sector monitoring fees due to the presumption that participating vessels would not be actively fishing, but rather exist for the sole purpose of providing PSC that the sector may use to enable other sectors to continue fishing.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide (i.e., permit holder letter) will be sent to all holders of permits for the fishery. The guide and this final rule will be available upon request.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 18, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.10, revise paragraph (k)(1) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(k) * * *

(1) *Reporting requirements for all limited access NE multispecies vessel owners or operators.* In addition to any other reporting requirements specified in this part, the owner or operator of any vessel issued a limited access NE multispecies permit on either a common pool or sector trip must declare the following information via VMS or IVR, as instructed by the Regional Administrator:

(i) *Broad stock area(s) to be fished.* To fish in any of the broad stock areas, the vessel owner or operator must declare his/her intent to fish within one or more of the NE multispecies broad stock areas, as defined in paragraph (k)(3) of this section, prior to leaving port at the start of a fishing trip;

(ii) *VTR serial number.* On its return to port, prior to crossing the VMS demarcation line, as defined at § 648.10, the vessel owner or operator must provide the VTR serial number for the first page of the VTR for that particular trip, or other applicable trip ID specified by NMFS; and

(iii) *Trip-end hail report.* Unless otherwise required to comply with both the dockside/roving monitoring trip-start and trip-end hail reports pursuant to § 648.87(b)(5), beginning in fishing year 2011 (May 1, 2011), upon its return to port and prior to crossing the VMS demarcation line as defined in § 648.10, the owner or operator of any vessel issued a limited access NE multispecies permit that is subject to the VMS requirements specified in paragraph (b)(4) of this section must submit a trip-end hail report to NMFS via VMS, as instructed by the Regional Administrator. The trip-end hail report must include at least the following information, as instructed by the Regional Administrator: The vessel permit number; VTR serial number, or other applicable trip ID specified by NMFS; intended offloading location(s), including the dealer name/offload location, port/harbor, and state for the first dealer/facility where the vessel intends to offload catch and the port/harbor, and state for the second dealer/facility where the vessel intends to offload catch; estimated date/time of arrival; estimated date/time of offload; and the estimated total amount of all species retained, including species managed by other FMPs (in pounds, landed weight), on board at the time the vessel first offloads its catch from a particular trip. The trip-end hail report must be submitted at least 6 hr in advance of landing for all trips of at least 6 hr in duration or occurring more than 6 hr from port. For shorter trips, the trip-end hail reports must be submitted upon the completion of the last tow or hauling of gear, as instructed by the Regional Administrator.

* * * * *

■ 3. In § 648.14, revise paragraph (k)(7)(i)(B); and add paragraphs (k)(9)(i), (k)(15)(ii)(A)(*5*), and (k)(18)(i)(D) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(7) * * *

(i) * * *

(B) Fish for, harvest, possess, or land regulated species in or from the closed areas specified in § 648.81(a) through (f) and (o), unless otherwise specified in § 648.81(c)(2)(iii), (f)(2)(i), (f)(2)(iii), (f)(2)(vi), (i), (o)(2)(i), or as authorized under § 648.85.

* * * * *

(9) * * *

(i) If operating under the provisions of a limited access NE multispecies Handgear A permit south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), fail to declare the vessel operator's intent to fish in this area via VMS or fail to obtain or retain on board a letter of authorization from the Regional Administrator, as required by § 648.82(b)(6)(iv).

* * * * *

(15) * * *

(ii) * * *

(A) * * *

(*5*) If operating under the provisions of a limited access NE multispecies Handgear B permit south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), fail to obtain or retain on board a letter of authorization from the Regional Administrator, as required by § 648.88(a)(2)(iv).

* * * * *

(18) * * *

(i) * * *

(D) Offload fish before a dockside/roving monitor arrives, if selected to have its offloading events observed by a dockside/roving monitor, as specified by § 648.87(b)(1)(v)(B)(*1*) and (b)(5)(i)(C).

* * * * *

■ 4. In § 648.80, revise the introductory text to paragraph (a)(18), and remove paragraphs (a)(18)(ii)(C) and (D).

The revision reads as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(18) *Great South Channel Scallop Dredge Exemption Area.* Vessels issued a LAGC scallop permit, including limited access scallop permits that have used up their DAS allocations, may fish in the Great South Channel Scallop Dredge Exemption Area, as defined under paragraph (a)(18)(i) of this section, when not under a NE multispecies or scallop DAS or on a sector trip, provided the vessel complies with the requirements specified in paragraph (a)(18)(ii) of this section and applicable scallop regulations in subpart D of this chapter.

* * * * *

■ 5. In § 648.81:

■ a. Revise the introductory text of paragraph (f)(2)(vi);

■ b. Add paragraph (g)(2)(vi);

■ c. Revise paragraph (i); and

■ d. Add paragraph (o).

The revisions and additions read as follows:

§ 648.81 NE multispecies closed areas and measures to protect EFH.

* * * * *

(f) * * *

(2) * * *

(vi) That are fishing on a sector trip, or under the provisions of a Northeast multispecies Handgear A permit, as specified at § 648.82(b)(6), provided such vessels comply with the following restricted areas referred to as the Sector Rolling Closure Areas:

* * * * *

(g) * * *

(2) * * *

(vi) That are fishing under the provisions of a Northeast multispecies Handgear A permit, as specified at § 648.82(b)(6), or the provisions of a Northeast multispecies Handgear B permit, as specified at § 648.88(a).

* * * * *

(i) *Transiting.* Unless otherwise restricted or specified in this paragraph (i), a vessel may transit CA I, the Nantucket Lightship Closed Area, the Cashes Ledge Closed Area, the Western GOM Closure Area, the GOM Rolling Closure Areas, the GB Seasonal Closure Area, the EFH Closure Areas, and the GOM Cod Spawning Protection Area, as defined in paragraphs (a)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), and (o)(1), of this section, respectively, provided that its gear is stowed in accordance with the provisions of § 648.23(b). A vessel may transit CA II, as defined in paragraph (b)(1) of this section, in accordance with paragraph (b)(2)(iv) of this section. Private recreational or charter/party vessels fishing under the Northeast multispecies provisions specified at § 648.89 may transit the GOM Cod Spawning Protection Area, as defined in paragraph (o)(1) of this section, provided all bait and hooks are removed from fishing rods, and any regulated species on board have been caught outside the GOM Cod Spawning Protection Area and has been gutted and stored.

* * * * *

(o) *GOM Cod Spawning Protection Area.* (1) Except as specified in paragraph (o)(2) of this section, from April through June of each year, no fishing vessel or person on a fishing vessel may enter, fish in, or be in; and no fishing gear capable of catching NE multispecies may be used, on, or be on board, a vessel in the GOM Cod Spawning Protection Area, as defined by straight lines connecting the following points in the order stated (a chart depicting this area is available from the Regional Administrator upon request):

GOM COD SPAWNING PROTECTION AREA

Point	N. Latitude	W. Longitude
CSPA1	42°50.95′	70°32.22′
CSPA2	42°47.65′	70°35.64′
CSPA3	42°54.91′	70°41.88′
CSPA4	42°58.27′	70°38.64′
CSPA1	42°50.95′	70°32.22′

(2) Paragraph (o)(1) of this section does not apply to persons on a fishing vessel or fishing vessels:

(i) That have not been issued a NE multispecies permit and that are fishing exclusively in state waters;

(ii) That are fishing with or using exempted gear as defined under this part, excluding pelagic gillnet gear capable of catching NE multispecies, except for vessels fishing with a single pelagic gillnet not longer than 300 ft (91.4 m) and not greater than 6 ft (1.83 m) deep, with a maximum mesh size of 3 inches (7.6 cm), provided:

(A) The net is attached to the boat and fished in the upper two-thirds of the water column;

(B) The net is marked with the vessel owner's name and vessel identification number;

(C) There is no retention of regulated species or ocean pout; and

(D) There is no other gear on board capable of catching NE multispecies;

(iii) That are fishing as a charter/party or recreational fishing vessel, provided that:

(A) With the exception of tuna, fish harvested or possessed by the vessel are not sold or intended for trade, barter, or sale, regardless where the species are caught;

(B) The vessel has no gear other than pelagic hook and line gear, as defined in this part, on board unless that gear is properly stowed pursuant to § 648.23(b); and

(C) There is no retention of regulated species, or ocean pout; and

(iv) That are transiting pursuant to paragraph (i) of this section.

■ 6. In § 648.82:

■ a. Revise paragraphs (a)(2) and the introductory text of paragraph (b)(6);

■ b. Add paragraph (b)(6)(iv); and

■ c. Revise paragraph (n)(2)(iv).

The revisions and addition read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

(a) * * *

(2) Notwithstanding any other provision of this part, any vessel issued

a NE multispecies limited access permit may not call into the DAS program and fish under a DAS, fish on a sector trip, or fish under the provisions of a limited access Small Vessel Category or Handgear A permits pursuant to paragraphs (b)(5) and (6) of this section, respectively, if such vessel carries passengers for hire for any portion of a fishing trip.

(b) * * *

(6) *Handgear A category.* A vessel qualified and electing to fish under the Handgear A category, as described in § 648.4(a)(1)(i)(A), may retain, per trip, up to 300 lb (135 kg) of cod, one Atlantic halibut, and the daily possession limit for other regulated species and ocean pout, as specified under § 648.86. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is reduced below 300 lb (135 kg) per DAS by NMFS, the cod trip limit specified in this paragraph (b)(6) shall be adjusted to be the same as the applicable cod trip limit specified for NE multispecies DAS permits. For example, if the GOM cod trip limit for NE multispecies DAS vessels was reduced to 250 lb (113.4 kg) per DAS, then the cod trip limit for a vessel issued a Handgear A category permit that is fishing in the GOM Regulated Mesh Area would also be reduced to 250 lb (113.4 kg). Qualified vessels electing to fish under the Handgear A category are subject to the following restrictions:

* * * * *

(iv) *Declaration.* For any such vessel that is not required to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator stating an intent to fish south of the GOM Regulated Mesh Area and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. For any such vessel that is required, or elects, to use VMS pursuant to § 648.10(b)(4), to fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must declare an intent to fish south of the GOM Regulated Mesh Area on each trip through the VMS prior to leaving port, in accordance with instructions provided by the Regional Administrator. Such vessels may transit the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), provided that their gear is stowed in accordance with the provisions at § 648.23(b).

* * * * *

(n) * * *

(2) * * *

(iv) *Monitoring requirements.* Except as specified in paragraph (n)(2)(iv)(C), starting in fishing year 2012 (May 1, 2012), landings of regulated species or ocean pout by common pool vessels shall be monitored at the point of offload by independent, third-party service providers approved to provide such services by NMFS, as specified in paragraphs (n)(2)(iv)(A) and (B) of this section. Unless otherwise instructed by NMFS, these service providers shall deploy dockside monitors to monitor the offload of catch directly to a dealer, and roving monitors to monitor the offload of catch onto a truck for subsequent shipment to a dealer. For fishing year 2012 only, common pool vessels must comply with any dockside/roving monitoring program specified by NMFS pursuant to § 648.87(b)(1)(v)(B)(*1*). None of the costs associated with dockside/roving monitors during fishing year 2012 shall be paid by the owner or operator of a vessel subject to these requirements. Starting in fishing year 2013 and thereafter, the costs associated with monitoring vessel offloads shall be the responsibility of individual vessels, unless otherwise instructed by NMFS. An individual vessel owner or operator may only use one dockside/roving monitoring service provider per fishing year beginning in fishing year 2013, and must contract for such services with a service provider approved by NMFS pursuant to § 648.87(b)(4), as instructed by the Regional Administrator. Both common pool vessels and service providers providing offloading monitoring services will be subject to the requirements specified in § 648.87(b)(5).

(A) *Coverage levels.* For fishing year 2012, dockside/roving monitoring coverage levels shall be determined by NMFS based on available funding. If NMFS does not require 100-percent coverage of all common pool trips, NMFS shall first provide dockside/roving monitoring for trips that are not also assigned an observer or at-sea monitor pursuant to § 648.11. Starting in fishing year 2013, at least 20 percent of the trips taken by vessels operating under the provisions of the common pool shall be monitored. To ensure that these levels of coverage are achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip must be monitored by a dockside/roving monitor, as specified in paragraph (n)(2) of this section, and a vessel may not offload any of its catch until the dockside/roving monitor arrives. For example, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during offload at each location. All landing events at remote ports that are selected to be observed by a dockside/roving monitor must have a roving monitor present to witness offload activities to the truck, as well as a dockside monitor present at each dealer to certify weigh-out of all landings. Except as provided in this paragraph (n)(2)(iv)(A) or paragraph (n)(2)(iv)(C) of this section, or as instructed by the Regional Administrator, any service provider providing dockside/monitoring services required under this paragraph (n)(2)(iv) must ensure that coverage is randomly distributed among all such trips, and that the landing events monitored are representative of fishing operations by common pool vessels throughout the fishing year.

(B) *Dockside/roving monitor service provider standards.* Starting in fishing year 2013, a common pool vessel must employ a service provider approved by NMFS to provide dockside/roving monitor services, as identified by the Regional Administrator. To be approved to provide the services specified in paragraph (n)(2) of this section, dockside/roving monitor service providers must meet the standards in § 648.87(b)(4).

(C) *Exemption.* Common pool vessels operating under the provisions of either a limited access Northeast multispecies Small Vessel Category permit or Handgear A permit, as specified at §§ 648.82(b)(5) and (6), respectively, or an open access Northeast multispecies Handgear B permit, as specified at § 648.88(a), are exempt from the dockside/roving monitoring requirements specified in this paragraph (n)(2)(iv).

* * * * *

■ 7. In § 648.87:

■ a. Revise paragraphs (b)(1)(i)(A), (b)(1)(i)(C), (b)(1)(i)(E) introductory text, (b)(1)(i)(E)(*1*), (b)(1)(i)(E)(*2*)(*i*) and (*ii*), (b)(1)(iii)(C), (b)(1)(v)(B) introductory text, (b)(1)(v)(B)(*1*), (b)(1)(v)(B)(*3*) introductory text, (b)(1)(v)(B)(*3*)(*i*), (b)(1)(v)(B)(*4*) and (*5*), (b)(1)(viii) introductory text, and (b)(1)(viii)(C);

■ b. Revise paragraph (b)(2) introductory text;

■ c. Revise paragraphs (b)(5) introductory text and (b)(5)(i)(A)(*1*);

■ d. Add paragraph (b)(5)(ii)(E);

■ e. Revise paragraph (c)(2)(i); and

■ f. Add paragraphs (d)(20) through (24).

The revisions and additions read as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(A) *Allocated stocks.* Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock, with the exception of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder (both the GOM/GB and the SNE/MA stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels/permits participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section. In the event that a future allocation of SNE/MA winter flounder can be made available pursuant to the biennial adjustment or framework process specified in § 648.90(a)(2), an ACE for this stock will be specified pursuant to paragraph (b)(1)(i)(E)(*1*) of this section.

* * * * *

(C) *Carry-over.* With the exception of GB yellowtail flounder, a sector may carry over an amount of ACE equal to up to 10 percent of its original ACE allocation for each stock that is unused at the end of one fishing year into the following fishing year. Any unused ACE allocated for Eastern GB stocks pursuant to paragraph (b)(1)(i)(B) of this section will contribute to the 10-percent carry-over allowance for each stock, as specified in this paragraph (b)(1)(i)(C), but will not increase an individual sector's allocation of Eastern GB stocks during the following year. This carry-over ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

* * * * *

(E) *Potential sector contribution (PSC).* For the purposes of allocating a share of the available ACL for each NE multispecies stock to approved sectors pursuant to § 648.90(a)(4), the landings history of all limited access NE multispecies permits shall be evaluated to determine each permit's share of the overall landings for each NE multispecies stock as specified in paragraphs (b)(1)(i)(E)(*1*) and (*2*) of this section. When calculating an individual permit's share of the overall landings for a particular regulated species or ocean pout stock, landed weight shall be converted to live weight to maintain consistency with the way ACLs are calculated pursuant to § 648.90(a)(4) and the way ACEs are allocated to sectors pursuant to this paragraph (b)(1)(i). This calculation shall be performed on July 1 of each year, unless another date is specified by the Regional Administrator, to redistribute the landings history associated with permits that have been voluntarily relinquished or otherwise canceled among all remaining valid limited access NE multispecies permits as of that date during the following fishing year. The PSC calculated pursuant to this paragraph (b)(1)(i)(E) shall remain with the permit indefinitely, but may be permanently reduced or eliminated due to a permit sanction or other enforcement action.

(*1*) *Calculation of PSC for all NE multispecies stocks except GB cod.* Unless otherwise specified in paragraph (b)(1)(i)(E)(*2*) of this section, for each valid limited access NE multispecies permit, including limited access NE multispecies Handgear A permits, landings recorded in the NMFS dealer database of each stock of NE multispecies determined by NMFS to be the landings history associated with that permit while subject to the NE multispecies regulations based on whether the vessel fishing under that permit was issued a limited access NE multispecies permit or subsequently qualified for a limited access NE multispecies permit pursuant to § 648.4(a)(1)(i), including regulated species or ocean pout caught under a NE multispecies DAS when participating in the skate or monkfish fisheries, but excluding, for example, landings by scallop vessels operating under a scallop DAS, shall be summed for fishing years 1996 through 2006. This sum shall then be divided by the total landings of each NE multispecies stock during the same period by all permits eligible to join sectors as of May 1, 2008. The resulting figure shall then be multiplied by a factor of 1/PSC of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the PSC for each individual valid limited access NE multispecies permit for each regulated species or ocean pout stock allocated to sectors in the NE multispecies fishery for the following fishing year pursuant to this paragraph (b)(1)(i)(E)(*1*).

(*2*) * * *

(*i*) *GB cod PSC for permits committed to participate in the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector.* For each owner of a valid NE multispecies permit, or CPH, that committed to participate in either the GB Cod Hook Gear Sector or the GB Cod Fixed Gear Sector as evidenced by a valid authorized signature executed on or before March 1, 2008, on a preliminary roster for either of these sectors, the PSC for GB cod shall be equal to the sum of dealer landings of GB cod for fishing years 1996 through 2001, divided by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period. The PSC for all other regulated species or ocean pout stocks specified for these permits shall be calculated pursuant to paragraph (b)(1)(i)(E)(*1*) of this section. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(*2*)(*i*) shall then be multiplied by a factor of 1/PSC of remaining permits as of June 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit for the following fishing year.

(*ii*) *GB cod PSC for all other permits.* For each owner of a valid NE multispecies permit or CPH that has not committed to participate in either the GB Cod Hook Gear Sector or GB Cod Fixed Gear Sector, as specified in paragraph (b)(1)(i)(E)(*2*)(*i*) of this section, the GB cod PSC for each such permit or CPH shall be based upon the GB cod PSC available after accounting for the GB cod PSC calculated pursuant to paragraph (b)(1)(i)(E)(*2*)(*i*) of this section. To determine the GB cod PSC for each of these permits, the sum of the individual permit's landings of GB cod available in the NMFS dealer database for fishing years 1996 through 2006 shall be divided by the total landings of GB cod during that period by the total landings of GB cod by permits eligible to join sectors as of May 1, 2008, during that period, after subtracting the total landings of GB cod by permits that committed to participate in either the GB Cod Hook Sector or GB Cod Fixed Gear Sector as of March 1, 2008. This individual share shall then be multiplied by the available GB cod PSC calculated by subtracting the GB cod PSC allocated pursuant to paragraph (b)(1)(i)(E)(*2*)(*i*) of this section from one. The PSC calculated pursuant to this paragraph (b)(1)(i)(E)(*2*)(*ii*) shall then be multiplied by a factor of 1/PSC of remaining permits as of July 1 of each year, unless another date is specified by the Regional Administrator, to calculate the GB cod PSC for each permit.

* * * * *

(iii) * * *

(C) *ACE buffer.* At the beginning of each fishing year, NMFS shall withhold 20 percent of a sector's ACE for each stock for a period of up to 61 days (i.e., through June 30), unless otherwise specified by NMFS, to allow time to process any ACE transfers submitted at the end of the fishing year pursuant to paragraph (b)(1)(viii) of this section and to determine whether the ACE allocated to any sector needs to be reduced, or any overage penalties need to be applied to individual permits/vessels in the current fishing year to accommodate an ACE overage by that sector during the previous fishing year, as specified in paragraph (b)(1)(iii) of this section.

* * * * *

(v) * * *

(B) *Independent third-party monitoring program.* A sector must comply with any dockside/roving monitoring program specified by NMFS for fishing years 2011 and 2012, pursuant to paragraph (b)(1)(v)(B)(*1*) of this section, including the dockside/roving monitoring operational standards specified in paragraph (b)(5) of this section, and develop and implement an independent third-party dockside/roving monitoring program by fishing year 2013. A sector must also develop, implement, and pay for, to the extent not funded by NMFS, an at-sea or electronic monitoring program by fishing year 2012 (May 1, 2012) consistent with paragraph (b)(1)(v)(B)(*2*) of this section. Both the dockside/roving and at-sea or electronic monitoring program developed by sectors must be approved by NMFS for monitoring landings and utilization of sector ACE, as specified in this paragraph (b)(1)(v)(B). Any service provider providing dockside/roving and at-sea or electronic monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet the service provider standards specified in paragraph (b)(4) of this section, and any dockside/roving and at-sea or electronic monitoring program proposed by sectors must meet the operational standards specified in paragraphs (b)(5) and (b)(6) of this section, respectively, and be approved by NMFS in a manner consistent with the Administrative Procedure Act. None of the costs associated with any dockside/roving monitor monitoring requirements shall be paid by the owner or operator of a vessel subject to these requirements during fishing years 2011 and 2012. Starting in fishing year 2013, sectors shall be responsible for paying the costs associated with dockside/roving monitoring coverage, unless otherwise instructed by NMFS.

(*1*) *Dockside/roving monitoring program.* Dockside/roving monitors shall monitor landings of regulated species and ocean pout at every offload for which a trip has been selected to be observed by a dockside/roving monitor, whether directly to a federally permitted dealer or to a truck for transfer to a federally permitted dealer, to verify such landings at the time the landings are weighed by a federally permitted dealer and to certify the landing weights are accurate as reported on the dealer report. Unless otherwise specified in this part, the level of coverage for landings is specified in paragraph (b)(1)(v)(B)(*3*) of this section. To ensure that these levels of coverage are achieved, if a trip has been selected to be observed by a dockside/roving monitor, all offloading events associated with that trip, regardless of how many or the location of offloading events, must be monitored, and a vessel may not offload any of its catch until the dockside/roving monitor arrives. For example, if a trip is selected to be observed by a dockside/roving monitor, a vessel offloading at more than one dealer or facility must have a dockside/roving monitor present during the offload at each location. All landing events at remote ports that are selected to be observed by a dockside/roving monitor must have a roving monitor present to witness offload activities to the truck, as well as a dockside monitor present at each dealer to certify weigh-out of all landings. Any service provider providing dockside/roving monitoring services pursuant to this paragraph (b)(1)(v)(B)(*1*) must meet the service provider standards specified in paragraph (b)(4) of this section. The details of the dockside/roving monitoring program used by each sector starting in fishing year 2013 pursuant to paragraph (b)(1)(v)(B) of this section must be specified in the sector's operations plan, and must be consistent with the operational standards specified in paragraph (b)(5) of this section. The Regional Administrator shall review the dockside/roving monitoring program and approve/disapprove it as part of the yearly operations plan in a manner consistent with the Administrative Procedure Act. Common pool vessels operating under the provisions of the either a limited access Northeast multispecies Small Vessel Category permit or Handgear A permit, as specified at §§ 648.82(b)(5) and (6), respectively, or an open access Northeast multispecies Handgear B permit, as specified at § 648.88(a), are exempt from the dockside/roving monitoring requirements specified in this paragraph (b)(1)(v)(B)(*1*). Except as provided in this paragraph (b)(1)(v)(B)(*1*), all common pool and sector vessels, along with service providers providing dockside monitoring services, will be subject to the dockside monitoring operational requirements specified at § 648.87(b)(5).

* * * * *

(*3*) *Coverage levels.* Except as specified in paragraph (b)(1)(v)(B)(*3*)(*i*), any service provider providing dockside/roving or at-sea or electronic monitoring services required under this paragraph (b)(1)(v)(B)(*3*) must provide coverage that is fair and equitable, and distributed in a statistically random manner among all trips such that coverage is representative of fishing activities by all vessels within the common pool or each sector, and by all operations of common pool vessels or vessels operating in each sector throughout the fishing year.

(*i*) *Dockside/roving monitoring.* For fishing years 2011 and 2012, NMFS shall determine the level of coverage for any NMFS-sponsored dockside/roving monitoring program specified pursuant to paragraph (b)(1)(v)(B)(*1*) of this section based on available funding. If 100-percent coverage of all sector and common pool trips is not possible, NMFS shall first provide coverage to trips without an observer or at-sea monitor assigned pursuant to § 648.11(k), or approved electronic monitoring equipment assigned pursuant to paragraph (b)(1)(v)(B) of this section for sector vessels. Starting in fishing year 2013, at least 20 percent of all sector and common pool trips shall be monitored by dockside/roving monitors.

* * * * *

(*4*) *Hail reports.* For the purposes of the dockside/roving and at-sea monitoring requirements specified in this paragraph (b)(1)(v)(B), sector vessels must submit all hail reports for a sector trip in which the NE multispecies catch applies against the ACE allocated to a sector, as specified in this part, to service providers offering dockside/roving and at-sea monitoring services pursuant to this paragraph (b)(1)(v)(B). The mechanism and timing of the transmission of such hail reports must be consistent with instructions provided by the Regional Administrator for any dockside/roving monitoring program required by paragraph (b)(1)(v)(B)(*1*) of this section, or specified in the annual sector operations plan, consistent with paragraphs (b)(5) and (6) of this section.

(*5*) *Notification of service provider change.* If for any reason a sector decides to change approved service providers used to provide dockside/roving or at-sea or electronic monitoring services required in this paragraph (b)(1)(v), the sector manager must first inform NMFS in writing in advance of the effective date of the change in approved service providers in conjunction with the submission of the next weekly sector catch report specified in paragraph (b)(1)(vi)(B) of this section. A sector may employ more than one service provider at any time, provided any service provider employed by a sector meets the standards specified in paragraph (b)(4) of this section.

* * * * *

(viii) *ACE transfers.* All or a portion of a sector's ACE for any NE multispecies stock may be transferred to another sector at any time during the fishing year and up to 2 weeks into the following fishing year (i.e., through May 14), unless otherwise instructed by NMFS, to cover any overages during the previous fishing year. A sector is not required to transfer ACE to another sector. An ACE transfer only becomes effective upon approval by NMFS, as specified in paragraph (b)(1)(viii)(B) of this section.

* * * * *

(C) *Duration of transfer.* Notwithstanding ACE carried over into the next fishing year pursuant to paragraph (b)(1)(i)(C) of this section, ACE transferred pursuant to this paragraph (b)(1)(viii) is only valid for the fishing year in which the transfer is approved, with the exception of ACE transfer requests that are submitted up to 2 weeks into the subsequent fishing year to address any potential ACE overages from the previous fishing year, as provided in paragraph (b)(1)(iii) of this section, unless otherwise instructed by NMFS.

* * * * *

(2) *Operations plan and sector contract.* To be approved to operate, each sector must submit an operations plan and preliminary sector contract to the Regional Administrator no later than September 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. A final roster, sector contract, and list of Federal and state permits held by participating vessels for each sector must be submitted by December 1 prior to the fishing year in which the sector intends to begin operations, unless otherwise instructed by NMFS. The operations plan may cover a 1- or 2-year period, provided the analysis required in paragraph (b)(3) of this section is sufficient to assess the impacts of sector operations during the 2-year period and that sector membership, or any other parameter that may affect sector operations during the second year of the approved operations plan, does not differ to the point where the impacts analyzed by the supporting NEPA document are compromised. Each vessel and vessel operator and/or vessel owner participating in a sector must agree to and comply with all applicable requirements and conditions of the operations plan specified in this paragraph (b)(2) and the letter of authorization issued pursuant to paragraph (c)(2) of this section. It shall be unlawful to violate any such conditions and requirements unless such conditions or restrictions are identified in an approved operations plan as administrative only. If a proposed sector does not comply with the requirements of this paragraph (b)(2), NMFS may decline to propose for approval such sector operations plans, even if the Council has approved such sector. At least the following elements must be contained in either the final operations plan or sector contract submitted to NMFS:

* * * * *

(5) *Dockside monitoring operational standards.* In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any dockside monitoring program developed by NMFS pursuant to paragraph (b)(1)(v)(B)(*1*) of this section must meet the following operational standards to be approved by NMFS:

(i) * * *

(A) * * *

(*1*) *Trip-start hail report.* As instructed by the Regional Administrator, the vessel operator must submit a trip-start hail report prior to departing port at the beginning of each trip notifying the sector manager and/or dockside/roving monitor service provider of the vessel permit number; trip ID number in the form of the VTR serial number of the first VTR page for that trip, or another trip identifier specified by NMFS; and an estimate of the date and time of arrival to port. Trip-start hail reports by vessels operating less than 6 hours or within 6 hours of port must also include estimated date and time of offload. If the vessel operator does not receive confirmation of the receipt of the trip-start hail report from the dockside/roving monitor service provider within 10 minutes of sending the original trip-start hail report, the operator must contact the service provider to confirm the trip-start hail report via an independent back-up system developed by the service provider.

* * * * *

(ii) * * *

(E) *Inspection of fish holds.* A dockside/roving monitor assigned to observe the offloading of fish from a particular trip shall inspect the fish holds, or any other areas of the vessel in which fish are stored, to determine if all fish are offloaded for that particular trip.

* * * * *

(c) * * *

(2) * * *

(i) *Regulations that may not be exempted for sector participants.* The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: NE multispecies year-round closure areas; permitting restrictions (e.g., vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); and reporting requirements. For the purposes of this paragraph (c)(2)(i), the DAS reporting requirements specified at § 648.82; the SAP-specific reporting requirements specified at § 648.85; and the reporting requirements associated with a dockside monitoring program specified in paragraph (b)(5)(i) of this section are not considered reporting requirements, and the Regional Administrator may exempt sector participants from these requirements as part of the approval of yearly operations plans. This list may be modified through a framework adjustment, as specified in § 648.90.

* * * * *

(d) * * *

(20) *State of Maine Permit Banking Sector.*

(21) *State of Rhode Island Permit Bank Sector.*

(22) *State of New Hampshire Permit Bank Sector.*

(23) *State of Massachusetts Permit Bank Sector.*

(24) *Sustainable Harvest Sector III.*

■ 8. In § 648.88, revise paragraph (a)(1), and add paragraph (a)(2)(iv) to read as follows:

§ 648.88 Multispecies open access permit restrictions.

(a) * * *

(1) The vessel may possess and land up to 75 lb (90.7 kg) of cod, and up to the landing and possession limit restrictions for other NE multispecies specified in § 648.86, provided the vessel complies with the restrictions specified in paragraph (a)(2) of this section. If either the GOM or GB cod trip limit applicable to a vessel fishing under a NE multispecies DAS permit, as specified in § 648.86(b)(1) and (2), respectively, is adjusted by NMFS, the cod trip limit specified in this paragraph (a)(1) shall be adjusted proportionally (rounded up to the nearest 25 lb (11.3

kg)). For example, if the GOM cod trip limit specified at § 648.86(b)(1) doubled, then the cod trip limit for the Handgear B category fishing in the GOM Regulated Mesh Area would also double to 150 lb (68 kg).

(2) * * *

(iv) *Declaration.* To fish for GB cod south of the GOM Regulated Mesh Area, as defined at § 648.80(a)(1), a vessel owner or operator must obtain, and retain on board, a letter of authorization from the Regional Administrator declaring an intent to fish south of the GOM Regulated Mesh Area, and may not fish in any other area for a minimum of 7 consecutive days from the effective date of the letter of authorization. Such a vessel may transit the GOM Regulated Mesh Area, provided that their gear is stowed in accordance with the provisions at § 648.23(b).

* * * * *

■ 9. In § 648.89, revise paragraph (e)(1) to read as follows:

§ 648.89 Recreational and charter/party vessel restrictions.

* * * * *

(e) * * *

(1) *GOM Closed Areas.* Unless otherwise specified in this paragraph (e)(1), a vessel fishing under charter/party regulations may not fish in the GOM closed areas specified at § 648.81(d)(1) through (f)(1) during the time periods specified in those paragraphs, unless the vessel has on board a valid letter of authorization issued by the Regional Administrator pursuant to § 648.81(f)(2)(iii) and paragraph (e)(3) of this section. The conditions and restrictions of the letter of authorization must be complied with for a minimum of 3 months if the vessel fishes or intends to fish in the seasonal GOM closure areas; or for the rest of the fishing year, beginning with the start of the participation period of the letter of authorization, if the vessel fishes or intends to fish in the year-round GOM closure areas. A vessel fishing under charter/party regulations may not fish in the GOM Cod Spawning Protection Area specified at § 648.81(o)(1) during the time period specified in that paragraph, unless the vessel complies with the requirements specified at § 648.81(o)(2)(iii).

* * * * *

■ 10. In § 648.90, revise paragraph (a)(4)(iii)(E)(*2*) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

(a) * * *

(4) * * *

(iii) * * *

(E) * * *

(2) Commercial allocation. The ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(E)(*1*) of this section, shall be divided between sectors operating under an approved sector operations plan, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels/permits participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(E)(*2*) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

* * * * *

[FR Doc. 2011–9705 Filed 4–19–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110201085–1212–02]

RIN 0648–XY55

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2011 Sector Operations Plans and Contracts, and Allocation of Northeast Multispecies Annual Catch Entitlements

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

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule partially approves and implements 19 sector operations plans and contracts for fishing year (FY) 2011. NMFS received sector operations plans and contracts from the following 22 sectors: The Georges Bank (GB) Cod Fixed Gear Sector; the Maine Permit Bank Sector; the Massachusetts Permit Bank Sector; the New Hampshire Permit Bank Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II through XIII; the Port Clyde Community Groundfish Sector; the Rhode Island Permit Bank Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. This interim final rule partially approves the operations plans and contracts, and allocates an annual catch entitlement (ACE) of certain NE multispecies stocks to the following 19 sectors: The GB Cod Fixed Gear Sector; the Maine Permit Bank Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II through XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. The Massachusetts Permit Bank Sector, the New Hampshire Permit Bank Sector, and the Rhode Island Permit Bank Sector, were unable to fulfill the roster requirements, and, therefore, were not approved to operate in FY 2011. Certain exemptions proposed in the operations plans have not been approved, as explained in detail below. Additionally, NMFS is modifying, for the purposes of this rule, the definition for "unmarketable" fish (see Exemption 11) and will accept further comment on this definition. NMFS is also accepting further comment on final sector membership. NMFS will publish a subsequent final rule, if necessary, making any further changes to this definition or in light of additional comments on changes to membership of sectors since the publication of this rule.

DATES: Effective May 1, 2011, through April 30, 2012. Written comments must be received on or before May 10, 2011.

ADDRESSES: You may submit comments on the new definition of "unmarketable" fish and changes to sector membership, identified by 0648–XY55, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, Attn: Allison Murphy.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Microsoft Excel, WordPerfect, or Adobe PDF file formats only.

Copies of each sector's final operations plan, contract, the environmental assessment (EA), and the Final Regulatory Flexibility Analysis (FRFA) are available from the NMFS Northeast Regional Office: Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Allison Murphy, Sector Policy Analyst, phone (978) 281–9122, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: A proposed rule soliciting public comment on 19 sector operations plans and contracts was published in the **Federal Register** on February 28, 2011 (76 FR 10852), with public comments accepted through March 15, 2011. After review of the public comments, NMFS has partially approved 19 sector operations plans and contracts after determining the operations plans to be consistent with the goals of the NE Multispecies Fishery Management Plan (FMP), as described in Amendment 16 to the NE Multispecies FMP and other applicable laws, and in compliance with the proposed measures that govern the development and operation of a sector as specified in Section 4.2.3 of Amendment 16. Certain exemptions proposed in the operations plans have not been approved, as explained in detail below.

Background

The final rule for Amendment 13 to the FMP (69 FR 22906, April 27, 2004) implemented the GB Cod Hook Sector in 2004, and the Framework Adjustment 42 final rule (71 FR 62156, October 23, 2006) implemented the GB Cod Fixed Gear Sector in 2006. The final rule implementing Amendment 16 (75 FR 18262; April 9, 2010) revised and expanded the rules for sectors and authorized an additional 17 new sectors, including the Northeast Coastal Communities Sector, Northeast Fishery Sectors I through XIII, the Port Clyde Community Groundfish Sector, the Sustainable Harvest Sector, and the Tri-State Sector, in accordance with the revised Amendment 16 rules. Framework Adjustment 45 (FW 45), which is being implemented concurrently with this action, further revises the rules for these existing sectors and authorizes five new sectors (for a total of 24 sectors). The 5 sectors newly authorized by FW 45 are the Maine Permit Bank Sector, the Massachusetts Permit Bank Sector, the New Hampshire Permit Bank Sector, the Rhode Island Permit Bank Sector, and Sustainable Harvest Sector 3.

In accordance with Amendment 16, the proposed rule for this action discussed authorization of 22 sector operations plans and contracts for FY 2011. As discussed in the proposed rule, NMFS received sector operations plans and contracts from the following 22 sectors: The GB Cod Fixed Gear Sector; the Maine Permit Bank Sector; the Massachusetts Permit Bank Sector; the New Hampshire Permit Bank Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II through XIII; the Port Clyde Community Groundfish Sector; the Rhode Island Permit Bank Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. This rule partially approves the operations plans and contracts, and allocates an ACE of certain NE multispecies stocks to the following 19 sectors: The GB Cod Fixed Gear Sector; the Maine Permit Bank Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II through XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. The Massachusetts Permit Bank Sector, the New Hampshire Permit Bank Sector, and the Rhode Island Permit Bank Sector, were unable to fulfill the roster requirements, and, therefore, their operations were not approved for FY 2011. Since FW 45 revises some rules for all existing sectors and authorizes an additional five sectors, NMFS suggests that interested readers review the final rule for FW 45 to fully understand the measures being implemented in this final rule.

Amendment 16 defined a sector as "[a] group of persons (three or more persons, none of whom have an ownership interest in the other two persons in the sector) holding NE multispecies limited access vessel permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and which has been granted a TAC(s) [sic] in order to achieve objectives consistent with applicable FMP goals and objectives." A sector's total allowable catch (TAC) is referred to as an ACE. Regional Administrator approval is required for these sectors to be authorized to fish and to be allocated an ACE for stocks of regulated NE multispecies during each FY. Each individual sector's ACE for a particular stock represents a share of that stock's annual catch limit (ACL) available to commercial NE multispecies vessels, based upon the potential sector contribution (PSC) of permits participating in that sector for that FY. Therefore, sectors will be allocated all regulated multispecies stocks for which members have landings history, with the exception of Atlantic halibut, windowpane flounder, Atlantic wolffish, and Southern New England/Mid-Atlantic (SNE/MA) winter flounder. Sectors will also not be allocated ocean pout. Sectors are self-selecting, meaning each sector maintains the ability to choose its members. Sectors may pool harvesting resources and consolidate operations to fewer vessels, if they desire.

Concurrent with the implementation of FW 45, NMFS and the states of Maine, Massachusetts, New Hampshire, and Rhode Island have entered into separate Memoranda of Agreement (MOA) for the administration of state-managed permit banks in accordance with grants awarded to these states. Terms and conditions for permit banks include: The permit banks may only transfer out ACE, it may not transfer in ACE; the permit banks may only transfer ACE to sectors for use by vessels that are 45 ft (13.72 m) in length or smaller, based out of ports with a population of 30,000 residents or less.

For state permits banks to transfer ACE to approved sectors under the current regulations, each state permit bank developed and submitted an operations plan. Although the states of Massachusetts, New Hampshire, and Rhode Island met deadline requirements when submitting their operations plans and contracts, they were unable to fulfill roster requirements in time for their sectors to be considered in this rulemaking process for FY 2011. The Maine Permit Bank Sector, the only permit bank sector that met all of the requirements, consists of two privately held permits, as well as an additional five permits that are owned by the State of Maine. The permits owned by the State of Maine must abide by the terms of the MOA.

Sector ACEs

As of February 1, 2011, 836 of the 1,475 eligible NE multispecies permits, which accounts for 98.8 percent of the historical commercial NE multispecies landings during the Amendment 16 qualifying period, have indicated their intent to participate in a sector for FY 2011 (see Table 1). Following input during the public comment period for FW 45, and based on industry request, NMFS has allowed for a limited opportunity for additional changes to sector rosters for FY 2011 to accommodate permit holders who took ownership of their limited access NE multispecies permit(s) after the December 1, 2010, roster deadline. Reopening the rosters provides additional flexibility to new permit holders without disrupting the organization of sectors; however, each sector may decide whether or not a member may leave the sector and whether or not to accept new members. This window to reopen FY 2011 sector rosters began on March 23, 2011, and will end on April 30, 2011. An announcement of this limited opportunity to reopen sector rosters was sent out to all sector managers on March 16, 2011, and to all NE multispecies permit holders on March 23, 2011. All permits enrolled in a sector, and the vessels associated with those permits, have until April 30, 2011, to withdraw from a sector and fish in the common pool for FY 2011, if they so choose. NMFS will publish final sector ACEs, based upon final rosters for FY 2011 and common pool sub-ACL totals, as soon as possible after the start of FY 2011 on May 1, 2011. This final rule responds to public comments on the proposed rule and implements the approved regulatory exemptions that were requested by the individual sectors.

Table 2 details the maximum cumulative PSC (a percentage) each sector will receive based on their rosters as of February 1, 2011. Tables 3a and 3b detail the maximum ACEs (in thousands of pounds and metric tons, respectively) each sector will be allocated based on their February 1, 2011, sector rosters for FY 2011. While the common pool does not receive a specific allocation of ACE, it has been included in each of these tables for comparison.

Note that individual sector members are not assigned a PSC for Eastern GB cod or Eastern GB haddock; rather each sector is allocated a portion of the GB cod and GB haddock ACE to harvest exclusively in the Eastern U.S./Canada Area. The amount of cod and haddock that a sector may harvest in the Eastern U.S./Canada Area is calculated by multiplying the cumulative PSC of the GB cod and GB haddock allocated to a sector by the Eastern U.S./Canada Area by the GB cod and GB haddock TACs, respectively.

Each sector is required to ensure that its ACE is not exceeded during the FY. Sectors are required to monitor their landings, track their available ACE, and submit weekly catch reports to NMFS. In addition, the sector manager is required to provide NMFS with aggregate sector reports on a daily basis when a threshold (specified in the operations plan) is reached. Once a sector's ACE for a particular stock is caught, a sector is required to cease all fishing operations in that stock area until it acquires additional ACE for that stock. Each sector must also submit an annual report to NMFS and the New England Fishery Management Council (Council) within 60 days of the end of the FY detailing all of the sector's catch (landings and discards of all stocks by the sector), enforcement actions, and pertinent information necessary to evaluate the biological, economic, and social impacts from the sector, as directed by NMFS.

In accordance with Amendment 16, at the start of FY 2011, NMFS will withhold 20 percent of each sector's FY 2011 ACE for each stock for a period of up to 61 days, to allow time to process any FY 2010 ACE transfers submitted after May 1, 2011, and to determine whether the FY 2011 ACE allocated to any sector needs to be reduced, or any overage penalties need to be applied to accommodate an FY 2010 ACE overage by that sector. At the request of the Council, NMFS is relaxing the May 14 deadline to submit ACE transfers for FY 2010. NMFS will allow sectors to transfer FY 2010 ACE for 14 days after the date that NMFS provides final FY 2010 catch data to sectors. NMFS will notify the Council and sectors of this date in writing.

BILLING CODE 3510–22–P

Table 1. Summary of the number of permits, active vessels, gear type, and area fished for the proposed FY 2011 sectors.*

Sector	Permits Enrolled	Number of Active Vessels	Gear Type Fished	Regulated Mesh Areas
Northeast Fishery Sector II	85	42	100% trawl	Gulf of Maine (GOM), Offshore GB, Inshore GB and Southern New England (SNE)
Northeast Fishery Sector III	94	47	85% gillnet, 5% hook gear, 5%pots/traps, 5% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector IV	43	0	Lease-only sector	n/a
Northeast Fishery Sector V	34	27	3% gillnet, 97% trawl	Offshore GB, Inshore GB and SNE
Northeast Fishery Sector VI	19	5	100% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector VII	20	13	1% gillnet, 1% hook gear, 1% pots/traps, 93% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector VIII	20	16	1% gillnet, 1% hook gear, 1% pots/traps, 93% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector IX	60	25	100% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector X	51	21	36% gillnet, 13% hook, 6% pots/traps, 45% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector XI	46	21	80% gillnet, 20% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector XII	11	6	50% gillnet, 50% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Fishery Sector XIII	35	29	5% gillnet, 95% trawl	GOM, Offshore GB, Inshore GB and SNE
Fixed Gear Sector	100	40	45% gillnet, 55% hook	GOM, Offshore GB, Inshore GB and SNE
Sustainable Harvest Sector I	105	38	14% gillnet, 86% trawl	GOM, Offshore GB, Inshore GB and SNE
Sustainable Harvest Sector III	18	0	Lease-only sector	GOM, Offshore GB, Inshore GB and SNE
Port Clyde Sector	39	24	52% gillnet, 48% trawl	GOM
Tri-State Sector	19	6	14% gillnet, 14% hook, 71% trawl	GOM, Offshore GB, Inshore GB and SNE
Northeast Coastal Community Sector	30	10	3% gillnet, 83% hook gear, 4% trawl	GOM, Offshore GB, Inshore GB and SNE
Maine Permit Bank Sector	7	0	Lease-only sector	n/a

*The data in this table is from the sector operations plans rosters submitted as of February 1, 2011, and is subject to change based on final sector rosters, submitted April 30, 2011, as well as approval of FW 45. These numbers may increase due to changes in permit ownership or decrease due to a permit holder dropping out of a sector prior to the beginning of FY 2011.

Table 2. Cumulative PSC (a percentage (%)) of each sector by stock for FY 2011.*†

Sector Name	GB Cod**	GOM Cod	GB Haddock **	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	Redfish	White Hake	Pollock
Northeast Fishery Sector II	5.6488	19.8046	11.6889	18.3292	1.7102	1.7987	20.9085	8.7718	13.6138	1.6871	21.1028	16.6149	6.4183	12.3665
Northeast Fishery Sector III	1.2722	17.5142	0.1686	12.3554	0.0488	0.4094	9.5311	4.4444	3.0777	0.0332	11.0214	1.5541	5.2355	7.8642
Northeast Fishery Sector IV	4.986	7.9239	5.3969	6.3806	2.1591	2.3496	5.6749	9.113	9.0618	0.6946	5.2483	6.3399	7.8146	5.5114
Northeast Fishery Sector V	2.0169	0.1074	3.9224	0.3241	6.4689	24.6766	1.058	1.4547	1.7364	1.9876	0.3251	0.2893	0.2239	0.3082
Northeast Fishery Sector VI	2.0333	1.6866	2.8666	2.9698	2.695	5.1455	2.0704	3.5882	4.3721	1.4203	3.1218	5.2614	3.7111	3.227
Northeast Fishery Sector VII	4.396	0.4304	3.7899	0.562	9.0482	3.7208	2.6828	3.3936	3.0843	11.3692	0.8717	0.6456	0.7538	0.6925
Northeast Fishery Sector VIII	6.4176	0.4952	5.842	0.2143	11.3405	5.6501	6.6742	1.7347	2.614	16.1388	3.3718	0.4327	0.5016	0.6114
Northeast Fishery Sector IX	14.6524	1.6421	11.9671	4.6977	27.5463	8.103	10.6534	8.3833	8.3618	42.7913	2.4388	5.7766	4.1062	3.8955
Northeast Fishery Sector X	1.185	5.5302	0.3123	2.5837	0.0173	0.5471	13.8201	2.0181	3.6116	0.0154	27.348	0.5674	0.9716	1.5111
Northeast Fishery Sector XI	0.3951	12.5327	0.0359	2.5034	0.0008	0.0173	2.1834	1.4871	1.5354	0.0009	2.0243	0.9588	2.4371	6.5804
Northeast Fishery Sector XII	0.0153	2.428	0.0026	0.859	0.0008	0.0022	0.4841	0.7493	0.6076	0.0025	0.3168	1.0593	2.4958	2.9604
Northeast Fishery Sector XIII	7.9945	0.7006	14.88	0.8572	17.2305	12.6506	3.0582	3.8598	5.0271	10.832	1.2533	4.5673	1.8689	2.3411
Fixed Gear Sector	28.2003	1.9828	6.3521	1.3078	0.0125	0.301	1.9145	0.5519	0.8367	0.0274	2.2063	2.9012	5.8504	7.85
Sustainable Harvest Sector 1	16.3963	18.2919	28.8126	40.1049	11.6841	6.296	10.0961	39.3623	33.6617	9.9458	5.4883	48.1528	51.1011	38.7842
Sustainable Harvest Sector 3	1.1913	0.6756	1.9492	1.518	0.5156	4.1737	2.2232	1.117	1.5202	0.4394	3.2572	1.624	0.8672	1.0495
Port Clyde Sector	0.0882	3.9854	0.0316	2.1443	0.0032	0.6589	0.8582	5.7694	3.8318	0.002	1.2841	2.0356	3.6387	3.0283
Tri-State Sector	0.6752	0.8017	1.4476	0.4632	7.2444	1.2288	2.0391	1.0028	0.9409	1.9212	2.0843	0.0053	0.0184	0.0384
Northeast Coastal Community Sector	0.1711	0.7656	0.1213	0.3397	0.8379	0.7225	0.6148	0.1486	0.2172	0.0686	0.9058	0.44	0.857	0.4509
Maine Permit Bank Sector	0.1006	0.3269	0.0007	0.0433	0.0004	0.0002	0.2691	0.5862	0.3355	0.0045	0.8461	0.0154	0.0798	0.0713
All Sectors Combined	97.8361	97.6258	99.5883	98.5576	98.5645	78.452	96.8141	97.5362	98.0476	99.3818	94.5162	99.2416	98.951	99.1423
Common Pool	2.2992	2.6031	0.4178	1.4639	1.5255	21.8782	3.3421	2.5078	1.9901	0.6635	5.7657	0.7755	1.1787	0.9901

CC/COM Yellowtail Flounder refers to the Cape Cod/GOM stock.

*The data in this table are based on signed roster contracts as of February 1, 2011.

** For FY 2011, 4.56 percent of the GB cod ACE would be allocated for the Eastern U.S./Canada Area, while 31.26 percent of the GB haddock ACE would be allocated for the Eastern U.S./Canada Area.

† Percentages have been rounded to the nearest hundredth of a percent in this table, but thousandths of a percent are used in calculating ACEs in metric tons and tons. In some cases, this table shows a sector allocation of 0 percent of an ACE, but that sector is allocated a small amount of that stock.

Table 3a. ACE (in thousands of pounds) each sector will receive by stock for FY 2011.*†^

Sector Name	GB Cod east	GB Cod west	GOM Cod	GB Haddock east	GB Haddock west	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	Redfish	White Hake	Pollock
Northeast Fishery Sector II	25	511	2107	2484	5463	318	43	21	433	601	371	75	74	2762	421	3804
Northeast Fishery Sector III	6	115	1863	36	79	214	1	5	198	305	84	1	38	258	343	2419
Northeast Fishery Sector IV	22	451	843	1147	2522	111	54	27	118	624	247	31	18	1054	512	1695
Northeast Fishery Sector V	9	182	11	834	1833	6	163	285	22	100	47	88	1	48	15	95
Northeast Fishery Sector VI	9	184	179	609	1340	52	68	59	43	246	119	63	11	875	243	993
Northeast Fishery Sector VII	19	397	46	805	1771	10	228	43	56	233	84	503	3	107	49	213
Northeast Fishery Sector VIII	28	580	53	1242	2730	4	286	65	138	119	71	714	12	72	33	188
Northeast Fishery Sector IX	65	1325	175	2543	5593	82	694	94	221	574	228	1893	8	960	269	1198
Northeast Fishery Sector X	5	107	588	66	146	45	0	6	286	138	98	1	95	94	64	465
Northeast Fishery Sector XI	2	36	1333	8	17	43	0	0	45	102	42	0	7	159	160	2024
Northeast Fishery Sector XII	0	1	258	1	1	15	0	0	10	51	17	0	1	176	164	911
Northeast Fishery Sector XIII	35	723	75	3162	6955	15	434	146	63	264	137	479	4	759	123	720
Fixed Gear Sector	124	2550	211	1350	2969	23	0	3	40	38	23	1	8	482	384	2415
Sustainable Harvest Sector 1	72	1482	1946	6123	13466	696	294	73	209	2697	917	440	19	8005	3350	11930
Sustainable Harvest Sector 3	5	108	72	414	911	26	13	48	46	77	41	19	11	270	57	323
Port Clyde Community Groundfish Sector	0	8	424	7	15	37	0	8	18	395	104	0	4	338	239	931
Tri-State Sector	3	61	85	308	677	8	182	14	42	69	26	85	7	1	1	12
Northeast Coastal Community Sector	1	15	81	26	57	6	21	8	13	10	6	3	3	73	56	139
Maine Permit Bank Sector	0	9	35	0	0	1	0	0	6	40	9	0	3	3	5	22
All Sectors	431	8846	10385	21165	46546	1710	2482	906	2006	6683	2672	4397	329	16499	6488	30495
Common Pool	10	196	253	88	192	25	36	249	66	169	53	27	19	126	69	264

*The data in this table are based on signed roster contracts as of February 1, 2011. Numbers are rounded to the nearest metric ton, but allocations are made in pounds. In some cases, this table shows a sector allocation of 0 metric tons, but that sector may be allocated a small amount of that stock in pounds.

† The data in this table include FY 2011 ACLs proposed in FW 45.

^ The data in the table represent the total allocations to each sector. NMFS will withhold 20 percent of a sector's total ACE for each stock for up to 61 days.

Table 3b. ACE (in metric tons) each sector will receive by stock for FY 2011.*†^

Sector Name	GB Cod east	GB Cod west	GOM Cod	GB Haddock east	GB Haddock west	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	Redfish	White Hake	Pollock
Northeast Fishery Sector II	11	232	956	1127	2478	144	20	9	197	273	168	34	33	1253	191	1725
Northeast Fishery Sector III	3	52	845	16	36	97	1	2	90	138	38	1	17	117	156	1097
Northeast Fishery Sector IV	10	204	382	520	1144	50	25	12	53	283	112	14	8	478	232	769
Northeast Fishery Sector V	4	83	5	378	832	3	74	129	10	45	21	40	1	22	7	43
Northeast Fishery Sector VI	4	83	81	276	608	23	31	27	19	112	54	29	5	397	110	450
Northeast Fishery Sector VII	9	180	21	365	803	4	103	19	25	105	38	228	1	49	22	97
Northeast Fishery Sector VIII	13	263	24	563	1239	2	130	30	63	54	32	324	5	33	15	85
Northeast Fishery Sector IX	29	601	79	1154	2537	37	315	42	100	261	103	859	4	436	122	544
Northeast Fishery Sector X	2	49	267	30	66	20	0	3	130	63	45	0	43	43	29	211
Northeast Fishery Sector XI	1	16	605	3	8	20	0	0	21	46	19	0	3	72	72	918
Northeast Fishery Sector XII	0	1	117	0	1	7	0	0	5	23	8	0	1	80	74	413
Northeast Fishery Sector XIII	16	328	34	1434	3155	7	197	66	29	120	62	217	2	344	56	327
Fixed Gear Sector	56	1156	96	612	1347	10	0	2	18	17	10	1	3	219	174	1095
Sustainable Harvest Sector I	33	672	883	2778	6108	316	133	33	95	1223	416	200	9	3631	1520	5411
Sustainable Harvest Sector III	2	49	33	188	413	12	6	22	21	35	19	9	5	122	26	146
Port Clyde Community Groundfish Sector	0	4	192	3	7	17	0	3	8	179	47	0	2	154	108	423
Tri-State Sector	1	28	39	140	307	4	83	6	19	31	12	39	3	0	1	5
Northeast Coastal Community Sector	0	7	37	12	26	3	10	4	6	5	3	1	1	33	25	63
Maine Permit Bank Sector	0	4	16	0	0	0	0	0	3	18	4	0	1	1	2	10
All Sectors	196	4012	4710	9600	21113	776	1126	411	910	3031	1212	1995	149	7484	2943	13832
Common Pool	4	89	115	40	87	11	16	113	30	77	24	12	9	57	31	120

*The data in this table are based on signed roster contracts as of February 1, 2011. Numbers are rounded to the nearest ton, but allocations are made in pounds. In some cases, this table shows a sector allocation of 0 tons, but that sector may be allocated a small amount of that stock in pounds.

† The data in this table include FY 2011 ACLs proposed in FW 45.

^ The data in the table represent the total allocations to each sector. NMFS will withhold 20 percent of a sector's total ACE for each stock for up to 61 days.

BILLING CODE 3510–22–C

Sector Operations Plans and Contracts

All sectors must submit an operations plan and sector contract to NMFS by a specified deadline to be authorized to fish and receive an allocation of groundfish for the following FY. Of the 24 (19 current and 5 newly authorized under FW 45) sectors, a total of 19 sectors met the operations plan deadline and the roster deadline for FY 2011, including the Maine Permit Bank Sector. Two of the 24 sectors, the GB Cod Hook Sector and Northeast Fishery Sector I, again elected not to submit operations plans for FY 2011, and three sectors, the Massachusetts Permit Bank Sector, the New Hampshire Permit Bank Sector, and the Rhode Island Permit Bank Sector, were unable to fulfill the roster requirements, and, therefore, were not approved for operations in FY 2011. Two of the FY 2011 sectors, Northeast Fishery Sector IV and Sustainable Harvest Sector 3, will operate as private lease-only sectors. The Sustainable Harvest Sector 3 has not explicitly prohibited fishing activity, and may transfer permits onto active vessels. Each sector operations plan contains the rules under which each approved sector would fish. The sector contract provides the legal contract that binds members to a sector and its operations plan. Most sectors submitted one document to NMFS that encompasses both the operations plan and contract.

While each sector conducts fishing activities according to its approved operations plan, Amendment 16 contains numerous provisions that apply to all sector operations plans and sector members. All permit holders with a limited access NE multispecies permit that was valid as of May 1, 2008, are eligible to participate in a sector, including holders of permits currently held in confirmation of permit history (CPH). While membership in each sector is voluntary, each member (and his/her permits enrolled in the sector) must remain with the sector for the entire FY, and cannot fish in the NE multispecies days-at-sea (DAS) program outside of the sector (i.e., in the common pool) during the FY. Participating vessels are required to comply with all Federal fishing regulations, unless specifically exempted by a letter of authorization (LOA) issued by the Regional Administrator, as part of the approved sector's operations plan, as described further below.

Sector operations plans may be amended in-season if a change is necessary and agreed to by NMFS, provided the change is consistent with the sector administration provisions. These changes would be included in updated LOAs issued to sector members and through amendments to the approved operations plan.

Sector vessels are required to retain all legal-sized allocated groundfish, unless an exemption is granted allowing sector vessels to discard legal-sized unmarketable fish at sea (see Exemption 10 below). Catch (including discards) of all allocated groundfish stocks by a sector's vessels counts against the sector's ACE, unless the catch is an element of a separate ACL sub-component, such as groundfish bycatch caught when fishing in an exempted fishery, or yellowtail flounder caught when fishing in the Atlantic sea scallop fishery. Sector vessels fishing for monkfish, skate, lobster (with non-trap gear), and spiny dogfish when on a sector trip (e.g., not fishing under provisions of a NE multispecies exempted fishery) shall have their groundfish catch (including discards) on those trips debited against the sector's ACE. Discard ratios applied to sectors will be determined by NMFS, based on observed trips.

All vessels that fish in an approved sector, with the exception noted below, must receive a LOA for FY 2011 to fish under regulations that apply to the sector in which they are enrolled and to be exempted from the regulations that otherwise would be applicable if the vessels were not fishing as a sector vessel. Permits and vessels enrolled in Northeast Fishery Sector IV, which is a lease-only sector, will not receive an LOA to fish, as no vessels in that sector are authorized to actively fish.

Amendment 16 required sectors to develop independent third-party dockside monitoring programs (DSM) for monitoring landings and utilization of ACE, and to verify landings at the time they are weighed by the dealer to certify that the landing weights are accurate as reported by the dealer. FW 45, which is being implemented concurrently with this action, changes the required coverage level for DSM to the level NMFS is able to fund, up to 100-percent coverage through FY 2012, prioritizing coverage for trips that have not received at-sea or electronic monitoring. In addition, FW 45 removes DSM requirements (a reporting requirement) from the list of prohibited exemptions for sectors.

Each sector operations plan and contract provides procedures to enforce the sector operations plan, explains sector monitoring and reporting requirements, presents a schedule of penalties, and provides authority to sector managers to issue stop fishing orders to sector members that violate provisions of the contract. Sector members may be held jointly and severally liable for ACE overages, discarding of legal-sized fish, and/or misreporting of catch (landings or discards). Each sector operations plan and contract submitted for FY 2011 withholds an initial reserve from the sector's sub-allocation to each individual member to prevent the sector from exceeding its ACE. Each sector operations plan and contract also details the method for initial ACE allocation to sector members; for FY 2011, each sector will allow each member to harvest an amount of fish equal to the amount that member's permit(s) contributed to the sector's ACE.

In order to comply with the National Environmental Policy Act (NEPA) in an efficient manner, a single EA was prepared analyzing all 19 operations plans. The sector EA is tiered from the Environmental Impact Statement (EIS) prepared for Amendment 16. The summary findings of the EA conclude that each sector will likely produce similar effects that result in non-significant impacts. An analysis of aggregate sector impacts was also conducted and Finding of No Significant Impact for the sector EA were issued by the Regional Administrator on April 13, 2011.

Amendment 16 created several universal exemptions that are applicable to all sectors, including exemptions from: Trip limits on allocated stocks; the GB Seasonal Closure Area; NE multispecies DAS restrictions; the requirement to use a 6.5-inch (16.51-cm) mesh codend when fishing with selective gear on GB; and portions of the GOM Rolling Closure Areas. Amendment 16 prohibits sectors from requesting exemptions from year-round closed areas, permitting restrictions, gear restrictions designed to minimize habitat impacts, and reporting requirements (not including DAS reporting requirements). FW 45 removes DSM from the reporting requirements from which sectors may not be exempted. Sectors may request additional exemptions from NE multispecies regulations through their sector operations plan. Additional background information on requested exemptions for FY 2011 can be found in the proposed rule for this action.

Approved FY 2011 Sector Exemption Requests

In addition to the universal exemptions in Amendment 16, sectors requested 31 additional exemptions from the NE multispecies regulations in their FY 2011 sector operations plans. After thorough review and consideration of public comments on the exemption requests, NMFS authorizes 17 exemptions from the following regulations for the individual sectors that requested them, the first 9 of which were previously approved in FY 2010: (1) 120-day block out of the fishery required for Day gillnet vessels; (2) prohibition on a vessel hauling another vessel's gillnet gear; (3) limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS; (4) limitation on the number of gillnets imposed on Day gillnet vessels; (5) 20-day spawning block out of the fishery required for all vessels; (6) limits on the number of hooks that may be fished; (7) DAS Leasing Program length and horsepower restrictions; (8) prohibition on the possession or use of squid or mackerel in the Closed Area I (CA I) Hook Gear Haddock Special Access Program (SAP); (9) sink gillnet mesh size restrictions in the GOM from January through April; (10) extension of sink gillnet mesh size restrictions in the GOM through the month of May; (11) prohibition on discarding; (12) daily catch reporting by Sector Managers for vessels participating in the CA I Hook Gear Haddock SAP; (13) trawl gear restrictions in the U.S./Canada Management Area; (14) the requirement to power a VMS while at the dock; (15) DSM requirements for vessels fishing west of 72°30′ W. long.; (16) DSM requirements for Handgear A-permitted Sector Vessels; and (17) DSM Requirements for monkfish trips in the monkfish Southern Fishery Management Area (SFMA). Details of these exemptions are discussed below.

This interim final rule approves FY 2011 exemption requests only for sectors that requested those exemptions through their sector operations plans and contracts. The accompanying EA has analyzed all exemption requests as if all sectors had requested the exemptions. Therefore, sectors not granted an approved exemption may request any of the approved exemptions at any time during the FY, except the discarding exemption, and could add these exemptions to their operations plans and contracts through amendments. NMFS will accept additional public comment on this approach.

1. 120-Day Block Out of the Fishery Requirement for Day Gillnet Vessels

The 120-day block out of the fishery requirement for Day gillnet vessels was implemented in 1997 under Framework 20 (62 FR 15381; April 1, 1997) to help ensure that management measures for Day gillnet vessels were comparable to effort controls placed on other fishing gear types, given that gillnets continue to fish as long as they are in the water. Regulations at 50 CFR 648.82(j)(1)(ii) require that each NE multispecies gillnet vessel declared into the Day gillnet category declare and take 120 days out of the non-exempt gillnet fishery each FY. Each period of time taken must be a minimum of 7 consecutive days, and at least 21 of the 120 days must be taken between June 1 and September 30. An exemption from this requirement was previously approved for FY 2010 based upon the rationale that this measure was designed to control fishing effort and, therefore, is no longer necessary for sectors because sectors are restricted to an ACE for each groundfish stock, which limits overall fishing mortality. This exemption is again approved in FY 2011 based on the same rationale. Approval of this exemption increases the operational flexibility of sector vessels and is expected to increase profit margins of sector fishermen. For additional information pertaining to this exemption and other exemptions previously approved in FY 2010, please refer to the proposed and final sector rules for FY 2010 sectors (74 FR 68015, December 22, 2009; and 75 FR 18113, April 9, 2010, respectively). The exemption from the Day gillnet 120-day block requirement has been approved for the GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

2. Prohibition on a Vessel Hauling Another Vessel's Gillnet Gear

Regulations at §§ 648.14(k)(6)(ii)(A) and 648.84(a) specify the manner in which gillnet gear must be tagged, requiring that information pertinent to the vessel owner or vessel be permanently affixed to the gear. No provisions exist in the regulations allowing for multiple vessels to haul the same gear. An exemption from this regulation, which was previously approved in FY 2010 because it was determined that the regulations pertaining to hauling and setting responsibilities are no longer necessary when sectors are confined to an ACE for each stock, would allow a sector to share fixed gear among vessels, thereby reducing costs. This exemption is again approved in FY 2011 based on the same rationale. Consistent with the exemption as originally approved, the sectors requesting this exemption have agreed that all vessels utilizing community fixed gear will be jointly liable for any violations associated with that gear. Additionally, each member intending to haul the same gear will be required to tag the gear with the appropriate gillnet tags, consistent with § 648.84(a). The exemption from the prohibition against hauling another vessel's gear has been approved for the GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

3. Limitation on the Number of Gillnets That May Be Hauled on GB When Fishing Under a Groundfish/Monkfish DAS

Regulations at § 648.80(a)(4)(iv) prohibit Day gillnet vessels fishing on a groundfish DAS from possessing, deploying, fishing, or hauling more than 50 nets on GB were implemented as a groundfish mortality control under Amendment 13. An exemption from the limit on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS was previously granted in FY 2010 because it would allow nets deployed under existing net limits under the Monkfish FMP to be hauled more efficiently by vessels dually permitted under both FMPs. This exemption is again approved in FY 2011 based on the same rationale. The exemption from the limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS has been approved for the GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

4. Limitation on the Number of Gillnets for Day Gillnet Vessels

Current gear restrictions in the groundfish regulated mesh areas (RMA) restrict Day gillnet vessels from fishing more than: 100 gillnets (of which no more than 50 can be roundfish gillnets) in the GOM RMA (§ 648.80(a)(3)(iv)); 50 gillnets in the GB RMA (§ 648.80(a)(4)(iv)); and 75 gillnets in the SNE and MA RMAs (§§ 648.80(b)(2)(v) and 648.80(c)(2)(iv), respectively). This exemption was previously approved in FY 2010, and allows sector Day gillnet vessels to fish up to a maximum of 150 nets (any combination of flatfish or roundfish nets) in any RMA, and provides greater operational flexibility to sector vessels in deploying gillnet gear. This exemption was previously approved for FY 2010 because it is designed to control fishing effort and is no longer necessary, since each sector is restricted by an ACE for each stock, which caps overall fishing mortality. This exemption is again approved in FY 2011 based on the same rationale. The exemption from the limit on the number of gillnets for Day gillnet vessels has been approved for the GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

5. 20-Day Spawning Block

Regulations at §§ 648.82(b)(6) and 648.82(g) require vessels to refrain from fishing in NE multispecies DAS program for a 20-day period each calendar year between March 1 and May 31, when spawning is most prevalent in the GOM. This 20-day period must be declared in advance. This regulation was developed to reduce fishing effort on spawning groundfish stocks and an exemption was approved for FY 2010 sectors based upon the rationale that the sector's ACE will restrict fishing mortality, making this measure no longer necessary as an effort control. This exemption is again approved in FY 2011 based on the same rationale. An exemption from this requirement provides vessel owners greater flexibility to plan operations according to fishing and market conditions. The exemption from the 20-day block requirement has been approved for the GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II–III and V–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

6. Limitation on the Number of Hooks That May Be Fished

Current regulations for the GOM RMA, GB RMA, SNE RMA, and MA RMA at §§ 648.80(a)(3)(iv)(B)(*2*), 648.80(a)(4)(iv)(B)(*2*), 648.80(b)(2)(iv)(B)(*1*), and 648.80(c)(2)(v)(B)(*1*), respectively, prohibit vessels from fishing or possessing more than 2,000 rigged hooks in the GOM RMA, more than 3,600 rigged hooks in the GB RMA, more than 2,000 rigged hooks in the SNE RMA, or more than 4,500 rigged hooks in the MA RMA. This measure, which was initially implemented in 2002 through an interim action (67 FR 50292; August 1, 2002) and made permanent through Amendment 13, was designed to control fishing effort. An exemption from the limitation on the number of hooks that a vessel may fish was approved for FY 2010 because it would allow sector vessels to more efficiently harvest ACE and is no longer a necessary control on effort by sector vessels. This exemption is again approved in FY 2011 based on the same rationale. The exemption from the limitation on the number of hooks that may be fished has been approved for the GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

7. Length and Horsepower Restrictions on DAS Leasing

While sector vessels are exempt from the requirement to use NE multispecies DAS to harvest groundfish, sector vessels have been allocated, and still need to use, NE multispecies DAS for specific circumstances. For example, the Monkfish FMP includes a requirement that limited access monkfish Category C and D vessels harvesting more than the incidental monkfish possession limit must fish under both a monkfish and a groundfish DAS. Therefore, sector vessels may still use, and lease, NE multispecies DAS.

An exemption from the DAS Leasing Program length and horsepower baseline restrictions on DAS leases among vessels within individual sectors, as well as between vessels in different sectors, was approved in FY 2010. Restricting sectors to their ACEs eliminates the need to use vessel characteristics to control groundfish fishing effort. Further, exemption from this restriction allows sector vessels greater flexibility in the utilization of ACE and DAS. Providing greater flexibility in the distribution of DAS could result in increased effort on non-allocated target stocks, such as monkfish and skates. However, sectors predicted little consolidation and little redirection of effort to non-allocated species in their FY 2010 operations plans. In addition, any potential redirection in effort would be restricted by the sector's ACE for each stock, as well as by effort controls in other fisheries (*e.g.,* monkfish trip limits and DAS). This exemption is again approved in FY 2011 based on the same rationale. The exemption from the length and horsepower restrictions on DAS leasing has been approved for the GB Cod Fixed Gear Sector; the Maine Permit Bank Sector; all 12 Northeast Fishery Sectors; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

8. Prohibition on the Possession or Use of Squid or Mackerel in the CA I Hook Gear Haddock SAP

The restriction on the possession or use of squid or mackerel as bait in the CA I Hook Gear Haddock SAP was originally approved by the Council in Framework 41, and analyzed in the FEIS for Framework 41, but inadvertently not included in the regulations implementing Framework 41. To correct this oversight, this provision was implemented in the Amendment 16 final rule. This restriction was intended to control the catch rates of cod, as squid and mackerel have been demonstrated to result in higher catch rates of cod. NMFS received comments on Amendment 16 that the bait restrictions should not apply to sector vessels. In the final rule implementing Amendment 16, NMFS stated that "* * * because the Council did not provide for a specific exemption from such bait restriction in Amendment 16, NMFS cannot provide a sector an exemption from the bait requirements for this SAP in the final rule." However, because the bait restriction in Framework 41 was included under Section 4.2.2.2 "Requirements for Vessels not in the Hook Sector," NMFS has determined that Framework 41 specified that this bait restriction applied only to vessels fishing outside of a sector (i.e., the common pool). Based on this, NMFS intends to revise the current regulations for this requirement in an upcoming correction rule and, until the correction is effective, exempt any interested sector from this provision for FY 2011. Until the correction rule becomes effective, this exemption from this bait restriction has been approved for the GB Cod Fixed Gear Sector.

9. Sink Gillnet Mesh Size Restrictions in the GOM From January Through April

The regulations require a minimum mesh size of 6.5 inches (16.51 cm) for gillnets in the GOM RMA (§ 648.80(a)(3)(iv)). Minimum mesh size requirements have been used to reduce overall mortality on groundfish stocks, as well as to reduce discarding of, and improve survival of, sub-legal groundfish. An exemption from this requirements allows sector vessels to use 6-inch (15.24-cm) mesh stand-up gillnets in the GOM RMA from January 1, 2012, to April 30, 2012, when fishing for haddock. The designation of this season is consistent with the pilot program originally proposed in Amendment 16 and is the time period when haddock are most available in the GOM. Sector vessels utilizing this exemption would be prohibited from using tie-down gillnets on trips in the GOM, however, sector vessels may transit the GOM RMA with tie-down gillnets, provided they are properly stowed and not available for immediate use in accordance with one of the methods specified at § 648.23(b). Day gillnet vessels granted the sector exemption from Day gillnet net limits, as explained under Exemption 4, are not subject to the general net limit in the GOM RMA, and thus are able to fish up to 150 nets in the GOM RMA. To maximize the flexibility for vessels fishing under both exemptions, NMFS is allowing Day gillnet vessels granted both the Sink Gillnet Mesh Size Restrictions in the GOM exemption and the general net limit exemption to fish up to 150 stand-up sink gillnets in the GOM RMA during this period (up to 150 nets total in all RMAs). Day gillnets vessels participating in a sector that have not also been approved for the general net limit exemption are restricted to the limit of 50 stand-up sink gillnets during this period. To improve enforceability and increase flexibility, vessels using this exemption must declare their intent on a trip-by-trip basis through a VMS form. There is no limit on the number of nets that participating Trip gillnet vessels are able to fish with, possess, haul, or deploy, during this period, because Trip gillnet vessels are required to remove all gillnet gear from the water before returning to port at the end of a fishing trip.

For additional information pertaining to this exemption, please refer to the proposed and final supplemental rules for FY 2010 sector operations plans and contracts (75 FR 53939, September 2, 2010 and 75 FR 80720, December 23, 2010, respectively). The exemption from sink gillnet mesh size restrictions in the GOM from January through April has being approved for the GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector.

10. Extension of the Sink Gillnet Mesh Size Restrictions in the GOM Through May

For a full description of the Sink Gillnet Mesh Size Restrictions in the GOM, please see Exemption 9 of this section. As stated above under Exemption 9, the implementation of the sink gillnet mesh size restriction in the GOM during the January through April season is consistent with the pilot program originally proposed in Amendment 16 and is the time period when haddock are most available in the GOM. Since fishing effort by sector vessels is restricted by ACE for allocated stocks, overall mortality is capped. Extending this exemption through May will provide sector vessels the opportunity to potentially catch more GOM haddock, a fully rebuilt stock, and will also provide sector participants the opportunity to more fully harvest their allocation of GOM haddock, thereby increasing efficiency and revenues for vessel participating in this program. All provisions specified under Exemption 8 also apply to this exemption. The extension of the exemption of the sink gillnet mesh size restriction in the GOM through May has been being approved for the GB Cod Fixed Gear Sector, and Northeast Fishery Sectors III, VI–VIII, and X.

11. Prohibition on Discarding

Current regulations prohibit sector vessels from discarding legal-sized fish of any of the 14 stocks allocated to sectors while at sea (§ 648.87(b)(1)(v)(A)): GB cod, GOM cod, GB haddock, GOM haddock, GB yellowtail flounder, SNE/MA yellowtail flounder, CC/GOM yellowtail flounder, plaice, witch flounder, GB winter flounder, GOM winter flounder, redfish, white hake, and pollock. Amendment 16 contained this provision to ensure that the sector's ACE is accurately monitored. Sectors requested a partial exemption from this prohibition because of concerns that retaining and landing large amounts of unmarketable fish, including fish carcasses, creates operational difficulties and potentially unsafe working conditions for sector vessels at sea. NMFS has approved a partial exemption from the requirement to retain all legal-sized fish for FY 2011 sectors, which will allow sector vessels to discard these fish. However, all legal-sized unmarketable allocated fish will be accounted for in the overall sector-specific discard rates in the same way discards of undersized fish are currently accounted for, through observer and at-sea monitor coverage. The final supplemental rule to implement amendments to 17 FY 2010 sector operations plans and contracts initially defined unmarketable fish as "any legal-sized fish the vessel owner/captain elects not to retain because of condition or marketability problems." The intent of this exemption is to permit the discarding of fish that cannot be sold because of physical damage, not because of market price or availability; the regulations implementing Amendment 16 were developed to reduce the potential for any high-grading of catch. Therefore, NMFS is revising its definition of "unmarketable" fish. For the purpose of this regulatory exemption, "unmarketable" fish is re-defined as "any legal-sized fish the vessel owner/captain elects not to retain because of poor quality as a result of damage prior to, or from, harvest." NMFS is requesting additional comments on this revised definition of "unmarketable" fish and, depending on comments provided by the public, may further revise the definition in a future action. NMFS will publish a subsequent final rule, if necessary, with any changes to this definition. The definition of unmarketable fish will be included in the sector's LOA.

All vessels in a sector opting for this exemption will be required to discard legal-sized unmarketable fish at sea on all trips (*i.e.,* not just on select trips). Legal-sized unmarketable fish, as defined by the vessel operator, will be prohibited from being landed to prevent the potential to skew observed discards. NMFS intends to modify the sector-specific discard rates for each sector utilizing this exemption because this exemption represents a change to the treatment of unmarketable fish (from landings to discards). Once the discarding exemption takes effect and the discard rates have been modified, unmarketable fish discarded by the sector's vessels on observed trips will be deducted from the sector's ACE and incorporated into the sector's discard rates to account for discarding under this exemption on unobserved trips.

This exemption will enhance operational flexibility, foster safer working conditions for sector vessels, and relieve the burden on sector vessels and their dealers from having to dispose of the unmarketable fish upon landing. The determination of what fish should be discarded under this exemption is at the discretion of the vessel operator, but must be based on physical damage to the fish. There is an incentive for vessel operators to retain and market as much of their catch of allocated stocks as possible to maximize the value of the sector's ACE, because discarded fish will still count against the sector's ACE and be incorporated into the sector's discard rates, without any financial benefit. Thus, it is unlikely that this exemption will lead to additional mortality, but will provide flexibility to sector vessels. This exemption is expected to result in negligible impacts to allocated species, non-allocated species, and bycatch, because discarded unmarketable fish are already dead. Impacts to protected resources and the physical environment are also expected to be negligible because overall effort by sectors is limited by an ACE. Implementation of this exemption for all sectors may increase safety at sea, and may increase the expected profit margins of fishermen by eliminating any costs associated with disposal of unmarketable fish, thereby resulting in a positive impact on sector participants. The discarding exemption, in combination with the required reporting of legal-sized unmarketable fish discarded, will improve the monitoring of this portion of sector catch, particularly on unobserved sector trips. NMFS cannot add this exemption to a sector's operations plan in season, because adjusting sector-specific discard rates mid-season would disrupt the cumulative year-long dataset used to monitor the sector's ACE. The discard exemption has been approved for the GB Cod Fixed Gear Sector; and Northeast Fishery Sectors XI–XIII.

12. Daily Catch Reporting by Sector Managers for Vessels Participating in the CA I Hook Gear Haddock SAP

The regulations at § 648.85(b)(7)(v)(C) require that sector vessels that declare into the CA I Hook Gear Haddock SAP submit daily catch reports to the sector manager, and that the sector manager report catch information to NMFS on a daily basis. This reporting requirement was originally implemented through Framework 40A, to facilitate real-time monitoring of quotas by NMFS. Amendment 16 granted authority to the Regional Administrator to determine if weekly sector reports were sufficient for the monitoring of most SAPs. Through the final rule implementing Amendment 16, the Regional Administrator alleviated reporting requirements for sector vessels participating in other Special Management Programs (SMPs), but reporting requirements were retained for the CA I Hook Gear Haddock SAP, because NMFS must continue to monitor an overall haddock TAC that applies to sector and common pool vessels fishing in this SAP. This rule exempts sector managers from the daily reporting requirement for the CA I Hook Gear Haddock SAP.

NMFS evaluated the possibility of using the sector manager's weekly report, rather than daily reports, to monitor the TAC. Sector weekly reports are received in a timely enough manner to adequately monitor other SAPs. However, the weekly reports, in their current form, would not provide sufficient information, and would require NMFS and all sectors to update their reporting systems to accommodate any change to the weekly report to gather sufficient information. Requiring all sectors to modify their individual systems would produce unnecessary burden on sectors whose vessels do not participate in this SMP. However, participating vessels could submit a daily VMS catch report directly to NMFS containing all required information, analogous to the requirements for common pool vessels to satisfy this reporting requirement. Therefore, as proposed, an exemption from the daily catch reporting requirements for sector managers for member vessels participating in the CA I Hook Gear Haddock SAP with the requirement that sector vessels submit daily VMS catch reports directly to NMFS has been approved for the GB Cod Fixed Gear Sector and the Northeast Coastal Communities Sector.

13. Trawl Gear Requirements in the U.S./Canada Management Area

Current regulations require that a NE multispecies vessel fishing with trawl gear in the Eastern U.S./Canada Area must fish with a Ruhle trawl, a haddock separator trawl, or a flounder trawl net. The final rule implementing Amendment 13 clarified that the restriction to use a haddock separator trawl or a flounder trawl net was designed to "ensure that the U.S./Canada TACs are not exceeded. Because both the flounder net and haddock separator trawl are designed to affect cod selectivity, and because the cod TAC is specific to the Eastern U.S./Canada Area only, application of this gear requirement to the Western U.S./Canada Area is not necessary to achieve the stated goal." The requirement to utilize a Ruhle trawl in the Eastern U.S./Canada Area was implemented through several inseason actions, and made permanent in Amendment 16. This gear configuration was originally authorized for its demonstrated ability to allow the targeting of haddock, an under-harvested stock, while reducing bycatch of cod and yellowtail flounder stocks, which were identified as overfished. The addition of the Ruhle Trawl to gear previously approved (haddock separator trawl and flounder trawl net) provided added flexibility to trawl vessels.

An exemption from these specific gear requirements will enhance operational flexibility for sector vessels while not impacting overall fishing mortality given that sectors are constrained by the allocated ACE for each stock. An exemption from the gear requirements in the U.S./Canada Management Area has been approved for Northeast Fishery Sectors II and V, the Sustainable Harvest Sectors 1 and 3, and the Tri-State Sector. Any trawl gear not currently approved for the U.S./Canada Management Area, but utilized under this exemption, will be included in the standard otter trawl discard rate strata. For sectors approved to utilize this exemption, NMFS will apply the final sector-specific FY 2010 standard otter trawl rate derived for stocks in the Western GB stock area as the initial discard rate for FY 2011, prior to transitioning into an inseason discard rate based upon observed trips in those strata.

14. Requirement To Power a VMS While at the Dock

The regulations at § 648.10(b)(4) require that a vessel issued certain categories of NE multispecies permits, or participating in a sector, must have an operational VMS unit onboard. Additionally, the regulations at § 648.10(c)(1)(i) require that the VMS units onboard a NE multispecies vessel transmit accurate positional information (i.e., polling) at least every hour, 24 hr per day, throughout the year. Amendment 5 first included the requirement for vessels to use VMS (59 FR 9872; March 1, 1994). While the requirement to use VMS was delayed until a later action (FW 42 ultimately implemented a VMS requirement for NE multispecies DAS vessels), NMFS supported polling due to its ability to insure adequacy of monitoring requirements and address enforcement concerns, and because it could be beneficial in the event of an at-sea emergency.

Under certain circumstances, the regulations at § 648.10(c)(2) allow NMFS to issue a LOA allowing vessels to sign out of the VMS program for a minimum of 30 consecutive days. An exemption from the requirement to power a VMS at the dock request is administrative in nature, and is expected to have negligible impacts to allocated species, non-allocated species, protected resources, and the physical environment. Additionally, this exemption provides operational flexibility for sector vessels and may help to lower the costs associated with the operation of a VMS unit. Because sector managers are ultimately responsible for ensuring that their sector members adhere correctly to the operations plans requirements, the enforcement concerns related to powering down at the dock are mitigated. For these reasons, an exemption from the requirement to power a VMS while at the dock has been approved for the GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors IV, VI, and X; the Port Clyde Community Groundfish Sector, and the Tri-State Sector. Vessels will be granted this exemption provided the vessel is at the dock and not underway. The Regional Administrator reserves the right to revoke this exemption, should it be determined that the exemption is being misused or abused. Vessels granted this exemption and electing to power down must submit the appropriate VMS declaration, as specified on the sector's LOA. Since sectors may only request exemptions from NE multispecies regulations, this exemption only applies to NE multispecies requirements; vessels must continue to comply with the requirements of other FMPs for which the vessel is permitted. For instance, a vessel in a sector granted this exemption that has a surfclam/ocean quahog permit would still need to have an active VMS 24 hr a day, 7 days a week.

15. DSM Requirements for Vessels Fishing West of 72°30′ W. long.

Upon receiving requests for an exemption from the DSM requirement (§ 648.87(b)(1)(v)(B)(*1*)) for vessels fishing in SNE and MA waters during FY 2010, the Regional Administrator, in a September 1, 2010, letter to the Council, requested that the Council consider establishing a geographic boundary outside of which DSM would not be required. At its November 18, 2010, meeting, the Council considered this request and voted to remove DSM from the list of prohibited exemptions.

Several Northeast Fishery Sectors and the Sustainable Harvest Sector proposed exemptions from areas in the SNE and MA RMAs; the Northeast Fishery Sectors requested an exemption from DSM requirements when fishing in certain statistical areas (615, 616, 621, 622, 623, 625, 626, 627, 631, 632, 633, 635, 637, and 638) and the Sustainable Harvest Sector requested an exemption from DSM requirements for vessels fishing west of 72°30′ W. long. All noted that historical data indicate that little groundfish incidental catch has been observed in these areas, and monitoring of such trips is burdensome and not a beneficial use of financial resources. Using VMS declarations and Vessel Trip Report (VTR) data, NMFS has verified that little groundfish has been landed from these areas. For example, VTR data from FY 2009 indicates that of 1,220 groundfish trips fishing west of 72°30′ W. long., 74 trips (approximately 6 percent) landed a total of 11,345 lb (5,146.01 kg) of groundfish. Similarly, VTR data available from FY 2010 (May 1, 2010 through February 3, 2011) indicates that 8 out of 390 trips (2 percent) fishing west of this line landed approximately 1,500 lb (680.39 kg) of groundfish.

NMFS believes that one exemption area based on a longitudinal line will better facilitate enforcement and, therefore, has approved the request for a southern boundary drawn along the 72°30′ W. long. line, where vessels that fish exclusively west of this line on a fishing trip would be exempted from DSM requirements for that trip. Vessels fishing under this exemption must stow all gear capable of catching groundfish consistent with the regulations at § 648.23(b) while steaming to or from areas west of 72°30′ W. long. Sectors electing to utilize this exemption must coordinate with their contracted DSM providers to establish a method to exclude these trips from DSM.

Trip start and trip end hails are used by NMFS to coordinate the deployment of enforcement resources in monitoring offloads. Therefore, NMFS will continue to require vessels utilizing this exemption to comply with all hail requirements. An exemption from DSM requirements for vessels fishing west of 72°30′ W. long. has been approved for the GB Cod Fixed Gear Sector, Northeast Fishery Sectors III, V–VI, X–XII, Sustainable Harvest Sectors 1 and 3, and the Tri-State Sector; as well as Northeast Fishery Sectors VII,VIII, and XIII, which requested an exemption from DSM requirements when fishing in certain statistical areas.

16. DSM Requirements for Handgear A-Permitted Sector Vessels

The FY 2011 proposed rule included two requests for exemption from DSM requirements (§ 648.87(b)(1)(v)(B)(*1*)) for vessels using hook gear (Exemption 22: DSM Requirements for Jig Vessels and Exemption 26: DSM, Roving Monitoring, and Hail Requirements for Hook-only or Handgear Vessels), noting that vessels utilizing this gear type are among the smallest operators, have historically landed small amounts of groundfish, and are able to target certain species with little incidental catch of other allocated groundfish species. The sectors pointed out that the cost of monitoring these trips is disproportionately high, due to the comparatively small amount of catch that this gear type yields, and that the proceeds from these trips may be less than the cost of deploying monitors.

FW 45 removes DSM requirements in FY 2011 for Handgear A- and B-permitted vessels, as well as for Small Vessel-permitted vessels (Category HA, HB and C, respectively) in the common pool, because the small quantities of groundfish landed by these permit categories would make monitoring such trips uneconomical. Consistent with flexibility provided for Handgear-permitted vessels in FW 45, NMFS has partially approved the two exemption requests highlighted above, allowing limited access Handgear A-permitted sector vessels to be exempt from DSM requirements. As explained in the proposed rule, hail requirements (including trip start and trip end hails) remain reporting requirements, and sectors may not be exempted from such provisions. Additionally, hails are used by NMFS to coordinate the deployment of enforcement resources in monitoring offloads. An exemption from DSM requirements for Handgear A-permitted sector vessels has been approved for the GB Cod Fixed Gear Sector, the Northeast Coastal Communities Sector, and Northeast Fishery Sectors VI and X.

17. DSM Requirements for Monkfish Trips in the Monkfish SFMA

Amendment 13 specified that sectors are responsible for monitoring sector catch, and Amendment 16 expanded this requirement. Unless a vessel is fishing in a NE multispecies exempted fishery specified in § 648.80, directed monkfish, skate and dogfish trips are considered a sector trip. Several sectors requested exemptions from DSM while on directed fishing trips for monkfish, skate, and/or dogfish, contending that: Data collected from observed FY 2010 trips demonstrate that little groundfish incidental catch occurs in these fisheries, making the cost of DSM per pound of groundfish too low to support it; and that the implementation of DSM in FY 2010 has not met the objectives stated in Amendment 16 in an economically efficient manner.

NMFS cited several operational concerns about exempting these trips from DSM in the proposed rule for this action. Vessels fishing on a directed monkfish, dogfish, or skate trip, outside of an exempted fishery, must declare a NE multispecies DAS or sector trip through VMS or IVR prior to starting their trip because the gear utilized on such trips has the ability to catch groundfish, and because groundfish retention is permitted. It is currently impossible to distinguish most directed fishing trips for monkfish, skate and/or dogfish from directed fishing trips for groundfish because neither the skate nor the spiny dogfish FMPs currently require VMS. It is not possible for a groundfish action to implement VMS requirements for fisheries managed under other FMPs.

Trawl vessels fishing on a NE multispecies DAS or on a sector trip in the Southern New England RMA must use a minimum 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh through the body and 6.5-inch (16.5-cm) square or diamond mesh applied to the codend of a trawl net (648.80(b)(2)(i)). Day and Trip gillnet vessels must fish with a minimum mesh size of 6.5 inches (16.5 cm) throughout the entire net (§ 648.80(b)(2)(iv)). Monkfish management measures at

§ 648.91(c)(1)(i) require vessels fishing under the monkfish DAS program with trawl gear in the SFMA to utilize a minimum 10-inch (25.4-cm) square or 12-inch (30.5-cm) diamond mesh throughout the codend and for at least 45 continuous meshes forward of the terminus of the net. The monkfish regulations also require vessels fishing under the monkfish DAS program with gillnet gear to fish with a minimum diamond mesh size of 10 inches (25.4 cm) or larger (§ 648.91(c)(1)(iii)). Vessels that are issued both monkfish limited access and NE multispecies limited access permits must comply with the more restrictive set of management measures. Therefore, a vessel that is fishing under concurrent monkfish DAS and NE multispecies DAS on a sector trip must abide by the more restrictive monkfish gear requirements.

Since publication of the proposed rule for this action, NMFS was able to identify a subset of groundfish trips under concurrent monkfish/NE multispecies DAS. Data from VTRs from April 2010 through March 2011 for this subset of trips show sector trips declared into the SFMA monkfish fishery using 10-inch (25.4-cm) or larger mesh, as required in the Monkfish FMP, landed only a small amount (1,248 lb, or 566.1 kg) of groundfish on 18 trips out of the 847 trips declared in the monkfish SFMA through March, 31, 2011. Based on this information, NMFS has approved an exemption from dockside monitoring for sector trips declared into the SFMA when fishing on a concurrent monkfish/NE multispecies DAS trip provided that the vessel fishes the entirety of its trip in the SFMA. Sector vessels utilizing this exemption must have non-conforming gear stowed as specified in § 648.23(b), and comply with dockside monitoring hail requirements specified at § 648.87(b)(5)(i)(A). Sector vessels utilizing this exemption must determine with their dockside monitoring provider how to notify their provider that a given sector trip is utilizing this exemption. Therefore, NMFS has partially approved an exemption from DSM requirements for directed monkfish trips for gillnet and trawl vessels on concurrent NE multispecies and monkfish DAS trips when declared into the monkfish SFMA and fishing with 10-inch (25.4-cm) or greater mesh size nets for the Northeast Coastal Communities Sector; Northeast Fishery Sectors III, V–X, and XIII; and the Tri-State Sector.

Special Management Program (SMP) Reporting Requirements

Amendment 16 provided the Regional Administrator with the authority to remove SMP-specific reporting requirements for sectors if it is determined that the reporting requirements are unnecessary. Consistent with the provisions adopted under Amendment 16, NMFS retained the authority to reinstate such reporting requirements if it is later determined that the weekly sector catch reports are insufficient to adequately monitor catch by sector vessels in SMPs. For FY 2010, the Regional Administrator determined that daily SMP-specific VMS catch reports for vessels participating in sectors were unnecessary, because sectors were allocated ACE for most NE multispecies regulated species, and ocean pout, and, therefore, would not be subject to any SMP-specific TACs or other restrictions on catch; would be responsible for ensuring that sector allocations are not exceeded; and would provide sufficient information to monitor all sector catch through the submission of weekly sector catch reports. For these same reasons, the Regional Administrator has determined, unless otherwise noted above, that SMP-specific reporting requirements are not necessary to monitor sector catch for FY 2011. This exemption from the SMP reporting requirements for sector vessels will not apply to vessels participating in the CA I Hook Gear Haddock SAP, as this SAP includes an overall haddock TAC that is applicable to both sector and common pool vessels fishing in this SAP. Therefore, the existing requirement for sector managers to provide daily catch reports by participating sector vessels is maintained for the CA I Hook Gear Haddock SAP only.

Disapproved Exemption Requests

After completing an initial review of the 19 sector operations plans and contracts submitted as of September 1, 2010, NMFS discussed all sector exemption requests in the proposed rule for this action, and highlighted exemption requests of concern when soliciting public comment. Public comment that was received pertaining to these exemptions did not provide new data or sufficient additional rationale to mitigate concerns raised by NMFS in the proposed rule. Due to the fact that no new information was received by the public that would provide sufficient rationale to grant such exemption requests, exemption requests from the following regulations have not been approved by NMFS for FY 2011: Access to GOM Rolling Closure Areas in May and June; prohibition on pair trawling; minimum hook size requirements for demersal longline gear; minimum trawl mesh size requirement; Ruhle and haddock separator trawl requirements to utilize the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl in areas where these gear types have previously been approved; all DSM and roving monitoring requirements; DSM requirements for hook vessels when the sector has caught less than 10,000 lb (4,535.9 kg) of groundfish per year; DSM requirements when fishing in several mid-Atlantic NMFS Statistical Areas; DSM, roving monitoring, and hail requirements for vessels using demersal longline, jig and handgear while targeting spiny dogfish in Massachusetts state waters in NMFS Statistical Area 521; DSM requirements when at-sea monitoring has previously observed the trip; the requirement to delay offloading due to the late arrival of the assigned monitor; the prohibition of offloading non-allocated stocks prior to the arrival of the monitor; and the requirement to provide a sector roster to NMFS by the specified deadline. These requests and NMFS's decisions on them are discussed below.

18. Access to GOM Rolling Closure Areas in May and June

Exemptions from GOM Rolling Closure Areas, specifically blocks 138 and 139 during May and/or access to blocks 139, 145, and 146 during June, for FY 2011 are disapproved for the same reasons that these exemptions were ultimately disapproved in the final rule implementing the FY 2010 sector operations plans. This request is disapproved because the requesting sectors failed to consider that, despite ACE limits, direct targeting of spawning aggregations can adversely impact the reproductive potential of a stock, as opposed to post-spawning mortality. In addition, this request has been disapproved because that the existing GOM Rolling Closure Areas provide some protection to harbor porpoise and other marine mammals.

The sectors requesting this exemption for FY 2011 asserted that the GOM Rolling Closure Areas were originally intended as mortality closures and are therefore now unnecessary because fishing mortality for sectors is capped by the ACE allocated for each groundfish stock. They also argued that vessels fishing in the requested closed areas would provide information, which could serve as a pilot study for future use of these areas and times by all sectors.

One sector noted that Table 177 in the EIS for Amendment 16 indicates that May is not a particularly important time for groundfish spawning, with the exception of plaice and haddock. While previous actions addressed the protection of spawning cod, NMFS believes that the protection of spawning stocks of all species is relevant, and necessary to the rebuilding and maintaining of rebuilt stocks.

FW 45 includes a closure of the Whaleback region of the GOM in June to protect spawning cod. In addition, a scientific paper (Stock Identification of Atlantic Cod in U.S. Waters Using Microsatellite and Single Nucleotide Polymorphism DNA Analyses by Wirgin *et al.,* 2007) indicates that there is some cod spawning in the GOM in June, which supports this decision.

One sector proposed a strategy to minimize the impacts to spawning fish, whereby the harvesting of any species in these areas and times would be restricted by capping the percentage of the sector's available ACE that could be harvested from these areas, and would institute a closure of these areas if, based on NMFS Northeast Fisheries Observer Program (NEFOP) data, a significant amount of spawning fish were harvested. Additionally, that sector proposed to implement a program to notify the sector manager and other vessels if spawning aggregations and/or marine mammals were detected in these areas. NEFOP does not currently collect data on spawning activities; therefore, this is not a viable option to limit the impacts on spawning aggregations of fish.

Ancillary benefits from the GOM Rolling Closure Areas afford protection to harbor porpoise and other marine mammals. Further, increased harbor porpoise interactions could trigger Coastal GOM Consequence Closure Areas, as specified in the Harbor Porpoise Take Reduction Plan, resulting in the closure of the GOM to all gillnet gear, including gear deployed by both sector and common pool vessels. Given these concerns, it is not prudent to allow further exemptions from the GOM Rolling Closure Areas at this time.

19. Prohibition on Pair Trawling

The prohibition to prohibit pair trawling in the NE multispecies fishery was originally implemented through an emergency rule in 1993 (58 FR 32062; June 8, 1993), and made permanent in Amendment 5 (59 FR 9872; March 1, 1994). This prohibition was originally implemented to protect cod and haddock because of the high efficiency of this gear and the need to drastically reduce fishing effort on these stocks. Several Northeast Fishery Sectors requested an exemption from the pair trawling restriction for FY 2011 to allow pairs of vessels to utilize either the Ruhle Trawl or the Eliminator Trawl, asserting that sectors are managed under an ACE and should be exempt from effort controls. These sectors asserted that the exemption would enable participating vessels to harvest the sector's ACE more efficiently and economically.

NMFS raised concerns in the proposed rule for this action that the impacts and effects of these gear configurations have not been studied. NMFS believes that pair trawling using the Ruhle Trawl or Eliminator Trawl could diminish the established selectivity of these gears through increased herding of fish, and could result in increased catch of prohibited stocks, for which sectors have no ACE and little incentive to reduce catch. In addition, NMFS has observed an increase in interactions between bottom trawl fisheries on GB and Atlantic white-sided dolphins, a protected species, and is concerned that granting this exemption could increase these interactions. For these reasons and concerns, NMFS has disapproved the exemption from the prohibition on pair trawling.

20. Minimum Hook Size Requirements for Demersal Longline Gear

The minimum longline gear size of 12/0 was first implemented through Amendment 13 to reduce the catch of small fish and improve their survivability, as well as to reduce overall effort in the hook fishery. The Northeast Coastal Communities Sector requested an exemption from this regulation in FY 2011 to target flatfish, stating this exemption would allow its members to more effectively harvest the sector's ACE and increase profit margins for sector fishermen.

Due to concern that this exemption would increase catch of sublegal fish and result in recruitment overfishing, and that potential changes to size selectivity of the fishery would be inconsistent with those used to determine current Allowable Biological Catch levels, NMFS has disapproved the exemption from the minimum hook size requirements for demersal longline gear.

21. Minimum Mesh Size Requirements on Targeted Redfish Trips

The current minimum mesh size requirements at § 648.80 were implemented to provide protection to spawning fish and increase the size of targeted fish. Several Northeast Fishery Sectors requested an exemption from the current minimum mesh size codend for targeted redfish trips in FY 2011; replacing this requirement with a 5-inch (12.7-cm) minimum mesh size codend when fishing on directed redfish trips, stating that this reduced codend mesh size could increase operational flexibility and profit margins of sector fishermen.

As stated in the proposed rule for this action, NMFS is currently funding a study through the Northeast Cooperative Research Partners Program to investigate strategies and methods to sustainably harvest the redfish resource in the GOM, which will include determining the success of various mesh sizes within the fishery. Recognizing that there is an established mechanism through the Council for the review and incorporation of scientific research, NMFS believes that the exemption request from minimum mesh size requirements on targeted redfish trips is premature, and has, therefore, not approved this request.

22. Ruhle and Haddock Separator Requirements To Utilize the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl

NMFS has previously authorized the use of the Ruhle Trawl (f.k.a., Eliminator Trawl and Haddock Rope Trawl) as one of the gears required to be used in the B DAS Program (§ 648.85(b)(6)(iv)(J)), Eastern U.S./Canada Haddock SAP (§ 648.85(b)(8)(v), and the Eastern U.S./Canada Area (§ 648.85(a)(1)(iii)). NMFS approval of this gear was based upon a recommendation from the Council, following review of a study that demonstrated that this experimental net was successful at targeting haddock and significantly reducing the catch of other groundfish species. Several of the Northeast Fishery Sectors requested an FY 2011 exemption to utilize a smaller version of the approved Ruhle trawl, *i.e.,* the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl, in areas and programs where the Ruhle trawl has been approved as an acceptable gear, asserting that this gear will provide sector members with greater flexibility, as many vessels are too small to utilize the currently approved version of the net. The sectors cited the final results of "Exploring Bycatch Reduction in the Haddock Fishery through the use of the Eliminator Trawl with Fishing Vessels in the 250 to 550 HP Range," by Laura Scrobe, David Beutel, and Jonathan Knight, 2006, which indicated that this smaller net may reduce the catch of major stocks of concern, while allowing vessels to selectively target haddock.

The results of the smaller-scale trawl study were reviewed at the March 16, 2011, Research Steering Committee (RSC) meeting. At that meeting, the RSC determined that the statistical analysis presented was not appropriate to measure the performance of the gear against the control and requested additional statistical analysis of the results before continuing their review of the study.

There is an established mechanism for the incorporation of additional gear types for special management programs through review by the RSC and approval by the Council, and approval of this exemption request would be inconsistent with this process. Based on this, the exemption request from Ruhle and Haddock Separator requirements to utilize the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl has been disapproved. Currently, there is no prohibition against vessels using this smaller-scale trawl net outside of SAPs and the Eastern U.S./Canada Area.

23. All DSM and Roving Monitoring Requirements

The DSM program was implemented under Amendment 16 to ensure that catch is accurately monitored to bolster compliance monitoring. For FY 2011, several sectors requested an exemption from all DSM requirements at § 648.87(b)(1)(v)(B)(*1*), arguing that there is little value to the program, and that it is not meeting its objectives as an enforcement tool.

At its November 18, 2010, meeting, the Council voted to alter several of the DSM provisions originally implemented by Amendment 16, including setting a goal of 100-percent DSM and prioritizing DSM for trips that did not receive an at-sea monitor, and removing DSM from the list of reporting requirements, thereby removing this requirement from the list of prohibited sector exemptions. These provisions were included in FW 45, and approved by NMFS. The Council's modifications to DSM, as highlighted in their comment on the proposed rule for this action (Comment 28), do not support exemptions from DSM for all trips. Therefore, NMFS has disapproved the request for an exemption from all DSM and roving monitoring requirements.

NMFS acknowledges that the DSM program could be strengthened and is modifying DSM requirements through FW 45 for the start of FY 2011 to include provisions such as inspection of fish holds, to help ensure better compliance monitoring, the primary objective of the program.

24. DSM Requirements for Hook Vessels When the Sector Has Caught Less Than 10,000 lb (4,535.9 kg) of Groundfish per Year

VTR data collected through February 2011, document that hook vessels, i.e., handgear and longline vessels, have landed approximately 2.3 percent of the total groundfish catch thus far for FY 2010 (May 1, 2010–March 21, 2010); of this amount, longline gear landed 2.13 percent of the total groundfish catch. Although handgear vessels represent a small portion of this amount, FW 45, as approved by NMFS, exempts handgear permitted vessels from DSM. Unless otherwise exempted by the Council, the current regulations at § 648.87(b)(1)(v) require catch of all stocks on sector trips to be monitored, to help ensure the accuracy of the total catch being documented by dealers, which is used to calculate sector discards. The sector requested that this exemption start once a certain threshold of fish is caught.

Implementation of a DSM program mid-year would not meet the requirements that trip selection be random and representative. Further, the threshold of 10,000 lb (4,535.9 kg) is arbitrary, and could be construed as unfair to vessels fishing other gear types with minimal pounds caught for the year. Therefore, NMFS has disapproved the request for an exemption from DSM requirements for hook vessels when the sector has caught less than 10,000 lb (4,535.9 kg) of groundfish per year.

25. DSM Requirements When Fishing in Certain Mid-Atlantic (MA) Areas

Several Northeast Fishery Sectors requested an exemption from DSM requirements at (§ 648.87(b)(1)(v)(B)(*1*)) in May and June on non-groundfish directed trips that occur in the following NMFS statistical areas: 615, 616, 621, 622, 623, 625, 626, 627, 631, 632, 633, 635, 637, and 638 (§ 648.87(b)(1)(v)(B)(*1*)). The sectors pointed out that historical data indicate that little groundfish incidental catch has been observed in these areas, and monitoring of such trips is therefore not a beneficial use of financial resources. NMFS's VTR data indicate that 1,222 trips were taken within these areas during FY 2009, and 374 trips were taken, thus far, in these areas in FY 2010 (May 1, 2010–February 3, 2011). These data showed that none of the trips from FY 2009 or 2010 landed any groundfish. Many of the sectors' reasons for submitting this exemption request are addressed through the approval of Exemption 15, a similar exemption request from DSM requirements for vessels fishing west of 72°30′ W. long., which represents roughly the same area as described in this exemption. Because Exemption 15 was comparable, and would more easily facilitate enforcement efforts by setting a longitudinal line rather than a statistical area boundary, NMFS approved Exemption 15. Exemption 25 has been disapproved for FY 2011.

26. DSM, Roving Monitoring, and Hail Requirements for Vessels Using Demersal Longline Gear, Jig Gear, and Handgear While Targeting Spiny Dogfish in Massachusetts State Waters

Unless a vessel is fishing in an exempted fishery, directed spiny dogfish trips are considered sector trips. The GB Cod Fixed Gear Sector requested an exemption from DSM, roving monitoring, and hail requirements for vessels using demersal longline gear, jig gear, and handlines while targeting spiny dogfish in Massachusetts state waters (NMFS Statistical Area 521) (§ 648.87(b)(1)(v)(B)(*1*)), stating that its FY 2010 sector data indicate little groundfish incidental catch in this area and that deploying monitors on such trips would provide little value to a program designed to monitor landings of regulated groundfish.

Vessels fishing on a directed dogfish trip, outside of an exempted fishery, must declare a sector trip through the NE multispecies VMS or IVR declarations prior to starting their trip because the gear utilized on such trips have the ability to catch groundfish, and because groundfish retention is permitted. It is currently impossible to distinguish such a trip from a directed groundfish trip because the declaration is a requirement of the NE Multispecies FMP and because the Spiny Dogfish FMP does not currently require VMS. Granting this exemption would therefore pose operational issues that would be difficult to resolve. Regulations require catch of all stocks on sector trips be monitored, to help ensure the accuracy of the total catch being documented by dealers, which is used to calculate sector discard ratios. Additionally, as previously stated, sectors are prohibited from being exempted from hail requirements, which are considered to be reporting requirement. For these reasons, NMFS has disapproved an exemption from DSM, roving monitoring, and hail requirements for vessels using demersal longline Gear, jig gear, and handgear while targeting spiny dogfish in Massachusetts state waters.

27. DSM Requirements When a Trip Has Been Monitored by Either an At-Sea Monitor or Fishery Observer

The Northeast Coastal Communities Sector requested an exemption from DSM requirements (§ 648.87(b)(1)(v)(B)(*1*)) when a trip has been monitored by either an at-sea monitor or fishery observer, stating that requiring both at-sea monitoring and DSM is redundant, as the goal of both programs is catch verification.

At its November 18, 2010, meeting, the Council asked NMFS to prioritize DSM for trips that did not receive an at-sea monitor (if 100-percent DSM was not possible), and included this provision in FW 45. The final rule implementing FW 45, which is being implemented concurrently with this action, implements prioritization of dockside/roving monitor coverage for trips that do not have an observer, at-sea monitor, or approved electronic monitoring equipment. Because NMFS is addressing this exemption through alternate rulemaking, it is not being approved through this rule.

28. The Requirement To Delay Offloading Due to the Late Arrival of an Assigned Dockside Monitor

The regulations at § 648.87(b)(5)(i)(C) specify that a vessel may not offload any fish from a trip that was selected to be observed by a dockside/roving monitor until the dockside/roving monitor assigned to that trip is present. The regulations implementing Amendment 16 require each sector to develop, implement, and fund a DSM program, including the selection and hiring of approved monitoring provider(s). The GB Cod Fixed Gear Sector requested a partial exemption from the above regulation, allowing vessels to begin offloading catch if a dockside or roving monitor is late, arguing that it is the responsibility of the monitor to ensure timely arrival at monitoring events.

In the proposed rule for this action, NMFS highlighted several operational concerns with this exemption request. Because each sector contracts directly with a monitoring provider(s), the sector has the ability and responsibility to resolve the late arrival of an assigned monitor directly with its contracted provider(s). For these reasons, this exemption has been disapproved for FY 2011.

29. Prohibition of Offloading Non-Allocated Species Prior to the Arrival of the Monitor

When selected to be observed by a dockside/roving monitor, a vessel may not offload any fish from a trip until the dockside/roving monitor assigned to that trip is present (§ 648.87)(b)(5)(i)(C)). Sustainable Harvest Sectors 1 and 3 requested an exemption from the prohibition of offloading non-allocated species prior to the arrival of the monitor. The sectors contend that, on occasion, dealers request vessels to offload non-allocated stocks, such as lobster, prior to the offload of groundfish and that this exemption would give additional flexibility to sector members and dealers for the processing of catch.

The Amendment 16 DSM standards require catch of all stocks to be monitored, to help ensure the accuracy of the total catch being documented by dealers. Additionally, NMFS remains concerned that granting an exemption for components of a vessel's catch could create a loophole in the existing regulations. Therefore, for compliance purposes, NMFS has disapproved this exemption request, and retains the Amendment 16 requirement to observe the offload of the entire catch from sector trips.

30. Requirement To Provide a Sector Roster to NMFS by the Specified Deadline

The regulations implementing Amendment 16 require that sector operations plan submissions must be submitted to NMFS by September 1 of each year (unless the operations plan is for multiple years), to ensure that the operations plans and associated analyses are reviewed in time to implement such operations by the start of the next FY (§ 648.87(b)(2)). Several administrative roster deadline extensions were provided by NMFS for FY 2011. Setting the deadline for submitting sector rosters is an administrative matter. Therefore, this exemption request was highlighted in the proposed rule, but not proposed because NMFS was able to administratively accommodate these submission deadline extensions. Therefore, this exemption has not been approved for FY 2011.

Requested Exemptions Not Considered in This Action Because They Are Prohibited or Were Previously Rejected

Exemptions requested by several sectors, ranging from at-sea monitoring provisions, discard rate calculation methods, Eastern U.S./Canada Area requirements, VTR requirements, and NMFS's Office of Law Enforcement (OLE) confidentiality requirements, are either specifically prohibited, or fall outside the NE multispecies regulations. For a more detailed discussion, see the proposed rule for this action.

Comments

Nine letters, each containing several comments, were submitted from several entities: An attorney on behalf of an undisclosed number of individuals, three sectors, one sector support organization, one industry organization, one non-governmental organization, the New England Fishery Management Council (Council), and the Massachusetts Division of Marine Fisheries (DMF). Only comments that were applicable to the proposed measures, including the analyses used to support these measures, are responded to below.

General Sector Issues

Comment 1: Three comments were received supporting NMFS's proposal to relax the 14-day deadline for the submission of ACE transfer requests after the end of the FY.

Response: NMFS acknowledges that the current regulatory text requiring ACE transfers to be completed within 14 days of the end of the FY is insufficient; therefore, an extension will be granted for FY 2010, allowing sector managers additional time to submit ACE transfers.

Comment 2: Two comments were received pertaining to the costs associated with the implementation of sector management. The Northeast Coastal Communities Sector asserted that monitoring costs are excessive, especially for small vessels and vessels operating out of remote ports. An individual noted that the cost of sectors is high in comparison to the gross value of landings.

Response: For FY 2010, NMFS provided funding to sectors for hiring a manager, the writing of an operations plan, reimbursement of DSM costs, and for the costs of a contractor to prepare the sector EAs. NMFS anticipates that funding will be available to provide similar reimbursement in FY 2011. Additionally, NMFS is granting exemptions from DSM requirements to certain gear and permitted vessels, as well as for vessels fishing exclusively west of 72°30′ W. long. NMFS acknowledges that there are additional costs for sector vessels under this co-management system. The costs associated with sector management and the responsibility of sector managers monitoring their own allocation are exchanged for the ability to fish with exemptions from certain NE multispecies regulations. As outlined above, joining a sector is voluntary. Given that 57% of permits have joined a sector in FY 2011, it appears that sectors remain a better choice for many NE multispecies limited access permit holders over the alternative of fishing in the common pool fishery. As we move forward, NMFS will continue to work with the sectors to evaluate and reduce costs associated with sector management, where it can.

Comment 3: The Northeast Sector Service Network, Inc. (NESSN), representing Northeast Fishery Sectors II through XIII noted, and the Northeast

Seafood Coalition (NSC) concurred, that sectors, in general, are constrained by their allocated ACE, as adjusted by transfers, and assert previous effort control management measures should no longer be applicable.

Response: NMFS acknowledges that many effort control measures are not applicable when vessels are constrained by ACE. The regulations implementing Amendment 16 relieved sectors of some of these effort control measures through universal exemptions, e.g., DAS requirements. In addition, sectors have the opportunity to request exemptions from additional specific NE multispecies management measures through their operations plan, subject to NMFS's approval. For FY 2010, and again for FY 2011 through this rule, sectors are exempt from the following requirements: 120-day block out of the fishery required for Day gillnet vessels; 20-day spawning block out of the fishery required for all vessels; limitation on the number of gillnets imposed on Day gillnet vessels; prohibition on a vessel hauling another vessel's gillnet gear; limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS; limits on the number of hooks that may be fished; DAS Leasing Program length and horsepower restrictions; GOM Sink Gillnet Mesh Exemption; and bait restrictions in the CA I Hook Gear Haddock SAP. However, some effort control measures remain necessary, because an overall mortality limit, such as an ACE, does not by itself prevent some other negative impacts, such as disruption of spawning aggregations or overharvest of juveniles. Accordingly, NMFS has disapproved several exemption requests, including: Access to GOM Rolling Closure Areas, minimum hook size requirements, and trawl size and trawl mesh size requirements.

Comment 4: An attorney, commenting on behalf of an unspecified number of individuals, raised concern that the operations plans do not contain specific strategies for the management of inter-related groundfish stocks.

Response: Current regulations require sector operations plans to include specific management rules that the sector participants agree to abide by in order to avoid exceeding the allocated ACE for each stock, including a plan of operations or cessation of operations in an area once the ACE(s) of one or more stocks in that area are harvested. Each sector operations plan includes a set of harvest rules and specifies actions to be taken as thresholds of ACE are achieved. Each sector is allocated ACE for NE multispecies stocks and determines how the sector members will sub-allocate the ACE among themselves. Details of this distribution are prescribed in the operations plan. It is the responsibility of each sector to successfully manage these inter-related stocks. Sector management provides industry the opportunity to determine how best to harvest allocated fish, and provides flexibility for industry to balance allocations of inter-related stocks. Further, current regulations specify that vessels in a sector may only fish in particular stock areas if the sector has been allocated or acquires sufficient ACE for all stocks caught in that stock area. NMFS believes these provisions of the regulations adequately address the management of inter-related stocks in the NE multispecies fishery.

Comment 5: DMF commented that the process established to annually review and approve sector operations plans and the associated exemption requests lacks Council input and involvement. DMF questioned at what point approval of exemptions would be incorporated into the FMP, especially considering the costs to both NMFS and individual sectors to request and analyze each exemption annually.

Response: Regulations implementing Amendment 16 require sectors to submit to NMFS a list of existing regulations that the sector is requesting exemption from, as part of the operations plan. In order for a sector to be implemented, approved to fish, and allocated ACEs, it must first submit a preliminary operations plan to the Council 1 year prior to the year in which it wants to fish and request implementation in a FW or FMP amendment. Thus, the Council determines whether and when to implement additional sectors. If the Council decides to authorize a new sector, it begins the development of an appropriate action to do so. In anticipation of approval of such action by the Council and NMFS, the sector submits its operations plan and contract to NMFS by the required deadlines. NMFS then reviews the final operations plan and solicits comment through a proposed rule. The Council can, and has, commented on sector operations plans and proposed exemptions at that time. Therefore, the Council has input and involvement both at the initial stage of considering a new sector and annually when operations plans are proposed. Amendment 16 is silent on how NMFS-approved exemptions could be incorporated into the suite of Council-issued universal exemptions granted to sector vessels. It is up to the Council to evaluate the feasibility and desirability of incorporating approved exemptions into the FMP.

Allocation Issues

Comment 6: The Council commented on the proposed rule language that stated: "As required by Amendment 16, each sector contract submitted for FY 2011 states that the sector will withhold an initial reserve from the sector's sub-allocation to each individual member to prevent the sector from exceeding its ACE." The Council wanted to clarify that Amendment 16 does not require the withholding of ACE from individual sector members, but rather that a portion of the sector's overall ACE must be withheld.

Response: NMFS agrees that the regulations implementing Amendment 16 require NMFS to withhold a percentage of each sectors ACE at the start of a FY to account for any ACE overages. However, each sector, through its operations plan, has allocated an amount of fish to each vessel equal to what the vessel contributed to the sector's ACE. Because the sector has the flexibility to fish its quota however it wishes to, their method of allocation is strictly voluntary.

Comment 7: An attorney estimated that one sector will be allocated approximately 32 percent of the combined NE multispecies ACLs in FY 2011, and raised the concern that one party is controlling an excessive share of the NE multispecies fishery.

Response: Several comments were received as part of the Amendment 16 rulemaking process regarding capping the amount of ACE that can be allocated to an individual sector, stated that the absence of an allocation cap could compromise small vessel operations due to consolidation. NMFS recognizes that the fact that one sector may have a significant percentage of the total ACE for one fishing season may raise potential concerns for incidental allocative or market effects, and that such possibilities should be closely monitored. However, analysis by the PDT during the development of Amendment 16 suggested it is unlikely that any one sector could accumulate a large enough share of a stock to exercise market power over the rest of the fishery. Because sector ACEs are temporary in nature and depend upon the collective PSCs of participating vessels, no one sector would be allocated a permanent share of any resource. This further limits the ability of a sector to influence market conditions for a particular stock over the long term. Amendment 16 allowed sectors to transfer ACE for use during FY in which it is allocated. This will minimize the influence of the initial sector allocation, including any cap on initial allocations, on market control, as a sector could acquire an unlimited amount of ACE from another sector through ACE transfers. Based on those comments, NMFS in a January 21, 2010, letter to the Council, recommended that the Council consider addressing potential problems of the incidental allocative effects of the sector program as well as individual permit holders acquiring excessive control of fishing privileges through an allocation cap. In response to these concerns, the Council has begun development of Amendment 18, and NMFS has published an Advanced Notice of Public Rulemaking (76 FR 19305, April 7, 2011) that puts into place a control date that the Council may use in setting future allocation measures. Given that concerns about consolidation are part of the overall sector program adopted and addressed in Amendment 16, such concerns are beyond the scope of this rule.

Sector Operations Plans and Contracts

Comment 8: The Council noted that the Maine Permit Bank Sector, and its prospective permits, was provided a February 1, 2011, deadline to submit a finalized sector roster. The Council agreed that it was reasonable for NMFS to extend the roster submission deadline to December 1, 2010, but suggested that the final roster submission date of February 1, 2011, provided to permit holders wanting to sell permits to the Maine Permit Bank Sector could complicate the analyses and was not consistent across all sectors.

Response: NMFS accepted a preliminary list of permits from the Maine Permit Bank Sector on December 1, 2010, which included permits that the State of Maine anticipated purchasing, with the stipulation that these permits were the only permits that could be included in the final roster. Because of the unique nature of the Maine Permit Bank Sector, NMFS allowed these permit holders additional time, through February 1, 2011, to finalize agreements with the State of Maine. This was handled administratively to provide additional flexibility to individual permit holders who were considering selling their permits to the State of Maine. Without this flexibility, permit holders selling to the State of Maine would have been required to drop out of the sector that they previously signed into by the December 1, 2010, deadline. Had the sale not occurred, the permit holder would have had to drop out of the Maine Permit Bank for FY 2011. Since approximately 99 percent of the historical landings are associated with those vessels that had elected to sign up to participate in sectors in FY 2011, the impacts associated with the harvest of the ACE allocated to the Maine Permit Bank Sector is sufficiently analyzed in the final EA.

Comment 9: DMF commented that the ability of the public to comment on the proposed action was hindered by incomplete access to data, including the redaction of roster information and inconsistencies between the information presented in the rule, the EA, and the operations plans.

Response: NMFS acknowledges minor inconsistencies between the data presented in these documents. During FY 2011, sector rosters were reopened following the initial September 10, 2010, deadline, allowing additional permit holders to enroll in sectors up to December 1, 2010. Permit holders negotiating permit sales with the Maine Permit Bank Sector were allowed through February 1, 2011, to either sell permits to the Maine Permit Bank Sector, or to enroll permits in that sector. Due to evolving roster deadlines, and the time required to draft these documents, slightly different information was used. NMFS has elected not to publish rosters or roster-specific information contained elsewhere in the operations plans because final sector membership is subject to change, as permit holders have until April 30, 2011, to withdraw from a sector. NMFS published the rosters associated with the final approved operations plans in this final rule. Any further changes to rosters made through April 30, 2011, will be acknowledged through amendments to the operations plan. NMFS will accept comment on final sector membership. Amendments are posted to: *http://www.nero.noaa.gov/sfd/sfdmultisector.html.*

Proposed Exemptions

Comment 10: DMF stated that the list of proposed exemptions is extensive and difficult to properly evaluate.

Response: NMFS acknowledges the extensiveness of the proposed exemptions and the difficulty in evaluating them. This is an unavoidable problem, however, given the nature of the sector management program and the number of sectors involved. NMFS also attempts to summarize, as concisely as possible, all exemption requests and justifications in the proposed rule for this action, excluding exemptions that were specifically prohibited. Further, all proposed exemptions were analyzed in the EA, and the final determination on the approval of the exemption requests and supporting reasons are summarized in this final rule.

Several FY 2010 Exemptions Requested Again in FY 2011

Comment 11: Four individuals commented on the exemption from the 120-day block requirement for gillnet vessels, the exemption from the prohibition on a vessel hauling another vessel's gillnet gear, the exemption from the limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS, the exemption from the limitation on the number of hooks that may be fished, and the limitation on the number of gillnets imposed on Day gillnet vessels. NESSN and the NSC supported the reauthorization of these exemption requests. The Northeast Coastal Communities Sector raised concern that the scarcity of available space to set this extra gear could potentially lead to safety hazards on the water as gear density and fishing pressure increases. The Northeast Coastal Communities Sector also asserted that granting this exemption could increase the potential for sector ACE overages as gillnets can be left in the water for long periods of time, increasing catch and mortality on some stocks. DMF offered the same comments on these exemptions that they submitted in FY 2010 for the same exemption request, *i.e.,* supporting requests for exemption from the 120-day block requirement for gillnet vessels, the exemption from the prohibition on a vessel hauling another vessel's gillnet gear, the exemption from the limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS, the exemption from the limitation on the number of hooks that may be fished; and opposing the requests for exemption from the limitation on the number of gillnets imposed on Day gillnet vessels.

Response: NMFS approved these gillnet and hook gear exemption requests for FY 2010 because these measures were designed to control fishing effort and are no longer necessary for sectors because sectors' overall fishing mortality is limited by an ACE. While RMA-specific limits on the number of nets have been exempted, NMFS has retained the overall 150-net cap on the amount of gear that may be deployed, as specified in the regulations, because an increase in catch per unit effort could result in the rapid acquisition of the sectors' ACEs, at which point the sectors would remove their fishing gear. The EA indicates that this measure could result in longer soak times or gear left untended to hold fishing ground, which could increase inter-vessel conflicts. However, NMFS has not received any reports of such incidents occurring during FY 2010. NMFS maintains that sectors are responsible for managing the harvest of ACE by its members, and sector members remain jointly and severally liable for any misreporting of catch.

NMFS has again approved these exemptions for FY 2011, based on the same rationale. Comments and responses on the FY 2010 exemption request can be found in the FY 2010 sector final rule.

20-Day Spawning Block

Comment 12: Two industry groups and DMF commented on the exemption from the 20-day spawning block requirement. NESSN and NSC supported this exemption request. DMF offered the same comments on these exemptions that they submitted in FY 2010 for the same exemption request, i.e., supporting the exemption from the 20-day spawning block, but raised an additional concern about the potential impacts to spawning aggregations of GOM cod.

Response: The regulations specify that the 20-day spawning block may be taken anywhere in a span of 92 days (March 1 to May 31) and, therefore, it is expected that some amount fishing effort would be present during this entire time period. While NMFS supports the protection of spawning stocks, prohibiting vessels from fishing 20 days within a 3-month spawning period will likely provide minimal benefit to the stocks, and thus NMFS has approved this exemption for FY 2011.

DAS Leasing Program Length and Horsepower Restrictions

Comment 13: Two industry support groups, one sector, and DMF commented on the exemption from the DAS leasing program length and horsepower restrictions. NESSN and the NSC supported this exemption request. The Northeast Coastal Communities Sector raised concern that the unrestricted free market has led to the price of DAS leases rising above a level which small-scale fishermen can afford. DMF offered the same comments on these exemptions that they submitted in FY 2010 for the same exemption request, i.e., questioned whether DAS that otherwise would have been used by sector vessels for groundfish fishing could not be leased to sector vessels targeting monkfish, but raised concern that granting this exemption could undermine the original intent of this regulation, which was implemented to preserve the character of the fleet. DMF also commented that similar baseline restrictions should be implemented for ACE transfers. Finally, DMF claimed that unrestricted leasing could increase mortality on monkfish and skates through redirection of effort.

Response: NMFS approved this exemption for FY 2010 because it will help ease the transition into sector management for limited access NE multispecies permitted vessels also issued a limited access monkfish permit by allowing vessels to retain more monkfish on a sector trip, resulting in increased vessel profits and reduced regulatory discards. NMFS maintains its support for this exemption in FY 2011 for providing this additional flexibility to sectors. This exemption is not expected to change the character of the fleet, because vessel replacements will continue to be limited by length overall, tonnage, and horsepower limits. Regulations implementing Amendment 16 allow a sector to transfer ACE to another sector in a given FY. ACE transfers take place at the sector level, not the vessel level. Although the Council did not choose to implement restrictions on ACE transfers in Amendment 16, the Council has begun development of Amendment 18 to address ACE accumulation limits and could consider restrictions on ACE transfers at that time. Through the FY 2011 operations plans, sectors summarized anticipated redirection of effort to other species based on information available to them from FY 2010. Most sectors stated that current fishing behaviors and patterns were not anticipated to change as a result of operating under sector management.

Sink Gillnet Mesh Size Restriction in the GOM

Comment 14: Three comments were received on the exemption from the sink gillnet mesh size restriction in the GOM from January through April and the extension through May. NESSN and the NSC supported the reauthorization of this exemption request. The Northeast Coastal Communities Sector raised concern that scarcity of available space to set this extra gear could potentially lead to safety hazards on the water as gear density and fishing pressure increases. The sector also asserted that granting this exemption could increase the potential for sector ACE overages as gillnets can be left in the water for long periods of time, increasing catch and mortality on some stocks.

Response: NMFS approved this exemption request for FY 2010, stating that the impacts to target allocated would be minimal because fishing mortality by sector vessels is restricted by an ACE for allocated stocks, which caps overall mortality. While RMA-specific limits on the number of nets have been exempted, NMFS has retained the overall 150-net cap on the amount of gear that may be deployed as specified in the regulations because an increase in catch per unit effort could result in the rapid acquisition of the ACE by sectors, at which point they would remove their fishing gear. The EA indicates that this measure could result in longer soak times or gear left untended to hold fishing ground, which could increase inter-vessel conflicts. However, NMFS has not received any reports of such incidents occurring during FY 2010. NMFS maintains that sectors are responsible for managing the harvest of ACE by their members, and sector members remain jointly and severally liable for any misreporting of catch. NMFS has approved this exemption for FY 2011, based on the same rationale.

Discarding Exemption

Comment 15: Four comments were received on the exemption from the regulations prohibiting discarding of unmarketable fish. NESSN and the NSC supported the reauthorization of this exemption request. The Sustainable Harvest Sector commented that it wished to withdraw its request for the discarding exemption. The Sustainable Harvest Sector was concerned about the effect this exemption would have on discard rates and stated that it has been able to operate effectively under the existing requirement to retain all legal-sized fish for landing. The Sustainable Harvest Sector does not object to the exemption being granted to other sectors that have requested it. The Council commented that, if this exemption is granted, it should be done in a way that allows for the most accurate discard estimates. The Council also commented that the proposed rule does not define the term “unmarketable” with regard to the discarding of legal-sized unmarketable fish. Further, the Council asserted that “unmarketable” should refer specifically to “fish that are damaged and not to fish that are deemed ‘unmarketable’ for reasons such as little demand, low price, etc.”

Response: NMFS agrees that this exemption must be implemented in a way to most accurately capture discard estimates. Under this exemption, sector vessels are required to discard all legal-sized fish at sea. This will ensure that the discards observed by NEFOP observers or at-sea monitors will accurately represent the activities on unobserved trips. The final rule implementing amendments to FY 2010 sector operations plans initially defined unmarketable fish as "any legal-sized fish the vessel owner/captain elects not to retain because of condition or marketability problems." The intent of this exemption is to permit the discarding of fish that are depredated or otherwise damaged. NMFS agrees with the Council that this definition should be clarified and therefore, has revised the definition of "unmarketable" fish to be any legal-sized fish the vessel owner/captain elects not to retain because of poor quality as a result of damage prior to, or from, harvest. For example, fish may be damaged from sandfleas, seals, cetaceans, or fishing gear. The definition of unmarketable fish will be included in the sector's LOA. This exemption does not authorize captains to discard legal-sized allocated fish based on marketability or availability of market if the fish are not damaged. NMFS is requesting additional comments on this definition of "unmarketable" fish under this interim final rule and, depending on comments provided by the public, may further revise the definition in a future action. This exemption is not authorized for members of the Sustainable Harvest Sector, based on that sector's request.

Daily Catch Reporting by Sector Managers for Vessels Participating in the CA I Hook Gear Haddock SAP

Comment 16: The GB Cod Fixed Gear Sector, which requested an exemption from daily catch reporting by sector managers for vessels participating in the CA I Hook Gear Haddock SAP, raised a concern regarding the alternative reporting method highlighted in the proposed rule, stating that modifications to the sector manager weekly report are expensive to implement. The sector requested that, should this exemption be approved, modifications should be made to VMS software allowing for the reports to be submitted to NMFS without the extra cost of software changes to the sector. The sector asserted that sector monitoring would not be impacted, as the sector maintains the requirement to receive trip catch data within 24 hr of landings. DMF supported this exemption, as it only changes the mechanism for the submission of the reports.

Response: NMFS agrees with the GB Cod Fixed Gear Sector that modifications to existing databases and systems could be costly to sectors. Additionally, if NMFS required the submission of CA I Hook Gear Haddock SAP information through the sector manager weekly report, and only a subset of sectors elected this exemption, an unnecessary burden would be placed on sectors not granted this exemption. Due to these concerns, NMFS did not pursue modifications to the sector manager weekly report to collect this information. NMFS has approved this exemption, but will require that vessels submit this information on a daily basis to NMFS via VMS, which are the same reporting requirements as common pool vessels participating in the SAP. NMFS believes that sectors will be able to monitor landings appropriately and take any necessary action through the requirement for vessels to submit catch data within 24 hr of landing.

Gear Requirements in the U.S./Canada Management Area

Comment 17: DMF supported the request for an exemption from gear requirements when fishing in the U.S./Canada Management Area, commenting that they do not believe the current flatfish net restriction in this area has been effective.

Response: NMFS implemented restrictions on trawl gear that could be utilized in the U.S./Canada Management Area to ensure that TACs are not exceeded. These net restrictions were implemented under DAS management and were designed to control fishing effort on certain stocks. The exemption from these gear requirements has been approved for sectors in FY 2011, given that they are no longer necessary because sectors are restricted to an ACE for each groundfish stock, which limits overall fishing mortality.

Requirement to Power a VMS While at the Dock

Comment 18: The Council commented on the exemption from the requirement to power a VMS while at the dock, stating that this requirement may be considered a reporting requirement, from which sectors are prohibited from exemption. However, the Council believes that this request does not conflict with the intent of management measures.

Response: Current NE VMS regulations allow vessels to sign out of the VMS program for a minimum of 30 consecutive days, through the request and issuance of an LOA. NMFS believes that the request of sectors to power down VMS units while at the dock is an extension of the current regulatory exemption, and would grant sector vessels additional flexibility by reducing costs. Further, because sector managers are responsible for ensuring that vessels comply fully with the regulations, issues of potential enforcement concerns due to this exemption are mitigated. NMFS has approved this exemption for FY 2011, but will revoke the exemption if it undermines enforcement.

DSM Requirements for Handgear A-Permitted Sector Vessels

Comment 19: Two comments were received on the requests for an exemption from DSM requirements for jig vessels and for DSM requirements, roving monitoring, and hail requirements for hook-only or handgear vessels. The Northeast Coastal Communities Sector commented in support of gear-specific exemption requests, citing the similarity of the DSM exemption in FW 45 for handgear-permitted common pool vessels. The Council commented that an exemption request similar to the exemption for common pool handgear vessels in FW 45 seemed sensible.

Response: NMFS has approved a request for an exemption from DSM for Handgear A-permitted sector vessels, similar to the exemption in FW 45 for handgear-permitted common pool vessels, acknowledging that these vessels land only small amounts of groundfish. Without this exemption, these vessels would likely pay disproportionately higher DSM costs per monitoring event.

DSM Requirements for Vessels Fishing West of 72°30′ W. long.

Comment 20: Two comments were received on the request for an exemption from DSM requirements for vessels fishing west of 72°30′ W. long. NSC expressed support for this exemption in comments on FW 45. The Council commented that it supported requests specifying geographic boundaries or requests for particular gear types that catch small amounts of groundfish bycatch.

Response: In a September 1, 2010, letter, NMFS requested that the Council consider establishing a geographic boundary to prescribe where the dockside monitoring requirements apply, citing that having each sector develops a dockside monitoring program with different geographic boundaries would be problematic. The Council addressed this issue by removing DSM from the list of prohibited exemptions, thereby allowing sectors to request such exemptions. Amendment 16 specifies that sectors must develop and implement a dockside monitoring system that is "satisfactory to NMFS for monitoring landings and utilization of ACE." NMFS has approved this exemption, given that few groundfish were caught from the area. This exemption will more efficiently utilize the financial resources dedicated to the DSM program.

DSM Requirements for Directed Monkfish, Skate, and Dogfish Trips

Comment 21: Five comments were received on the requested exemption from DSM requirements for directed monkfish, skate, and dogfish trips. The Council stated that its support for exemption requests specifying geographic boundaries and particular gear types that catch small amounts of groundfish bycatch should not be inferred to mean that it supports general exemptions from DSM for trips targeting other species such as monkfish or skates. The Northeast Coastal Communities Sector and NSC supported this exemption request. The GB Cod Fixed Gear Sector disagreed with the proposed rule statement that it is impossible to distinguish directed dogfish trips from groundfish trips. NESSN opposed, and NSC concurred with, NMFS's assertion that granting this exemption would decrease oversight and confidence in discard rates, because NMFS does not use the data generated from DSM to establish discard rates.

Response: NMFS agrees that some relief from DSM requirements can be offered through exemptions, and has therefore approved three requests for exemption from DSM requirements for FY 2011, for: Handgear A-permitted vessels, consistent with a measure included in FW 45 exempting handgear-permitted common pool vessels from DSM; for vessels fishing exclusively west of 72°30′ W. long; and for monkfish Category C- and D-permitted vessels fishing on a monkfish trip in the monkfish SFMA when such vessels are required to fish with nets containing 10-inch (25.4-cm) mesh codends or gillnets. The exemption from DSM for these particular monkfish trips specifically addresses identifiable trips with low groundfish catch, since information in NMFS databases show that catch of NE multispecies on such trips is minimal (11,345 lb (5,145.01 kg) in FY 2009 and approximately 1,500 lb (680.39 kg) thusfar in FY 2010). This approach is consistent with the Council's comment about allowing sectors to request exemptions from DSM requirements. While the Council may not have intended to allow for exemptions for directed monkfish trips, NMFS believes that the data show that groundfish catch on this subset of monkfish trips is low, and warrants an exemption.

NMFS will be able to identify such trips through the required VMS declaration, which specifies the area fished. Granting additional exemptions specific to directed skate and dogfish trips is currently not possible because these trips cannot be clearly identified. Such trips utilize gear capable of catching groundfish, and groundfish retention is permitted, which therefore requires vessels to declare into the NE multispecies fishery.

Exemption Requests That Were Not Approved

Access to GOM Rolling Closure Areas in May and June

Comment 22: Three comments were received supporting the granting of additional access to GOM rolling closure areas in May and June. The Council commented that, contrary to the justification provided by the Port Clyde Community Groundfish Sector, NEFOP does not collect information pertaining to the amount of spawning fish, and therefore observer data would not be adequate to measure the impacts of granting this exemption. The Northeast Coastal Communities Sector asserted that, if evidence supports the presence of spawning activity in these areas during May and June, the areas should remain closed. DMF raised concerns about the potential impacts to spawning aggregations of GOM cod, stating that these areas were originally intended to protect spawning aggregations of fish, and requested specific information on sectors' strategies for avoiding these aggregations.

Response: NMFS agrees that the GOM Rolling Closure Areas were initially established to protect spawning fish, specifically GOM cod. Table 177 in Amendment 16 indicates that cod spawn during the months of January through May. Although this table does not indicate cod spawning in June, the scientific paper written by Wirgin et al, 2007 (referenced above in Exemption 18) indicates that there are some cod spawning in the GOM in June. Other groundfish of importance also spawn during this timeframe. While previous actions specifically addressed the protection of spawning cod, NMFS believes that the protection of spawning stocks of all species managed under the NE Multispecies FMP is relevant, and necessary to the rebuilding and maintaining of rebuilt stocks. NMFS agrees with the Council that NEFOP data cannot be relied upon by a sector utilizing this exemption to measure the impacts on spawning fish because NEFOP observers to not collect information pertaining to the amount of spawning fish. Based on this information, NMFS has disapproved all GOM Rolling Closure Area exemption requests for FY 2011.

Prohibition on Pair Trawling

Comment 23: Four comments were received on the exemption from the prohibition on pair-trawling. The Northeast Coastal Communities Sector raised concern with this exemption request, stating that pair-trawling was prohibited to protect rebuilding stocks and that many of the NE multispecies stocks are still undergoing rebuilding. The Council also raised concerns, suggesting that this configuration should first be subject to an experimental fishery to verify performance. The Council also provided comment on potential implementation concerns. Finally, NESSN and NSC supported the exemption request by reiterating the justifications provided by the sectors originally requesting the exemption, *e.g.,* that, because sectors are managed under an ACE they should be exempt from effort control measures.

Response: NMFS is concerned that when fishing with a pair-trawl, selectivity may be decreased, which could result in increased catch of prohibited stocks for which sectors have no ACE. Without an ACE for these stocks, sectors would have little incentive to alter fishing behaviors. Further, the overall impacts of the Ruhle trawl when fished in a pair trawl configuration are unknown. For these reasons and others discussed in Exemption 19 above, NMFS has disapproved this exemption request.

Minimum Hook Size Requirements for Demersal Longline Gear

Comment 24: Two comments were received on the exemption from minimum hook size requirements for demersal longline gear. DMF commented that the sector would unlikely to be successful at targeting flatfish with this exemption and the exemption would likely have increased catch of sub-legal-sized fish. The Council provided comment on the implementation of discard rates, should this exemption be approved.

Response: NMFS agrees that granting this exemption could impact sub-legal fish, which could result in recruitment overfishing, despite sectors' overall impact on mortality being constrained by ACE. For this reason, NMFS disapproved this exemption request.

Minimum Mesh Size Requirements on Targeted Redfish Trips

Comment 25: Four comments were received on the exemption request from minimum mesh size requirements on targeted redfish trips. NESSN and NSC supported the exemption request by reiterating the justifications originally submitted by the sectors requesting this exemption. The Council supported granting sectors flexibility to target healthy stocks, but commented that the Council's established scientific research study process should consider the proposed gear, which may lead to better understanding of the impacts on non-target species. DMF cited its participation in the ongoing NMFS-funded redfish study to investigate strategies and methods to sustainably harvest the redfish resource, and believe that, upon completion of the study, additional data will be available to more accurately evaluate the impacts of this exemption.

Response: NMFS agrees that the established Council process for review and incorporation of scientific research is the appropriate mechanism to determine if this exemption request has merit. Therefore, approval of this exemption request is premature at this time and, it was not approved.

Ruhle and Haddock Separator Requirements To Utilize the 98.4 in x 15.7 in (250 cm x 40 cm) Eliminator Trawl

Comment 26: NMFS received four comments on the exemption request from Ruhle and Haddock Separator trawl requirements when fishing in certain fishery management programs and requested the use of a smaller trawl size, the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl. The Council expressed concern that the process for incorporating modifications to this trawl gear should be evaluated using the Council's established research process. However, the Council noted it may support approval if the net design is similar to previously approved gear. DMF expressed general concern about the enforceability of trawl gear requirements and cautioned against assuming that the impacts of this gear would be the same as larger-scale nets of similar design. DMF concluded by recommending that approval of this exemption should be conditional, based on results of RSC review. NESSN reiterated, and NSC concurred, with the justification originally submitted by the sectors requesting this exemption.

Response: NMFS agrees that the Council's established mechanism for the review and incorporation of scientific research is appropriate for such changes to this gear. The RSC, which met on March 16, 2011, to discuss this issue, rejected the initial analysis of this gear and requested additional analysis for further review. NMFS awaits the recommendation of the RSC and Council on the future approval of this gear type for vessels fishing in the NE multispecies fishery before approving this exemption.

All DSM and Roving Monitoring Requirements

Comment 27: Four comments were received on the requested exemption from all DSM and roving monitoring requirements. NESSN and NSC supported the exemption requests. The Northeast Coastal Communities Sector supported an exemption from all DSM requirements, reiterating their concern about the costs of DSM for vessels landing small amounts of fish and operating out of remote ports, stating that these vessels are disproportionately impacted by the costs of DSM. The Council summarized the decision-making process behind allowing sectors to request exemptions from DSM requirements and stated its intent was to allow, or support, requests specifying geographic boundaries or for particular gear types which catch small amount of groundfish bycatch, similar to the Handgear A exemption in FW 45 for common pool vessels.

Response: NMFS agrees that some relief from DSM requirements can be offered through exemptions, and has therefore approved three DSM exemptions for FY 2011, for: Handgear A-permitted vessels, consistent with a measure included in FW 45 exempting Handgear A-permitted common pool vessels from DSM, for vessels fishing west of 72°30′ W. long, and for monkfish trips in the monkfish SFMA. The exemption from DSM for trips exclusively fishing west of 72°30′ W. long., and for certain monkfish trips (see above), specifically address identifiable trips with low groundfish catch. This approach is consistent with the Council's comment about allowing sectors to request exemptions from DSM requirements. Thus, although NMFS has disapproved an exemption to all DSM requirements, some exemptions to area- and gear-specific DSM requirements have been approved, DSM Requirements for Hook Vessels when the Sector has Caught less than 10,000 lb (4,535.9 kg) of Groundfish per Year.

Comment 28: Two comments were received pertaining to the request for an exemption from DSM requirements for hook vessels when the sector has caught less than 10,000 lb (4,535.9 kg) of groundfish per year. The Council supported exemption requests specific to geographic boundaries or for particular gear types that catch small amounts of groundfish bycatch. The Northeast Coastal Communities Sector strongly urged consideration of this request, believing the economic burden outweighs compliance concerns, and offered to work with NMFS to establish a suitable threshold.

Response: NMFS agrees with the Council that an exemption from DSM requirements for certain vessels that catch small amounts of groundfish is appropriate. Therefore, NMFS approved an exemption from DSM requirements for Handgear A-permitted sector vessels, consistent with a measure included in FW 45 exempting handgear permitted common pool vessels from DSM. NMFS believes that this permit-based gear exemption will help to address the Northeast Coastal Communities Sector's concerns for some of its members, and minimizes enforceability concerns by having multiple gear exemptions. NMFS, however, does not support exempting all hook vessels from DSM when catching less than a specific amount of groundfish, and has therefore disapproved this exemption. To do so would be inequitable to other gear types, as well as administratively very difficult to do. NMFS will continue to reimburse DSM costs for FY 2011 through a grant to GMRI.

DSM Requirements in May When Fishing in Certain MA Areas

Comment 29: Three comments were received on the requested exemption from DSM requirements for vessels when fishing in certain MA areas. The Council supported DSM exemption requests specifying specific geographic boundaries. NESSN and NSC supported this request stating that historic data show that little groundfish is caught in these areas.

Response: NMFS agrees that a geographic boundary for DSM should be established and has approved an exemption from DSM requirements for vessels fishing west of 72°30′ W. long. For a full response, please see Response to Comment 21. NMFS believes that establishing different boundaries within New England waters where DSM was exempt would be difficult from both an administrative and enforcement perspective, and therefore has not approved this exemption.

DSM, Roving Monitoring, and Hail Requirements for Vessels Using Demersal Longline Gear, Jig Gear, and Handgear While Targeting Spiny Dogfish in Massachusetts State Waters

Comment 30: Three comments were received on the exemption from DSM, roving monitoring, and hail requirements for vessels using demersal longline gear, jig gear, and handgear while targeting spiny dogfish in Massachusetts state waters. The

Northeast Coastal Communities Sector strongly supported consideration of this request. The Council did not support the exemption request. The GB Cod Fixed Gear Sector commented on NMFS's inability to distinguish directed dogfish trips from groundfish trips.

Response: NMFS agrees with the Council that an exemption from DSM requirements for vessels fishing in certain areas that catch small amounts of groundfish is appropriate, and approved exemptions from DSM requirements for vessels fishing exclusively west of 72°30′ W. long.; and for monkfish Category C- and D-permitted vessels fishing on a monkfish trip in the monkfish SFMA when such vessels are required to fish with nets containing 10-inch (25.4-cm) mesh codends or gillnets. Granting an additional exemption specific to directed dogfish trips is currently not possible because these trips cannot be clearly identified. Such trips utilize gear capable of catching groundfish, and groundfish retention is permitted, which therefore requires vessels to declare into the NE multispecies fishery. Due to these concerns, NMFS has disapproved this exemption request.

DSM Requirements When a Trip Has Been Monitored by Either an At-Sea Monitor or Fishery Observer

Comment 31: Two comments were received regarding the requested exemption from DSM requirements when a trip has been monitored by either an at-sea monitor or fishery observer. The Council commented on this exemption related to the Council's November 18, 2011, motion recommending that NMFS prioritize trips for DSM that have not received an at-sea monitor (including NEFOP observers). The Northeast Coastal Communities Sector strongly supported consideration of this exemption, commenting on the need to balance monitoring with costs.

Response: The final rule implementing FW 45 rectifies the DSM standards to prioritize trips that do not receive at-sea monitoring (including NEFOP observers) for DSM selection. Therefore, the request for an exemption is not approved under this action since it is being implemented under FW 45. For FY 2011, NMFS anticipates funding DSM coverage for all trips that do not receive at-sea monitoring (including NEFOP observers). The Requirement to Delay Offloading Due to the Late Arrival of an Assigned Dockside Monitor

Comment 32: The Council commented on the request for an exemption from the requirement to delay offloading due to the late arrival of an assigned dockside monitor, stating that it might be sensible to set a window establishing the timely arrival of a monitor. The Council suggested that after that window of time expires, a vessel be allowed to proceed with the offload of catch, assuming all hail requirements were fulfilled.

Response: The regulations implementing Amendment 16 prohibit a vessel from offloading any fish from a trip that was selected for DSM prior to the arrival of the monitor. NMFS believes that it is the responsibility of the sector to resolve the late arrival of a monitor with the sector's dockside monitoring provider(s) that the sector has contracted with to fulfill the DSM standards. Provisions to address monitor tardiness could be captured in individual contracts, therefore, NMFS has disapproved this request.

Prohibition on Offloading of Non-Allocated Species Prior to the Arrival of the Monitor

Comment 33: The Northeast Coastal Communities Sector commented on its opposition to granting an exemption from the prohibition on offloading non-allocated species prior to the arrival of a monitor, asserting that allowing partial offloading prior to the arrival of a monitor handicaps the monitoring process and decreases transparency.

Response: NMFS agrees and is concerned that granting exemptions to many components of DSM would create serious loopholes in the existing regulations. Allowing a portion of an offload to be unmonitored would undermine the value of the monitored portion. Therefore, for compliance purposes, NMFS has disapproved this exemption request.

Exemptions Not Considered in This Rulemaking

Delayed Opening of the Eastern U.S./Canada Area

Comment 34: The Sustainable Harvest Sector commented that NMFS did not adequately address in the proposed rule the request for its exemption from a delay in the opening of the Eastern U.S./Canada Area to trawl gear. The sector believes that being granted an exemption allowing vessels to fish in this area during the summer months is important for smaller vessels for safety reasons and would facilitate harvesting a higher percentage of the sector's ACE for stocks in that area.

Response: NMFS is not able to consider the request for an exemption from the delay in the opening of the Eastern U.S./Canada Area to trawl gear because a delay in opening the Eastern U.S./Canada Area to trawl gear is not a specific regulation to be exempted from, but rather an in season action to modify or close access to the U.S./Canada Management Area at any time during the FY, or prior to the start of the FY, pursuant to § 648.85(a)(3)(iv)(D), which governs the Regional Administrator's ability to implement such actions. NMFS directs the public to the final rule for FW 45, which announces that NMFS is postponing the opening of the Eastern U.S./Canada Area for common pool (non-sector) vessels fishing with trawl gear in FY 2011 from May 1, 2011, to August 1, 2011.

Hail Requirements

Comment 35: The Council commented that DSM trip-start and trip-end hail requirements could be considered a reporting requirement instead of a part of the DSM program and, therefore, cannot be exempted, because the regulations prohibit sectors from requesting exemptions from reporting requirements.

Response: At its November 18, 2010, meeting, the Council voted to remove DSM requirements from the list of reporting requirements, thereby allowing sectors to request exemptions from these requirements. The Council was silent as to whether hails, a component of DSM, should also be removed from the list of reporting requirements. Since the inception of the DSM program, NMFS has interpreted hail requirements to be reporting requirements and believes hails to be integral to successful compliance monitoring of vessels participating in NE multispecies sectors. Hails are used by DSM providers to effectively deploy resources, and by NMFS to assist in the coordination of enforcement efforts. Therefore, this exemption request has been disapproved and the partial exemptions from DSM provisions granted in FY 2011 have retained hail requirements for vessels utilizing the exemptions.

Other Comments

Comment 36: One attorney, submitting comments on behalf of an unspecified number of individuals, raised concerns with the implementation of catch shares in the NE multispecies fishery through Amendment 16. The individual submitted Amendment 16 litigation materials as an attachment to the formal comments.

Response: Concerns regarding implementation of Amendment 16 sector provisions should more appropriately be raised to the Council. Any issues or concerns raised in the ongoing litigation regarding Amendment 16 is being decided by the court in the litigation, and, therefore, it is not appropriate to respond to them here; nor are such issues and concerns directly related to this action.

Sector EA

Comment 37: The CBD commented that the EAs prepared in support of both FW 45 and the FY 2011 sector operations plans do not adequately evaluate the impacts on a number of species proposed for listing under the Endangered Species Act (ESA), particularly Atlantic sturgeon and loggerhead sea turtles. The CBD noted that three distinct population segments (DPS) of Atlantic sturgeon were proposed to be listed under the ESA by NMFS's Northeast Regional Office on October 6, 2010 (75 FR 61872), while the Northwest Atlantic loggerhead sea turtle was proposed to be listed as endangered under the ESA on March 16, 2010 (75 FR 12598). They contended that the FW 45 and FY 2011 sector operations plans EAs rely upon previous assessments of impacts to protected species specified in the Amendment 16 EIS that was completed on October 16, 2009. Therefore, they claimed that the analysis for these actions is not appropriate, given the proposed listings of Atlantic sturgeon and loggerhead sea turtles occurred after this analysis was completed, and requested that the analysis be updated. Further, they questioned how the draft FY 2011 sector operations plans EA could conclude that the action would not result in jeopardy to listed species prior to completion of the ESA Section 7 informal consultation. The CBD also noted that the FY 2011 sector operations plans EA recommended conservation actions be considered to limit the potential for adverse effects to candidate species, such as Atlantic bluefin tuna and cusk, but described no such measures under consideration.

Response: NMFS agrees that the analysis originally included in the FY 2011 sector operations plans EA did not adequately describe the impacts to DPS of Atlantic sturgeon and loggerhead sea turtles. In response to this comment, NMFS has updated the analysis supporting this action in the FY 2011 sector operations plans EA to include analysis of measures on the DPS for these species, and has concluded that there will be no significant impact on Atlantic sturgeon or loggerhead sea turtles for the expected duration of this regulation. NMFS is also addressing this concern in connection with the approval and implementation of FW 45. The revised analysis concluded that the measures implemented under this final rule are not likely to jeopardize the continued existence of Atlantic sturgeon between now and the time when a final listing determination will be made, and that a conference for the proposed loggerhead sea turtle DPS is not required based on determinations and the incidental take statement in the 2010 Biological Opinion for the Multispecies FMP. For Atlantic sturgeon, NMFS Sustainable Fisheries Division engaged in an informal conference with NMFS Protected Resources Division per the ESA regulations and no additional measures were recommended by NMFS Protected Resources. While it is possible that there may be interactions between Atlantic sturgeon and gear used in the NE multispecies fishery, the number of interactions that will occur between now and the time a final listing determination will be made is not likely to cause an appreciable reduction in survival and recovery. A final listing determination for the Atlantic sturgeon DPS is expected by October 6, 2011. With the publication of a final listing rule, the Section 7 consultation for the NE multispecies fishery would need to be reinitiated, consistent with the requirement to reinitiate formal consultation where discretionary Federal agency involvement or control of the action has been retained and a new species is listed that may be affected by the action. During the reinitiation, the effects of the NE multispecies fishery on the five DPS for Atlantic sturgeon would be fully examined.

Furthermore, the draft EA included a determination with respect to the ESA, because the regulations at § 402.12(a) governing the preparation and submission of a Biological Assessment (BA) specify that a BA shall include a determination as to whether any listed and proposed species and designated and proposed critical habitat are likely to be adversely affected by the proposed action, for review and concurrence by NMFS. Thus, the draft EA included draft analysis and findings for review by NMFS, and for use in the ESA Section 7 informal consultation on the proposed FY 2011 sector operations plans.

The FY 2011 sector operations plans EA has also been modified to clarify that NMFS has initiated review of recent stock assessments, bycatch information, and other information for candidate and proposed species, including Atlantic bluefin tuna and cusk, which must be completed to accurately characterize recent interactions between fisheries and the candidate/proposed species in the context of stock sizes. Any conservation measures deemed appropriate for these species will follow the information reviews.

Comment 38: One comment was received stating that the term "sector" has several uses in the draft EA (*e.g.,* "sector" as a segment of the fishery vs. "sector" as an entity), and requested that NMFS develop different terms to distinguish between these different meanings.

Response: NMFS acknowledges that the term "sector" has multiple uses in the draft EA. However, "sector" as an entity was the term adopted by the Council for groups of NE multispecies permit holders in Amendment 13 and is defined in the regulations at § 648.2. Therefore, this term will continue to be used by NMFS for NE multispecies unless a future Council action renames these entities.

Comment 39: The DMF supported NMFS's decision to consolidate analyses of the 19 FY 2011 sector operations plans into one EA, noting this greatly simplified review.

Response: NMFS agrees that consolidating the analysis of the 19 operations plans, based on their general uniformity, rendered the EA more user friendly, and will continue to try to identify approaches to further simplify the review process for future fishing years.

Comment 40: DMF commented that no analysis of FY 2010 sector operations plans' performance was included in the draft EA, specifically commenting on a lack of analysis regarding whether the impacts of approved exemptions were as predicted and whether there was any consolidation and or redirection of effort that occurred. They further commented that the information that was provided was general in nature and mainly used to predict interactions for FY 2011. DMF noted that, given the timing of submission of annual reports and sector operations plans, it appeared that the analyses of proposed sector operations plans would always use 2-yr old datasets.

Response: As noted by DMF and in section 1.2.2 of the draft EA, a complete dataset from the first year of expanded sector operations in FY 2010 was not yet available to use in the analysis of proposed FY 2011 sector operations plans. NMFS acknowledges that the concurrent operation of approved sectors in a given FY, and development of proposed sectors operations plan for the following FY, creates a lag in the data and analysis of actual sector fishing activities and associated impacts. However, NMFS uses the most complete information available in the analysis of sector operations plans each FY, including predictions provided by the sectors about the expected fishing activities of their members in the upcoming FY. As noted in section 1.2.2 of the Final EA, in future FYs, beginning with FY 2012, NMFS will have sector annual reports and complete datasets from prior FYs, under sector management, excluding the FY underway during operations plan review. This will include certain sector-specific exemptions to use in the analysis of newly proposed sector operations plans for those specific sectors.

Comment 41: DMF commented that the data in the draft EA and in Table 4 of the proposed rule were inconsistent, though they cited the same roster date of September 10, 2010, and stated that the proposed rule and all associated documents should be based on the same roster information.

Response: NMFS acknowledges DMF's concerns, but disagrees that all associated documents need to be based on the same roster information. Table 4 of the proposed rule summarized the roster information that was submitted by FY 2011 sectors on September 10, 2010, and that was used in preparation of the IRFA. The roster information contained in the draft EA was also based on rosters submitted by September 10, 2010, but which had been updated as a result of NMFS's iterative review of sector operations plans and contracts. While the commenter might prefer that all associated analyses be based on the same roster information, September roster submissions are only preliminary estimates provided by sectors and are used by NMFS to establish a basis and scope for the analysis of proposed sector operations plans, including a relative maximum number of participants, ports, and ACE. However, the September roster information is not final, as permit holders may withdraw and join the common pool up through April 30 of the following calendar year, and NMFS may provide additional opportunities for permit holders to join a sector prior to the start of the FY, as it did this year by extending the roster deadline to December 1, 2010, which may lead to a modification of sector membership. Based on industry request, NMFS again reopened the rosters for certain permit holders who acquired permits after the December 1, 2010, roster deadline. As noted in section 1.0 of the Final EA, such changes are minimal and do not substantively affect the analyses. The proposed rule contained the most up-to-date information regarding sector membership and proposed ACEs available at the time of publication, based on updates by sector managers or additions/changes as a result of extensions to the roster deadline. Because of this roster flexibility, NMFS requested that the Council revise the Amendment 16 roster deadline to December 1 and the Council incorporated that change into FW 45. In future rulemakings, NMFS will endeavor to note any consistencies in roster information within the appropriate documents.

Comment 42: DMF commented that the Maine Permit Bank should be referred to as a federally funded, state-operated permit bank in section 3.2.2 of the draft EA.

Response: NMFS agrees that section 3.2.2 of the draft EA incorrectly referred to the Maine Permit Bank as a state-funded permit bank. NMFS has since revised this and other sections to reflect this correction.

Comment 43: A comment from DMF noted that the Port Clyde Community Groundfish Sector proposed a strategy in its FY 2011 operations plan (whereby the sector would cap the percentage of ACE that could be harvested from the rolling closure areas and institute a closure of the area if NEFOP data indicated a significant amount of spawning fish were being harvested) to minimize its impact on spawning fish as part of its rationale for a request for exemption from portions of the GOM Rolling Closure Areas in May and June, which was described in the proposed rule but not discussed in the draft EA.

Response: The Port Clyde Community Groundfish Sector did propose such a strategy; however, this strategy was not analyzed in the EA because not all sectors requesting exemptions from GOM rolling closure areas put forward this strategy. For the purposes of the analysis, sector exemptions that were similar were aggregated and the broadest or "worst-case" scenario was analyzed. NMFS reviewed the strategy proposed by the Port Clyde Community Groundfish Sector and determined it is not conservation equivalent to the Rolling Closure Areas, because the impacts discussed in the EA could result from the exemption, regardless of whether this mitigation strategy was adopted by all sectors.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the NMFS Assistant Administrator has determined that this final rule is consistent with the NE Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This action is exempt from review under Executive Order (E.O.) 12866.

The Assistant Administration for Fisheries (AA), NOAA, finds good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after the date of publication for the measures implemented by this final rule. Aspects of this rule are conditional upon approval and publication of the final rule for FW 45. These rules must be in effect at the beginning of FY 2011, which begins on May 1, 2011, to fully realize the environmental and economic benefits. However, the time available for this rulemaking and for the final rule for FW 45 was constrained by multiple factors, including the development of FW 45, data availability, and the scheduling of U.S. and international management bodies. Due to these constraints, the rulemaking could not be completed further in advance of May 1, 2011, and in order to have this action effective at the beginning of FY 2011, it is necessary to waive the 30-day delay period for this rule.

In addition, the AA finds that this rule relieves several restrictions under 5 U.S.C. 553(d)(1), because this rule helps the NE multispecies fishery mitigate the adverse economic impacts resulting from continued efforts to end overfishing and rebuild overfished stocks, and increases the economic efficiency of vessel operations through the authorization of 19 sector operations plans for FY 2011. As explained in detail above, 17 exemptions have been approved for FY 2011, which provide increased flexibility to sectors by exempting them from effort control restrictions that would be onerous for fishing vessels whose fishing activity is constrained by a hard quota.

Failure to waive the 30-day delay in effectiveness could result in short-term adverse economic impacts to NE multispecies vessels and associated fishing communities, as well as to the fish stocks subject to this rule. Without this rule, vessels that have signed up to join a sector in FY 2011 (836 vessels, 57 percent of eligible groundfish vessels) would not be able to take advantage of the flexibility in vessel operations this rule implements. For example, sector vessels would receive exemptions from trip limits, DAS, and seasonal closure areas that this rule allows. Moreover, because vessels committed to a sector may not fish in both the common pool and a sector in the same FY, vessels currently signed into a sector would be forced to cease fishing operations entirely during the delay in effectiveness, or forego sector membership for the entire FY, thereby losing the mitigating economic efficiencies of the restrictions relieved for sector vessels. This would also reduce the economic efficiency of the majority of the fleet until such measures become effective, and cause unnecessary adverse economic impacts to affected vessels. For the reasons above, the requirement to delay implementation of this rule for a period of 30 days is hereby waived.

A Final Regulatory Flexibility Analysis (FRFA) was prepared for this rule, as required by section 604 of the Regulatory Flexibility Act (RFA). The FRFA consists of and incorporates the Initial Regulatory Flexibility Analysis (IRFA), which was summarized in the preamble of the proposed rule, the relevant portions of the proposed rule describing sector operations plans and requested exemptions, the corresponding analysis in the EA prepared for this action, the discussions, including responses to public comments included in this rule, and this summary of the FRFA.

Description and Estimate of the Number of Small Entities to Which the Final Rule Would Apply

This action will affect regulated entities engaged in commercial fishing for groundfish that have elected to join any one of the 19 proposed sectors that have submitted operations plans for FY 2011. Any limited access Federal permit issued under the NE Multispecies FMP is eligible to join a sector (Table 4). The Small Business Administration (SBA) size standard for commercial fishing (NAICS code 114111) is $4 million in sales. Available data indicate that, based on 2005–2007 average conditions, median gross annual sales by commercial fishing vessels were just over $200,000, and no single fishing entity earned more than $2 million annually. Although we acknowledge there are likely to be entities that, based on rules of affiliation, would qualify as large business entities, due to lack of reliable ownership affiliation data, NMFS cannot apply the business size standard at this time. Data are currently being compiled on vessel ownership that should permit a more refined assessment and determination of the number of large and small entities in the groundfish fishery for future actions. However, for this action, since available data are not adequate to identify affiliated vessels, each operating unit is considered a small entity for purposes of the RFA, and, therefore, there is no differential impact between small and large entities. As of February 1, 2011, 836 of 1,475 eligible permits had elected to join a sector. Table 4 summarizes the number and percent of individual permits currently enrolled in a sector for FY 2011, as well as those predicted to be active. Since individuals may withdraw from a sector at any time prior to the beginning of FY 2011, the number of permits participating in sectors on May 1, 2011, and the resulting sector ACE allocations, are likely to change. Additionally, NMFS is allowing for a limited reopening of the roster, through April 30, 2011, for new permit holders who acquired their permits through an ownership change that occurred after December 1, 2010.

Over the past decade, there has been a significant amount of consolidation in this fishery in response to management measures to end overfishing of, and to rebuild, groundfish stocks. The recent implementation of ACLs and AMs, and the expanded use of sectors under Amendment 16, has affected fishing patterns in ways that cannot yet be quantified and analyzed. Sector measures were intended to provide a mechanism for vessels to pool harvesting resources and consolidate operations in fewer vessels, if desired, and to provide a mechanism for capacity reduction through consolidation. The reasons why fewer vessels have fished thus far in FY 2010, in comparison to FY 2009, may be related to owners with multiple vessels fishing fewer vessels, or vessel owners or sectors using quota differently and waiting to fish later in the FY to maximize revenue in response to some of the efficiencies gained through the implementation of sector measures in 2010. It is also likely that some vessels that have not landed groundfish have received revenue from leasing the groundfish allocated to them by their sector or have been fishing in other fisheries. Thus, fewer vessels are actively fishing for and landing regulated species and ocean pout stocks, with 10 percent of the fishing vessels earning more than half of the revenues from such stocks since 2005, leading to a seemingly continuing trend of consolidation in the fishery. However, as alluded to above, this trend began before the implementation and expansion of the sector program and, based on limited data available to date, the trend is not significantly out of proportion to FYs prior to the implementation of Amendment 16. Further, most proposed FY 2011 sectors are anticipating no further consolidation than previously occurred through FY 2010. Five sectors have reported that they anticipate a smaller percentage of permits to harvest groundfish for FY 2011 as compared to FY 2010. Based upon concerns over consolidation raised by the public during the development of Amendment 16, the Council is currently working on a white paper regarding fleet diversity and accumulation limits, and has begun development of an amendment to the FMP to address concerns identified (i.e., Amendment 18).

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Action

This rule contains no collection-of-information requirement subject to the Paperwork Reduction Act.

Description of Steps the Agency Has Taken To Minimize the Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

Joining a sector is voluntary. This means that the decision whether or not to join a sector may be based upon which option—joining a sector or fishing under effort controls in the common pool—offers the greater economic advantage. Since sectors would be granted certain universal exemptions, and may request and be granted additional exemptions from regulatory measures that will apply to common pool vessels, sector vessels would be afforded greater flexibility. Sector members would no longer have groundfish catch limited by DAS allocations and would, instead, be limited by their available ACE. In this manner, the economic incentive changes from maximizing the value of throughput of all species on a DAS to maximizing the value of the sector ACE. This change places a premium on timing of landings to market conditions, as well as changes in the selectivity and composition of species landed on fishing trips.

Unlike common pool vessels, sectors bear the administrative costs associated with preparing an EA, as well as the costs associated with sector management, DSM, and at-sea monitoring. However, FW 45 changes the required coverage level for DSM to the level NMFS is able to fund, up to 100-percent coverage through FY 2012, prioritizing coverage for trips that have not received at-sea or electronic monitoring. The magnitude of the administrative costs for sector formation and operation is estimated to range from $60,000 to $150,000 per sector, and the potential cost for dockside and at-sea monitoring ranges from $13,500 to $17,800 per vessel. These estimates serve to illustrate the fact that the potential administrative costs associated with joining a sector may be expected to influence a vessel owner's decision. The majority of these administrative costs was subsidized by NMFS in FY 2010 and will continue to be subsidized in FY 2011. Whether these subsidies, which include providing financial support for preparation of sector EAs, DSM, and at-sea monitoring, will continue beyond FY 2011 is not known. Nevertheless, these subsidies may make joining a sector a more attractive economic alternative for FY 2011.

The capability to form a sector in the groundfish fishery was first implemented in 2004 through Amendment 13. Prior to FY 2010, there were only two sectors operating and only one sector had been operating continuously from FY 2004 to FY 2010. Available data (Table 5) suggest that the economic performance of the two sectors that had been operating prior to FY 2010 was positive. Whether improved profitability experienced by these two sectors will translate into improved performance for all 17 sectors that were implemented during FY 2010 is not known since the FY is incomplete. Amendment 16 revised and expanded sector management and was analyzed in an environmental impact statement. The analysis conducted for Amendment 16 posited that the combination of relief from specific regulations and the incentives to change fishing practices would result in improved ACL utilization compared to TAC use rates while the majority of the groundfish fleet was still operating under DAS controls. Using a straight-line projection approach suggests that for most stocks the use rates for aggregate sector ACLs will be higher than the average observed TAC use rates compared to FY 2007 and FY 2008. This assumes that the average weekly catch rates by sector vessels will remain constant for the remainder of the FY. Further, given substantial differences in ACE across sectors and among members within sectors, economic performance may be expected to vary considerably.

Small entity impacts may differ depending on sector-specific operations plans. The number of permits that have enrolled in each sector, as well as the operating characteristics of the sector, may have an economic affect on sector members (Table 1). The number of permits enrolled in a sector ranges from 7 to 105. The allocation to any given sector is based on the combined sum of the PSC for each stock associated with all permits enrolled in that sector. All sector operations plans convert the total ACE into an individual share proportional to the PSC that each member brings to the sector. This share is then allocated to the member to be fished by that member or traded to another sector member.

Sector operations plans include a number of harvesting rules designed to track catches, as required, but also contain provisions that require advance notification of when the sector or sector member may be approaching a harvest share limit or the sector's ACE for a given stock. This system may provide the information needed to allow sector members to more fully utilize their harvest share.

TABLE 4—SUMMARY OF THE NUMBER AND PERCENT OF INDIVIDUAL PERMITS AND LIKELY ACTIVE PERMITS CURRENTLY ENROLLED IN A SECTOR FOR FY 2011

Sector	Number of individual permits *	Percent of individual permits	Number of active permits *	Percent of active permits **
Northeast Fishery Sector II	85	5.76	42	49.41
Northeast Fishery Sector III	95	6.44	47	49.47
Northeast Fishery Sector IV	43	2.92	0	0.00
Northeast Fishery Sector V	34	2.31	27	79.41
Northeast Fishery Sector VI	19	1.29	5	26.32
Northeast Fishery Sector VII	20	1.36	13	65.00
Northeast Fishery Sector VIII	20	1.36	16	80.00
Northeast Fishery Sector IX	60	4.07	25	41.67
Northeast Fishery Sector X	51	3.46	21	41.18
Northeast Fishery Sector XI	46	3.12	21	45.65
Northeast Fishery Sector XII	11	0.75	6	54.55
Northeast Fishery Sector XIII	35	2.37	29	82.86
Fixed Gear Sector	100	6.78	40	40.00
Sustainable Harvest Sector 1	105	7.12	38	36.19
Sustainable Harvest Sector 3	18	1.22	0	0.00
Port Clyde Sector	39	2.64	24	61.54
Tri-State Sector	19	1.29	6	31.58
Northeast Coastal Community Sector	30	2.03	10	33.33
Maine Permit Bank Sector	7	0.47	0	0.00
All Sectors	837	56.75	370	44.21

* Number of permits in each sector is from sector operation plans and EAs submitted as of February 1, 2011. These numbers may increase due to changes in permit ownership or decrease due to a permit holder dropping out of a sector prior to the beginning of FY 2011.

** In 2010, 453 sector vessels were reported to be active vessels.

TABLE 5—SECTOR CATCHES AND PROJECTED ACL USE RATES FOR FY 2010

[May 1, 2010–March 26, 2010]

Stock	Percent sector catch	Sector weekly catch rate (%/week)	Projected FY10 sector ACL utilization	2007–2008 Average utilization rate
GB Cod	69.3	1.4	75.1	44
GOM Cod	81.0	1.7	87.7	69
GB Haddock	16.1	0.3	17.4	17
GOM Haddock	41.8	0.9	45.3	51
GB Yellowtail Flounder	63.6	1.3	68.9	117

TABLE 5—SECTOR CATCHES AND PROJECTED ACL USE RATES FOR FY 2010—Continued

[May 1, 2010–March 26, 2010]

Stock	Percent sector catch	Sector weekly catch rate (%/week)	Projected FY10 sector ACL utilization	2007–2008 Average utilization rate
SNE/MA Yellowtail Flounder	50.3	1.0	54.5	174
CC/GOM Yellowtail Flounder	75.9	1.6	82.2	55
Plaice	52.0	1.1	56.4	28
Witch Flounder	77.7	1.6	84.2	24
GB Winter Flounder	70.0	1.5	75.8	48
GOM Winter Flounder	57.4	1.2	62.2	NA
Redfish	27.8	0.6	30.1	46
White Hake	75.6	1.6	81.9	114
Pollock [1]	29.9	0.6	32.4	82

[1] The 2010 projection of the pollock sector use rate is significantly lower than that of the 2008–2009 average. This is because the revised pollock reference points raised the ACL substantially above the TAC-levels set for either 2007 or 2008.

This action will provide relief from having to comply with specified regulations. These regulatory exemptions include a set of universal exemptions in Amendment 16, as well as the additional exemptions requested by individual sectors. During FY 2010, a number of exemptions were requested by individual sectors. To provide maximum regulatory relief, as well as to reduce the cost of administering, monitoring, and enforcing a unique set of exemptions for each sector, these sector-requested exemptions were extended to additional sectors for the remainder of FY 2010 through supplemental rulemaking. The exemptions in this rule were analyzed as though they were approved for all sectors, whether it had been requested or not. However, unlike the universal exemptions, any of the sector exemptions approved during FY 2010 must be requested again for FY 2011. All exemptions requested by the sectors were intended to provide positive social and economic effects to sector members and ports.

The objective of sector management, as originally developed and implemented under Amendment 13 and expanded under Amendment 16, is to provide opportunities for like-minded vessel operators to govern themselves so that they can operate in a more effective and efficient manner. Sectors developed the proposed operations plans and prospective members signed binding sector contracts to abide by the measures specified in the proposed operations plan. NMFS is unable to develop additional alternatives because this would require NMFS to develop sector operations plans, which is counter to the intent of sectors, as outlined in Amendment 16. Accordingly, the proposed operations plans reflect the management measures preferred by participating vessels. Therefore, no other alternatives in addition to the No Action and the preferred alternative were considered. Under the No Action alternative, none of the FY 2011 sector operations plans would be approved, none would be approved to operate, none would receive an authorization to fish, and no exemptions would be granted in FY 2011. Therefore, no sector would receive a LOA to fish or an allocation to fish. Under this scenario, vessels would remain in the common pool and fish under the common pool regulations. Because of effort control changes made by both Amendment 16 and Framework 44, it is likely that vessels enrolled in a sector for FY 2011 and forced to fish in the common pool would experience revenue losses in comparison to the proposed action. It is more likely under the No Action alternative that the ports and fishing communities where sectors plan to land their fish would be negatively impacted.

Below is the analysis for the preferred alternative, which is being implemented in this final rule. An exemption for the following requirements has been granted to the requesting sectors because each sector's ACE reduces the need for effort controls, and there are perceived economic benefits from such exemptions: (1) 120-day block out of the fishery required for Day gillnet vessels; (2) prohibition on a vessel hauling another vessel's gillnet gear; (3) limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS; (4) limitation on the number of gillnets imposed on Day gillnet vessels; (5) 20-day spawning block out of the fishery required for all vessels; (6) limits on the number of hooks that may be fished; and (7) DAS Leasing Program length and horsepower restrictions; (8) prohibition on the possession or use of squid or mackerel in the CA I Hook Gear Haddock SAP; (9) sink gillnet mesh size restrictions on the GOM from January through April; (10) extension of the sink gillnet mesh size restrictions on the GOM through the month of May; (11) prohibition on discarding; (12) daily catch reporting by Sector Managers for vessels participating in the CA I Hook Gear Haddock SAP; (13) trawl gear restrictions in the U.S./Canada Management Area; and (14) the requirement to power a VMS while at the dock; (16) DSM requirements for Handgear A permitted sector vessels; (16) DSM requirements for vessels fishing west of 72°30′ W. long.; and (17) DSM Requirements for monkfish trips when fishing in the monkfish SFMA.

Exemption from the Day gillnet 120-day block out of the fishery requirement was requested by the GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. Existing regulations require that vessels using gillnet gear remove all gear from the water for 120 days per year. Since the time out from fishing is up to the vessel owner to decide (with some restrictions), many affected vessel owners have purchased more than one vessel such that one may be used while the other is taking its 120-day block out of the groundfish fishery, to provide for sustained fishing income. Acquiring a second vessel adds the expense of outfitting another vessel with gear and maintaining that vessel. The exemption from the 120-day block allows sector members to realize the cost savings associated with retiring the redundant vessel. Furthermore, this exemption provides additional flexibility to sector vessels to maximize the utility of other sector-specific and universal exemptions, such as the exemption from the GB Seasonal Closure in May and portions of the GOM Rolling Closure Areas.

The GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested exemption from the prohibition on a vessel hauling gear that was set by another vessel. The community fixed-gear exemption allows sector vessels in the Day gillnet category to effectively pool gillnet gear that may be hauled or set by sector members. This provision reduces the total amount of gear that would have to be purchased and maintained by participating sector members, resulting in some uncertain level of cost savings, along with a possible reduction in total gear fished.

The GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector was requested to be exempt from the limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS. Approving this exemption increases operational flexibility and provide an opportunity for a substantial portion of the fleet to improve vessel profitability.

The GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, V–VIII, and X–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested an exemption from the limit on the number of nets (not to exceed 150) that may be deployed by Day gillnet vessels. This exemption provides greater flexibility to deploy fishing gear by participating sector members according to operational and market needs.

The GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II–III and V–XIII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested an exemption from the 20-day spawning block out of the fishery requirement. Exemption from the 20-day spawning block improves flexibility to match trip planning decisions to existing fishing and market conditions. Although vessel owners currently have the flexibility to schedule their 20-day block according to business needs (within a 3-month window) and may use that opportunity to perform routine or scheduled maintenance, vessel owners may prefer to schedule these activities at other times of the year, or may have unexpected repairs. Removing this requirement may not have a significant impact, but would still provide vessel owners with greater opportunity to make more efficient use of their vessel.

The GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested exemption from the number of hooks that may be fished. These exemptions provide vessel owners in these sectors with the flexibility to adapt the number of hooks fished to existing fishing and market conditions. This exemption also provides an opportunity to improve vessel profitability. The exemption from the number of hooks that may be fished has been granted to the GB Cod Hook Sector every year since FY 2004, and was granted to the GB Cod Fixed Gear Sector for FY 2010. Approving this exemption for these additional sectors extends the potential economic benefits to more vessels in other sectors.

The GB Cod Fixed Gear Sector; the Maine Permit Bank Sector; all 12 Northeast Fishery Sectors; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested an exemption from regulations that currently limit leasing of DAS to vessels within specified length and horsepower restrictions. Current restrictions create a system in which a small vessel may lease DAS from virtually any other vessel, but is limited in the number of vessels that small vessels may lease to. The opposite is true for larger vessels. Exemption from these restrictions allows greater flexibility to lease DAS between vessels of different sizes and may be expected to expand the market of potential lessees for some vessels. The efficiency gains of this exemption for a requesting sector would be limited because the exemption would only apply to leases within and between sectors requesting this exemption. Since DAS would not be required while fishing for groundfish, the economic importance of this exemption are associated with the need to use groundfish DAS when fishing in other fisheries, for example, monkfish.

The GB Cod Fixed Gear Sector requested an exemption from the prohibition on the use of squid or mackerel as bait, or possessing squid or mackerel on board vessels, when participating in the CA I Hook Gear Haddock SAP. Providing relief from the bait restrictions provides participating sector vessels with greater operational flexibility to choose the bait that best meets fishing circumstances. Participating vessels are also able to use the bait of their choice, depending on expected catch, as well as the cost of bait.

The exemption from sink gillnet mesh size restriction in the GOM from January through April was requested by the GB Cod Fixed Gear Sector; Northeast Fishery Sectors III, VI–VIII, and X–XII; the Port Clyde Community Groundfish Sector; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector. The exemption allows the use of 6-inch (15.24-cm) mesh gillnets in the GOM RMA from January 1, 2012, through April 30, 2012. This exemption provides participating sector vessels an opportunity to potentially retain more GOM haddock, a healthy stock, and share in the benefits from the stock recovery. To utilize this exemption, it would be necessary for participating sector vessels to purchase 6-inch (15.24-cm) mesh gillnets. However, it would allow a greater catch of haddock, which may increase revenues for gillnet fishermen and the ports where they land their fish, particularly if participating vessels are able to change fishing behavior to selectively target this stock and minimize catch of other allocated target stocks.

The GB Cod Fixed Gear Sector, and Northeast Fishery Sectors III, VI–VIII, and X requested an exemption from the sink gillnet mesh size restriction in the GOM in May, thereby extending the sink gillnet mesh size exemption in the GOM. This ancillary exemption to the sink gillnet mesh size restriction in the GOM provides participating sector vessels an opportunity to achieve higher profitability. Preliminary estimates indicate that about half of the available GOM haddock ACE will not be taken during FY 2010. This does not necessarily mean, however, that a larger share of the GOM haddock ACE will not be taken, as the FY has another 5 months.

The GB Cod Fixed Gear Sector; and Northeast Fishery Sectors XI–XIII requested an exemption from the regulations that currently prohibit sector vessels from discarding any legal-size regulated species allocated to sectors. Sector vessels have had to retain legal-size unmarketable fish, which requires them to store this fish on the vessel while at sea, in some cases in large quantities in totes on deck, which creates potential unsafe work conditions. In addition, sector vessels have had to determine a method of disposal for any unmarketable fish landed. Anecdotal information indicates that some fish dealers dispose of unmarketable fish for sector vessels as a courtesy; however, the scope of this occurrence and any operational costs incurred by the dealer or vessels is unknown. A partial exemption from this regulation would allow sector vessels to discard unmarketable fish, and would provide sector vessels more operational flexibility and improves safety conditions at sea. It also relieves the burden, if any, on sector vessels and their dealers to find a way to dispose of the unmarketable fish once landed.

The GB Cod Fixed Gear Sector and the Northeast Coastal Communities Sector requested an exemption from the requirement that the sector manager submit daily catch reports for the CA I Hook Gear Haddock SAP, proposing instead that members submit daily catch reports directly to NMFS. Eliminating the daily catch reporting by sector managers provides some administrative relief to the sector. Reporting burden of individual participating vessels remains unchanged, as they would merely change the recipient of their current daily report. This exemption may result in some cost savings to the operation of any given sector and therefore reduce the transactions costs to all sector members, not only to the individual vessels or sector members that participate in the SAP.

Northeast Fishery Sectors II and V, the Sustainable Harvest Sectors 1 and 3, and the Tri-State Sector requested an exemption from the trawl gear requirements in the U.S./Canada Management Area. This exemption allows the use of any groundfish trawl gear, provided the gear conforms to regulatory requirements for using trawl gear to fish for groundfish in the GB RMA. This exemption results in greater operational flexibility to participating sector vessels, as these vessels would be able to better harvest allocation of ACE. Whether this would result in increased profitability depends on the ability to achieve cost efficiencies by reducing the amount and type of gear necessary to prosecute the groundfish fishery in the U.S./Canada Management Area and elsewhere, and/or the ability to reduce operating costs if the same amount of ACE can be taken with less fishing time.

The GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors IV, VI, and X; the Port Clyde Community Groundfish Sector, and the Tri-State Sector requested an exemption from the requirement to power a VMS while at the dock. Maintaining a VMS signal while at the dock, or tied to a mooring, requires constant power be delivered to the vessel or constant use of onboard generators at all times. These requirements increase the cost of operating a fishing vessel, whether the vessel is fishing or not. This exemption provides the opportunity to reduce the overhead costs of maintaining a fishing operation and would result in some improved profitability.

The GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors III and V–XIII; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested partial exemptions from DSM requirements. NMFS has approved exemptions to DSM requirements for Handgear A permitted sector vessels, for vessels fishing west of 72°30′ W. long., and an exemption from DSM requirements for gillnet and trawl vessels on concurrent multispecies and monkfish DAS when using 10-inch (24.4-cm) or greater mesh fishing in the monkfish SFMA. The cost of DSM for FY 2010 has been subsidized by NMFS. Based on preliminary data, the overall average cost associated with DSM averaged about $0.02 per landed pound of groundfish, but ranged from approximately $0.01 to $0.06 per pound of groundfish landed. The estimated cost per pound landed for monitored trips was based on invoices received by sectors from May–February 2010. However, not all sectors had sent in invoices as of the date the average cost reported herein were estimated, so the actual costs may differ by sector and may be substantially different once the FY has been completed. Sectors are reimbursed based upon an agreed-upon formula between the Gulf of Maine Research Institute and sector managers to calculate reimbursement for DSM services, which includes a per-pound rate of $0.015, $33 per trip monitored, and $27 per trip requiring a roving monitor. Using methods similar to that used to estimate expected revenues for the FY 2011 and FY 2012 ACLs (i.e., based on a linear projection of average ACL use rates and average discard rates), the total estimated cost for DSM for FY 2010 would be $616,000, or 0.8 percent of estimated FY 2010 revenues. Through Amendment 16, DSM was scheduled to be reduced to 20 percent during FY 2011, and the estimated monitoring cost would be $281,000, or 0.4 percent of the estimated FY 2011 groundfish revenues, however, FW 45 alters the coverage level. NMFS anticipated that 62 percent of trips will receive coverage in FY 2011. The actual overall average DSM cost per pound landed will be zero for any lease-only sectors, and may be higher for sectors with below average landings per trip, since the trip cost gets spread out over fewer pounds. Similarly, the average cost per pound may be lower for sectors with higher than average landings per trip. Granting these exemptions will alleviate all up-front costs associated with this program, as well as the unreimbursed costs for monitoring of other stocks, and therefore provide the opportunity to reduce the overhead costs of operating a fishing vessel, which may result in some improved profitability.

NMFS received several comments on those exemption requests that NMFS identified as requests of concern in the proposed rule; however, these comments did not provide any new or additional data to support approval of these exemptions. For FY 2011, NMFS did not approve requests for exemption from the following requirements: (18) Access to GOM Rolling Closure Areas in May and June; (19) prohibition on pair trawling; (20) minimum hook size requirements for demersal longline gear; (21) minimum mesh size requirement on targeted redfish trips; (22) Ruhle and Haddock Separator requirements to utilize the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl in areas where these gear types are approved; (23) all DSM and roving monitoring requirements; (24) DSM requirements for hook vessels when the sector has caught less than 10,000 lb (4,535.9 kg) of groundfish per year; (5) DSM requirements in May when fishing in several Mid-Atlantic NMFS Statistical Areas; (26) DSM, roving monitoring, and hail requirements for vessels using demersal longline, jig, and handgear while targeting spiny dogfish in Massachusetts state waters of NMFS Statistical Area 521; (27) DSM requirements when at-sea monitoring has previously observed the trip; (28) the requirement to delay offloading due to the late arrival of the assigned monitor; (29) the prohibition on offloading of non-allocated stocks prior to the arrival of the monitor; and (30) the requirement to provide a sector roster to NMFS by the specified deadline.

The GB Cod Fixed Gear Sector, the Northeast Coastal Communities Sector, Northeast Fishery Sectors II and III, the Port Clyde Community Groundfish Sector, and Sustainable Harvest Sectors 1 and 3 requested access to specific blocks within the GOM Rolling Closure Areas (Exemption 18), specifically blocks 138 and 139 during May and/or access to blocks 139, 145, and 146 during June. These closure areas were selected primarily to reduce fishing mortality on GOM cod at a time of year where catch rates had been observed to be high. However, they also serve to protect spawning fish, as well as protected species and therefore this exemption request was not approved for FY 2011. Given higher catch per unit effort, sector vessels would have been able to harvest available ACE at a lower cost, since less fishing time would be required to harvest the same amount of available ACE. Whether this would have resulted in higher profitability is uncertain, since prices during May and June tend to be lower due to larger supplies and somewhat lower fish quality. During FY 2010, average cod prices have been above their historic average. The price effect of increased supplies of cod entering the market early in the FY is uncertain, but could have offset some of the cost savings associated with being able to obtain higher catch rates.

Northeast Fishery Sectors V–X and XIII requested an exemption from the prohibition on pair trawling (Exemption 19). Pair trawling was originally prohibited because of its higher catch rates and impacts to then-declining cod and haddock stocks. Providing an exemption allowing for pair trawling would have provided participating sector vessels with greater operational flexibility. However, the high catch rates that resulted from this fishing practice while under DAS management may not have been as advantageous under sector management unless the practice could be used to selectively target stocks for which a sector has a comparatively large ACE. That is, characterizing the use of pair trawling as highly efficient may be accurate from a technical standpoint, but may not necessarily be economically efficient unless catch rates of stocks with limiting ACE can be reduced or eliminated. This exemption was disapproved in FY 2011 due to possible diminished selectivity of the gear and potential interactions between protected species.

The GB Cod Fixed Gear Sector and the Northeast Coastal Communities Sector requested an exemption from the minimum hook size (Exemption 20). This exemption may have improved operational flexibility for participating sector vessels, but it was uncertain whether the ability to use alternative hook sizes would translate into improved profitability, particularly if the larger hook does select for larger fish, which do tend to fetch a premium price. Nevertheless, the exemption would have improved flexibility and may have allowed delivery of a broader range of fish sizes to final markets.

The GB Cod Fixed Gear Sector and Northeast Fishery Sectors II, V–X, and XIII requested an exemption from the trawl minimum mesh size when targeting redfish, a healthy stock. The 6.5-inch (16.51-cm) mesh size has been argued to be too large to catch Acadian redfish in quantities that would have permitted development of a targeted fishery. The proposed exemption would have offered participating sector vessels greater operational flexibility. These sectors proposed that the fishery using this exemption would have been monitored using 100-percent observer coverage, and would have required daily catch reporting to the sector manager. Whether the potential improved catch rates would offset these added costs is uncertain. As long as the at-sea monitoring or observer costs are being subsidized, the only added cost may have been the requirement for daily reporting by the sector manager. The extent to which observer costs would continue to be subsidized is unknown, but may have been needed to be taken into account when assessing the potential profitability that developing a targeted redfish fishery may provide.

Northeast Fishery Sectors II, V–X, and XIII requested an exemption from gear restrictions in the U.S./Canada Management Area, and would have allowed for the use of the 98.4-inch x 15.7-inch (250-cm x 40-cm) Eliminator Trawl. This exemption would have allowed the use of a configuration of an eliminator trawl that differs from what is currently approved for specific areas, including the U.S./Canada Management Area. Allowing this exemption would have offered greater operational flexibility, but would still be limited to the areas and conditions under which the current eliminator or Ruhle trawl has already been approved. While this net may be used in open areas, the use of this net is prohibited in the Special Management Program, including the SAPs, and Gear Restricted Areas. This exemption was requested because the specification for approved gear types for these areas is too large to be utilized by some of the participating sector vessels. The extent to which this exemption may have improved economic profitability is uncertain, but would have been limited to vessels that have already purchased the gear, would have been able to re-rig existing gear at low cost, and would have accessed the areas where the Ruhle trawl is already approved.

The GB Cod Fixed Gear Sector; the Northeast Coastal Communities Sector; Northeast Fishery Sectors II–III and V–XIII; Sustainable Harvest Sectors 1 and 3; and the Tri-State Sector requested complete or additional partial exemptions from DSM requirements. As stated above, the cost of DSM for FY 2010 has been subsidized by NMFS. Based on preliminary data, the overall average cost associated with DSM averaged about $0.02 per landed pound of groundfish, but ranged from approximately $0.01 to $0.06 per pound of groundfish landed. The estimated cost per pound landed for monitored trips was based on invoices received by sectors from May–February 2010. However, not all sectors had sent in invoices as of the date the average cost reported herein were estimated, so the actual costs may differ by sector and may be substantially different once the FY has been completed. Sectors are reimbursed based upon an agreed formula between the Gulf of Maine Research Institute and sector managers to calculate reimbursement for DSM services, which includes a per-pound rate of $0.015, $33 per trip monitored, and $27 per trip requiring a roving monitor. Using methods similar to that used to estimate expected revenues for the FY 2011 and FY 2012 ACLs (i.e., based on a linear projection of average ACL use rates and average discard rates), the estimated cost for DSM for FY 2010 would be $616,000, or 0.8 percent of estimated FY 2010 revenues. Through Amendment 16, DSM was scheduled to be reduced to 20 percent during FY 2011, and the estimated monitoring cost would be $281,000, or 0.4 percent of the estimated FY 2011 groundfish revenues, however, FW 45 alters the coverage level. The actual overall average DSM cost per pound landed will be zero for any lease-only sectors, and may have been higher for sectors with below average landings per trip, since the trip cost gets spread out over fewer pounds. Similarly, the average cost per pound may be lower for sectors with higher than average landings per trip. Granting all or a portion of these exemptions would have alleviated additional up-front costs associated with this program, as well as the unreimbursed costs for monitoring of other stocks, and therefore would have provided additional opportunity to reduce the overhead costs of operating a fishing vessel, which may have resulted in some additional improved profitability.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1966 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to sector members that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Regional Administrator. The guide and this final rule will be available upon request.

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

Dated: April 18, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 2011–9711 Filed 4–19–11; 4:15 pm]

BILLING CODE 3510–22–P

FEDERAL REGISTER

Vol. 76 Monday,
No. 79 April 25, 2011

Part IV

Department of Transportation

14 CFR Parts 244, 250, 253 Et al.
Enhancing Airline Passenger Protections; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 244, 250, 253, 259, and 399

[Docket No. DOT–OST–2010–0140]

RIN 2105–AD92

Enhancing Airline Passenger Protections

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The Department of Transportation is issuing a final rule to improve the air travel environment for consumers by: Increasing the number of carriers that are required to adopt tarmac delay contingency plans and the airports at which they must adhere to the plan's terms; increasing the number of carriers that are required to report tarmac delay information to the Department; expanding the group of carriers that are required to adopt, follow, and audit customer service plans and establishing minimum standards for the subjects all carriers must cover in such plans; adding carriers to those required to include their contingency plans and customer service plans on their websites; increasing the number of carriers that must respond to consumer complaints; enhancing protections afforded passengers in oversales situations, including increasing the maximum denied boarding compensation airlines must pay to passengers bumped from flights; strengthening, codifying and clarifying the Department's enforcement policies concerning air transportation price advertising practices; requiring carriers to notify consumers of optional fees related to air transportation and of increases in baggage fees; prohibiting post-purchase price increases; requiring carriers to provide passengers timely notice of flight status changes such as delays and cancellations; and prohibiting carriers from imposing unfair contract of carriage choice-of-forum provisions. The Department is taking this action to strengthen the rights of air travelers in the event of oversales, flight cancellations and delays, ensure that passengers have accurate and adequate information to make informed decisions when selecting flights, prohibit unfair and deceptive practices such as post-purchase price increases and contract of carriage choice-of-forum provisions, and to ensure responsiveness to consumer complaints.

DATES: This rule is effective August 23, 2011 except for the amendments to 14 CFR 399.84 which become effective October 24, 2011.

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Tim Kelly or Daeleen Chesley, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202–366–9342 (phone), 202–366–7152 (fax), *tim.kelly@dot.gov* or *blane.workie@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 2009, the Department published a final rule in which it required certain U.S. air carriers to adopt contingency plans for lengthy tarmac delays; respond to consumer problems; post flight delay information on their websites; and adopt, follow, and audit customer service plans. The rule also defined chronically delayed flights and deemed them to be an "unfair and deceptive" practice. The majority of the provisions in that rule took effect on April 29, 2010. See 74 FR 68983 (December 30, 2009).

In the preamble to that final rule, the Department noted that it planned to review additional ways to further enhance protections afforded airline passengers and listed a number of subject areas that it was considering addressing in a future rulemaking. On June 8, 2010, the Department published a notice of proposed rulemaking (NPRM), 75 FR 32318, in which it addressed the following areas: (1) Contingency plans for lengthy tarmac delays; (2) reporting of tarmac delay data; (3) customer service plans; (4) contracts of carriage; (5) responding to consumer problems/complaints (6) oversales; (7) full fare advertising; (8) baggage and other ancillary fees; (9) post-purchase price increases; (10) notification to passengers of flight status changes; (11) choice-of-forum provisions; and (12) peanut allergies. In response to the NPRM, the Department received over 2100 comments, the vast majority of which were related to the proposal to address peanut allergies in air travel.

The Department received comments on the NPRM from the following: U.S. carriers and U.S. carrier associations; foreign air carriers and foreign carrier associations; U.S. and foreign consumer groups; travel agents and members of organizations in the travel industry; airports and various airport-related industry groups; members of Congress; embassies; peanut industry groups and allergy associations; as well as a number of individual consumers. In addition, the Department received a summary of the public discussion on the NPRM proposals that occurred on the Regulation Room Web site, *http://www.regulationroom.org*. The Regulation Room site is a site where members of the public can learn about and discuss proposed federal regulations and provide feedback to agency decision makers. To support this Administration's open government initiative, the Department partnered with Cornell University in this pilot project to discover the best ways to use Web 2.0 and social networking technologies to increase effective public involvement in the rulemaking process.

The Department has carefully reviewed and considered the comments received. The commenters' positions that are germane to the specific issues raised in the NPRM and the Department's responses are set forth below, immediately following a summary of regulatory provisions and a summary of the regulatory analysis.

Summary of Regulatory Provisions

Subject	Final rule
Tarmac Delay Contingency Plans	• Requires foreign air carriers operating to or from the U.S. with at least one aircraft with 30 or more passenger seats to adopt and adhere to tarmac delay contingency plans. • Requires U.S. and foreign air carriers to not permit an international flight to remain on the tarmac at a U.S. airport for more than four hours without allowing passengers to deplane subject to safety, security, and ATC exceptions. • Expands the airports at which airlines must adhere to the contingency plan terms to include small hub and non-hub airports, including diversion airports. • Requires U.S. and foreign carriers to coordinate plans with Customs and Border Protection (CBP) and the Transportation Security Administration (TSA).

Subject	Final rule
	• Requires notification regarding the status of delays every 30 minutes while aircraft is delayed, including reasons for delay if known. • Requires notification of opportunity to deplane from an aircraft that is at the gate or another disembarkation area with door open if the opportunity to deplane actually exists.
Tarmac Delay Data	• Requires all carriers that must adopt tarmac delay contingency plans to file data with the Department regarding lengthy tarmac delays.

Customer Service Plans	• Requires foreign air carriers that operate scheduled passenger service to and from the U.S. with at least one aircraft with 30 or more passenger seats to adopt, follow and audit customer service plans.
	• Establishes standards for the subjects U.S. and foreign air carriers must cover in customer service plans. Examples include:
	  • delivering baggage on time, including reimbursing passengers for any fee charged to transport a bag if the bag is lost;
	  • where ticket refunds are due, providing prompt refunds including refund of optional fees charged to a passenger for services that the passenger was unable to use due to an oversale situation or flight cancellation; and
	  • allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure date.

Posting of Customer Service Plans and Tarmac Delay Contingency Plans.	• Requires foreign carriers to post their required contingency plans, customer service plans, and contracts of carriage on their websites as is already required of U.S. carriers.
Response to Consumer Problems	• Expands the pool of carriers that must respond to consumer problems to include foreign air carriers operating scheduled passenger service to and from the U.S. with at least one aircraft with 30 or more passenger seats (*i.e.,* monitor the effects of irregular flight operations on consumers; inform consumers how to file a complaint with the carrier, and provide substantives responses to consumer complaints within 60 days).
Oversales	• Increases the minimum denied boarding compensation limits to $650/$1,300 or 200%/400% of the one-way fare, whichever is smaller. • Implements an automatic inflation adjuster for minimum DBC limits every 2 years. • Clarifies that DBC must be offered to "zero fare ticket" holders (*e.g.,* holders of frequent flyer award tickets) who are involuntarily bumped. • Requires that a carrier verbally offer cash/check DBC if the carrier verbally offers a travel voucher as DBC to passengers who are involuntarily bumped. • Requires that a carrier inform passengers solicited to volunteer for denied boarding about all material restrictions on the use of transportation vouchers offered in lieu of cash.
Full Fare Advertising	• Enforces the full fare advertising rule as written (*i.e.,* ads which state a price must state the full price to be paid). Carriers currently may exclude government taxes/fees imposed on a per-passenger basis. • Clarifies the rule's applicability to ticket agents. • Prohibits carriers and ticket agents from advertising fares that are not the full fare and impose stringent notice requirements in connection with the advertisement of "each-way" fares available for purchase only on a roundtrip basis. • Prohibits opt-out provisions in ads for air transportation.
Baggage and Other Fees and Related Code-Share Issues.	• Requires U.S. and foreign air carriers to disclose changes in bag fees/allowances on their homepage for three months, to include information regarding the free baggage allowance. • Requires carriers (U.S. and foreign) and ticket agents to include on e-ticket confirmations information about the free baggage allowance and applicable fees for the first and second checked bag and carry-on but allows ticket agents, unlike carriers, to do so through a hyperlink. • Requires carriers (U.S. and foreign) and ticket agents to inform passengers on the first screen on which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to see these baggage fees. • Requires U.S. and foreign air carriers to disclose all fees for optional services to consumers through a prominent link on their homepage. • Requires that the same baggage allowances and fees apply throughout a passenger's journey. • Requires the marketing carrier to disclose on its website any difference between its optional services and fees and those of the carrier operating the flight. Disclosure may be made through a hyperlink to the operating carriers' websites that detail the operating carriers' fees for optional services, or to a page on its website that lists the differences in policies among code-share partners.

Subject	Final rule
Post-Purchase Price Increases	• Bans the practice of post-purchase price increases in air transportation or air tours unless the increase is due to an increase in government-imposed taxes or fees and only if the passenger was provided full disclosure of the potential for the increase and affirmatively agreed to the potential for such an increase prior to purchase.
Flight Status Changes	• Requires U.S. and foreign air carriers operating scheduled passenger service with any aircraft with 30 or more seats to promptly notify consumers through whatever means is available to the carrier for passengers who subscribe to the carrier's flight status notification services, in the boarding gate area, on a carrier's telephone reservation system and on its website of delays of 30 minutes or more, cancellations and diversions within 30 minutes of the carrier becoming aware of a change in the status of a flight.
Choice-of-Forum Provisions	• Prohibits U.S. and foreign air carriers from limiting a passenger's forum to pursue litigation to a particular inconvenient venue.

Summary of Regulatory Analysis

The regulatory analysis shows that the monetized benefits of the proposed requirements exceed their monetized costs, even without considering non-quantifiable benefits. This analysis, outlined in the table below, has determined that the present value of monetized net benefits for a 10 year period at a 7% discount rate is $14.3 million. At a 3% discount rate, the present value of monetized net benefits is estimated to be $20.3 million.

		Present value (millions)
Monetized Benefits	10 Years, 7% discounting	$45.0
	10 Years, 3% discounting	53.5
Monetized Costs	10 Years, 7% discounting	30.7
	10 Years, 3% discounting	33.2
Monetized Net Benefits	10 Years, 7% discounting	14.3
	10 Years, 3% discounting	20.3

A comparison of the monetized benefits and costs for each of the final requirements is provided in the Regulatory Analysis and Notices section, set forth below, along with information on additional benefits and costs for which quantitative estimates could not be developed.

Comments and Responses

1. Tarmac Delay Contingency Plans

A. Entities Covered

The NPRM: The NPRM proposed to require any foreign air carrier that operates scheduled passenger or public charter service to and from the U.S. using any aircraft originally designed to have a passenger capacity of 30 or more passenger seats to adopt and comply with a tarmac delay contingency plan for their flights to and from the U.S. that includes minimum assurances identical to those currently required of U.S. carriers. As proposed, it would apply to all of a foreign carrier's flights to and from a covered U.S. airport, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft originally designed to have a passenger capacity of 30 or more seats to or from the U.S.

We sought comment on whether the requirement to have a contingency plan should be narrowed or expanded, and if so, the cost burdens and benefits of doing so. For example, we proposed to include foreign carriers that operate aircraft originally designed to have a passenger capacity of 30 or more seats to and from the U.S., but we invited interested persons to comment on whether, in the event that we adopt a rule requiring foreign carriers to have contingency plans, we should limit its applicability to foreign air carriers that operate large aircraft to and from the U.S.—*i.e.,* aircraft originally designed to have a maximum passenger capacity of more than 60 seats. We also asked whether the requirement to adopt tarmac delay contingency plans should apply not only to U.S. and foreign air carriers but also to U.S. airports. We requested that proponents and opponents of these or other alternative proposals provide arguments in support of their positions.

Comments: A number of U.S. and foreign airlines and airline associations support requiring airports to develop their own contingency plans to address lengthy tarmac delays but generally agree that these plans should be limited to coordinating with airlines and government agencies and assisting airlines during tarmac delays. Some of these commenters note that airports are in the best position to address the logistics associated with lengthy delays, particularly with respect to diverted flights. For example, they argue that an airport authority is most likely to know the areas in the airport where international passengers can be allowed to deplane without resulting in U.S. Customs and Border Protection (CBP) or Transportation Security Administration (TSA) concerns. Commenters also note that requiring only carriers to have a contingency plan unreasonably places the burden of the operations of the entire air transport industry on carriers. Consumer groups are also in favor of requiring airports to adopt contingency plans. Of the airport and airport industry commenters, Dallas/Fort Worth Airport generally supports requiring U.S. airports to adopt a tarmac delay contingency plan but notes that U.S. airports do not have direct contact with airline passengers when they are on the aircraft and have no control over deplaning. Airports Council International (ACI) supports the airlines' plans being coordinated with airports but does not support requiring airports to adopt separate plans. ACI believes that separate airport and airline contingency plans could result in confusion and states that it is committed to supporting airlines in the development of their plans.

With regard to the adoption of a tarmac delay contingency plan by foreign carriers, the views of foreign carrier associations and carriers differed significantly from those of other commenters. In general, the foreign carriers and foreign carrier association commenters object to the proposal that they adopt tarmac delay contingency plans as unnecessary and note that the same issues with tarmac delays do not arise as often with international flights as they do with domestic flights. The International Air Carrier Association (IACA) states that EU Regulation 261/2004 is an EU passenger rights provision to which EU carriers are subject on all their flights, including flights that depart from U.S. airports, and that the Department's proposals could conflict with EU laws. The International Air Transport Association (IATA) generally supports the principle of contingency plans, but believes such plans should be developed individually by each carrier according to its specific operations and conditions as opposed to having terms set by the government. The Arab Air Carrier Association (AACA) and the Latin American and Caribbean Air Transport Association (ALTA) concur with IATA, as do many foreign carriers. The Air Transport Users Council (AUC) and a number of European carriers point out, similar to IACA, that many of the provisions in the NPRM are covered under EU legislation. The National Airlines Council of Canada (NACC) supports the need for contingency plans in the event of irregular operations but states that they should be developed in the interest of enhanced customer service rather than being mandated by government regulation. TUI Travel notes that EU carriers must comply with EU regulations and asks that carriers originating outside the U.S. be excluded from the tarmac delay contingency plan rule. Monarch Airlines commented that an exception to any requirement should exist for flights that do not pick up passengers in the United States.

U.S. carrier associations such as the Air Transport Association of America (ATA) and National Air Carrier Association (NACA) indicated their support for requiring foreign air carriers to meet the same standards as U.S. carriers for adopting tarmac delay contingency plans. Of the U.S. carriers that commented, Spirit Airlines supports extending the rule to foreign carriers, while Virgin America states that DOT should not adopt any of the proposals related to tarmac delays.

Most of the comments received from individuals on this issue noted that a requirement to develop a tarmac delay contingency plan should be extended to foreign carriers because it is important to protect consumers on all flights to and from the United States, not merely on flights operated by U.S. airlines. Among the consumer group commenters, the Consumer Travel Alliance (CTA) supports the expansion of the tarmac delay rules to foreign carriers, as does the Association for Airline Passenger Rights (AAPR), National Business Travel Association (NBTA), Flyersrights.org, Consumers Union and Aviation Consumer Action Project (ACAP). The American Society of Travel Agents (ASTA) also supports extending the tarmac delay contingency plan provisions to foreign carriers and states that the rule should cover all aircraft types.

Among the airports and airport industry commenters, ACI supports requiring foreign air carriers to adopt plans that include minimum assurances as required of U.S. airlines and strongly supports extending the rule to foreign air carriers operating aircraft with 30 or more seats. The American Association of Airport Executives (AAAE) agrees that foreign carriers should comply with specified contingency plans in order to provide equal and fair competition. The New York State Consumer Protection Board supports requiring foreign carriers to adopt tarmac delay contingency plans that provide for passengers to receive the same basic necessities that U.S. carriers are required to provide.

DOT Response: After fully considering the comments received, the Department has decided not to promulgate a requirement that airports adopt contingency plans addressing lengthy tarmac delays. The Department is aware that many airports are voluntarily working with U.S. carriers to develop policies and procedures to address lengthy tarmac delays and to cooperate with U.S. carriers in the coordination of the carriers' contingency plans as required of U.S. airlines by the first tarmac delay rule. As such, it is not necessary to regulate in this area at this time.

However, the Department thinks it is reasonable and necessary to require foreign carriers that operate scheduled passenger or public charter service to and from the U.S. to adopt and adhere to tarmac delay contingency plans. International air travel is a large and increasingly significant market sector, and customers who use non-U.S. airlines deserve no less protection from lengthy tarmac delays at U.S. airports than do customers of U.S. airlines. We also wish to be consistent with the application of our rules. The lengthy tarmac delays experienced by a number of foreign carriers at John F. Kennedy International Airport (JFK) during and after the December 26, 2010, blizzard highlights the need to extend the rule to those carriers.

In order to address commenters' concerns that certain European laws (or laws of other countries) may conflict with this regulation, we want to clarify that the requirement to adopt and follow a plan applies only to tarmac delay events that occur at a covered U.S. airport. The rule should not conflict with EU Regulation 261/2004, the EU rule on compensation and assistance to be provided to passengers in the event of denied boarding, flight cancellation or long flight delays. The types of assistance required under the EU rule are for the most part services that would not be available on board an aircraft during a tarmac delay, *e.g.* phone calls, a hotel room, transportation between the airport and the hotel room, and rerouting on another flight. The context of the food and beverage requirement in regulation 261/2004 suggests that these services are to be provided in the airport terminal during a normal (*i.e.,* non-tarmac) flight delay before passengers have been boarded. As such, although EU 261/2004 applies to EU carriers departing from or traveling to an EU member state and to non-EU carriers departing from an EU member state airport, we see no conflict between that rule and this one. On a tarmac delay at a U.S. airport, EU and non-EU carriers can comply with all provisions of both rules.

With regard to charter flights, we agree with Monarch Airlines and TUI Travel that an exception should exist for foreign-originating charters that operate to and from the United States but do not pick up any U.S. originating passengers. Consequently, carriers will not be required to adopt a tarmac delay contingency plan as long as their operations fall within these parameters. This is consistent with 14 CFR 382.7(d) of the DOT rule on air travel by passengers with disabilities and with the minimal regulation of these flights by the Department's public charter rule in 14 CFR part 380.

B. Time Frame for Deplaning Passengers on International Flights

The NPRM: Under the proposed rule, a covered foreign air carrier would be required to include in its tarmac delay contingency plan an assurance that it will not permit an aircraft to remain on the tarmac at a U.S. airport for more than a set number of hours as determined by the carrier in its plan before allowing passengers the opportunity to deplane. The proposal included appropriate safety, security, and ATC exceptions. This is already required of U.S. carriers for their international flights under the Department's existing rule. As for domestic flights, U.S. carriers are required to provide an assurance that they will not permit an aircraft to remain on the tarmac for more than three hours without deplaning passengers subject to the same safety, security and ATC exceptions. In the NPRM, we noted that there are ongoing questions as to whether mandating a specific time frame for deplaning passengers on international flights as currently exists for domestic flights is in the best interest of the public. We asked for comments on whether any final rule that we may adopt should set a uniform standard for the time interval after which U.S. or foreign air carriers would be required to allow passengers on international flights to deplane rather than allowing the carriers to set their own tarmac delay time limit for such flights. We also asked commenters who support the adoption of a uniform standard to propose specific time limits and state why they believe these intervals to be appropriate.

Comments: Of the U.S. carriers and carrier associations that commented, ATA objects to a hard time limit on tarmac delays for international flights. NACA supports requiring foreign air carriers to meet the same standards as U.S. carriers for adopting tarmac delay contingency plans.

In general, the non-U.S. carriers and carrier associations object to the proposal as unnecessary, asserting that the same problems with tarmac delays do not exist with international flights as with domestic flights. For example, Condor Flugdienst Airlines (Condor) states that it sees no reason to enforce a mandatory deplaning requirement for a problem that occurs only very rarely. Many of these carriers also comment that a "one size fits all" approach is not practical and note that there are large differences between domestic and international operations, and between long-haul and short-haul operations. IATA and IACA object to a uniform time limit entitling passengers to deplane. IACA states that the proposal may conflict with EU passenger rights requirements since EU carriers must follow EU requirements on all their flights, including flights that depart from U.S. airports. The Association of European Airlines (AEA) and foreign airlines' comments are similar to IATA's. Many object to the proposal to require carriers to set a time limit to deplane due to various operational concerns. Specifically, a number of foreign industry groups and airlines noted the following:

- International flights operate less frequently and a cancellation could result in missed connections with serious consequences for passengers;
- Returning to the gate and/or a flight cancellation may result in the crew "timing-out" and many foreign carriers do not have U.S.-based crews, which could result in a delay of 24 hours or more;
- International flights have limited windows of opportunity to depart due to gate constraints at foreign airports;
- Larger aircraft used for international flights take much longer to enplane and deplane (up to 40 minutes), which can cause even further delay;
- International flights are often better equipped to meet passenger needs on-board the aircraft; and
- Long-haul and ultra-long haul operations can make up time while in the air.

Some carriers, such as Air New Zealand, support a 3 hour time limit, but note that consideration should be given to crew restrictions and gate allocations, or situations where resolution of the delay is less than an hour away and deplaning would further delay the flight. Qantas also supports the 3 hour limit in principle, but thinks such an assurance is limited by the carrier's ability to control the circumstances. Of the travel agents and other industry group commenters that commented on this issue, ASTA agrees that a specific standard for international flights is important but supports a four hour rather than three hour rule.

Among the consumer commenters, the Association for Airline Passenger Rights (AAPR) and Flyersrights.org strongly advocate for a maximum permissible tarmac delay of three hours for international flights. Flyersrights.org urges that tarmac delays of over three hours not be permitted for international flights and notes that the "health and inconvenience problems" are the same regardless of whether the flight is domestic or international. Consumer Action, along with Consumer Federation of America, the National Consumers League, Public Citizen, and U.S. PIRG support the extensive comments filed by Flyersrights.org. Some individual commenters also expressed concern about lengthy tarmac delays on international flights and advocated for a uniform time limit for deplaning passengers. Of the commenters on "Regulation Room," almost half noted, generally, that the Department should apply a uniform federal time limit on tarmac delays to all flights and airlines, regardless of aircraft size, airport size, and whether the flight is domestic or international.

DOT Response: As noted above, the Department is expanding its requirement to adopt a tarmac delay contingency plan to foreign carriers, as we believe that it is important to ensure that passengers on these carriers are also afforded protection from unreasonably lengthy tarmac delays. With regard to a required time period for deplaning passengers on international flights operated by U.S. or foreign carriers, we are requiring that these carriers provide an assurance that they will not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours without providing passengers an opportunity to deplane. As in our initial rulemaking to enhance airline passenger protections, this new requirement will allow exceptions for safety and security considerations and in instances where Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations. We decided to impose a uniform time limit for deplaning passengers on international flights rather than allowing carriers to establish their own tarmac delay time limits because we believe the consistency in standard will provide passengers with clearer expectations as to when they would be allowed off aircraft in the event of a tarmac delay. A uniform standard will also make it clearer to the other stakeholders such as airports of the need to assist airlines in deplaning passengers on international flights before the four hour mark. Further, the Department believes that a uniform time limit will reduce or prevent lengthy tarmac delay incidents such as those that occurred at JFK during and after the December 26, 2010, blizzard and the resulting impact on passengers traveling on those flights.

We decided to impose a four hour time limit for lengthy tarmac delays on international flights as opposed to the three hour limit that applies to lengthy tarmac delays on domestic flights for a number of reasons. First, because international flights are of much longer duration on average than domestic flights, it is possible that delays may not have as negative an impact on international passengers as they were already planning on spending a significant amount of time in the aircraft and some of the time spent on the tarmac can be made up while in the air. We also reviewed the contingency plans for the U.S. carriers as they are already required to establish their own tarmac delay time limits for international flights, and found that most of these carriers have chosen to set a four hour time limit for deplaning passengers from their international flights that experience a tarmac delay. In addition, we are persuaded by comments of the different environment in which international flights operate and the need to provide greater leeway for international flights than we allow for domestic flights. For these reasons, we have decided to impose a four hour time limit for deplaning passengers on international flights and not allow U.S. and foreign carriers to establish their own longer tarmac delay time limits for international flights.

As clarified in the first rule to enhance airline passenger protections, an international flight for purposes of this requirement is a nonstop flight segment that departs from the United States and lands in another country, or vice-versa, exclusive of non-traffic technical stops. For example, if a U.S. carrier operates a direct flight Chicago-New York-Frankfurt, with some Chicago-originating passengers destined for New York and others destined for Frankfurt, and the aircraft experiences a tarmac delay in Chicago, then we would consider the tarmac delay to be on a domestic flight. This is because Chicago-New York is a domestic flight segment even though the final destination of the flight is Frankfurt, Germany. If, on the other hand, the aircraft only stops for refueling or a crew change in New York and the flight carries no Chicago-New York traffic and no Frankfurt-bound passengers enplane in New York, then we would consider the tarmac delay in Chicago to be a tarmac delay on an international flight.

C. Provision for Adequate Food and Water, Operable Lavatories, and Medical Attention if Needed

The NPRM: As proposed in the NPRM, the tarmac delay contingency plans adopted by foreign air carriers for international flights that depart from or arrive at a U.S. airport would need to include: (1) An assurance that the carrier will provide adequate food and potable water no later than two hours after the aircraft leaves the gate in the case of departure or touches down in the case of an arrival if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service; (2) an assurance of operable lavatory facilities while the aircraft remains on the tarmac; and (3) an assurance of adequate medical attention if needed while the aircraft remains on the tarmac. These requirements already apply to U.S. carriers under the current rule.

Comments: With regard to the provision for adequate food and water, ATA notes that generally aircraft used for international flights are able to comfortably accommodate passengers onboard for longer periods of time, with food service and entertainment options often available given the type of equipment used and the expected length of these flights. Among the foreign air carriers that commented, Condor Airlines notes that when a longer delay becomes inevitable, Condor has snacks and drinks available for passengers. Similarly, Qatar Airways notes that the logistics of the ultra long-haul flights operated to and from the U.S. already require that Qatar Airways provide extra catering and potable/bottled water to allow for extra time beyond that scheduled during which its customers and crew may have to spend in the aircraft. Qatar explains that it already ensures that its customers are regularly offered water and soft drinks by cabin crew. Qantas indicates that it too provides passengers access to potable water and refreshments during tarmac delays but does not consider it reasonable to impose a mandatory requirement to provide food to all passengers after two hours in all cases, as the commencement of a meal service may lead to further delays and missed opportunities for departure. The carrier also thinks that the term "adequate food" is too broad and open to different interpretations. South African Airways wants the Department to understand that foreign airlines have significantly less flexibility than U.S. airlines to store extra catering items onboard. In the absence of evidence that lengthy delays are a problem for passengers traveling on foreign airlines, the airline believes the Department is not justified in imposing the costs associated with these requirements.

Regarding assurance of operable lavatory facilities, a number of carriers noted that this is a reasonable requirement and that they have working lavatories and toilet serviceability is maintained at the highest levels. However, one carrier expressed concern about unforeseen maintenance issues.

With regard to providing medical attention, Condor states that its flight attendants are capable of providing basic first aid when needed and have access to remote medical advice for more serious medical emergencies. Similarly, Qatar Airways notes that its cabin crews are highly trained in first aid. Qantas Airlines believes that it is reasonable to require carriers to seek medical assistance for any onboard emergency and states that it engages the services of an external medical provider to provide advice and assistance as required, but thinks the extent of this requirement needs clarification. South African Airways expresses similar concerns as Qantas and notes that the NPRM is not clear regarding what comprises medical attention within the meaning of the proposal. South African Airways states that while its in-flight crewmembers have basic first-aid capabilities, the carrier relies on consultations with remote medical-care contractors and other passengers with medical training to provide good-Samaritan assistance. South African explains that it sees no practical way to ensure medical attention during tarmac delays that exceeds this basic assistance. The National Airlines Council of Canada (NACC) states that many airlines are not in a position to provide adequate medical attention as airlines are not medical organizations and in-flight staff in not medical staff. As such, it believes that such assistance is up to local authorities to provide.

Among consumer groups and individual commenters, the AAPR urges the Department to require the tarmac delay contingency plans of U.S. and foreign air carriers contain minimum guidelines for accommodating passengers with disabilities. The New York State Consumer Protection Board states that foreign carriers should be required to adopt a plan that provides for passengers to receive the same basic necessities that U.S. carriers are required to provide, *i.e.,* adequate food and water, operable lavatories, and medical attention if needed. By and large, individual commenters also support the Department imposing identical requirements for foreign and U.S. carriers. Of those that commented on Regulation Room, they generally support the Department requiring airlines to provide working bathrooms, water, beverages, snacks and, in some cases, meals on delayed flights. A few commenters also mention the need for adequate temperature control and the ability to walk around an aircraft during a delay in order to stretch and use the restroom.

DOT Response: The Department continues to believe that passengers stuck on an aircraft during lengthy tarmac delays deserve to be provided some type of food, potable water, operable lavatories, and if necessary, medical care. It appears from the comments that most carriers already have procedures to provide food and water during long tarmac delays, and ensure that their lavatory facilities are operable while the aircraft remains on the tarmac. The concern expressed by South African Airways about storage space for extra catering items seems to be based on a misconception that extensive supplies are needed. There also appears to be confusion as to what the Department means by the term "adequate food." The Department would consider snack foods such as granola bars that carriers typically provide on flights to suffice as "adequate" food. Carriers are, of course, free to provide more complete meals to passengers if they so wish. We note that the requirement to provide food and water within two hours would not apply if the pilot-in-command determines that safety or security precludes such service, so the commencement of a meal service should not lead to further delays or missed opportunities for departure as feared by at least one commenter. As for the requirement to provide medical care if necessary, the Department's expectation is that carriers would have the capabilities to provide basic first aid assistance on the aircraft and would seek further medical assistance as necessary for any onboard emergency, including disembarking the passenger for treatment if needed with the assistance of airport emergency personnel.

D. Coordination With Covered Airports

The NPRM: In the initial rulemaking to enhance airline passenger protections, we required U.S. carriers to have contingency plans for tarmac delays to large-hub and medium-hub airports, as well as diversion airports that the carrier serves or utilizes. In the NPRM for the current proceeding, we proposed to extend this requirement to small hub and non-hub airports and to require all covered carriers (U.S. and foreign) to coordinate their plans with each covered U.S. airport that they serve or utilize for diversions. In making this proposal, the Department noted its belief that the same issues and discomfort to passengers during an extended tarmac delay are likely to occur regardless of airport size or layout. We also noted our strong belief that it is essential that airlines involve airports in developing their plans in order to enable them to effectively meet the needs of passengers. We invited comment on whether it was workable to require covered carriers coordinate with small hub and non-hub airports to which they regularly operate scheduled passenger or public charter service. We also asked if the rule should be expanded to include other commercial U.S. airports (*i.e.,* those with less than 10,000 annual enplanements). Finally, we specifically solicited comments from airlines, airports and other industry entities on whether there are any special operational concerns affecting such airports.

Comments: Of the U.S. carriers and carrier association commenters, ATA supports expanding the number of airports where carriers must coordinate plans to include small hub and non-hub airports. The Regional Airline Association (RAA) opposes extending the rule to small-hub and non-hub airports because it believes there is no evidence that doing so is necessary or beneficial and believes that the cost to expand tarmac delay contingency plans to smaller airports outweighs the benefits, as requiring regional and other carriers serving small airports to coordinate plans with all such airports would require significant resources.

In general, non-U.S. carrier and carrier association commenters object to the proposal as unnecessary and note that they have limited presence or service at these smaller airports. Air France and KLM specifically oppose this provision. On the other hand, Alitalia supports the idea of coordination, but believes the proposal is extremely burdensome. Singapore Airlines supports coordinating contingency plans with airports to handle diverted flights, but states that the plans should focus on customer care such as swiftly disembarking passengers, returning baggage, accommodating passengers if necessary in hotels or on alternate flights, and ensuring that passengers continue their journey. Monarch Air disagrees and states that coordination with airports is not necessary, as it would let the airport determine what is best for the customer.

Of the travel agent interests that commented, ASTA supports expanding contingency plan coordination obligations to include small hub and non-hub airports. TUI Travel states that coordinating contingency plans is not necessary, as the airport can determine what is in the best interest of the airline customer and notes restrictions on gate availability that may be determined on the day of arrival, so pre-coordination will reduce operational flexibility.

Of the airport and airport industry commenters, Dallas/Fort Worth Airport supports requiring carriers to coordinate their contingency plans with all airports that they serve and notes that important airport factors such as terminal capacity, equipment, and government services are taken into account during such coordination. ACI also supports the need for airlines to coordinate with airports of all sizes and states that it is committed to supporting airline development of contingency plans with accurate and relevant information about the airports the carriers serve.

Of the consumer and consumer group commenters, CTA supports the expansion of the tarmac-delay rules to smaller airports. AAPR and Flyersrights.org fully support increasing the number of covered airports to include small hub and non-hub airports. NBTA also supports these provisions. The New York State Consumer Protection Board supports expanding the rule to all airports, as do many Regulation Room commenters, some of whom state that airlines and airports should be required to work together to develop and implement tarmac delay contingency plans.

DOT Response: The Department is adopting the requirement that covered carriers, both U.S. and foreign, include small hub and non-hub airports in their tarmac delay contingency plans and ensure that the plan has been coordinated with airport authorities at those airports. We continue to maintain that the same issues and discomfort to passengers during an extended tarmac delay are likely to occur regardless of airport size or layout. Similar to the expansion of the scope of the requirement to adopt contingency plans to include foreign carriers, this requirement will protect a greater number of passengers at more airports.

We are not convinced by commenters' concerns that requiring carriers to coordinate their plans with small hub and non-hub airports will have a significant financial impact on carriers. U.S. carriers are already required to coordinate plans with large-hub and medium-hub airports and should be able to tailor existing plans to apply to these smaller airports. We recognize that the requirement to coordinate contingency plans with airports is a new requirement for foreign carriers, but expect that it will not be overly burdensome for foreign carriers as the large-hub and medium-hub airports are familiar with the coordination process after having worked with the U.S. carriers on tarmac delay contingency plans this past year. The need for such coordination was recently highlighted by the events at JFK airport following the December 26, 2010 blizzard. Also, during the past two years significant amount of work has been done through a project funded by the Federal Aviation Administration (FAA) to produce a best-practice guidance document for developing coordinated contingency plans for tarmac delays at small hub and non-hub airports.

The benefit of airlines coordinating with airports on contingency plans becomes particularly clear when there are flight diversions. In situations where flights must be diverted from their intended destination airports, it is imperative that airlines and the airports that regularly serve as their diversion airports have already discussed things such as locations within the airport where passengers are allowed to wait when TSA or CBP personnel are not present and the availability of equipment to deplane/bus passengers to the terminal to minimize the hardship to travelers. It is essential that airlines involve airports in developing their plans to enable them to effectively meet the needs of passengers. The rule on coordination with airports is also being clarified to ensure that at airports, like JFK, where operations such as snow removal and gate use are managed by entities other than the airport authority (*e.g.,* a carrier, a consortium of carriers, or a contractor), carriers covered by this rule must also coordinate with these terminal operators.

E. Coordination With CBP and TSA

The NPRM: As recommended by the Tarmac Delay Task Force,[1] we proposed to require carriers to include TSA in their coordination efforts for any large, medium, small, and non-hub U.S. airports, including U.S. diversion airports which they regularly use. We also proposed to require carriers to coordinate with CBP for any U.S. airport that the carrier regularly uses for its international flights, including diversion airports. We proposed these measures as it had come to the Department's attention on more than one occasion that passengers on international flights were held on diverted aircraft for extended periods of time because there were reportedly no means to process those passengers and allow them access to terminal facilities. At that time, the U.S. Department of Homeland Security (TSA and CBP are part of DHS) had advised this Department that, subject to coordination with CBP regional directors, passengers on diverted international flights may be permitted into closed/sterile terminal areas without CBP screening. In the NPRM, we invited interested persons to comment on this proposal and asked what costs and benefits would result from imposing this requirement.

Comments: Of the U.S. carriers and carrier associations that commented, ATA states that carriers already coordinate with TSA and CBP and will continue to do so but stresses that interagency coordination between CBP and TSA as well as coordination between the airports and CBP/TSA is needed in order to get diverted passengers who so desire off airplanes. USA3000 suggests that airports may not be properly staffed by CBP during irregular operations and urges DOT to review this issue with CBP and local airports.

The non-U.S. carrier and carrier association commenters object in general to the proposal as unnecessary. IACA notes that tarmac delays of more than three hours are very rare and believes the NPRM imposes a disproportionate burden on airlines to coordinate plans not only with airports, but with federal agencies. IATA supports the need for the United States government to be more responsive to the needs of airline passenger who arrive at airports where TSA and CBP personnel are not normally stationed or are not present during off hours, but think it is the responsibility of those agencies to work together to put systems in place. The comments of the Association of European Airlines (AEA) and many foreign airlines' are similar to or support IATA, while NACA adds that DOT should work with CBP and other government agencies on a memorandum of understanding to address issues regarding extended tarmac delays. The National Airlines Council of Canada (NACC) adds that carriers have limited influence over TSA and CBP, so obligations should be on the U.S. government to ensure these agencies have their own contingency plans in place. The Arab Air Carrier Association (AACA) states that coordinating contingency plans with diversion airports as well as TSA and CBP will be very costly and suggests, along with other commenters, that TSA and CBP should design their own contingency plans for any airport that receives international flights.

Some foreign carriers assert that this proposal is flawed because TSA and CBP can provide only limited assistance at some airports due to limited after-hours federal inspection capabilities or limited federal personnel available at the smaller airports. Carriers also ask how they can ensure that passengers will remain in one area of the airport or that a sterile area will be available for containing such passengers. British Airways supports the proposal that passengers on diverted international flights be permitted into closed terminal areas without CBP screening and notes, as do some other foreign carriers, that these carriers generally do not have a presence at diversion airports. As such, British Airways and other carriers assert that CBP and the airport operator should be responsible to ensure that passengers can disembark the aircraft. Cathay Pacific adds that the burden to coordinate plans should be on all the stakeholders, while Malaysia Airlines does not support coordinating delay contingency plans with CBP and TSA, but thinks those agencies should design their own plans. Cathay Pacific notes that not all airports can handle aircraft carrying 300+ passengers and states that airports not suitable for deplaning international passengers should fall outside the scope of the proposed rules.

Of the travel agents and other industry group commenters, ASTA supports extending the rule to include coordination with CBP and TSA. NBTA expresses concern that costs associated with requiring coordination with TSA and CBP may outweigh the benefits and may be passed on to the business traveler. As such, NBTA thinks DOT should develop a clearer picture of cost-benefits before implementing this provision. TUI believes that it is not necessary to coordinate plans with TSA or CBP, and is concerned that this would add another layer of planning.

Of the consumer and consumer group commenters, CTA supports rules being promulgated by CBP and TSA that will allow passengers on inbound international flights forced to land at a diversion airport to be processed, as does the AAPR, Flyersrights.org and the Consumers Union. Dallas/Fort Worth Airport supports requiring carriers to coordinate plans with CBP and TSA and states that plans should be in place to deal with the process of handling international passengers and allowing them access to terminal facilities at small and medium size airports with no CBP services. ACI applauds DOT for proposing to expand coordination to TSA and CBP.

DOT Response: After considering all the comments, the Department is adopting the requirement that carriers coordinate plans with CBP and TSA at large, medium, small, and non-hub airports that they regularly serve, including at diversion airports they plan to utilize. Because tarmac delays are a particular problem in situations where flights must be diverted from their intended destination airports, this rule requires carriers to coordinate their plans with airports that serve as diversion airports for such operations. As recommended by the Tarmac Delay Task Force, it is also important for carriers to include in their coordination efforts appropriate government authorities such as Customs and Border Protection and the Transportation

[1] In January 2008, the Department established a Tarmac Delay Task Force to coordinate and develop contingency plans to deal with lengthy delays. The Task Force comprising of individuals who represented airlines, airports and consumer groups issued a report that set forth guidelines for airlines, airports, and other stakeholders to use when dealing with long ground delays.

Security Administration, when appropriate.

In adopting this requirement, we note that more than one incident of concern to the Department has occurred at a diversion airport where passengers could not deplane the aircraft due at least in part to security concerns or issues with processing international passengers. It is important to ensure that there is a contingency plan in place in order to address the objective of deplaning passengers in those situations. The Department is actively working with TSA and CBP to develop policies and procedures in order to assist carriers with coordinating their plans and complying with this regulation. We would consider an airline to have complied with the requirement to coordinate its plan with CBP and TSA if the carrier submits its plan to CBP's Regional Director and TSA's Federal Security Director for that airport and considers any issues raised in response to those agencies.

F. Passenger Notification

The NPRM: In the NPRM we proposed to require that U.S. and foreign air carriers update passengers every 30 minutes during a tarmac delay regarding the status of their flight and the reasons for the tarmac delay. We also proposed that carriers announce that passengers have the opportunity to deplane the aircraft when the flight is delayed and the doors are open. In proposing these requirements, the Department gave consideration to passengers' frustration with lack of communication by carrier personnel about the reasons a flight is experiencing a long tarmac delay. We noted that it did not seem unreasonable or unduly burdensome to require carriers to address this issue and verbally inform passengers as to the flight's operational status on a regular basis during a lengthy tarmac delay. We did not anticipate that a carrier's flight crews will know every nuance of the reason for the delay, but we noted our expectation that they inform passengers of the reasons of which they are aware and make reasonable attempts to acquire information about the reasons for that delay.

We also invited comment on whether carriers should be required to announce that passengers may deplane from an aircraft that is at the gate or other disembarkation area with a door open. The Department's Office of Aviation Enforcement and Proceedings had previously explained that a tarmac delay begins when passengers no longer have an option to get off an aircraft, which usually occurs when the doors of the aircraft are closed, and has encouraged carriers to announce to passengers on flights that remain at the gate with the doors open for lengthy periods that the passengers are allowed off the aircraft if that is the case. However, we noted that such an announcement is not explicitly required in the existing rule. Consequently, we sought comment on the benefit to consumers of mandating such announcements and asked commenters, including carriers and carrier associations, to address any costs and/ or operational concerns related to implementing a rule requiring such announcements.

Comments: Non-U.S. carrier and carrier association comments generally object to the proposal to update passengers every 30 minutes during a tarmac delay regarding the status of their flight and the reasons for the tarmac delay, characterizing it as unnecessary. IACA states that notifying passengers every 30 minutes as to reason for a tarmac delay is unnecessary overregulation. Some foreign carriers, such as Air France and KLM note that requiring announcements every 30 minutes will have unintended consequences and state that keeping passengers informed is already important to carriers and a regulation is not needed. Other carriers, such as Qantas and JetStar, agree that notifying passengers every 30 minutes is reasonable, but state that too much detail may lead to false expectations on the part of the passengers. AACA expresses concern about the broad language regarding the format of communication and when a carrier should be aware of information to provide to the passenger, and the ability of airlines to prove they have relayed information to the passenger. NACC does not support updates every 30 minutes as this could result in relaying incomplete or inaccurate information to the passengers.

U.S. carriers and carrier association commenters generally agree that it would be beneficial for passengers to be updated frequently on flight status changes when there is a tarmac delay but expressed concern that carriers are not always updated by FAA on a timely basis. Of the travel agents and other industry group commenters, ASTA supports the provision for carriers to make tarmac delay announcements every 30 minutes. However, TUI Travel does not believe DOT should be overly prescriptive or detail the circumstances or time intervals upon which updates on delays should be given, but agrees that information needs to be given and updated at regular intervals.

Consumers and consumer group commenters support a requirement to provide updates every 30 minutes. More specifically, AAPR and Flyersrights.org fully support requiring carriers to communicate with passengers during delays. Of the airport industry commenters, the AAAE agrees that essential communication with passengers is necessary. The New York State Consumer Protection Board adds that communication with passengers during a delay is important because failure to update the flight's status adds to the frustration caused by the situation. As such, it strongly supports the proposal that air carriers update passengers every 30 minutes during a delay.

We received various differing comments on whether carriers should be required to announce that passengers may deplane from an aircraft that is at the gate or other disembarkation area with the door open. Spirit Airlines opposes DOT requiring carriers to permit passenger to leave an aircraft that remains at the gate for a delay of less than three hours but notes that its practice is to permit deplaning after two hours. It states that deplaning could create operational problems and raise costs and notes that the window of time to enplane may be small, passengers may be hard to locate and re-boarding will be time consuming and delay departure. Spirit believes that the airline can exercise the best judgment regarding whether passenger should be allowed to deplane.

IATA also does not support the proposal to announce that passengers may deplane from an aircraft with the door open and states that the option to deplane raises a number of issues (*e.g.* removing baggage if a passenger doesn't travel, DHS personal data accountability issues, passenger manifest issues, length of time to deplane and enplane large aircraft, short windows for departure). Comments of AEA and foreign airlines' comments are similar to IATA's. Many foreign carriers object to the proposal to notify passengers that they can deplane due to various operational concerns similar to those posited by IATA and other foreign carrier associations. ALTA raises additional concerns with safety issues, and questions who will have control over passengers that temporarily deplane and, miss flights. Air France and KLM also state that a carrier should be given the option to make the announcement that passengers can deplane depending on the specific circumstances. Air Tahiti asks for clarification on whether there is a minimum duration an air carrier must wait for passenger to re-enplane the aircraft and whether deplaned passengers' baggage must be deplaned.

CTA states carriers should be required to communicate with passengers on a regular basis and agrees that carriers should inform passengers during delays while the aircraft is at a loading bridge with its doors open that they may deplane at any time, to stretch their legs, to be rebooked on another flight or to cancel their flight and get a refund. NBTA also supports this provision.

DOT Response: After considering the comments received, the Department has decided to require that carriers notify passengers every 30 minutes about the status of a tarmac delay, including the reasons for the delay if known. In implementing this requirement, we note that we expect the carrier to make reasonable attempts to acquire information about the status of the delay and to provide this information to consumers. A carrier would not be held responsible for failing to provide a status that was not known to it so long as the carrier made reasonable efforts to find out the status.

We have also decided to require U.S. and foreign air carriers to notify passengers that they can deplane from an aircraft that is at the gate or another disembarkation area with the door open, if that is the case. The purpose of this requirement is to address problems that have arisen since the first tarmac delay rule has been in effect where U.S. carriers have asserted that the three hour clock should not yet be running but where passengers did not know that the door to the aircraft was open and that they had the option to get off of the aircraft, particularly on a departure delay at the gate or on large aircraft. We are not requiring carriers to provide passengers the opportunity to deplane in less than three hours but simply to inform them that the opportunity to deplane exists, if it does. Of course, in situations where an aircraft is at the gate with the door open and passengers are not allowed off the aircraft, the tarmac delay begins at the point when passengers are no longer permitted to deplane and not when the doors of the aircraft are shut.

As for commenters' concerns with reconciling passenger manifests and dealing with the checked baggage of passengers who choose to deplane, we are not requiring airlines to re-board a passenger who chooses to deplane and therefore misses a flight, or to remove the checked baggage of a passenger that has deplaned. DHS/TSA also doesn't require that passenger's checked baggage be removed if the passenger is no longer on that flight. We encourage airlines to announce to passengers that they are deplaning at their own risk and that the flight could depart at any time without them if this is the case.

G. Code-Share Flights

The NPRM: We sought comment on whether, in the case of a code-share flight, we should expand coverage of the requirement to adopt tarmac delay contingency plans so that the obligation to adopt such a plan and adhere to its terms is not only the responsibility of the operating carrier but also the carrier under whose code the service is marketed, if different.

Comments: Of the U.S. carrier and carrier association commenters, ATA states that the operating carrier has sole operating authority and is in sole control of how a passenger is treated, so it is unreasonable to also hold the marketing carrier accountable, especially if the contingency plans differ or are in conflict. The U.S. carriers that commented on this issue concur with ATA. RAA disagrees and states that, if DOT insists that operating carriers adopt contingency plans, it should place primary responsibility for adoption and compliance with the plan on the marketing carrier. RAA asserts that carriers that hold out, sell and ticket passengers should have sole responsibility to the Department and that liability of the operating carrier should be determined by its contract with the marketing carrier.

Of the non-U.S. carrier and carrier association commenters, IATA believes that only the operating carrier should be responsible for the terms of the contingency plan. AEA and ALTA, among others, concur with IATA. Of the foreign carriers that commented, most believe that only operating carriers should be responsible in a code-share situation based on their assertion that the operating carrier has responsibility for how the passengers are treated. Some commenters also note that the marketing carrier might not operate its own aircraft to all of the airports served by its code-share partners and thus would not have a relationship with those airport authorities. Others, such as Air Tahiti and Swiss International, note that the proposed regulations fail to consider the intricacies of the code-share relationship and suggest that there may be issues with collusion and antitrust concerns in some jurisdictions.

We received few comments from travel agents and other travel industry commenters on this issue. ASTA believes that code-share partners should be responsible for harmonizing their consumer protection processes so consumers don't worry about which carrier does the marketing, ticketing or flying. Among the consumer and consumer group comments, CTA states that given the expansion of code-shares and with the antitrust immunity granted to airline alliances, there should be no difference between flights operated by U.S. or foreign carriers. AAPR supports expanding coverage of the requirement to adopt tarmac delay contingency plans to the carrier under whose code the service is marketed if different than the operating carrier.

DOT Response: After considering all the comments, the Department has decided to require that the tarmac delay contingency plan of the carrier under whose code the service is marketed governs if different from the plan of the operating carrier, unless the marketing carrier specifies in its contract of carriage that the operating carrier's plan governs. In adopting this rule, we have considered the comments stating that the operating carrier should be responsible for following the terms of a plan, as it is in the best position to address passenger concerns in the event of a tarmac delay. However, on balance, we have concluded that the expectation of the types of services a passenger will be provided is based on the information given to him or her by the marketing carrier, as this is the carrier that held out, sold, and ticketed passengers for the flight. It is reasonable for a consumer to expect the marketing carrier's tarmac delay contingency plan to apply unless the marketing carrier specifies in its contract of carriage that the operating carrier's tarmac delay plan governs. Irrespective of whether the marketing carrier's or operating carrier's contingency plan governs in a particular situation, we intend to hold both the marketing carrier and the operating carrier (*i.e.,* the carrier that sold the passenger a ticket under its name as well as the carrier that operates the aircraft in which that passenger travels) legally responsible. We encourage code-share partners to the extent possible to align their tarmac delay contingency plans. In situations where there are multiple marketing carriers on a single flight and the marketing carriers have not specified in their contracts of carriage that the operating carrier's plan governs, it becomes even more critical that the carriers' plans are aligned. If not, several different contingency plans may apply to passengers on the same flight.

H. Retention of Records

The NPRM: As is the case for U.S. carriers under the existing rule, the NPRM proposed to require foreign carriers to retain for two years the following information on any tarmac delay that lasts at least three hours: the length of the delay, the specific cause of the delay, and the steps taken to minimize hardships for passengers (including providing food and water, maintaining lavatories, and providing medical assistance); whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and an explanation for any tarmac delay that exceeded three hours, including why the aircraft did not return to the gate by the three-hour mark.

Comments: We received few comments on this issue. Of the carriers and carrier associations that did comment, they expressed concerns that this provision would be burdensome and time consuming.

DOT Response: The requirement to retain tarmac delay records already applies to U.S. carriers. We are extending it here to foreign carriers operating passenger service to and from the U.S. on at least one aircraft with a passenger capacity of 30 or more seats. The tarmac delay information that the Department is requiring foreign airlines to retain is not available to it through other means. This information will help the Department obtain a more complete picture about lengthy tarmac delays and ensure carrier compliance with the tarmac delay requirements. The Department also believes that the requirement to retain tarmac delay data would not be burdensome for carriers, since we believe most carriers would as a matter of good business practice, obtain this information for their own purposes and, in any event, there are relatively few tarmac delays of more than three hours. In addition, the Department is not prescribing the manner in which this information must be kept and there is no requirement that a carrier submit the information to the Department unless specifically requested to do so, all of which should reduce any costs associated with this requirement.

2. Tarmac Delay Data

The NPRM: The proposed rule would require any U.S. or foreign carrier that operates passenger service (charter or scheduled) to, from or within the U.S. using any aircraft with a passenger capacity of 30 or more seats to submit monthly to the Department a set of data regarding tarmac delays of three hours or more at a U.S. airport to the extent that the carrier doesn't already provide such data to the Department. If a covered carrier has no flight with 3-hour tarmac delays, the proposed rule would require the carrier to submit a negative report, *i.e.,* a report stating there are no 3-hour tarmac times. The report would be due within 15 days after the end of each month being reported.

Reporting carriers (carriers that account for at least one percent of domestic scheduled passenger revenue which in calendar year 2009 consisted of the 16 largest U.S. carriers by scheduled passenger revenue plus two carriers that voluntarily file under Part 234) already file with the Department on-time flight performance data which includes all the data fields proposed to be reported here and more for their domestic scheduled flights pursuant to 14 CFR part 234. In recognition of this fact, the NPRM proposed that these U.S. carriers file tarmac delay data only for other types of transportation covered by the proposed rule, *i.e.,* their charter and international flights. The NPRM proposed to require other U.S. carriers and foreign carriers to provide data on tarmac delays that occurred at a U.S. airport and lasted for three hours or more for any of their flights—scheduled and charter flights as well as domestic and international flights. We sought comments on whether we should limit the tarmac delay reporting requirement to U.S. and foreign air carriers that operate large aircraft, *i.e.,* aircraft originally designed to have a maximum passenger capacity of 60 seats or more.

Comments: Individual consumers or consumer groups who submitted comments on this proposal unanimously support this proposal. Consumers Union states that it supports expanding the pool of reporting carriers to all U.S. and foreign carriers that operate any aircraft with 30 or more seats. It maintains that such a requirement is particularly important because it will reach many airline passengers who are currently not protected by these policies. One individual commenter states that equal treatment for all carriers is necessary to ensure competitive equality. Consumers Union also supports requiring Part 234 reporting carriers to provide tarmac delay data for public charter and international flights.

The Association for Airline Passenger Rights points out that the Department is attentive to the potential burden to small carriers and has narrowed the data fields it proposed to be reported for tarmac delays from the comprehensive on-time reporting scheme that exists. One commenter adds that most carriers already collect some of the data required under this proposal so it should not be overly burdensome for carriers to comply with the requirements. Several commenters from the Regulation Room state that technology development makes compliance relatively easy.

A few consumers and consumer organization commenters believe that the Department should go further in this respect. FlyersRights.org suggests that, in addition to filing reports under this Part and complying with the record retention requirement in Part 259, the Department should require carriers to submit a comprehensive written report within 14 days of the occurrence of any lengthy tarmac delay. One individual commenter asserts that data should be reported for tarmac delays of one hour or more to reflect a better picture of the tarmac delay problem.

Among U.S. carriers and carrier associations that commented on this proposal, ATA states that it generally supports expanding the reporting carrier pool. RAA, on the other hand, argues that all carriers that are not required to report tarmac delay data under Part 234 should be exempted from this reporting requirement. RAA reasons that the new reporting requirements are not necessary because most carriers, including carriers not covered under Part 234, are already required to retain tarmac delay data for two years. Thus, according to RAA, the Department may request such information for policy-making purpose whenever necessary. Additionally, RAA contends that the Department failed to provide a quantifiable cost/benefit analysis in the NPRM to justify such a requirement. NACA expresses its uncertainty regarding the purpose of requiring smaller carriers (which it defines as those that operate fewer than 25 aircraft) to report tarmac delay data. As a compromise, NACA suggests that carriers should be required to file tarmac delay reports under any rule only if during any given month the occurrences of tarmac delays have exceeded a certain threshold, *e.g.,* more than 10 incidents.

Comments provided by foreign carriers and carrier associations generally oppose this proposal or request that the reporting obligation be limited. Several commenters contend that the Department has not provided justification as to how the proposed data collection from foreign carriers would address the causes of tarmac delays and benefit consumers. Some commenters take the position that requiring foreign carriers to report tarmac delay data is not necessary because international flights operate less frequently than domestic flights and tarmac delay incidents for international flights are rare. Thus, according to these commenters, the cost for carriers to set up a reporting infrastructure outweighs the benefit. Furthermore, they believe it is inappropriate to require smaller carriers to submit and retain tarmac delay data due to their lesser administrative resources and the small segment of the market these carriers serve. A number of commenters state that tarmac delays usually occur as the result of airport infrastructure problems. Therefore, these commenters believe that the Department should require airports to report this data. Likewise, some carriers argue that the data collected from this proposal is readily available from FAA's Air Traffic Control System Command Center. A few commenters note that the burden on foreign carriers is increased if the Department maintains the proposal that negative reports must be filed when no reportable tarmac delay has occurred during a month.

Qantas and JetStar Airways state that they would not oppose a rule if it imposed the reporting responsibility on operating carriers instead of the marketing code-share partners and limited the reporting fields to the identification of aircraft, airport, relevant times, and a brief explanation for the tarmac delay. They also request that easy methods of report submission should be permitted, such as email submission.

Virgin Atlantic raises the concern that publishing reported data may be misleading to consumers who tend to judge a carrier's performance based on raw tarmac delay records, and overlook the causes for such delay, which could be factors that are not under carrier's control. Lufthansa also requests that any publication of the tarmac delay data by the Department should also include the cause of the delay. National Airlines Council of Canada further states that such misjudgments will cause undue commercial damage to Canadian carriers that face the most challenging weather conditions, which could contribute to more tarmac delays.

Monarch Airlines and TUI Travel contend that foreign charter carriers that operate roundtrip flights to limited U.S. destinations should be exempted from the reporting requirements. In addition to consumers and industry commenters, NBTA and ACI–NA both provided comments in support of the Department's proposal.

DOT Response: After thoroughly considering all the comments received, the Department continues to believe that the proposed data collection requirement is crucial to obtaining a more complete picture of the tarmac delays at U.S. airports. Without such data, we do not have adequate statistical foundations to support a determination regarding whether lengthy tarmac delays are or will be a significant problem for consumers on international flights or charter flights. We reiterate that the causes of lengthy tarmac delays are comprehensive and there is not a universal solution that would cure all problems at all airports. We continue to believe that a more complete picture of lengthy tarmac delays is the first step to obtaining a baseline that the Department can use to analyze the issue by carrier, by region/airport, by month, or by the type of flight, as appropriate.

We note that several recent tarmac delays that attracted significant public attention were international arrivals. Tarmac delays involving international flights, although rare, tend to be particularly lengthy and complicated. In that regard, we reiterate that collecting tarmac delay information for international flights is important. The data that we are seeking to obtain here are not available to us through other means. Commenters are mistaken when they assert that the FAA has this information readily available. Furthermore, the publication of the tarmac delay data would increase public awareness of the issue, providing incentives for airline management to focus on addressing tarmac delay problems.

With respect to whether the costs for foreign carriers to set up the reporting infrastructure justifies the benefits obtained from such reports in light of the relatively less frequent occurrence of tarmac delay incidents on international flights, we note that none of the commenters opposing extension of the reporting requirement to foreign carriers has provided any cost/benefit analysis in support of their position. We understand that most data contained in the reporting fields under this proposal are already collected by the carriers internally. BTS already has a system in place to accept reports electronically. Reporting to the BTS would incur a one-time IT infrastructure setup cost and minimal maintenance expenditure. We do not expect these costs to be significant.

We have also considered some commenters' suggestion that we should not require a negative report to be filed when no reportable tarmac delay occurred during a given month. Based on data submitted by the reporting carriers, during the past six months the total number of tarmac delay incidents that lasted for two hours or more at U.S. airports was less than 0.1% of the total domestic scheduled passenger flights operated by those carriers for each month. We agree that these data indicate that international flights that experience reportable tarmac delays will only represent a fraction of the total number of flights. As such, the vast majority of carriers filing reports if the rule is adopted as proposed would be filing a negative report for most months. Although negative reports are an effective enforcement tool for ensuring accurate reporting of tarmac delay, we have decided not to require negative reports to be filed, in order to further reduce the carriers' burden in complying with this rule.

With respect to some foreign carriers' suggestion that for code-share arrangements we should require the marketing carrier rather than the operating carrier to file the report, we are of the opinion that it is up to the code-share partners to designate who has the responsibility to file the report. Based on each carrier's resources and ability, it may be more convenient for a foreign carrier to use its U.S. code-share partner to file the reports, but the Department will not dictate which carrier has the reporting responsibility and will hold both marketing and operating carriers legally responsible if data for a reportable tarmac delay are not timely or accurately filed.

Regarding some foreign carriers' comments on roundtrip charter services between foreign points and U.S. destinations, we agree that as long as these flights carry only passengers that originate at a foreign point and do not pick up any U.S.- originating passengers, tarmac delays on those flights will have minimal impact on U.S. consumers. Moreover, the Department is not applying its requirement for carriers to adopt contingency plans for lengthy tarmac delays to such operations. Therefore, we have decided that this reporting requirement should not apply to such flights.

We have also considered some carriers' concern that publishing tarmac delay information may lead the public to compare carriers' performance quality based on the raw data, while carriers may not be at fault for all tarmac delay incidents. We are not convinced that this will create overall false perceptions. The public is generally well informed about the causes contributing to a lengthy tarmac delay, not only through Departmental reports and press releases, but also through supplemental resources such as the media and the Internet. This information will normally enable the public to look beyond the net number of tarmac delays by each carrier. Moreover, carriers are always free to provide the public information about the cause of their tarmac delays, so long as that information is correct and not misleading.

To address the suggestion of some consumer commenters that we should require carriers to report tarmac delays of less than three hours, we note that the three-hour standard is consistent with the current tarmac delay contingency plan regulations and have reached the conclusion that this threshold represents the proper balance between the reporting burden placed on carriers and the benefits to the public. In addition, we do not believe it is necessary to mandate that a detailed explanation for each tarmac delay be filed with the tarmac delay report. Such detailed explanation is of little use to BTS, which is a data collecting and analysis agency. If the Department believes that a particular tarmac delay warrants further investigation, its Aviation Enforcement Office will request information from the carrier, which the carrier is required to retain for tarmac delays of more than 3 hours.

Finally, we would like to provide further clarification regarding the reporting duties for carriers that are currently filing Part 234 Airline Service Quality Performance Reports. According to BTS Technical Directive #20, issued on November 5, 2010, and effective on January 1, 2011, there are 15 U.S. carriers whose domestic scheduled passenger revenues meet the threshold for mandatory filing of Part 234 reports. These carriers are identified as Part 234 "reporting air carriers." The carriers on this list may change from time to time due to carriers' revenue fluctuation and corporate restructuring, and BTS updates the list annually. In addition to the 15 reporting air carriers, Express Jet will submit on-time data under Part 234 in 2011 as a "volunteer air carrier." Although Part 234 only requires data for domestic scheduled passenger flights to and from a large hub U.S. airport, all reporting carriers, including the volunteer air carriers, are currently filing data for all domestic scheduled flights to and from all U.S. airports, including medium, small, and non-hub airports. As long as they continue to do so, they are only required to file tarmac delay data for international and charter flights to a U.S. airport under the new reporting regulation, 14 CFR part 244. However, if any Part 234 reporting carrier decides to report only the minimum required data under Part 234, *i.e.*, on-time performance data for domestic scheduled flights to and from large hub U.S. airports, it must report any tarmac delay of three hours or more for domestic scheduled flights to and from a medium, small, or non-hub U.S. airport under Part 244. The same rationale applies to any volunteer air carriers under Part 234. If a volunteer air carrier ceases to file any or all reports under 234, it must file tarmac delay data for reportable flights under Part 244. As we have explained in the NPRM, the purpose of Part 244 is to fill in the tarmac delay data gap that is not covered by Part 234. In that regard, no carrier is required to file both Part 234 and Part 244 reports for the same flight.

3. Customer Service Plans

A. Entities Covered

The NPRM: The NPRM proposed to increase the protections afforded consumers in the first Enhancing Airline Passenger Protections rule by requiring foreign air carriers to adopt, follow, and audit customer service plans, as covered U.S. carriers have been required to do since April 2010. We proposed to cover foreign air carriers operating scheduled passenger service to and from the U.S. that use any aircraft designed to have a passenger capacity of 30 or more. We noted that the rule would apply to all flights to and from the U.S. of those carriers, including flights involving aircraft with fewer than 30 seats, if a carrier operates any aircraft with 30 or more passenger seats to and from the U.S. We asked interested persons to comment on whether the proposed requirement for foreign air carriers to adopt, follow and audit customer service plans should be narrowed in any fashion. (*e.g.*, should never apply to aircraft with fewer than 30 seats).

Comments: Of the foreign-carrier industry commenters, the majority expressed their strong belief that the customer service plans requirement should not be extended to foreign carriers. IACA states that DOT's regulatory proposals ignore the fact that airlines have designed customer service in a way to attract their customer and asserts that these provisions intervene in the airline's business and service practices. IATA strongly opposes any customer service requirements being imposed on foreign carriers unless those requirements are harmonized with the regulations of other jurisdictions. IACA and IATA also assert that the proposals are extraterritorial in that they would apply to all flights to and from the U.S. and could be interpreted in such a way that these obligations would also cover sales generated outside the U.S. AACO, AEA and ALTA concur with IATA.

Of the foreign air carrier commenters, LAN Airlines (LAN Ecuador, LAN Peru, LAN Argentina), Emirates, and SAS, among others, oppose DOT requiring them to adopt customer service provisions. Swiss International contends that the application of customer service plans to the conduct of foreign carriers on foreign soil or in foreign airspace poses several issues under U.S. and international law related to extraterritorial application of U.S. regulations. TAP Portugal makes similar comments regarding extraterritorial concerns, as do, among others, Lufthansa and Austrian Airlines. Other carriers, such as British Airways, note that they are already subject to customer service provisions in their own countries (*e.g.* EU provisions) and, therefore, the Department's proposal is unnecessary and redundant, as well as potentially inconsistent with those countries' requirements. Singapore Airlines adds that competition is more effective than government mandates in improving customer service, and the Department does not need to be involved in customer service matters.

All Nippon states that the customer service provisions should apply only to sales made within the U.S. Qantas states that it is not necessary, practical or efficient to require foreign carriers to provide customers with additional or different customer service plans when carriers already have such provisions in place (*e.g.*, Qantas has a Customer Charter on its website) and states that any requirement should be limited to carriers that do not already have a customer service plan in place. JetStar essentially concurs with Qantas. JAL makes similar comments and notes that some of its standards are more stringent than the service requirements proposed and that foreign airlines compete on service and should determine their own service standards. JAL also expresses concern about the potential costs associated with this provision, characterizes it as an intrusive service regulation and states that it is not justified. VivaAerobus opposes the Department requiring small carriers to have a customer service plan. The Washington Aviation Assembly, representing 35 Embassies in the U.S., notes general issues with extraterritoriality, operational consequences for foreign airlines, and the potential economic burden for foreign airlines if they are required to comply with the customer service provisions.

As for U.S. airlines and associations, ATA expresses concern that DOT requiring foreign carriers to adopt a customer service plan could drive foreign governments to retaliate against U.S. carriers operating outside the U.S., which could create conflicting standards and unnecessarily drive additional costs. Among the travel agency interests that commented, ASTA agrees that customer service plan rules and standards should apply equally to foreign air carriers, with no aircraft-size exceptions. ITSA supports in general the Department's efforts to provide passengers with the means to make better informed decisions and more informed choices in travel.

Commenters on "Regulation Room," who primarily identified themselves as air travelers, generally support DOT's proposal. However, some of those that commented oppose the regulation and fear the costs will be passed on to consumers. The consumer groups that commented on this issue generally supported the provision and note that passengers should have the ability to know that certain customer service standards will be defined and met regardless of the carrier that a passenger chooses to travel on. CTA notes that foreign carriers operating as members of any international airline alliance must be included in these rules. AAPR, Consumers Union and Flyersrights.org generally support the proposal to require foreign air carriers to adopt, follow, and audit customer service plans. NBTA supports extending customer service provisions to foreign carriers using aircraft with 30 or more passenger seats.

DOT Response: After fully considering the comments, we have decided to require foreign carriers that operate scheduled passenger service to and from the U.S. using any aircraft with 30 or more seats to adopt, follow and audit customer service plans. As noted previously, a substantial number of passengers travel to and from the U.S. on flights operated by foreign air carriers and the Department continues to believe that it is important to protect these passengers, as well as to be consistent with the application of our consumer protection rules to both U.S. and foreign carriers.

Foreign carriers' and others entities' concerns with extraterritoriality have persuaded us, however, that some clarifications are needed. First, we want to point out that out of the twelve customer service commitments in this final rule, the substance of two of them already applies to foreign air carriers under existing DOT rules, *i.e.*, 14 CFR part 250 concerning passengers who are "bumped" from flights that are oversold and 14 CFR part 382 which addresses air travel of passengers with disabilities. Prior to issuing those final rules, the Department addressed the issue of extraterritoriality and determined how best to apply each of these requirements to foreign air carriers. For instance, the Department determined not to apply its oversales rule to international flights inbound to the United States and determined not to apply U.S. disability rules to a foreign carrier simply because a foreign carrier's flight between two foreign points carried passengers under a code-sharing arrangement with a U.S. carrier. The manner in which we are applying these existing requirements to foreign air carriers through the customer service commitments is not new and is not an extraterritorial extension of U.S. jurisdiction.

We note also that several of the other customer service commitments are merely reinforcing new requirements imposed elsewhere in this final rule, *i.e.*, 14 CFR 259.8 which addresses notification of delays and cancellations, 14 CFR 259.4 which addresses lengthy tarmac delays, and 14 CFR 259.7 which addresses responding to consumer complaints. Concerns with extraterritoriality are specifically addressed in those sections of this preamble that deal with those issues. In this final rule, for example, we explain in the tarmac delay section that the requirement to adopt and follow a tarmac delay contingency plan applies only to tarmac delay events that occur at a covered U.S. airport. Likewise, we clarify in the section on known delays, cancellations and diversions that the requirement to notify consumers of flight irregularities on a carrier's website and via the carrier's telephone reservation system applies to a foreign carrier only if the carrier markets to U.S. consumers. We also make clear that the requirement to make this information available in the boarding gate areas applies only to boarding gate areas at a U.S. airport. We believe that these types of clarifications address the foreign carriers' main objections, which are the application of the customer service plan to sales made outside the U.S. and to the conduct of foreign carriers on foreign soil.

We have made similar changes to other customer service commitments that involve foreign carriers' websites and reservation centers to ensure that we are not applying U.S. rules to a foreign carrier when that carrier does not market its services to the U.S. For example, the customer service commitment to disclose, among other things, cancellation policies and frequent flyer rules on the selling carrier's website and upon request from the selling carrier's telephone reservations staff or the commitment to disclose the availability of the lowest fare on a carrier's website or through its reservation center will apply to a foreign carrier only if it markets its services to U.S. consumers. We are also making changes to the customer service commitments related to services to be provided generally or services to be provided at the ticket counter and boarding gate area to specify that such action is required only at U.S. airports.

Finally, we want to clarify that for purposes of this section, except as otherwise provided in individual customer service provisions in this section, a "flight" that a foreign carrier operates to and from the U.S. means a continuous journey in the same aircraft or with one flight number that begins or ends at a U.S. airport. For example, if a carrier were to operate flight 100, a direct flight from San Francisco to Singapore with a stop in Hong Kong, the customer service plan applies to both segments of this flight with respect to U.S.-originating passengers. It would not apply to any Hong Kong originating passengers who board the aircraft there and go to Singapore. On the reverse routing, the plan would apply to passengers who board in Singapore or Hong Kong and travel to the U.S.; it would not apply to passengers boarding in Singapore whose destination is Hong Kong. Temporarily deplaning at the intermediate stop on a direct flight (Hong Kong in the above example) does not break the journey for purposes of the applicability of the customer service plan requirements for passengers who re-board and continue on that same flight operation. If an international passenger whose journey originates or terminates in the U.S. makes a connection to a flight with a different flight number, the carrier's customer service plan applies only to the direct flight to or from the U.S. In the case of change of gauge, all flight segments with the same flight number that begin or end in the U.S. are covered by the Customer Service Plan even if passengers must change aircraft due to a change of gauge.

As for the comments concerning the cost involved in adopting customer service plans, we note that a number of carriers state that they already have customer service plans or similar plans in place and that these plans contain provisions similar or more stringent than those the Department is requiring them to adopt, or that their governments have similar requirements. To the extent provisions in existing plans are more stringent than the minimum standards set in this rule, carriers are encouraged to continue to apply these more stringent provisions. To the extent provisions in existing plans vary from our requirements, even if they are similar to them, it does not seem overly burdensome for a carrier to amend those plans with respect to flights to and from the U.S. to comply with this rule. Also, while we understand that some foreign countries have rules requiring customer service standards in air carriage, we are not aware, nor are we convinced based on the comments received, that any of those rules or standards conflict with the requirements of this provision in a manner that would prevent a carrier from complying with both requirements.

B. Content of Customer Service Plan

The NPRM: In the NPRM, we noted that under the final rule published on December 30, 2009, U.S. carriers are required to adopt customer service plans for their scheduled flights that address, at a minimum, the following service areas: (1) Offering the lowest fare available; (2) notifying consumers of known delays, cancellations, and diversions; (3) delivering baggage on time; (4) allowing reservations to be held or cancelled without penalty for a defined amount of time; (5) providing prompt ticket refunds; (6) properly accommodating disabled and special-needs passengers, including during tarmac delays; (7) meeting customers' essential needs during lengthy on-board delays; (8) handling "bumped" passengers in the case of oversales with fairness and consistency; (9) disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; (10) ensuring good customer service from code-share partners; (11) ensuring responsiveness to customer complaints; and (12) identifying the services they provide to mitigate passenger inconveniences resulting from flight cancellations and misconnections. We proposed to extend the requirement to address these twelve subjects in the customer service plan to foreign air carriers and requested comment on whether any of these subjects would be inappropriate if applied to a foreign carrier.

The NPRM also proposed to require that U.S. and foreign carriers' customer service plans meet minimum standards to ensure that the plans are specific and enforceable. The minimum standards that we proposed are as follows: (1) Offering the lowest fare available on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation; (2) notifying consumers in the boarding gate area, on board aircraft, and via a carrier's telephone reservation system and its website of known delays, cancellations, and diversions; (3) delivering baggage on time, including making every reasonable effort to return mishandled baggage within twenty-four hours and compensating passengers for reasonable expenses that result due to delay in delivery; (4) allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made; (5) where ticket refunds are due, providing prompt refunds for credit card purchases as required by 14 CFR 374.3 and 12 CFR part 226, and for cash and check purchases within 20 days after receiving a complete refund request; (6) properly accommodating passengers with disabilities as required by 14 CFR part 382 and other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays; (7) meeting customers' essential needs during lengthy tarmac delays as required by 14 CFR 259.4 and as provided for in each covered carrier's contingency plan; (8) handling "bumped" passengers with fairness and consistency in the case of oversales as required by 14 CFR part 250 and as described in each carrier's policies and procedures for determining boarding priority; (9) disclosing cancellation policies, frequent flyer rules, aircraft configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff; (10) notifying consumers in a timely manner of changes in their travel itineraries; (11) ensuring good customer service from code-share partners operating a flight, including making reasonable efforts to ensure that its code-share partner(s) have comparable customer service plans or provide comparable customer service levels, or have adopted the identified carrier's customer service plan; (12) ensuring responsiveness to customer complaints as required by 14 CFR 259.7; and (13) identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.

In addition, we invited comment on whether the minimum standards for any of the subjects contained in the customer service plans should be modified or enhanced in some way. With regard to delivering baggage on time, we solicited comment on whether we should also include as standards (1) that carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered, as well as (2) the time when a bag should be considered not to have been timely delivered (*e.g.,* delivered on the same or earlier flight than the passenger, delivered within 2 hours of the passenger's arrival). With regard to providing prompt refunds, we sought comment on whether we should also include as a standard that carriers refund ticketed passengers, including those with non-refundable tickets, for flights that are canceled or significantly delayed if the passenger chooses not to travel as a result of the travel disruption. In addition, we requested comment on whether it is necessary to include as a standard the requirement that when a flight is cancelled carriers must refund not only the ticket price but also any fees for optional services that were charged to a passenger for that flight (*e.g.,* baggage fees, "service charges" for use of frequent flyer miles when the flight is canceled by the carrier). With respect to notifying passengers on board aircraft of delays, we sought comment on how often updates should be provided and whether we should require that passengers be advised when they may deplane from aircraft during lengthy tarmac delays.

Finally, we requested comment as to whether it is workable to set minimum standards for any of the subjects contained in the customer service plans and invited those that oppose the notion of the Department setting minimum standards for customer service plans as unduly burdensome to provide evidence of the costs that they anticipate. We also sought comment on whether the Department should require airlines to address any other subject in their customer service plans. We specifically asked if mandatory disclosure to passengers and other interested parties of past delays or cancellations of particular flights before ticket purchase should be a new subject area covered in customer service plans.

Comments: U.S. carriers and carrier associations are generally opposed to the Department setting minimum standards for the customer service plans, particularly if the Department requires that the plans be incorporated into the carriers' contracts of carriage. ATA notes that, although U.S. carriers are already required under the current regulation to address each of the proposed customer service plan topics, the current regulation does not mandate minimum requirements and allows carriers to set their own standards for their customer service plans based on their own particular circumstances. ATA asserts that for the Department to set the minimum standards for carriers' plans would face a major change to existing carrier policies in areas where U.S. carriers currently compete and could dampen innovation, harm competition and reduce the flying public's options. Many U.S. carriers concur with ATA.

RAA is opposed not only to the establishment of minimum standards but also to any continued requirement for its members to adopt customer service plans. RAA explains that most regional carriers do not offer fares, take reservations, ticket passengers, receive payment from passengers, provide refunds to passengers, or have their own frequent flyer rules or cancellation policies. RAA maintains that the subjects to be addressed in the customer service plan would be inappropriate if applied to an airline that does not hold out, market, sell tickets for its operations and asks that the customer service requirements apply only to carriers that hold out, market, sell and ticket air transportation.

Most foreign carriers and carrier associations expressed strong opposition both to the requirement to have a customer service plan and for that plan to meet minimum standards set by the Department. A number of foreign carriers such as Air Berlin and associations such as IATA and IACA raised the issue of extraterritoriality and argued that the Department was overreaching as the customer service requirements could be interpreted in such a way as to cover sales generated outside the U.S. and to cover the conduct of foreign carriers on foreign soil or in foreign airspace. There were also assertions that the Department's regulatory proposals ignore the fact that airlines have designed their customer service initiatives in a way to attract customers and the fact that carrier customer service plan provisions are a way for carriers to differentiate their services. South African Airways contends that prescriptive regulations should not take the place of competitive forces, especially when there is no evidence of market failure. Virgin Atlantic, while agreeing that defining a baseline standard is acceptable, states that forcing all carriers to be the same denies them the right to compete commercially and does not allow carriers to innovate.

Others raised the existence of customer service requirements imposed by other entities as a reason for the Department not to issue a rule in this area. For instance, Air France and KLM state that the customer service proposals should not be finalized as to EU carriers where they are inconsistent with or more stringent than EU regulations. Still other foreign carriers raised concerns that some of the minimum service levels are impracticable for a carrier to meet (for example, if a carrier sells a number of tickets via a travel agent and the passenger contact information is not passed on then the carrier may not have that passenger's contact information in order to advise them of a change in itinerary). Some carriers also expressed concerns that certain provisions may be outside of a carrier's control (*e.g.,* "good customer service" from a code-share partner).

Travel agent organizations such as ASTA and consumer groups such as AAPR, Flyersrights.org, NBTA, and CTA all support requiring carriers to adopt customer service plans and for those plans to meet the minimum standards as proposed in the NPRM. Most individual commenters also support these DOT proposals, but a few oppose the regulation as burdensome and fear the costs will be passed on to consumers. Many "Regulation Room" commenters want the Department to go further in setting minimum standards and prohibiting certain practices.

The Department received a number of comments on some of the minimum standards proposed to be included in the customer service plans as well as some of the questions we posed on modifying or enhancing these standards and we address those issues more fully below.

1. Offering the Lowest Fare Available

Many foreign air carrier associations, including AACO and NACC, contend that requiring carriers to offer the lowest fare on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or make a reservation would interfere in airline business practices. ALTA seeks clarification on the meaning of "offering the lowest fare available" and asserts that a "one size fits all" fare will prejudice passengers by increasing fares and limiting competition.

Among the foreign air carriers that commented, Cathay Pacific states it can only publish the fare at the time a request is made, as fares are driven by complex inventory and fare managing systems and a fare guarantee cannot be made. JetStar basically concurs and states that the proposal fails to take account of legitimate distribution and pricing practices. Qantas strongly opposes this requirement on the basis that it fails to take into account the numerous possible options and fare constructions that may be applicable to a consumer, and there may be a false perception that a carrier is not quoting the best price when the lowest priced inventory sells out. It is also concerned that carriers will not be able to enforce the proposed requirement against ticket agents and should not be responsible for ticket agent actions. British Airways states that it offers the lowest fare that meets customers' needs and its website allows consumers to find the lowest fare. Similarly, JAL states that it already offers the lowest fare on its website, at the ticket counter and via telephone reservations as appropriate. Singapore Airlines states that, if this requirement is adopted, the Department should confirm that this provision is intended to conform with ATA's Customers First initiative and should make it clear that the airline does not have to offer to a customer shopping via one point-of-sale the lowest fare available in any channel.

Of the U.S. carriers that commented, Spirit Airlines (Spirit) opposes a requirement that all fares available on its website should be made available through its telephone reservation service. Should DOT impose such a standard, it must be limited to a carrier's generally available fares and not apply to special sales fares because many of these lower fares cannot be purchased over higher-cost channels.

2. Allowing Reservations To Be Held at the Quoted Fare

A number of foreign carriers and carrier industry groups also expressed serious concerns with the proposal to allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made and thought this provision may lead to inconsistent sales policies. For example, Air New Zealand strongly opposes this provision because it takes inventory off the market for the duration of the refund period, blocking it from sale to other customers and risking that the seat may not be sold again. The carrier points out that passengers have the option to buy refundable fares, and choosing whether to allow a passenger to hold a reservation without payment is a commercial decision. Air France and KLM oppose this proposal primarily for the reasons stated above, as does Qatar Airways. Alitalia opposes this proposal and thinks the airline should be the party that establishes commercial terms and conditions with its customers. Singapore Airlines states that it is not set up to permit reservation holds and reprogramming the system to do so is costly. It also notes that this proposal interferes with the free market and deprives other passengers of the lowest fare, as well as compromises an airline's ability to adjust to overnight currency fluctuations. British Airways notes that its current selling systems do not allow for reservations to be held without penalty, but passengers that book via call centers have a "24 hour cooling off" period. It also states that consumers that visit BA.com have several opportunities to review exactly what they are booking and to confirm knowledge of details prior to booking.

ATA strongly objects to a CSP proposal that would require a carrier to hold a reservation “at the quoted fare” for 24 hours for the following reasons: it eliminates the carrier's ability to sell these seats to another willing buyer; the DOT has not demonstrated a market failure that merits this action; a consumer could hold a reservation during the last 24 hours and then cancel, resulting in a seat that will never be sold; and this requirement would effectively prevent re-pricing, which ordinarily happens multiple times a day.

Of the U.S. carriers that commented, US Airways does not support adoption of a 24-hour standard as a rigid rule. The carrier suggests that DOT allow airlines flexibility to restrict refunds in certain situations in order to assure that the largest number of potential passengers have access to seats. Spirit states this proposal is an effort to impose on all airlines a practice that was common prior to deregulation. As a low cost carrier, it states that almost all low-fare carriers require payments at time of booking to guarantee the fare and that making tickets non-refundable is a practice that is critical to its ability to keep fares low. Should a consumer choose to, he or she can buy refundable tickets at a higher price. The carrier states that travel agents that book via global distribution systems (GDS) can hold a reservation (space only) for 24 hours without penalty and Spirit offers a 24 hour courtesy refund for bookings made via GDS, but no other procedure for refunds via travel agents can be accomplished due to limited GDS functions. In order to comply with this provision, Spirit states that it would have to substantially change its business model and incur large IT cost.

Hawaiian Airlines (Hawaiian) notes that it has “on-demand” or “walk-up” flights that run on a high frequency basis. As proposed, this provision would put the carrier in the position of turning inventory over to passengers who will make several reservations for a flight (within a 24 hour time period) but will pay for only one of the reservations, even though Hawaiian must retain a seat for them on each flight. It notes the rule could result in forcing Hawaiian to oversell flights to protect against the loss of seats and revenue. The carrier suggests the proposal be modified to allow customers to hold seats for 24 hours up until 72 hours before the departure of the flight. Similar to Hawaiian, JetBlue suggest that the proposal be modified and that the “24 hour rule” apply not later than 120 hours prior to departure for carriers that have a no oversales policy. JetBlue explains that it does not oversell seats on its flights and it is the company's policy not to issue refunds to passengers that cancel their reservations (in return for a guaranteed seat on the flight). It notes that the proposal would allow customers to hold a reservation without making a financial commitment and could cause lower load factors, which would threaten JetBlue's business model. ASTA supports the 24 hour “reservation hold” rule applying to travel agent bookings.

3. Refunding the Ticket Price for Flights That Are Canceled or Significantly Delayed

In discussing a commitment to provide prompt refunds, we asked for comments on whether we should require carriers to refund the ticket price for flights that are canceled or significantly delayed if the passenger chooses not to travel as a result of the travel disruption. ATA opposes including as a standard in the customer service plan a requirement that carriers automatically provide ticketed passengers holding non-refundable tickets a refund for flights that are canceled or significantly delayed. ATA notes that the regulatory effort to redefine restricted tickets as fully refundable even when cancellation is desirable due to impending weather or government order would impose obligations not present in any other mode of transportation. ATA adds that in most cases passengers on a cancelled flight are accommodated soon after the originally scheduled flight. In addition, ATA provides the following reasons for its opposition:

- The cause of the delay could be out of the carrier's control;
- Carriers often allow free rebooking for significant delays or cancellation;
- This is a marketplace issue;
- Imposing mandatory refunds when a passenger chooses not to fly would convert all tickets in cancel or delay situations to fully refundable tickets;
- Passengers have a choice of what type of ticket to buy; and
- The DOT is not authorized to interfere in the marketplace in this manner.

Of the foreign carriers and carrier associations that commented, AACO asserts that this provision intrudes in business practices and raises a risk that carriers cannot resell the seat post-cancellation. NACC is also concerned about this proposal. Malaysia Airlines strongly opposes this proposal because delays are often beyond airlines' control and carriers already make efforts to mitigate their impact. Similarly, Qantas states that cancellations may also be out of the carrier's control.

Lufthansa and Austrian state that, if imposed, the final rule should allow carriers to accommodate passengers in ways other than refunding the fare. JetStar contends that it is unfair to place the entire burden of costs of unforeseen delays and cancellations on the carriers and states that mandatory refunds may result in the operation of delayed flights empty or at a net loss. The carrier also believes that it is not unfair or deceptive for consumers to share some of the risk in return for lower priced non-refundable tickets, provided fare rules are disclosed prior to purchase. VivaAerobus states that it is a no frills ultra low-fare carrier that only sells non refundable tickets and its policy is disclosed on its website so customers can comparatively shop prior to purchase. The carrier asserts that it never overbooks flights and contends that it cannot give refunds.

Of the U.S. carriers that commented, US Airways notes that many of its tickets are fully refundable and consumers that purchase non-refundable tickets are clearly informed of the risk. While the carrier supports the Department's efforts in the NPRM to enhance disclosure, it does not think DOT should restrict options available to passengers or competition among carriers by requiring refunds of non-refundable tickets. Spirit Air opposes requiring carriers to make refunds to passengers who choose to purchase non-refundable tickets but decide not to fly because of a flight cancellation or significant delay. Rather, Spirit gives passengers the option of re-accommodation or a voucher or refund, or a passenger can purchase travel insurance.

Of the consumers and consumer organizations that commented on this issue, Flyersrights.org thinks tickets should be refunded if the flight is cancelled or significantly delayed for reasons within the airline's control. However, it is concerned about passengers who don't receive refunds of taxes and fees collected by the government for services passengers do not receive due to cancelled reservations. Some “Regulation Room” commenters favor airlines providing full refunds as well as reimbursement for hotel rooms and meals if there is a significant flight delay.

With regard to defining a “significant delay” for purposes of ticket refunds, ATA opposes any definition of “significant” delay that would create a single government standard and eliminate a carrier's latitude to create its own policies on non-refundable tickets that serve customer and commercial needs. It reiterates that the application of non-refundable tickets and carrier policies to re-accommodate passengers during an event beyond the carrier's control is best left to the marketplace in a deregulated industry, which will leave customers with more options. Of the foreign carriers that commented on defining a "significant delay," Cathay Pacific states the Department should take into account the length of delay, length of the flight and the circumstances. The longer the flight, then the greater the tolerance should be for the delay. TAP Portugal makes a similar comment and states that the definition should depend on the duration of the flight. It also notes that long-haul flights can make up for delays while in the air. Some commenters on "Regulation Room" suggest that any delay over three hours is "significant," while others note they are willing to let the Department define the term.

4. Refunding Fees for Optional Services for Flights That Are Canceled

In discussing prompt refunds, we specifically asked for comments on whether we should require, as part of any refund due a consumer, a refund of any optional fees charged a passenger in connection with the flight in question. ATA opposes including as a standard in the customer service plan that when a flight is cancelled carriers must refund not only the ticket price but also any fees for optional services that were charged to a passenger for that flight. ATA states that its members object to the Department's concept that cancellation in itself should create a right to the refund of optional fees. It urges the Department to clarify that a carrier has the opportunity to accommodate a passenger with other transportation options after a cancellation, instead of automatically refunding a ticket and ancillary fees. ATA also asks the Department to clarify that the proposed customer service plan requirement to provide prompt refunds "where ticket refunds are due" is meant to include only those situations where the passenger is unable to fly due to the carrier's decision to cancel. US Airways supports refunding fees for optional services for flights that are canceled, but only in cases where the services in question are not ultimately provided (*e.g.* baggage fees, seating fees). It asks the Department to clarify that if the services are provided, refunds are not mandated. Among the foreign carriers and carrier associations that commented, AACO states that fees should not be reimbursed for the ticket and ancillary services that have been provided. Malaysia Airlines also states that this proposal should not require refunds of fees for services already delivered. ASTA thinks mandated refunds should include "optional fees" paid by a passenger.

5. Delivering Baggage on Time, Compensating Passengers for Expenses Due To Delay in Delivery of Baggage and Refunding Baggage Fees

Of the foreign air carriers and industry groups that commented, AACO states that the Department needs to define what "on time" delivery of baggage means and opposes any requirement that airlines bear the sole responsibility for areas of business that other parties have control over (*e.g.* bags may be handled by airport or TSA). Air Berlin notes that international baggage compensation is already governed by the Montreal Convention. South African Airways states that the proposal does not address Montreal or Warsaw and asks DOT to confirm that the rule does not apply where either Convention controls. Singapore Airlines offers similar comments. Air France and KLM state that the NPRM does not take into account vast differences between long-haul international flights and domestic U.S./transborder flights, and as such, returning bags within 24 hours may be impossible due to limited frequencies to a specific destination, absence of local services, and/or a passenger with a multi-stop and multi-country itinerary.

Among the U.S. industry groups and air carriers, US Airways believes that, before advancing new proposals in this area, DOT should articulate any additional facts warranting action beyond steps that the Department has already taken. It asserts that it is neither possible nor desirable to set a uniform maximum time for delivery of delayed bags or to impose remedies for failure to make delivery within a time frame because there are too many variables involved, and asks that the Department seek more input from stakeholders involved. Spirit Airlines notes that Part 254 already requires airlines to compensate passengers and airlines have incentives to locate and return bags. It also states that "every reasonable effort" to return bags is a vague standard, and points out that there is no evidence that the current rules are inadequate or passengers are being treated unfairly or with deception.

ATA notes that its members oppose including as a standard in the customer service plan that carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered. ATA states that bag fees are a competitive issue and whether a carrier chooses to refund a fee in all instances is a matter the marketplace should determine. Spirit also opposes such a requirement although it notes that its policy is to refund fees when there is a delay in delivery. Flyersright.org states that fees should be refunded if the bag is not delivered on the same flight or an earlier one.

6. Notifying Passengers of Past Delays and Cancellations Prior to Ticket Purchase

We already require the reporting carriers (*i.e.,* largest U.S. carriers) to provide delay and cancellation information on their websites and upon request provide consumers on-time performance information during oral reservations. We asked for comment on whether all carriers required to have a customer service plan should be required to disclose past delays and cancellations of flights to consumers before the latter purchase a ticket. Many carriers oppose having a customer service commitment on disclosure to passengers of past delays or cancellations of particular flights before ticket purchase and do not see the need for it. They assert that past performance is not necessarily indicative of future performance. Swiss International also states that, if imposed, the requirement to disclose past delay and cancellation information should not apply to reservations agents via telephone because foreign carriers utilize call centers that often work with multiple carriers and the proposal is not feasible. Cathay Pacific does not support mandatory disclosure of past delays and cancellations before ticket purchase for international flights that have limited operations, but notes that for domestic services operated more frequently there may be value. ATA members oppose additional information notices regarding past flight delays or cancellations before purchase of a ticket, as the Department has recently adopted new flight information requirements and in accordance with those rules, the public will have access to information on flight delays, cancellations, and flights 30 minutes late more than 50% of the time before purchase on the largest U.S. carriers' websites. Of the U.S. carrier commenters, US Airways notes, similar to ATA, that this information is available on the carrier's website and that is sufficient to provide consumers with information. It also asserts that historic data is unreliable, the current rule is new and more time is needed to see how effective it is prior to initiating new rules, and DOT already decided further disclosures were not required.

7. Other Customer Service Provisions

With regard to the customer service requirement to notify consumers of itinerary changes in a timely manner, British Airways expressed support for this provision, but thinks it should be limited to passengers for which the carrier has reliable contact information. In situations where a passenger books his/her ticket through a travel agent, British Airways states that the travel agent and not the carrier should be held responsible for notifying the passenger of any itinerary changes. With respect to disclosing aircraft configuration, among other things, to consumers on the selling carrier's website and upon request from the selling carrier's telephone reservations staff, Singapore Airlines contends that there is no reason for its telephone reservations staff to provide this information as its customers can find this information on the carrier's website. With regard to responding to consumer complaints, Air Berlin is concerned that as drafted the proposed definition would obligate a carrier to react to complaints from non-passengers.

As for the requirement to ensure "good customer service" from code-share partners, a number of carriers and carrier associations expressed concerns with the definition of "ensuring good customer service" as it relates to code-share partners and claim that they cannot be held responsible for code-share partners' actions. More specifically, NACC contends that the provision to have "comparable service plans" could be an extraterritorial application of law if applied to more than flight segments to or from a U.S. airport. It states that the requirement to have comparable service is too prescriptive and is an unwarranted interference in commercial relationships, and may discourage such arrangements, leading to less flexibility and network connectivity. NACC also expresses concerns that aligning customer service plans with code-share partners may raise anti-trust issues. JetStar does not support requiring code-share participants to adopt each other's customer service plans or align their service levels and states that this is an issue of competition best left to the marketplace. It also notes that the marketing carrier has the primary relationship with the consumer. US Airways states that DOT should not adopt rules that marketing carriers are responsible for violations by operating carriers and says that marketing carriers cannot control the application of uniform standards of all operating carriers with which they work.

DOT Response: Having fully considered the comments, the Department has decided to adopt a final rule largely along the lines set forth in the NPRM, with some clarifications to address comments received about extraterritorial application of U.S. law and the appropriateness of individual customer service commitments. In adopting this approach, we believe that our action strikes a proper balance between ensuring that the traveling public is provided an adequate level of service and is not subjected to unfair or deceptive practices, while ensuring the marketplace governs to the extent possible. We also view our approach as striking the proper balance between protecting consumers on nearly all flights to and from the United States by requiring not just U.S. carriers but also foreign carriers to adopt and adhere to customer service plans, while ensuring that these requirements do not involve an extraterritorial application of U.S. law by limiting their application to foreign carriers to flights to and from the U.S., sales made within the U.S., and to the conduct of foreign carriers on U.S. soil.

Under the final rule, foreign carriers are required to address the same subjects in their customer service plan as U.S. carriers. The final rule also establishes minimum standards for the customer service plans of both U.S. and foreign carriers. In making this decision, we note that carriers are already required to address a number of the subjects and comply with the minimum standards imposed for these subjects through existing requirements [*e.g.,* 14 CFR part 250, Part 254 (for U.S. carriers), and Part 382] or requirements imposed by other sections of this rule (*e.g.,* 14 CFR 259.4, 259.7, and 259.8). Additionally, based on the comments received, many carriers already address many of the requirements in the customer service plans and, in some cases, their customer service commitment is more stringent than those we are adopting. Consequently, we are not persuaded that it would be unduly burdensome for carriers to adopt and adhere to these standards.

Commenters have convinced us that it is not appropriate to require U.S. or foreign air carriers to include in their customer service plans a commitment to ensure good customer service from their code-share partners by making certain that code-share partners have comparable customer service plans or provide comparable customer service levels. We agree with commenters that the requirement for code-share partners to have comparable service may unnecessarily restrict the marketplace and may unduly discourage code-sharing arrangements. We have also decided against requiring covered carriers to include in their customer service plans an assurance that they will notify consumers of past delays and cancellations. We are persuaded that the current availability of data about past delays and cancellations provided by the largest U.S. carriers on their websites as a result of action of our recent consumer rulemaking is sufficient and additional requirements in this area would not materially benefit consumers.

While, as noted above, the Department has decided to establish minimum standards for the customer service plans of both U.S. and foreign carriers, we are modifying or clarifying a few of these standards based on comments received. For example, we are clarifying, as requested by U.S. and foreign carriers and associations, that the requirement to compensate passengers for reasonable expenses that result due to delay in baggage delivery comports with 14 CFR part 254 for domestic transportation and applicable international agreements for international transportation. We are also adding as a standard that carriers must reimburse passengers for any fee charged to transport a bag if the bag is lost. We have decided against requiring carriers to reimburse passengers for any fee charged to transport a bag that is not timely delivered. Arguably, as is the case with transporting passengers themselves, while delay in receiving baggage may be inconvenient, once the carrier delivers a bag the service has been performed. Consumers may, of course, seek reimbursement for damages caused by delay in the delivery of their baggage by filing a claim with the airline or, if dissatisfied with the airline's resolution of the matter, with an appropriate civil court.

With regard to carriers' obligation to notify passengers of known delays, cancellations and diversions, we specify that the minimum standard required to comply with this obligation is met through compliance with a requirement imposed elsewhere in this final rule, *i.e.,* 14 CFR 259.8. Under section 259.8, we explain that the obligation to notify passengers of delays applies only to delays of 30 minutes or more and that the carrier has the obligation to inform passengers of such delays, cancellations and diversions within 30 minutes of the carrier becoming aware of a change in the status of a flight. We also explain that carriers must inform consumers of cancellations and delays of 30 minutes or more and diversions in the boarding gate area at U.S. airports, on board aircraft, via a carrier's telephone reservation system and on its website, and through whatever means made available by the carrier for passengers who subscribe to the carrier's flight status notification services.

With respect to providing prompt refunds, we conclude that the obligation to provide such refunds applies not only to refunding the basic price of a ticket but also to refunding optional fees charged to a passenger for services that the passenger is unable to use due to an oversale situation or a flight cancellation. For example, if a passenger pays for premium economy seating, but his flight is canceled or oversold and that seating is not available on the flight that he/she has agreed to be re-rerouted on, then the carrier must promptly refund the passenger the fee paid for the premium seating. In adopting this requirement, the Department believes it is unfair for a carrier to refuse to provide a refund to a passenger of fees paid for services not provided through no fault of the passenger.

We continue to believe that there are circumstances in which passengers would be due a refund, including a refund of non-refundable tickets and optional fees associated with those tickets due to a significant flight delay. However, we have been persuaded by industry commenters that the Department should not adopt a strict standard of what constitutes a significant delay as such a delay is difficult to define. We agree with the contention of carriers and carrier associations that the definition of a significant delay depends on a wide variety of factors such as the length of the delay, length of the flight and the passenger's circumstances. The Department's Aviation Enforcement Office will continue to monitor how carriers apply their non-refundability provision in the event of a significant change in scheduled departure or arrival time, and will determine on a case by case basis based on the facts and circumstances of the delay whether a failure to provide a refund in response to such a delay is an unfair and deceptive practice.

We reject some carriers' and carrier associations' assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (*e.g.,* greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel. Since at least the time of an Industry Letter of July 15, 1996 (see *http://airconsumer.dot.gov/rules/guidance*) the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.

We also have determined to modify the standard regarding the availability of the lowest fare from what was proposed in the NPRM. In the NPRM, we proposed that a carrier offer the lowest fare available on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation. Having taken into consideration the comments received about how this requirement could unduly interfere with airline business models by requiring airlines offer to a consumer shopping via one point-of-sale the lowest fare available via any channel, we are modifying this provision to require carriers to disclose to consumers who contact the carrier through any of these mediums that a lower fare may be offered by the carrier through another channel (for example, the carrier must reveal via its telephone reservation service that a lower fare may be available on the carrier's website if that is the case). Of course, wherever the carrier offers its lowest fare, the carrier should not state that the lowest fare may be available elsewhere as such a statement would likely confuse consumers and could result in increased search time by consumers for a nonexistent lower fare. In sum, we are not requiring carrier personnel to offer the lowest fare available via whatever sales channel a consumer chooses to use, but to inform all of its customers and prospective customers that a lower fare may be available elsewhere in the carrier's systems in order to give the consumer the opportunity to locate a lower fare offered by that carrier.

We have also decided to modify the customer service proposal which would require carriers to allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made. We agree with commenters who expressed concerns that allowing consumers to hold a seat without payment for twenty-four hours could result in loss of sales and revenue by carriers and prevent other passengers from purchasing the seat if the seat is not released in a timely manner prior to the flight. We find persuasive the comments submitted by JetBlue and Hawaiian Airlines suggesting that a set point in time should exist after which carriers would no longer be required to hold a passenger's reservation in order to give the carrier a more realistic opportunity to sell that seat in the final days before the flight departs. Accordingly, we are modifying this provision to require carriers to hold the reservation for twenty-four hours only if a consumer makes the reservation one week (168 hours) or more prior to a flight's scheduled departure. After that time, a carrier is no longer required to hold a reservation without payment for any period of time. The Department believes that this modification strikes the right balance between a consumer's desire to make travel plans and shop for a fare that meets his or her needs, and the carrier's need for adequate time to sell seats on its flights.

As for the remaining seven customer service requirements, we received very few comments on them and we are adopting them as proposed in the NPRM. These seven customer service requirements pertain to accommodating passengers with disabilities, meeting customers' essential needs during lengthy tarmac delays, handling "bumped" passengers with fairness and consistency, disclosing cancellation policies, frequent flyer rules, aircraft configuration, and lavatory availability, notifying consumers of changes in their travel itineraries, ensuring responsiveness to customer complaints, and identifying the services the carrier provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections. In adopting these customer service commitments as proposed, we note our disagreement with comments stating that the requirement for carriers to notify consumers of itinerary changes should be limited to passengers who book their tickets directly with the carrier and not apply to passengers who book their tickets through a travel agent. A passenger has a right to know and benefit from knowing about changes in his/her itinerary whether that person purchased the ticket directly from a carrier or from a travel agent. We also disagree with comments that the disclosure of aircraft configuration be limited to the selling carrier's website. While most consumers will have access to the Internet and be able to obtain this information from carriers' websites, we also see benefit in requiring that aircraft configuration information be made available upon request from the selling carrier's telephone reservations staff, particularly for those passengers who do not have access to the Internet or are not familiar with how to use it. With regard to the concern expressed by a carrier that it may be required to respond to complaints from non-passengers, we want to point out that "complaint" is defined in section 259.7 as a specific written expression of dissatisfaction concerning a difficulty or problem which a person experienced when using or attempting to use an airline's services.

C. Self-Auditing of Plan

The NPRM: The NPRM proposed that foreign air carriers audit their adherence to their customer service plan annually and make the results of their audits available for the Department's review upon request for two years following the audit completion date. U.S. carriers are already required to self-audit their plans and to make the audit results available for the Department's review upon request for two years.

Comments: Of the foreign carriers that commented, TAP Portugal opposes self-auditing and contends that it is too burdensome to audit a dozen service standards, some of which involve hundreds of activities performed on a daily basis. Similarly, British Airways opposes self-auditing customer service plans on the basis that the plans cover many services and involve different departments that are responsible for these services, and as such would necessitate coordination at significant additional costs. Qatar Airways states that global surveys regarding customer service standards already exist and audits specific to a limited number of international routes will not add value to consumers. Swiss International and Air Tahiti note that there is no guidance as to what a "self-audit" requires.

A business travel organization supports requiring audits and states that its travel managers can provide their clients better protection on flights to and from the U.S. if they have this information available. Of the consumer groups, Flyersrights.org supports requiring foreign air carriers to audit customer service plans and thinks failure to adopt a plan, adhere to it, and make audit results available should be considered an unfair and deceptive practice.

DOT Response: We have decided to adopt the self-auditing requirements as proposed in the NPRM. The final rule requires each carrier to audit its own adherence to its plan annually and to make the results of each audit available for the Department's review upon request for two years afterwards. The Department believes that a system for verifying compliance with the customer service plans is essential. As noted in the first rule to enhance airline passenger protections, we believe that requiring covered carriers to audit their plans annually will further ensure that carriers will live up to their commitments. It will also enable an airline to quickly take action if it learns that it is not in compliance with its customer service plans or if it is not effectively implementing its plan. A self-audit is essentially a system for the carrier to verify its compliance with its customer service plan. We are not requiring that such audits be conducted "at similar times in the year" or even that there be a single unified audit of all the subjects covered in the customer service plans, in order to allow each airline the flexibility to design an audit program that fits its particular operational environment.

4. Contracts of Carriage

The NPRM: This NPRM was the second time that the Department proposed requirements regarding incorporation of tarmac delay contingency plans and customer service plans into carriers' contracts of carriage. In December 2008, the Department published in the Federal Register an NPRM proposing to require U.S. carriers to incorporate their tarmac delay contingency plans and customer service plans in their contracts of carriage, and make their contracts of carriage available on their websites. In December 2009, the Department issued a final rule where it decided not to require such incorporation. Instead, the Department strongly encouraged carriers to voluntarily incorporate the terms of their contingency plans and customer service plans in their contracts of carriage and required the carriers to post their plans and their contracts of carriage on their website. At that time, the Department also indicated its intention to address this matter again through rulemaking.

In this proceeding, the Department again proposed to require carriers to include their tarmac delay contingency plans and customer service plans in their contracts of carriage, and for foreign air carriers that have a website to post their entire contract of carriage on their website in an easily accessible form. U.S. carriers are already required to post their contract of carriage on their website under the existing rule.

The Department again sought comment on whether incorporation of the contingency plans and customer service plans in the contract of carriage would give consumers notice of what might happen in the event of a long delay on the tarmac and of passengers' rights under carriers' customer service plans. As in the past, we asked commenters to address whether and to what extent requiring the incorporation of contingency plans in carriers' contracts of carriage might weaken existing plans: that is, would the requirement encourage carriers to exclude certain key terms from their plans in order to avoid compromising their flexibility to deal with circumstances that can be both complex and unpredictable.

Comments: RAA questions whether DOT has authority to impose a requirement for carriers to incorporate their tarmac delay contingency plans or customer service plans into their contracts of carriage. If the Department nevertheless adopts such a requirement, RAA states that it should not apply to regional carriers, as most regional passengers are subject to the ticketing carrier's contract of carriage.

ATA contends that the Department would be exceeding its regulatory authority if it were to require that the contingency plans and customer service plans be incorporated into carriers' contracts of carriage as a means of creating a private right of action. ATA asserts that Congress did not create a private right of action for violations of 49 U.S.C. 41712 and the Department cannot substitute a different enforcement process than the one Congress intended. ATA also states that the Department has failed to demonstrate how a carrier's failure to incorporate either its tarmac delay contingency plan or its customer service plan in its contract of carriage could be viewed as an unfair and deceptive practice under 49 U.S.C. 41712 . ATA points out that if the Department is interested in ensuring that passengers are more aware of their rights, then it should be sufficient that both the contingency plan and customer service plan are available on carrier websites.

U.S. carriers that commented generally support ATA. For example, US Airways, like ATA, states that there is no reason to require incorporation of the contingency plans or customer service plans as U.S. carriers already post these plans on their websites. US Airways speculates that only a small percentage of visitors to its website review the page containing the Contract of Carriage, suggesting that the inclusion of the plans in carriers' contracts of carriage would not increase passenger awareness of their rights. US Airways as well as other carriers are particularly concerned that this requirement would create a private right of action and subject airlines to a multitude of lawsuits in a variety of jurisdictions.

Similar to the U.S. carriers and carrier association, foreign carriers and carrier associations strongly oppose the proposed requirement to incorporate plans into carriers' contracts of carriage. IATA asserts that the DOT exceeds its authority in proposing this requirement and that it would substantially increase airlines' legal costs. IATA also states that international airlines cannot be expected to adopt multiple contracts of carriage for each territory into and out of which they fly and that contracts of carriage are contracts between a carrier and all of its passengers, not just those that fly into the U.S. AEA generally supports and agrees with IATA. IACA states that placing contingency and customer service plans in a contract of carriage will make the contracts unreadable, as they are already detailed and will result in too much information for the consumer. IACA also states, similar to IATA, that for many airlines U.S. flights make up only a small share of the total flights, so it is inappropriate to incorporate information that is valid only for U.S. flights. IACA also notes that EU regulations already require carriers to provide customers with details of their rights, so the proposal is superfluous and counterproductive. IACA suggests that foreign carriers be exempted from this requirement.

The foreign air carriers that commented generally support IATA. Many carriers note that rules already exist in their countries regarding customer service issues. For example, Virgin Atlantic notes that EC Reg 261/2004 already has passenger rights requirements covering delays and oversales. Others raised concerns about extraterritoriality. More specifically, JAL and TAP Portugal note concerns about the proposal as their Conditions of Carriage are reviewed and approved by their homeland regulator and any changes would need to be approved by those bodies. Qatar Airways states that there should be global harmonization of different government regulatory standards before such plans are incorporated in each carrier's Contract of Carriage. Various carriers also expressed fears about the litigation risks that would exist. South African Airways notes that mandating terms of an airline's contract of carriage may improperly create a private right of action for minor lapses in service. Air France speculates that in order to avoid legal risks carriers may weaken plans if incorporation into carrier's contract of carriage is required. Air France as well as many other carriers who object to the proposal assert, similar to IATA, that the Department does not have authority to impose this requirement. In a similar fashion, Lufthansa strongly opposes the proposal and fully supports ATA's and IATA's comments, as do Alitalia, British Airways and various other foreign carriers.

While most foreign air carriers are opposed to including the plans in their contract of carriage, a number of them did support the idea of placing the contingency plans and customer service plans on their respective websites or state that they have already done so. For example, Air France and KLM agree that the plans could be placed on a website. Virgin Atlantic states that its Conditions of Carriage are based on IATA standards and are available on its website, as does Qatar Airways. In addition, Virgin Atlantic suggests that contingency plans and customer service plans be provided, where there is a specific situation, to an affected passenger. South African Airways makes similar comments.

Of the consumer groups that commented, CTA and AAPR generally support the proposal to include tarmac delay contingency plans and customer service plans in a carrier's contract of carriage, or in the alternative on their websites. CTA also states that code-share rules should be included in the contract of carriage. Flyersrights.org, and its individual members that filed comments, support the proposal that carriers place both the tarmac delay contingency plans and the customer service plans in their contracts of carriage. The organization warns, however, that requiring carriers to incorporate plans into their contracts of carriage may result in carriers excluding key terms from the plan so as to make the plans unenforceable and asks that the Department review and monitor the plans.

DOT Response: Having considered all the comments, the Department has decided not to adopt the proposal requiring U.S. and foreign carriers to include their contingency plans and customer service plans in their contracts of carriage. In making this decision, we note that some carriers have voluntarily put not only their customer service plans but also their tarmac delay contingency plans into their contracts of carriage since we issued the first rule to enhance airline passenger protections. We will continue to monitor whether other carriers choose to do so, as well as determine if we need to revisit this issue in the future should a problem exist.

Further, with regard to the need to incorporate customer service plans into the contract of carriage, the Department believes that our decision to set minimum standards for the provisions in a carrier's customer service plan gives consumers more certainty as to the quality and types of services they can expect. In addition, these minimum standards may make it easier for a consumer to demonstrate to the Department's Aviation Enforcement Office that a carrier has violated the law when that carrier does not meet its standard of service commitment as the requirements of the customer service plans are more exacting than in the past. If the minimum standards are not met by a given carrier, the Department can determine if enforcement action is appropriate in a given situation.

Although we are not requiring tarmac delay contingency plans and customer service plans to be incorporated in contracts of carriage, the Department has decided to require foreign carriers to post their tarmac delay contingency plans, customer service plans and contracts of carriage on their websites. The December 2009 rule to enhance airline passenger protections already requires U.S. carriers to post these plans on their websites. The purpose of this requirement is to ensure that interested consumers can easily review an airline's contract of carriage, customer service plan, and/or tarmac delay contingency plan. By having the ability to review these documents, consumers can find out an airline's stated obligations to passengers and be better informed about their rights and a carrier's responsibilities before purchasing tickets and whenever problems occur (for example, the passenger's rights and carrier's responsibilities if an airline delays or cancels a flight or loses a bag). The Department believes that having the plans and contracts of carriage on websites will lead to a better informed consumer. The Department's Aviation Enforcement Office will periodically monitor carriers' websites to ensure that the required information is available.

5. Response to Consumer Problems

A. Designated Advocates for Passengers' Interests

The NPRM: The NPRM proposed to require foreign air carriers that operate scheduled passenger service to and from the United States using any aircraft with 30 or more seats to designate an employee who will be responsible for monitoring the effects of flight delays, flight cancellations and lengthy tarmac delays on passengers. We proposed that this employee have input into decisions about which flights to cancel and which will be delayed the longest. U.S. carriers must comply with this requirement under the existing rules.

Comments: IATA, IACA, and AEA generally state that the proposal to designate an advocate for passenger interests intervenes too much in an airline's operation as airlines organize themselves differently to monitor operational issues and address customer concerns. Lufthansa opposes this proposal and comments that the decision to designate an employee to monitor the effects of irregular operations should be left to the discretion of each carrier. Similarly, Air Tahiti states that requiring dedicated staff to monitor delays improperly interferes with internal airline operations. JAL does not think it makes sense to designate an employee for a non-problem and asks for additional information and clarification regarding the employee's responsibilities. Swiss International states that this proposal is a substantial burden and believes that one individual may not be effective because each airport has its own issues, so splitting these tasks makes more sense and would result in better data. The carrier urges the Department to require each airport to designate an employee responsible for monitoring delays and coordinate with carriers to reduce delays. Air France and KLM oppose this requirement and explain that it has limited resources in the U.S. to fulfill any such new role and contends that this requirement would impose substantial costs on foreign carriers. Air France and KLM state that, if this proposal is implemented, the Department should permit foreign carriers to comply by having an off-site employee in a specific department who is accessible by a specific telephone number assist in such matters, and by providing this advocacy only in the principal language of the carrier's homeland (French for Air France, Dutch for KLM) and in English. Of the travel agent interests that commented, ASTA generally supports the proposal to have a designated employee, but does not believe the employee should have to be available in the U.S. as long as he or she is accessible. We received a few comments from consumers and consumer groups, all of whom generally support the proposals.

DOT Response: The final rule requires foreign air carriers operating scheduled passenger service to and from the U.S. using any aircraft with 30 or more passenger seats to designate an employee to monitor the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and to have input into decisions on which flights to cancel and which will be delayed the longest. It applies to all of a covered foreign carrier's scheduled flights to and from the United States, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft with 30 or more passenger seats to/from the U.S.

We are not persuaded by commenters that the Department is excessively intervening in an airline's operation by requiring an employee or employees be designated to monitor performance of flights and that these employees have input into decisions such as which flights are cancelled or subject to the longest delays. Additionally, we have taken note of foreign carriers' concerns regarding the potential lack of carrier personnel located in the United States or at specific airports where the carrier does not have a large presence. We are not requiring that the employees responsible for monitoring irregular flight operations be located at a U.S. airport. As has been permitted for covered U.S. carriers, foreign carriers can determine where its employees are located, as long as the designated employees can monitor flight delays and cancellations for the carriers' flights to and from the U.S. throughout the carriers' system and have input into decisions regarding how to best meet the needs of passengers affected by any irregular operations. This requirement is intended to ensure that passenger interests are considered by carriers when decisions on irregular flight operations are made. We are not requiring that the designated employees make themselves available to speak with airport personnel or passengers and certainly are not prescribing the language to be used by the designated airline employees. By adopting this performance standard, the Department leaves it up to each carrier to determine the most efficient and effective method to monitor the effects of flight delays and cancellations (for example, designating one or more individuals at its systems operations center). This rule does not require carriers to hire new employees to comply with this provision as these responsibilities may be borne by current employees in addition to their other responsibilities.

B. Informing Consumers How To Complain

The NPRM: Under the proposed rule, a foreign air carrier that operates scheduled passenger service to and from the U.S. using any aircraft with 30 or more passenger seats would be required to inform consumers how to file a complaint with the carrier (name of department, address, and email or web-mail address) on its website, on all e-ticket confirmations, and, upon request, at each ticket counter and gate.

Comments: As with other sections of this proposal, carrier association commenters, such IATA, IACA, and AEA, generally state that the proposal to inform consumers how to complain unnecessarily and excessively intervenes in an airline's operations. Many foreign carriers concur. For example, Qantas and JetStar state that if a carrier has given a consumer reasonable access for lodging complaints, there is no need for the Department to mandate a particular form of communication. Qatar Airways, among others, notes that foreign carriers already offer passengers a number of means by which to file a complaint.

Foreign carriers and carrier associations also oppose the requirement to inform consumers how to complain as an extraterritorial application of U.S. law. IATA asserts that this requirement would violate the Chicago Convention and U.S. Open Skies Agreement as it would necessitate foreign carriers modifying procedures and operations that take place outside the U.S. to meet U.S. regulatory requirements. For example, IATA states that this requirement would mandate that foreign carriers modify their home websites and foreign-issued tickets to include information mandated by the Department.

NBTA generally supports the provisions, as do Consumers Union and AAPR. Flyersrights.org, in addition to supporting a requirement for foreign airlines to make the mailing address and email or web address for filing a complaint available on their website and e-ticket confirmations, thinks there should be contact information for the Department's Aviation Consumer Protection Division on e-ticket confirmations and boarding passes.

DOT Response: The Department is extending this provision to foreign carriers as proposed in the NPRM, with some clarifications to address concerns about extraterritoriality. First, we are requiring foreign carriers to inform consumers how to complain, upon request, at each ticket counter and boarding gate at U.S. airports. We are not seeking to govern the activities of foreign carriers outside the United States. U.S. carriers are still required to inform consumers how to complain upon request at all ticket counters and boarding gates staffed by the carrier or a contractor of the carrier, whether or not those locations are within the U.S. We are also specifying that the requirement to make information about how to file a complaint available on a carrier's website applies to a foreign carrier only if its website markets to U.S. consumers. Foreign carriers would not need to modify their home websites to ensure that they are complying with this requirement unless those sites market to U.S. consumers. We expect foreign carriers to follow U.S. law in the U.S. when marketing within the U.S. and when flights are entering, operating within or departing from the U.S.

Also, while we acknowledge foreign commenters' concerns with the Department mandating avenues by which a consumer can file a complaint, we believe it is important that consumers have more than one avenue for registering their service-related concerns. As commenters note, since some foreign carriers already provide a number of means by which to file a complaint, the requirements of this rule should not prove overly burdensome. As with the December 2009 rule to enhance airline passenger protections, this rule requires carriers to only provide passengers their email or web-form address and their mailing address. We did not propose and are not now requiring that carriers provide passengers a telephone number for complaint calls because of concerns that telephone "talk time" would impose a high cost on airlines when there are other more-efficient and effective complaint processing methods available. Of course, in addition to accepting complaints through the Internet and postal mail, airlines are free to voluntarily accept customer complaints through other methods such as telephone. We also point out that, as is currently allowed for U.S. carriers, a foreign carrier can comply with the requirement to provide contact information on an e-ticket confirmation or itinerary by including a link to a website containing the complaint information in lieu of displaying the entire text of the contact information, which will take up even less space on an e-ticket and reduce cost. It is our opinion that requiring complaint contact information on e-tickets and, upon request, at each ticket counter and boarding gate instead of just on websites will be beneficial to consumers since a large number of passengers do not have access to the Internet while traveling and would not be able to access the complaint contact information through the airlines' websites.

We are not adopting the suggestion that carriers be required to provide consumers information as a general matter on how to file complaints with DOT. That suggestion is beyond the scope of the notice and is not wise since it might direct consumers away from contacting carriers that are in the best position to quickly resolve problems.

C. Responding to Consumer Complaints

The NPRM: Under the NPRM, a foreign air carrier that operates scheduled passenger service to and from the U.S. using any aircraft with 30 or more passenger seats would be required to acknowledge receipt of a complaint within 30 days of receiving it and send a substantive response to each complainant within 60 days of receiving it. We proposed to define a complaint as a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline's services. We solicited comments on any operational difficulties U.S. and foreign airlines may face in responding to such complaints when received through social networking mediums such as Facebook and Twitter.

Comments: We received a number of comments on this issue from foreign carriers and carrier associations, some of whom supported this requirement. IATA, IACA, AEA, and many foreign carriers generally state that the proposal to respond to consumer complaints within a set timeframe excessively intervenes into an airline's business practices and disregards procedures carriers already have in place to respond to consumer complaints. They also contend that the Department has not shown that this type of requirement is needed. More specifically, British Airways notes that the timeline is unnecessary and overly burdensome and would force carriers to divert personnel to unnecessary administrative and recordkeeping functions. Qantas states that it does not see the need to single out the airline industry for mandatory requirements related to customer response times and that the carrier already aims to provide substantive responses in less than 60 days. IATA suggests that, if adopted, any final rule should include a provision allowing an airline to stop the clock by providing a provisional response. Lufthansa makes a similar suggestion that the Department allow for a "provisional" response to a customer's concerns within the 60 day time frame in the event it cannot provide a full detailed response. A number of carriers such as Virgin Atlantic also recommend that any final rule adopted include an exception to the time frame established to respond to complaints for extraordinary circumstances, such as the Icelandic volcano incident, as the volume of complaints resulting from such events requires a longer response time.

Some carriers generally agree with the proposal or note that they respond to consumers in a shorter time period. For example, Singapore Airlines states that it would not oppose the Department's proposal to provide a substantive response in 60 days if complaints are limited to actual customers and flights to or from the U.S. Japan Airlines states that its response time of 14 days surpasses the Department's proposal and that it has many mediums by which passengers can contact it. Air France notes that it tries to reply to complaints within 28 days. Virgin Atlantic states that it already has a robust complaint handling process and generally replies to all written complaints within 28 days of receipt. Air New Zealand states that the suggested timeframes to respond to complaints are generous.

A number of carriers expressed concern regarding the definition of a complaint. Swiss International states that complaints need to include the passenger's name, mailing address or email address, a copy of the ticket or boarding pass and the applicable flight number. Qatar Airways generally supports the principles stated in the NPRM, but states that it should only have to respond to complaints from passengers who use its service, *i.e.,* the definition of a complaint should be limited to a difficulty or problem which the person experienced when using an airline's service. Similarly, South African Airways and Condor state the proposal as drafted is burdensome and flawed because carriers would have to respond in 60 days to both customers and anyone else that "attempted" to use their service. They also note that the proposal fails to give carriers any discretion in refusing to respond to repetitive or frivolous complaints. With regard to complaints received through social networking mediums, U.S. and foreign carriers and carrier associations all oppose any mandate to communicate to passengers through such mediums. They recommend that the definition of complaint exclude complaints sent by passengers to carriers' Facebook or Twitter accounts.

The consumers and consumer groups that commented generally support requiring carriers to acknowledge and respond to complaints within the time frame set forth in the NPRM. Flyersrights.org states that U.S. passengers should have an avenue to file a complaint with a foreign carrier and to expect a timely and substantive response. CTA states that U.S. airline customer service personnel should be responsible for handling any foreign alliance partner complaint and believes there should be a clear way to contact foreign carriers through the Internet or by telephone number provided on the homepage of the airline. Very few consumers or consumer groups commented on the issue of complaints sent through social networking sites. Of those that did, AAPR states that social networking sites are not an appropriate venue for filing complaints though it supports the requirement for foreign carriers to acknowledge a complaint within 30 days and send a substantive response within 60 days, as does the NBTA.

DOT Response: We have decided to require foreign carriers to acknowledge receipt of a complaint within 30 days and provide a substantive response to passengers within 60 days, as is currently required of U.S. carriers. We believe that 30 days to acknowledge a complaint and 60 days to provide a passenger with a substantive response allows carriers adequate time to investigate and respond appropriately. We are not convinced by arguments put forth by commenters that suggest 60 days is not enough time to provide a substantive response. We note that more than one carrier suggests that 60 days is a reasonable amount of time in which to respond.

We acknowledge and agree with industry commenters that it may not be possible in all instances to provide a final reply to a passenger within 60 days. The rule speaks of a substantive reply, which is not necessarily a final reply. By substantive response, we mean a response that addresses the specific problems about which the consumer has complained. This type of response often but not always results in a resolution of the complaint. If a carrier is actively investigating a complex complaint and is not able to conclude the investigation within 60 days, it is still likely to know more at the 60-day point than it did when it acknowledged the complaint. The airline can update the complainant with all known information prior to the 60-day mark by sending a substantive response, continue its investigation, and thereafter send the final reply later. Regarding carriers' suggestions for an exception for complaints concerning unusual events such as the Icelandic volcano, the Department believes that such an exception is not necessary as many consumers complain about similar issues associated with such events (*e.g.,* delays, cancellations) and carriers generally create form letters in which to respond substantively to most such complaints.

As for the definition of a complaint to which carriers must respond, the Department continues to believe that it is important that this definition include not just problems which a person experiences when using an airline's services but also problems encountered by a person attempting to use an airline's services (for example, if he or she had problems while attempting to book or cancel a flight on the carrier's website). Carriers are not required to respond to general complaints from members of the public. We are requiring a carrier to respond to complaints from individuals that had a problem when they used or attempted to use its services. As with other portions of this section, foreign air carriers are only required to respond to complaints from consumers that are related to a carrier's services being marketed in the U.S. and its flight to or from the U.S.

We are persuaded by the commenters that the Department should not mandate that U.S. and foreign carriers respond to complaints sent through social networking sites. Carriers do use such sites to invite the public to communicate with them and perhaps even to monitor public opinion about their practices. However, we can appreciate concerns that such sites are not intended to be a mechanism for handling individual consumer complaints. In recognition of these somewhat competing interests, the final rule makes it clear that U.S. and foreign carriers need not to respond to such complaints so long as (1) the carrier's primary page on that social networking site clearly indicates that it will not reply to complaints filed via that medium, and (2) on that page the carrier directs the consumer to the mailing address, e-mail address, or website location for filing written complaints. The Department believes this approach takes into account the difference between social networking sites and the traditional one-on-one methods of text communication (*e.g.* a letter, email, printed complaint form, or Internet complaint form) while ensuring passengers know how to file a complaint that will result in a response from the carrier.

6. Oversales

A. Denied Boarding Compensation Limits, Rates, and CPI–U Adjuster

The NPRM: We proposed to increase the minimum for denied boarding compensation (DBC) limits from the current amounts of $400 or $800 depending on the length of the bumped passenger's delay to $650/$1,300 to take into account fully the increase in the Consumer Price Index—All Urban Consumers (CPI–U) since 1978. We also proposed to implement an inflation adjuster for these minimum DBC limits. We sought comments on whether the proposed increases in the DBC limits and the periodic adjustment are called for and, if so, whether the increased amounts are reasonable. We asked whether we should completely eliminate the DBC limits and require carriers to pay DBC based on 100%/200% of a passenger's fare without limit, and whether the current 100%/200% formula (depending again on the length of the bumped passenger's delay) should be increased to, for example, 200%/400% of a passenger's fare.

Comments: Eighteen individuals and consumer organizations, in addition to over 60 individuals who participated on the Regulation Room website, provided comments on the oversales proposals. The majority of these commenters support increasing DBC limits. Some commenters, however, oppose calculating DBC amounts based on the passenger's fare, arguing that it will provide carriers an incentive to bump passengers with the lowest fare. As an alternative, one individual suggests that DBC should be based on a fixed amount. Another commenter suggests that DBC amounts should be based on the length of delay.

A number of individual commenters go further by suggesting that the Department should abandon the oversales rule and ban oversales. These commenters reason that a ticket is a contract between a passenger and a carrier and that when the carrier cannot honor the ticket, it should run a bid or auction by continuously increasing the offer to volunteers until enough volunteers come forward. Most commenters on Regulation Room support eliminating DBC limits though a number of these commenters support a DBC amount based on 200%/400% of the passenger's fare instead of the current 100%/200% of the passenger's fare.

Among the few individual commenters who oppose increasing DBC limits, one commenter questions whether raising DBC limits would result in the reduction of the number of passengers being bumped. Another commenter states that increasing DBC limits to $650/$1,300 would only benefit passengers whose fare is more than the current limits (*i.e.,* $400/$800 one way). One commenter is concerned about the possibility that in response to the raised DBC limits and amounts, carriers would increase the required check-in time for the purpose of being eligible for DBC.

We also received comments on a variety of other issues. With respect to the proposed bi-annual adjustment on DBC amounts based on CPI–U, Consumers Union as well as several commenters on Regulation Room expressed their full support for the proposal. FlyersRights.org suggests that we should declare it to be a deceptive practice to give boarding priority to passengers who checked in later but paid a higher fare. In addition, FlyersRights.org recommends that we ask carriers to increase offers to passengers solicited to volunteer.

Nine U.S. carriers and carrier associations as well as 27 foreign carriers and carrier associations commented on the oversales proposals. ATA states that it does not oppose the proposed increase to the DBC limits to $650/$1,300 but questions the effectiveness of such an increase in reducing the number of passengers being involuntarily bumped. According to ATA, increasing DBC limits may provide incentives to passengers who would have otherwise volunteered to hold out, hoping to be bumped involuntarily. ATA opposes eliminating the DBC limits, contending that DBC is meant to compensate passengers for the loss of time only, because passengers retain the value of the fare by accepting alternate transportation provided by carriers. Delta Air Lines does not oppose the proposed increase of DBC limits but suggests that the new DBC limits should not be applied to airfare purchases that occur before the effective date of the final rule. On the other hand, the Regional Airline Association (RAA) opposes the increase of DBC limits to $650/$1,300, asserting that these increases far exceed the costs of most regional airfares.

Southwest Airlines asserts that the current 100%/200% of one-way fare formula works well and if the Department worries about the impact of fare unbundling practices on the DBC value, it should require that the carriers refund all ancillary fees in the event of oversales, instead of raising the 100%/200% rates to 200%/400%. RAA avers that the DBC limits should be 100%/200% of the fare, and any adjustment to DBC limits should be based on fare changes. Spirit Airlines and Virgin America both oppose the increase of DBC limits, questioning the economic soundness of such increases. Virgin America argues that the new proposal is a departure from the hybrid calculation method that the Department established in 2008. Virgin America also points out that in 2007 the Department rejected the proposal to implement a CPI-based adjuster on the DBC limits. Spirit Airlines takes a similar position as Virgin America and further contends that as a result of the proposal, many consumers will be harmed by increased fares due to the windfall that the new DBC proposal will provide to a small number of passengers.

The majority of foreign carriers and carrier associations oppose the proposed increase in the DBC limits to $650/$1,300. Several commenters argue that increasing DBC limits will reduce the number of passengers who volunteer to be denied boarding and in turn increase the number of passengers who are involuntarily bumped, a result that is counter to the goal of the oversales rule. Some commenters contend that the Department has failed to provide evidence showing that the current DBC amounts are inadequate and also failed to recognize that air fares have decreased in “real” terms during the past decade. IATA and several foreign carriers operating long haul international flights to and from the U.S. raise the concern that passengers on those flights will most likely get the higher limit of $1,300 in an oversales situation due to the infrequent schedule, and these passengers, according the commenters, will get a windfall for their mild inconvenience. Some long haul carriers also insist that the Department’s proposal is aimed at addressing the fare unbundling practice by most U.S. carriers and these foreign carriers’ bundled fares would be subject to inequitable and discriminatory treatment under this proposal. IATA further comments that the proposed $1,300 DBC limit is disproportionate to the value of time that a passenger denied boarding involuntarily may lose due to the delay. The Air Transportation Association of Canada and National Airline Council of Canada, on the other hand, argue that the increased DBC limits will penalize foreign carriers operating short flights, as these limits far exceed the cost of air fare for those flights. IACA argues that the proposal interferes with the European Union (EU) laws and may create uncertainty for carriers and passengers. Several European carriers suggest that the U.S. oversales rule should be harmonized with the EU rule.

The majority of foreign carrier commenters firmly oppose eliminating DBC limits, averring that without a limit, the DBC amounts would be exorbitant, especially for many long-haul carriers who do not unbundle fares. Virgin Atlantic and Air New Zealand prefer a fixed amount for all involuntary denied boarding situations, reasoning that this approach will avoid the complexity in calculating DBC amounts based on fares.

Most foreign carrier commenters also oppose the CPI-based bi-annual adjuster, arguing that air fare changes in the past are not related to CPI. The National Airlines Council of Canada argues that the proposal ignores the fact that fares paid by passengers are significantly lower than what they were ten or fifteen years ago, accounting for the inflation. Qantas and JetStar Airways state that the interval for the CPI–U based adjuster should be every five years instead of two years to avoid excessive administrative costs to implement the changes.

DOT Response: With respect to the DBC limits increase, we have come to the conclusion that the proposed $650/$1,300 amounts are not only reasonable but also necessary. We disagree with carriers’ remarks that the increase in the DBC limits is a disincentive for passengers to volunteer for denied boarding and will result in an increase in the number or rate of passengers who are involuntarily denied boarding. To the contrary, if the DBC limits are increased, carriers will have a greater incentive to seek volunteers through increasing the value of the compensation they offer to volunteers in order to avoid the higher DBC payments to involuntarily bumped passengers. The ultimate result is that involuntary denied boarding should decrease while both volunteers and passengers who must involuntarily be denied boarding will receive increased compensation that more accurately reflects their inconvenience.

Although it is our firm belief that the DBC limits at the level of $400/$800 tend to be insufficient to compensate the passengers who are involuntarily denied boarding for their inconvenience and loss of time, we maintain that the basic structure of the regulatory regime for oversales remains sound. In that regard, we are declining to adopt the suggestion of some commenters that the Department should eliminate involuntary denied boarding and require carriers to run auctions until they obtain sufficient numbers of volunteers. As we have repeatedly stated in the past, the benefits to most consumers of a well-controlled oversales system outweigh the inconvenience experienced by a few. By contrast, an unlimited auction system could increase the cost of oversales to carriers to a prohibitive level, which would cause airlines to be much more conservative in overbooking flights. Considering the reduced schedule frequency and capacity during recent years, such an approach would result in fewer affordable seats being available to the public in general. Running an unlimited auction for volunteers is both time-consuming and complex, and requiring such a system may impose other negative impacts on all passengers, such as causing more flight delays, increasing the number of misconnections, and requiring earlier check-in times.

We are also not adopting some consumer commenters' suggestion that we should set a minimum standard for the amount of compensation offered to passengers solicited to volunteer for denied boarding. We maintain that other than the requirement that carriers must solicit volunteers before bumping any passengers involuntarily, the procedures for solicitation of volunteers and the amounts of incentive offered to potential volunteers should remain within carriers' discretion because this aspect of the system has worked well. The Department believes that the involuntary DBC rates and limits set by the regulation are effective tools to motivate carriers to offer adequate compensation for volunteers.

This final rule also provides that carriers must pay DBC equal to 200%/400% of the fare based on the length of delay experienced by passengers up to the maximum of $650/$1,300. We are unconvinced by the argument of some industry commenters that the regulatory mandated DBC limits should not be increased because airfares have not increased "in real terms." Although the "fare," in terms of the dollar amount reflected on a passenger's ticket confirmation or ticket receipt, may not seem to be increasing over the past decade, the actual cost for a passenger to travel by air, however, has indeed increased. Such increase in air travel cost is not reflected in the base ticket prices that are used as the basis for calculating DBC amounts. The increase of the cost to passengers is evident by the fact that a passenger now must pay, in addition to the base airfare, for many items that were included in the fare before the unbundling practice became widespread, such as for checked baggage, food and beverage, in-flight entertainment, preferred seating, advance seat selection, telephone reservations, etc. It is the Department's view that carriers may continue to explore other ways to further unbundle fares, thus leading to base ticket prices staying flat or declining. The Department believes that DBC amounts based on 100%/200% of the base fare are no longer adequate, under many circumstances, to address the inconvenience and consequential damages suffered by passengers who are denied boarding involuntarily, especially passengers who purchased the most deeply discounted fares, and who, by virtue of the low fares, are most likely to be selected as the candidates for involuntary denied boarding. Realistic DBC rates are also a necessary incentive to encourage careful overbooking practices on the part of carriers. Precisely for these reasons, we are raising the 100%/200% rates in the involuntary DBC calculation to 200%/400%. In our opinion, this new formula, in conjunction with the raised DBC limits of $650/$1,300, strikes a balance between permitting carriers to continue to overbook flights, but limiting the carriers' financial burden from compensating passengers due to oversales, and adequately protecting passengers' interests in oversales situations.

We are aware that the amended DBC formula and limits may have a larger impact on carriers operating regional and international short-haul flights, because these flights' base fares are lower in general than the fares of long haul flights. RAA has argued in its comments that the DBC amounts should be based on 100%/200% of the fare and that the $650/$1,300 limits far exceed the costs of tickets on most regional flights. Several Canadian carriers and carrier associations also contended that the oversales rule as proposed unfairly discriminates against carriers operating shorter flights by requiring the same limits of compensation depending on the length of delay, regardless of the length of the flights from which the passengers were involuntarily denied boarding. The Department has fully considered these comments but remains unconvinced that the consequences of our amendment would be detrimental to these carriers. It is important to understand that the $650/$1,300 limits come into play only when the DBC formula would cause a passenger's DBC to exceed the limit. To the extent the fare paid by a passenger is low, the new $650/$1,300 limits have no effect. Fares in the $49–$59 range are still regularly sold and even under the 400% calculation formula, the DBC amounts would not even come close to the $800 limit under the previous rule. Furthermore, compared to long-haul flights that are usually less frequently scheduled, regional and low cost carriers typically have more options with regard to finding alternate transportation in a timely fashion for passengers who are denied boarding involuntarily. Thus, passengers on these short haul flights often have a better chance of getting to their destination or the next stopover without extensive delay. Consequently, regional and low cost carriers have a better chance of limiting their DBC exposure to the lower rate of 200% of the fare with a $650 limit.

To ensure that there isn't any confusion as to how DBC is calculated, we have added a definition for "fare" in section 250.1. Under this definition, carriers do not need to take into account any ancillary fees and/or charges for optional service paid by passengers when calculating DBC amounts based on the passenger's fare. In relation to this definition, however, we emphasize in section 250.5 that when a passenger is denied boarding involuntarily, the carrier must refund all unused ancillary fees paid by that passenger. Carriers do not have to refund any ancillary fees that will be applied to the alternate transportation to the extent those same services are provided to the passenger. For instance, when a passenger denied boarding involuntarily has paid for seat selection and checked baggage for the original flight, the passenger should receive a refund for the seat selection fee if the alternate transportation arranged by the carrier does not allow the passenger to select his/her seat. Conversely, the carrier does not need to refund the checked baggage fee if the passenger was able to check in the same number of bags for the substitute flight at no additional cost.

We are also clarifying the meaning of the term "minimum DBC amounts" in this final rule as some commenters seem to be confused by the term. These commenters believe that the Department is mistaken in referring in the NPRM preamble to "minimum" DBC amounts when it should be referring to "maximum" DBC amounts. We recognize that the source of the confusion was the term "maximum" used in the rule text under section 250.5. The term "minimum DBC amounts" as used in the preamble of the NPRM refers to the lowest amount of DBC that is due an involuntarily oversold passenger when the DBC calculation based on the passenger's one-way fare results in an amount exceeding the DBC limits (previously $400/$800 and increased to $650/$1,300 in this Final Rule). For example, when a passenger on a domestic flight who paid $550 one-way for a non-stop flight is delayed for 1 hour 20 minutes due to having been involuntary denied boarding, the initial calculation of DBC due is based on 200% of the fare, which amounts to $1,100. However, the maximum amount of DBC a carrier is required to pay this passenger under our rule would be $650. We continue to use the term "maximum" in the rule text. Accordingly, in order to avoid further confusion, we have used the term "DBC limits" instead of the term "minimum DBC amounts" in the preamble of this final rule.

With regard to an automatic inflation adjustor for DBC limits, the Department has decided to adopt the proposed bi-annual adjustment on DBC limits. In doing so, we note our disagreement with some carriers' comments that such an adjuster is not justified because air fares do not reflect changes in the CPI–U. DBC is not meant to fully compensate passengers for the loss of transportation, because carriers are obligated to offer alternate transportation for the passengers or refund the passengers' fare; therefore, fare value change is not directly relevant. DBC is meant as a form of liquidated damages to compensate passengers for their inconvenience, loss of time, and other incidental and consequential costs associated with the delay (*e.g.,* food, lodging, ground transportation, communication etc.). To simplify the DBC calculation and to expedite the process, the Department uses a formula that is tied to the one-way airfare paid by the passenger, which does not necessarily mean DBC amounts should be changed according to the levels at which the average airfare has changed. We observe that the costs for food, lodging and other accommodations and commodities passengers need in an oversales situation have all increased in correlation with inflation. In addition, as noted in the NPRM and further discussed above, the actual total cost of flying is likely to have increased, while what is commonly referred to as the "fare" may not have increased or increased as much as a result of the carriers' current practice of unbundling fares, *i.e.,* charging extra for services once provided as part of the airfare. Our decision to adopt the bi-annual inflation adjustment provision for DBC limits is also not contradictory to our decision made two years ago that we would take up the issue de novo. We have indeed taken a fresh look at the issue during this rulemaking and ultimately reached the conclusion that the bi-annual inflation adjustment is the most efficient way to address the impact of inflation on the DBC limits.

We are also addressing the issue of airline travel vouchers vis-à-vis DBC in this final rule. Carriers frequently offer free or reduced-rate air transportation, most commonly in the form of airline travel vouchers, to passengers denied boarding involuntarily as an alternative to the cash or check DBC payment required by our rule. Our previous rule required that the value of such a voucher must be equal to or greater than the cash or check DBC payment otherwise required. One issue we did not address in the previous rule is whether any mandatory fees, such as service fees, that some carriers charge for using the voucher should be taken into account when considering the value of the benefit of the voucher offered. In this final rule, we clarify that any fees that passengers must pay in order to use the voucher for future travel must be considered when determining the value of the voucher. For instance, if the cash or check DBC payment for a passenger involuntarily denied boarding is required to be $400 under the 200%/400% calculation, and the passenger agrees to accept a travel voucher in lieu of that cash or check payment and there is a service fee of $50 to redeem the voucher, the minimum voucher value that the carrier must offer to the passenger is $450. The carrier must inform passengers, whether volunteers or involuntarily oversold, of any restrictions imposed on the use of the voucher. In addition, as described in detail below, it is unfair and deceptive for a carrier to offer a travel voucher as compensation, particularly in an oversale situation, without advising the person to whom the voucher is offered of any restrictions that may apply to the use of the voucher, such as service fees to redeem the voucher, and advance notice requirements or expiration dates.

Finally, we have made non-substantive revisions to the text of sections 250.5 and 250.9 in order to provide the most straightforward explanations of the methodology applicable under different circumstances for calculating DBC amounts. In a counterintuitive way, the previous rule describes the maximum DBC rate (200% at that time) and then states the circumstances under which the DBC amount will be reduced by half. We have encountered confusion on the part of both carriers and the public regarding this somewhat convoluted description. In this final rule, we discuss the DBC calculation for domestic flights and for international flights separately. In each category, we specify the amounts of DBC required under each of the three circumstances based on the length of delays incurred by a passenger using alternate transportation due to the involuntary denied boarding: no compensation; 200% of the fare subject to the $650 limit; and 400% of fare subject to the $1,300 limit. These categories and classifications are summarized in the two tables that we added in the written notice that carriers must provide to passengers who are denied boarding involuntarily and to anyone else upon request. These tables are meant to be used by carriers as a quick reference to assist bumped passengers so they can better understand the DBC limits and calculations when those passengers may be confused and under time pressure during an involuntary bumping situation.

We have also added a definition for "alternate transportation" in section 250.1 to capture the two components of this term. The first component is what was described as "comparable air transportation" under the previous rule. In order to qualify as "alternate transportation" and consequently allow the carrier to limit its DBC exposure to less than the 400% rate, any air transportation offered to passengers involuntarily denied boarding as a substitute for the original flight must be operated by a carrier as defined in Part 250, *i.e.,* a U.S. certificated or commuter air carrier or a foreign carrier that has been duly authorized by the Department to operate scheduled air services. Thus, if the carrier offered a substitute flight operated by an air taxi operator that is not a commuter carrier, that flight would not qualify as "alternate transportation." Furthermore, in order to qualify as "alternate transportation" carriers must offer a confirmed reservation on that alternative flight. The second component of the concept of "alternate transportation" includes non-air transportation (such as bus, rail, or taxi) and air transportation that does not meet the definition above of "alternate transportation" arranged by the carrier. In order for these modes of transportation to qualify as "alternate transportation," the carrier must obtain the passenger's consent that the passenger will accept the proposed form of transportation in lieu of air transportation. To further explain the concept and application of "alternate transportation," we emphasize that carriers are free to offer substitute transportation that does not meet the definition of "alternate transportation" in this rule (*e.g.,* a flight on an air taxi that is not a commuter carrier, transportation on a scheduled flight without a confirmed reservation, or on a charter flight, or surface transportation), but the bumped passenger has "veto rights" over such arrangements. If the bumped passenger declines this "non-alternate" transportation, he or she is due DBC at the 400% rate because the carrier did not offer "alternate transportation" as defined in section 250.1. However, if the passenger chooses to accept the carrier-offered transportation that does not qualify as "alternate transportation," the carrier is free to avail itself of the lower 200% DBC rate in the case of rerouting within 2/4 hours, and need not pay DBC at all if the non-alternate transportation accepted by the passenger will arrive at the passenger's destination less than one hour after the planned arrival time of the passenger's original flight. The passenger has no such veto right over "alternate transportation." If the carrier offers alternate transportation and the passenger declines it, the carrier is still free to limit DBC to 200% or zero as applicable.

Also in section 250.1, we have deleted the definitions for "sum of the values of the remaining flight coupons" and "comparable air transportation" as these terms are no longer used in the rule text.

B. Zero Fare Tickets

The NPRM: We proposed to clarify in the rule text that DBC must be offered to "zero fare ticket" holders who are involuntarily denied boarding. We asked the public to comment on whether these passengers should be protected by the oversales rule, and whether the proposed calculation method for their DBC amounts is reasonable (*i.e.,* the "passenger fare" for purposes of DBC would be the fare of the lowest priced ticket paid for a comparable class of ticket on the same flight). We also invited the public to suggest any alternative method of establishing denied boarding compensation for zero fare ticket holders, including whether we should allow carriers to compensate these passengers using the same "currency" (*e.g.,* frequent flyer miles or vouchers) in which the tickets were obtained.

Comments: The individual and consumer organization commenters generally support affording zero fare ticket holders who are involuntarily denied boarding the same protection and rights as passengers with other tickets. Regarding the form of compensation, some commenters suggest that compensation may be in the same form of "currency" as that was used in acquiring the tickets; others are in support of the Department's proposal, *i.e.,* providing zero fare tickets holders DBC in the form of cash or check based on the lowest fare paid for a ticket on the same flight for a comparable class of service. Some commenters support payment in either form.

The majority of the industry commenters do not oppose applying the oversales rule to zero fare ticket holders who are involuntarily denied boarding. However, these commenters are adamant that zero fare tickets covered under the oversales rule should not include non-revenue tickets such as airline employee passes. With respect to the form of DBC payment to zero fare ticket holders, several commenters are in support of compensating those passengers in the same form of "currency" that they used to acquire the tickets. ATA state that carriers should have the discretion to pay DBC in the same form of "currency," in travel vouchers, in cash/check, or in any combination thereof. ATA reasons that a mandatory cash payment requirement would create problems for carriers because gate agents cannot assign a cash value to the passenger's fare as they do not have information on the lowest comparable fare sold on the same flight. On similar grounds, the National Airlines Council of Canada avers that it is virtually impossible to figure out the value of a ticket in the comparable class of service "on the spot" as it is subject to a wide range of variables.

JAL opposes the inclusion of zero fare ticket holders under the oversales rule, stating that it should be left to a carriers' commercial judgment as to whether to compensate zero fare ticket holders; JAL further states that the Department should not assume that carriers' decisions would be adverse to passengers' interests. Also in opposition to the proposal, South African Airways states that such a requirement would drastically reduce the carriers' ability to offer zero fare tickets.

DOT Response: The majority of commenters from both consumer and industry representatives seem to agree that certain types of zero fare ticket holders should be compensated when they are denied boarding involuntarily in an oversale situation. The Department agrees with most industry commenters that compensable zero fare tickets should exclude "non-revenue" tickets as that term has traditionally been used in the industry. In that regard, we have added a definition in the final rule that defines "zero fare tickets" to cover only tickets acquired with frequent flyer miles and airline travel vouchers, as well as consolidator tickets that are purchased with money but do not display a dollar amount on the ticket. In our view and the view of most commenters, zero fare ticket holders provided something of value in exchange for their air transportation and when they are bumped, they should be compensated. The Department also wishes to point out that, for most non-revenue tickets such as airline employee and employee family travel vouchers, the terms and conditions accompanying these tickets have already explicitly excluded them from any compensation for involuntarily denied boarding. We note that under the definition of "zero fare ticket," a passenger who paid a nominal monetary amount in connection with a ticket may still qualify as a zero fare ticket holder. Therefore, a carrier must in those cases treat a passenger as a zero fare ticketholder even if the passenger's fare is not "zero" in a literal sense, *e.g.,* where the passenger has paid by cash or credit card the requisite taxes or "processing fees" and "service fees" for the redemption of travel vouchers or frequent flyer miles. On the other hand, if a passenger has paid substantial monetary value for the air transportation, *e.g.,* paid cash for an economy class seat and used frequent flyer miles to upgrade to a business class seat, this passenger should not be treated as a zero fare ticket holder if bumped from the flight and the amount of DBC the passenger receives should be based on the economy class fare paid by that passenger. However, the carrier must credit the amount of frequent flyer miles used for an upgrade back to the passenger's account if any substitute transportation provided is not in the class of service that he or she used the frequent-flyer miles to acquire.

With respect to the form of DBC for zero fare ticket holders, some consumer commenters urge the Department to require all DBC to be paid in cash or check while many industry commenters either oppose paying DBC to zero fare ticket holders or at a minimum, argue that the Department should allow those passengers to be compensated by means other than cash or check. The Department has fully evaluated the reasons presented by the carriers for why we should not mandate cash or check DBC payments to zero fare ticket holders, but we have decided to apply the same DBC standard by requiring carriers to offer DBC to these passengers in the form of cash or check. DBC in non-monetary forms such as frequent flyer miles would not compensate a passenger for food, lodging and other expenses that may be associated with delays caused by the denied boarding. Furthermore, we reject some commenters' notion that requiring carriers to pay cash to these passengers may result in harm to consumers, such as making frequent flyer tickets more expensive and restrictive for consumers. We note that under section 250.5(c), carriers may offer free or reduced rate air transportation to any involuntarily bumped passengers, including zero fare ticket holders, in lieu of cash payment. Carriers should not assume that zero fare ticket holders would almost always opt to receive cash or check compensation, as the cash or check DBC amount is calculated with the lowest comparable fare as the base amount. We also disagree with some carriers' suggestion that procedurally paying DBC in cash or by check based on the lowest comparable fare is unworkable because the gate agents may not have the lowest fare information "on the spot." Just as is permitted for DBC payment to passengers who purchased their tickets with money, carriers are being afforded up to 24 hours after the involuntary denied boarding occurred to tender a check to the affected passengers. We believe the 24-hour window is sufficient for the carriers to obtain necessary fare information and calculate the appropriate DBC amount for the zero fare ticket holders.

In calculating the DBC amounts for zero fare ticket holders, we clarify in the rule text as well as here that the applicable lowest comparable fare paid by cash, check, or credit card refers to the fare in the same class of service as the zero fare ticket. By adding a new definition for "class of service," we explain that we are referring to the lowest fare within the same service class or cabin such as first class, business class, economy/coach class, or economy plus (premium economy) class. For instance, when a passenger holding a zero fare ticket in economy plus class is bumped, as the base fare for DBC calculation purposes, the carrier should identify the lowest fare paid by cash, check, or credit card in the economy plus class on that flight, not the economy class.

C. Disclosure Requirements

The NPRM: In the NPRM we proposed to require that (1) carriers offer cash/check DBC options verbally if they verbally offer a travel voucher as DBC to passengers who are involuntarily denied boarding, and (2) carriers inform passengers solicited to volunteer for denied boarding about their principal boarding priority rules applicable to that specific flight, the availability of alternate transportation, and all material restrictions on the use of any transportation vouchers that may be offered as compensation for giving up the passenger's reservation. We asked whether there are any other forms of disclosure that may better inform passengers being solicited to volunteer or those involuntarily bumped of their rights and carriers' obligations.

Comments: Most consumer advocacy groups and associations support imposing more disclosure rules regarding oversales. CTA proposes more disclosure to passengers solicited as volunteers, such as informing them of the oversales rule in writing and orally prior to the negotiation, and providing them information on whether they will receive confirmed seats and when they are expected to arrive at the destination on the alternative flight. CTA also recommends that carriers provide their boarding priority rules to the passengers when soliciting volunteers. FlyersRights.org suggests that carriers should be required to publish their principal boarding priority rules on their websites and inform passengers of their risks of being bumped before ticket sales. Comments posted on the website of Regulation Room generally support our proposal of requiring carriers to verbally inform passengers of the cash or check option for DBC payment if carriers verbally offer these passengers travel vouchers as DBC. These commenters also support the proposal that both passengers solicited as volunteers and passengers denied boarding involuntarily should be clearly informed of their options, the amount of compensation they can receive, and details of alternative flights. They also recommend enhancing disclosures regarding oversales prior to and at the time of ticket sales, such as requiring carriers to ask whether a passenger is willing to be bumped at the time of making the reservation and to provide notice to all passengers 24 hours before the departure if the flight is oversold.

ASTA supports the idea of disclosing oversales rule at the time of ticket purchase and advising passengers of the risk involved if they do not secure a seat assignment. ASTA also recommends that carriers be prohibited from "gaming the system" by making it impossible to obtain seat assignments. ASTA points out that all disclosures regarding oversales should be made earlier because providing an explanation to passengers at the gate is time consuming and it may create chaos and passenger confusion.

Most carrier and carrier association commenters oppose all the proposed verbal disclosure requirements. These commenters are generally concerned about the additional time they assert would be needed for gate agents to comply with the various verbal notification requirements, arguing that these requirements would impose hardship on the agents who are under time pressure to board passengers and close out the flight. These commenters also contend that this information is available in the written notice and assert that verbal notification is not necessary and may be hard to enforce. Some carriers also point out that if the gate agents are not familiar with the oversales rule, verbal notification may result in inaccurate or incomplete information being passed on to consumers, causing further confusion.

DOT Response: As we have stated in the NPRM, we believe disclosure in an oversales situation is essential for the passengers to fully understand their rights and options. After thoroughly evaluating all the comments, we have decided to adopt some but not all of our proposals in this regard. We will discuss each proposal individually.

With respect to the requirement that carriers must verbally offer the cash option when they verbally advise passengers bumped involuntarily that a carrier voucher as a form of DBC is available, we have reached the conclusion that this requirement is in fact critical to ensuring that passengers are fully informed when they are given the opportunity to choose what form of DBC they are willing to take. Although the cash option is clearly stated in the written notice that carriers are required to provide to passengers denied boarding involuntarily, it is likely that due to the time pressure and occasional confusion associated with involuntarily denied boarding, passengers may not have the opportunity to fully review the written notice before they choose the form of DBC that they are willing to accept. Thus, it is the Department's view that when carriers verbally offer a voucher option but omit (either inadvertently or intentionally) mentioning the cash option, it is unfair and deceptive to the passengers. Furthermore we consider that to the extent carriers are willing to explain to passengers their option of receiving carrier vouchers as DBC payment, the additional time needed to add a few words about the cash/check option should not be substantial. In any event, if carriers are concerned about the additional time needed to verbally inform passengers of all options, it is permissible to not verbally advise passengers of DBC options at all. They can simply hand the passengers a written notice.

On similar grounds we have decided to adopt the proposed requirement that carriers must disclose any material restrictions on airline travel vouchers offered to both passengers solicited to be volunteers and passengers denied boarding involuntarily. Some carriers argue that the process of informing passengers is too time-consuming. The Department disagrees although we note that the more time-consuming such a notice is, the more restrictions must apply to the voucher, necessitating more than ever that notice of such restrictions be provided. To provide a brief summary covering all the material restrictions on vouchers should not take more than a few moments. For example, when the carrier announces at the gate that it needs volunteers who will receive a roundtrip voucher for any destination within the continental U.S., to add a description of conditions on the use of vouchers such as "the vouchers are not transferrable, subject to certain blackout dates and service charges and will expire after two years * * *" would not require more than a few moments, and carriers may encourage anyone who wants to learn more details to speak to the gate agent directly. Typical examples of material restrictions and conditions are expiration dates, blackout dates, advance booking requirements, transferability restrictions, administrative fees and flight choice restrictions. We emphasize that this is not an exhaustive list and by the term "material" we refer to all the restrictions and conditions that might reasonably be expected to affect a passenger's decision regarding whether to accept the voucher.

Since the substance of any restrictions and conditions on the airline vouchers varies by carrier and is not incorporated in the general written notice mandated by section 250.9, we require that any verbal offer of a travel voucher by carriers, either to passengers solicited to volunteer or to passengers denied boarding involuntarily, must be accompanied by a verbal explanation of any material restrictions and conditions imposed on that voucher. In the event carriers make a written offer of travel vouchers, but no verbal offer, carriers should provide a written explanation of the restrictions and conditions on travel vouchers, along with the general written notice required by section 250.9.

In adopting these disclosure requirements, we clarify that we do not intend to require carriers to give every passenger who is in danger of being denied boarding involuntarily a "personal presentation" of their rights. The Department's goal is to ensure that when carriers opt to verbally provide any information to the passengers, the information is not presented in a misleading manner regarding any material terms.

In the NPRM, we also proposed to require carriers to inform passengers solicited to volunteer of their principal boarding priority rules and the availability of comparable air transportation. Our intention in proposing these two requirements was to provide passengers more information upon which they would be able to determine whether volunteering to give up their confirmed reservations would be in their best interests. After considering all the comments in this regard, we are convinced that these proposals, as well as some other disclosure measures not proposed by us but recommended by consumer commenters, may not achieve the expected goal. Although we disagree with some carriers' comments that providing such information will only assist some passengers to "game" the system to the detriment of the majority of other passengers, we note that providing such information at the gate is time consuming and carriers' principal boarding priority rules can be found in the written notice prescribed in section 250.9, as well as on most carriers' websites and/or in the contracts of carriage. We conclude that the burden on carriers of verbally providing such information at the boarding gates outweighs the benefits. Furthermore, we reject some commenters' suggestions that all passengers should be informed of the carriers' principal boarding priority rules and whether a particular flight was oversold at the time they make their reservations. We note that oversales might not occur until close to the departure time or date and, due to no-shows, many overbooked flights will not be oversold on the day of departure. We believe requiring carriers to provide these two types of information through their reservation systems may not be beneficial to consumers yet will increase the operational costs of carriers, depress revenues and limit seat availability. These costs and restrictions ultimately will be borne by the consumers.

Related to the boarding priority rule disclosure proposal, FlyersRights.org and some other consumer commenters also suggested that we should not allow carriers to set their boarding priority rules based on the amounts of passengers' fares. FlyersRights.org went further to urge the Department to declare that bumping a passenger who checked in earlier but who paid a lower fare is an unfair and deceptive practice. We cannot agree. With the exception of unlawful discrimination, the Department has traditionally allowed carriers extensive flexibility to set their boarding priority rules based on several criteria, including passengers' fares. We believe affording carriers such flexibility is an important marketplace tool and permits carriers to proactively control the costs of oversales so they are able to continue to offer the maximum numbers of seats to the traveling public. It makes perfect sense that passengers who pay more for a ticket to get the last available seat and the right to obtain a full refund also want to be assured that they will be the last person to be bumped from an oversold flight. We do agree that passengers seeking the lowest fare on a flight are most likely budget-conscious consumers and are most likely to be the ones bumped by some carriers. In this final rule, we have adopted provisions to increase the DBC limits and rates based on the passengers' fare which should help them.

With respect to the proposal to require disclosure of the availability of alternate transportation at the time of volunteer solicitation, we have come to the conclusion that such a requirement is unworkable under most circumstances. The availability of alternate transportation is a fluid issue and is subject to many variables. Due to these variables, what carriers may offer at the time of volunteer solicitation could change by the time the alternate transportation is provided to the volunteer. Should such change occur, the expectation created by the earlier information may cause passengers further confusion and frustration. Thus, we are not going to require such information to be provided at the time of volunteer solicitation.

D. Covered Entities and Other Miscellaneous Issues

The NPRM: The oversales rule currently covers scheduled passenger service using aircraft with 30 or more seats. We solicited comments on whether the oversales rule should be expanded, either in its entirety or partially, to cover scheduled services using aircraft with 19–29 seats and whether we should allow these flights to be oversold at all.

Comments: CTA believes that the oversales rule should apply to all flights of major carriers, regardless of the size of the aircraft. Comments from RegulationsRoom.org generally support applying the oversales rule to all aircraft sizes. Some of these commenters urge the Department to ban oversales on small aircraft, arguing that being bumped from those flights is more disruptive and costly to passengers. ASTA supports extending the oversales rule to aircraft with 19–29 seats, stating that involuntary denied boarding on short-haul flights operated by small aircraft has drastic effects on passengers who are connecting to long-haul flights and these passengers are often surprised after being bumped to discover they have no protection from the Department's oversales rule.

On the carriers' side, ATA supports maintaining the status quo, *i.e.,* allowing overbooking on flights operated with aircraft with 19–29 seats and not applying the oversales rule to these flights. ATA argues that banning oversales on these flights will threaten the existence of small community air services and imposing the oversales rule on these flights would be too costly to carriers. RAA also opposes banning oversales on regional flights, arguing that such a ban would eliminate the ability of carriers to serve small communities, as carriers would not be able to bear the costs of running flights with empty seats. RAA also contends that the denied boarding risk is low on regional flights operated by small aircraft because regional carriers' load factors lag behind large aircraft operators.

DOT Response: The Department has been persuaded that it should not extend the oversales rule to flights operated with aircraft with 19–29 seats. Aircraft of this size make up a small and diminishing portion of scheduled-service operations, particularly in the case of the code-share partners that were the predicate for this proposal. After being bumped from a short-haul segment, the cost of paying DBC based on the fare to a passenger's downline destination — up to 400% of the fare and $1,300 under the final rule — would be an unreasonable burden for operators of 19–29-seat aircraft. These carriers are most likely to be the very small entities to which the Regulatory Flexibility Act requires federal agencies to afford special consideration in rulemaking. Based on similar rationale, we have also decided that it is not in the best interests of the public to ban oversales on these flights because doing so will further reduce the capacity of flights serving smaller airports and communities and cause price increases.

Although not proposed in the NPRM, there are several issues raised by the commenters that the Department feels it is important to address in order to clarify what appears to be confusion associated with the oversales rule. First, several foreign carriers urge the Department to harmonize its oversales rule with the rules of other jurisdictions, such as the European Union. The Department agrees in principle that the U.S. oversales rule should not conflict with the rules of other jurisdictions. The Department has worked diligently to that end, and sees no direct conflict between our oversales rule and the rules of other jurisdictions. We disagree with some commenters' claim that the rule as proposed and finalized here will cause confusion among carrier staff and passengers. With respect to both domestic and international flights, the U.S. rule applies only to denied boardings that occur at a U.S. airport, a relatively straightforward applicability standard that is similar to the approach taken in the EU oversales rule for flights of non-EU carriers. Thus, passengers are clear that when they are denied boarding at a U.S. airport, the U.S. oversales rule applies. The carriers have the responsibility to train their staffs to be familiar with rules of the jurisdictions to and from which they operate. We note that the EU oversales rule has an exception for denied boardings that are subject to compensation requirements of other jurisdictions. To the extent that flights of EU carriers from the U.S. to an EU state may also be subject to the EU oversales rule, those carriers should be able to comply with both the U.S. and EU rules (*e.g.,* by paying the higher compensation amount if the required amounts differ).

CTA and FlyersRights.org both suggest that the Department should not exempt carriers from complying with the oversales rule when the involuntary denied boarding is caused by an equipment change due to factors that are within carriers' control, *e.g.,* crew schedule or maintenance issues. We have carefully examined this suggestion but are not convinced that this proposal is consistent with the underlying rationale of our oversales rule. The Department's longstanding policy of exempting carriers from paying DBC when an involuntary denied boarding was caused by equipment change is based on the grounds that in this situation, the resulting denied boardings were not caused by overbooking, a practice that absent compensation is fundamentally unfair to the passengers who have paid for confirmed seats but are not permitted to board the flight because their promised seat was sold to another person. Accordingly, we will not change our rule involving oversales that result from substitution of equipment of lesser capacity.

Also raised by several foreign carriers is the issue of an alternative to "cash" payment of DBC. These carriers are under the impression that in order to comply with our rule, they must keep a large amount of cash (currency) at the U.S. airports they serve for the purpose of making cash payments to passengers denied boarding involuntarily. These carriers assert that such a cash reserve at their stations in U.S. airports, many of which are staffed by third-party contractors, imposes security concerns. Thus, these carriers urge the Department to allow them to tender DBC payments to passengers in the form of a debit card or other forms of electronic funds. The Department wishes to clarify that under our rule, carriers are permitted to tender a check, in lieu of cash payment, to passengers denied boarding involuntarily, and to do so up to 24 hours after the denied boarding occurred. The check may be mailed to the address that a passenger has provided. Therefore, it is not required that carriers maintain large amounts of cash at airports. We acknowledge the convenience and security features offered by electronic funds, but have not had the opportunity to fully examine the benefits and limitations of using this procedure as an alternative to cash/check DBC payments in this rulemaking proceeding. We may further explore this issue in future rulemaking.

Finally, we have decided not to adopt Delta's recommendation that the revised oversales rule should be applied only to tickets purchased on or after the effective date of the final rule. Such application would inevitably result in the situation where passengers bumped from the same flight will be subject to different rules. Additional delays may occur at the boarding gates when the gate agents have to spend additional time to determine the purchase dates of the tickets in order to determine which rule applies. For this reason, we will require that all denied boardings and other DBC-related processes covered by this rule that occur on or after the effective date of the final rule must comply with the new rule, regardless of the transaction dates of the ticket sales.

We note that this final rule also includes a technical amendment concerning reporting of oversales. We are correcting a technical inconsistency in the oversales reporting requirements in section 250.10. One sentence in that section states "The reporting basis shall be flights originating or terminating at or serving, a point within the United States." The last sentence of that section reads: "No reports need be filed for inbound international flights on which the protections of this part do not apply." Apparently, when the rule was amended many years ago to remove applicability to international flights inbound to the United States, the second sentence quoted above was added but the first sentence was not revised to remove the reference to flights "terminating in" or "serving a point within" the United States. The intent and the practice has been not to include international flights that terminate in the U.S. (*i.e.,* inbound international flights) in these Form 251 data. This has been clear in paragraphs (A) and (E) in the instructions to the form (see *http://www.bts.gov/programs/airline_information/forms/pdf/form_251.pdf*). We are not aware of any instances in which data for inbound international flights have been inadvertently included in Form 251 reports.

7. Full Fare Advertising

A. Change in Enforcement Policy

The NPRM: The Department's price advertising rule (14 CFR 399.84) states that any advertised price for air transportation, an air tour or an air tour component must be the entire price to be paid by the customer for that transportation, tour or tour component. However, the Department's enforcement policy with regard to this rule has permitted sellers of air transportation to state separately from the advertised price government-imposed taxes and fees, provided that they are not ad valorem in nature, are collected by the seller on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full price to be paid. The Department has prohibited sellers of air transportation from breaking out any other seller imposed fees, including fuel surcharges and service fees, and taxes imposed on an ad valorem basis.

In the NPRM, the Department proposed enforcing the price adverting rule as it is written. This proposal would change the existing enforcement policy by ending the practice of permitting sellers to exclude government taxes and fees from the advertised price, and would instead require that the price advertised include all mandatory fees. The Department invited comments on how sellers of air transportation foresee this change in enforcement policy affecting the methods they use to advertise fares and how consumers view the change. The Department also requested comment on the potential cost of changing the current advertising structures that carriers and ticket agents have in place in order to adhere to the proposed policy shift.

Comments: Individuals and consumer organizations such as Flyersrights.org, in addition to individuals who participated on Regulation Room, support the proposal that advertisements for air transportation state the total price to be paid by the consumer. Some commenters participating in discussions through Regulation Room reported that there were occasions when they thought they were going to pay one price for air transportation, but the final price was much higher due to additional taxes and fees. Regulation Room commenters also stated that the current advertising method borders on bait-and-switch tactics. Some individual commenters expressed similar sentiments, noting how they have been surprised by the total amount to be paid at the end of a purchase online and their preference to know the total amount to be paid earlier. Some consumers and consumer groups go further by suggesting that the Department should require that the true cost of travel, including ancillary fees, be disclosed earlier in the booking process. For example, CTA states that even if the price advertising rule requires the disclosure of all mandatory fees, consumers may still have trouble finding out the true cost of travel due to the proliferation of many kinds of ancillary fees for optional services.

U.S. carriers and carrier associations generally oppose the Department changing its enforcement policy to enforce the full price advertising rule as written. ATA states that its members support fare transparency, but notes that the Department declined to revise its full-fare rule four years ago and contends that the airfare advertising landscape has not changed since that time in a manner that would justify a change in 25 years of enforcement policy. ATA notes that several other industries advertise without including government-imposed taxes and fees, and states that the air transportation industry should not be treated differently. It asserts that this policy shift would suppress valuable information to consumers about how much of their total price consists of government-imposed taxes and fees. In addition, ATA argues that this policy shift would negatively impact competition because government-imposed taxes and fees vary from airport to airport and routing to routing. ATA contends that this means that an airline that has a competitive fare, but also has a routing that subjects the fare to higher taxes and fees, will be disadvantaged if it is required to include those taxes and fees in the advertised price. It remarks that this could negatively impact service to smaller communities. ATA also raised concerns about the cost implications of the proposal, because the proposal would require airlines to perform additional route pricing analysis, programming changes, website changes, and auditing and testing of changes. Many U.S. carriers raise similar points.

The views of foreign carriers and associations varied, with many opposing the proposed mandate that the advertised fare be the full fare to be paid by the customer but some supporting it. IATA believes that there is no evidence of widespread advertising deception to justify a change in the Department's enforcement policy. Additionally IATA notes that the complexity of non-airline charges makes listing a full fare with "all mandatory fees" difficult, and would only confuse air travel consumers because this complexity prevents a true fare comparison as the actual fare is obscured by the additional government-imposed taxes and fees. IATA also notes that passengers are made fully aware of the purchase price before purchase. Most foreign airlines support IATA's comments. Some foreign carriers, such as Singapore Airlines, Qatar Airways, and Jetstar Airways, support the proposed mandate that advertisements state the total price to be paid by the consumer. Many of these airlines state that they already advertise the total price to be paid by consumers due to regulations of other governments. Some foreign carriers expressed concerns about the applicability of this rule to advertisements on websites that are not domiciled in the United States or directed to United States customers.

Among other industry interests that commented, ASTA and ITSA support this policy shift and note that full fare disclosure is the best way to eliminate passenger confusion and ensure that passengers understand the total cost of their air travel. ASTA asserts that the full fare displayed in advertisements should include all mandatory fees, regardless of their source. The United States Tour Operators Association (USTOA) disagrees and states that the proposed change will place costly burdens on travel agents while doing very little to ease customer confusion in airline pricing. USTOA contends, as does ATA and many U.S. airlines, that ending the practice of permitting sellers to exclude government taxes and fees from the advertised price is not justified because the airfare advertising landscape has not changed since the Department last declined to revise the full-fare advertising rule. USTOA states that tour operators would be especially negatively affected by this shift in policy because government-imposed fees vary widely depending on where the consumers choose to start their trip, and therefore a tour operator would not be able to advertise a tour effectively since the purchaser usually has the option of a number of gateways.

DOT Response: The Department has decided to adopt the proposed policy change in relation to the full-fare advertising rule. We disagree with comments that the Department has not shown true harm to consumers in not having the full price quoted to them up front. On the contrary, comments from individual commenters and persons participating in Regulation Room show consumers feel deceived when the total price, including taxes and fees, is not quoted to them after an initial fare inquiry. Many consumers feel that advertising fares that exclude mandatory charges is a "bait and switch" tactic by travel sellers. The Department has also received complaints regarding fare advertising, some of which specifically mention feeling deceived when they are not quoted the full price to be paid after an initial inquiry.

Also, contrary to the assertions of some commenters, the Department has seen changes in the advertising methods used by sellers of air transportation since the Department declined to revise its full-fare rule in 2006. Sellers are now marketing air transportation through a variety of methods that they were not using then. For example, some carriers have started to sell tickets through Facebook and some have Twitter feeds dedicated solely to advertising sale fares. Additionally, in recent years, carriers are increasingly unbundling the cost of air travel, which further obscures the total fare to be paid by the consumer. Carriers and online travel agencies have also started to offer more complicated routings with multiple connections in order to provide the "lowest" airfare to consumers. However, with these changes in routings, taxes and fees can increase and become a significant portion of the price to be paid by consumers. In those cases, consumers need a full picture of the total price to be paid in order to compare fares and routings. In order to understand the true cost of travel, consumers need to be able to see the entire price they need to pay to get to their destination the first time the airfare is presented to them.

We also are not persuaded by argument that the Department should not require that the advertised price for air transportation, a tour or tour component be the total price to be paid by the customer for that transportation, tour or tour component because other industries advertise without including government-imposed taxes and fees. Airfares are different from products in other industries for a variety of reasons, including the multitude of methods of advertising that sellers of air transportation employ and the various taxes and government fees that apply. We believe that consumers are deceived when presented with fares that do not include numerous required charges and, in our view, air travelers will be better able to make price comparisons when they can see the entire price of the air transportation, tour or tour component being advertised. The advertised fare under this policy shift must include all government-imposed taxes and fees as well as mandatory carrier-imposed charges, including booking fees if the only way the consumer can obtain the air transportation is by paying the booking fee. While a carrier or ticket agent generally is not required to include a booking fee in its advertised fare if there are other means for the passenger to obtain the air transportation (*e.g.,* a booking fee only applies for tickets that are purchased over the telephone), where airfares are advertised via an Internet site that permits consumers to purchase fares, the fares advertised on the site must include all charges required to make the purchase on the site. For example, it would be unfair and deceptive to hold out on such an Internet site a fare that can be purchased only at airport ticket counters but that excludes a convenience fee that is applied to Internet sales.

In regard to the costs related to this change, online travel agencies that will face many of the same marketing and programming challenges as carriers do, if not more, feel that the operational costs of adhering to the rule will be overly burdensome. Sellers of air transportation are constantly updating their fare matrices and the methods by which they display fares. In addition, we believe many carriers may already have programs in place to accommodate this policy shift, as some foreign governmental entities such as Australia and the European Union already require the total price to be shown to consumers. We note also that the requirement for advertisements to state the total price is limited to advertisements published in the United States, including via the Internet if accessible in the U.S. Further, recognizing the amount of print advertising slated for use by tour operators that would need to be pulled thereby increasing costs of print advertising revision, we have decided that the new full fare adverting requirements will not take effect until 180 days after the publication of this final rule in the **Federal Register**. This should reduce the costs related to this requirement.

Some airlines were concerned that passengers would not know how much of their total price consists of government imposed taxes and fees. We want to assure these carriers that nothing in this rule prohibits them from making this information available to consumers. This final rule allows carriers to advise the public in their fare solicitations about government taxes and fees, or other mandatory carrier or ticket agent imposed charges applicable to their airfares. Sellers of air transportation may have pop-ups or links adjacent to an advertised price to take the consumer to a listing of such charges, or they may display these charges on the same page in fine print if they prefer. Such charges must accurately reflect the actual costs to the carrier of the service or matter covered, be displayed on a per passenger basis, and be displayed in a manner that otherwise does not deceive consumers. Consequently, the rule requires that any such listing not be displayed prominently and be presented in significantly smaller type than the listing of the total price to ensure that consumers are not confused about the total price they must pay. Also, we are prohibiting the presentation of any "total" fares in advertising that exclude taxes, fees or other charges since the major impact of such presentations is to confuse and deceive consumers.

B. Explicit Inclusion of Ticket Agents

The NPRM: The Department proposed to explicitly apply the price adverting rule to ticket agents. We have for years considered ticket agents to be subject to the price advertising rule since the Department's statutory authority to prohibit unfair and deceptive practices and unfair methods of competition applies to both carriers and ticket agents. However, the Department's price advertising rule doesn't specifically indicate that ticket agents are covered by the rule.

Comments: Comments received from airlines, travel agents, consumer groups and others all supported the inclusion of ticket agents in the price advertising rule. Air New Zealand and Qantas indicate that their support for including ticket agents in the rule is contingent on airlines not being responsible for the compliance of ticket agents.

DOT Response: The final rule explicitly includes ticket agents in the price advertising rule. This is consistent with longstanding Department policy and we did not receive any adverse comments. This inclusion will ensure that consumers are more fully protected. With regard to the Air New Zealand and Qantas comment, airlines have always been legally responsible along with their agents for their agents' advertising violations and they will continue to be under the revised rule.

C. Each-Way Advertising

The NPRM: The Department proposed to codify its enforcement policy on each-way airfare advertising. Under this policy, advertisement of an each-way airfare that is contingent on a round-trip purchase is an unfair and deceptive practice unless the airfare is advertised as "each way" and the round-trip purchase requirement is clearly and conspicuously disclosed in a location that is prominent and proximate to the advertised fare amount. The Department invited interested parties to comment on this proposal and on whether the Department should adopt a similar rule for air/hotel packages that advertise a single price but are sold at that price on a double occupancy basis, *i.e.,* two individuals must purchase the package to obtain the advertised fare.

Comments: Individual consumers and consumer groups had divergent views on whether the Department should allow each-way airfare advertising even if the round-trip purchase requirement is clearly and conspicuously disclosed proximately and prominently to the advertised fare. Flyersrights.org opposes this proposal, believing that disclosure of the full round-trip purchase price is most helpful to consumers. Consumers Union and AAPR support the proposed regulation, as long as the round-trip purchase requirement is clear and conspicuous. Most of the commenters on Regulation Room and individual commenters generally support this proposal but some, like Flyersrights.org, suggest the Department require that the full round-trip purchase price be disclosed. Airlines, airline associations and travel agency groups express support for the each-way advertising regulation. ATA requests clarification as to whether "one way" advertising would be allowed if there was no round-trip purchase requirement. ASTA supports this proposal as well, noting that specifically prohibiting the use of "one way" to advertise fares that are contingent on round-trip purchases will allow consumers to better comparison shop among fare quotes.

We received relatively few comments on whether the Department should adopt a rule requiring specific disclosure for air/hotel packages that advertise a single price but are sold at that price only on a double occupancy basis. Some commenters participating in the Regulation Room discussion state that clear and conspicuous disclosure concerning occupancy-related rates should be required. ASTA comments that double occupancy rates should still be allowed, as long as the "per person" requirement is disclosed.

DOT Response: The Department is codifying existing enforcement policy allowing sellers of air transportation to advertise an each-way price that is contingent on a round-trip ticket purchase so long as the round-trip purchase requirement is clearly and conspicuously disclosed in a location that is prominent and proximate to the advertised fare. This codification of longstanding enforcement policy allows sellers of air transportation to be flexible in the way they advertise round-trip fares while still requiring all pertinent disclosures to consumers. While the Department understands that some consumers would prefer the full round-trip price to be displayed, the Department has not found that the current regime has led to consumer confusion or deception and it does permit certain types of advertising that are beneficial. We note also that this final rule specifically prohibits referring to such an airfare as "one way" even if the round-trip purchase requirement is clearly disclosed, which should minimize or prevent consumer confusion. In response to ATA's request for clarification, we agree that "one way" advertising is allowed when purchase of that fare is not contingent on a round-trip purchase. We are deferring to a later date any requirement regarding double occupancy advertisements as we received few comments on this matter. We do not have enough information at this point to determine if consumers feel deceived by double occupancy rates, and consequently we will not formulate a specific regulation regarding the methods of such advertising at this time. "Double occupancy" advertising will still be subject to the general provisions of 49 U.S.C. 41712.

D. Opt-Out Provisions

The NPRM: The Department proposed to prohibit "opt-out" provisions by sellers of air transportation. "Opt-out" provisions involve situations where a consumer is purchasing air travel or an air tour package online and certain fees for ancillary services or products are pre-selected for the consumer and added to the total price to be paid by the consumer at the end of the transaction. The consumer is deemed to have selected these services (and the charges for them) unless the consumer "unchecks" the pre-selected box or boxes for the relevant services. The NPRM proposed prohibiting this practice as unfair and deceptive in violation of 49 U.S.C. 41712 and allowing carriers and ticket agents to add an optional service to the total airfare to be paid by the consumer only if the consumer affirmatively "opts in" to accept and purchase that service.

Comments: There was wide support among individual commenters and consumer groups for a prohibition against opt-out provisions. A few individual commenters noted that this prohibition will allow consumers to avoid unwanted fees. All of the individuals commenting through the discussion on Regulation Room stated that all optional services should be presented to consumers as an "opt-in" choice. Individual consumers recounted how they were sometimes faced with paying for travel insurance they did not need or a seat selection fee they were not aware of because those options were "pre-selected" by the seller of air transportation.

Many industry commenters, though not all, also agree with a prohibition on "opt-out" features in advertising. ATA and most U.S. carriers, such as US Airways and Delta Air Lines, support this proposal. American Airlines states that non-aviation services should be offered on an "opt in" basis, but that aviation services that most consumers expect as part of their travel should be pre-selected. American notes that this will allow consumers to customize their travel options. IATA does not oppose the prohibition on opt-out provisions. AEA notes that EU Regulation 1008/2008 already has an opt-in requirement. Qantas Airlines opposes this regulation, stating that it feels customers appreciate pre-selected options. ASTA supports a prohibition on "opt-out" features in price advertising.

DOT Response: The Department has decided to prohibit the use of opt-out provisions by carriers and ticket agents. The fact that consumers often don't realize that optional services are included in the total price of the ticket due to the deceptive nature of such opt-out provisions, is borne out by consumer comments. Many industry organizations also support prohibiting opt-out provisions. In addition, this action will align the United States with the consumer protection laws of other jurisdictions which prohibit opt-out provisions, including the European Union through its regulation 1008/2008. We do not agree with airline comments that consumers like having certain airline related services preselected for convenience sake so that they can see the total cost of travel with those services. We believe that having opt-in selections achieves the same goals of allowing travelers to customize their air transportation packages to their travel needs and see the total cost of travel with those service while eliminating the unfair and deceptive practice of pre-selecting items that the consumer has not selected and does not necessarily realize are pre-selected until late in the process — sometimes after a purchase is complete. This rule would prohibit opt-out provisions for any ancillary fee for an optional service such as seat selection, seat upgrades, pre-boarding, travel insurance, rental cars, and transfers to and from the airport. Under this rule, an optional service can be added to the total airfare to be paid by the consumer only if the consumer affirmatively agrees to pay a fee for such service, *i.e.* by checking a box for that service or other concrete action.

8. Baggage and Other Fees and Related Code-Share Issues

A. Covered Entities

The NPRM: In the NPRM, the Department proposed to require all U.S. and foreign air carriers that have websites accessible to the general public in the United States through which tickets are sold to provide notice to consumers about baggage fees and allowances and other ancillary fees that the carrier may charge. More specifically, the NPRM proposed: (1) Disclosure on the homepage for at least three months of any increase in the fee for passenger baggage or any change in the free baggage allowance for checked or carry-on baggage; (2) notice on e-ticket confirmations regarding the free baggage allowance for that flight and any applicable fee for the first and second checked bag and carry-on bag; and (3) disclosure of all fees for optional services in one central place on the seller's website. The Department noted that the recent trend to unbundle services and charge separate fees for services that may have once been included in the cost of a ticket has led to consumers having difficulty determining the total price they must pay to travel by air. The Department requested comment on whether these requirements to disclose baggage and other fees should apply to ticket agents as well as carriers. We also invited comment on alternative proposals, including whether the Department should limit the applicability of the disclosure requirements to all flights operated by U.S. carriers, U.S. and foreign carriers that operate any aircraft with 60 or more seats, or U.S. and foreign air carriers that operate any aircraft with or 30 or more seats.

Comments: Many consumers state that the type of fee disclosures contemplated in the proposed rule should apply to all sellers of air transportation. Some consumers relayed experiences where they felt fees were hidden when booking on online travel agency websites. CTA and BTC state that this section should apply to ticket agents as well as carriers, but they both note that the agents need accurate and up to date information from the airlines via the GDSs in order to provide accurate information to consumers.

USTOA contends that the disclosure requirements, as proposed, should not be applied to ticket agents because the airlines are updating and changing fees constantly, and the cost to agents to ensure that the various airline fees they display are correct would be burdensome. USTOA proposes that instead ticket agents simply be required to inform consumers on their websites and on e-ticket confirmations that baggage and other charges may apply by stating that "airline fees for baggage and other optional services may apply to your journey; please consult with your airline for information on those fees." USTOA further states that in the event that the Department concludes that additional specific information should be provided by ticket agents, it should allow ticket agents to provide hyperlinks to the locations on the airline websites where specific information may be obtained. ITSA does not object to extending the requirements to disclose baggage and other fees to ticket agents, but notes that if the information is not provided to the GDSs, the costs associated with agencies constantly updating information are high and the possibility exists that the information may not be accurate. ASTA takes a similar position to ITSA in regards to applying the disclosure requirements to ticket agents.

DOT Response: The Department has decided that the requirements to provide specific notice to consumers about baggage fees and allowances and other ancillary fees shall apply to all U.S. and foreign carriers that advertise or sell air transportation in the U.S. We are not limiting the applicability of the disclosure requirements to flights of only U.S. carriers, as the harm to the consumer is the same whether the lack of information about baggage and other ancillary fees involve flights operated by a U.S. carrier or a foreign carrier. We are also not limiting the applicability of these requirements based on the size of the aircraft that carriers operate as we believe that disclosure of add-on fees is an issue of sufficient significance to warrant application of this requirement to aircraft of all sizes. Consumers want to be informed of the fees that they will be required to pay for optional services regardless of the size of the aircraft on which they travel.

The Department also believes that it is important to ensure that consumers are alerted to airline-imposed fees that may be applicable to itineraries purchased through ticket agencies. However, we are persuaded by USTOA and others to apply a more limited requirement to ticket agents, particularly since the Department is deferring decision on whether to require U.S. and foreign carriers to give ancillary fee information to GDSs. Therefore, unlike the case for U.S. and foreign air carriers, this final rule does not require ticket agents to disclose on their website information about changes in baggage fees or allowances or to list on their website all of the airlines' fees for optional services. The final rule does, however, require ticket agents (and carriers) to inform passengers on the first screen in which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to see these baggage fees. This notification on the website must be clear, conspicuous and prominent. To comply with this requirement, ticket agents can choose between referring consumers to their own site where the baggage fees are displayed or to the airline websites where specific information may be obtained. This requirement is consistent with prior guidance provided by the Department's Aviation Enforcement Office. See, Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, *Guidance on Disclosure of Policies and Charges Associated with Checked Baggage,* May 13, 2008, *http://airconsumer.dot.gov/rules/guidance.htm.* The final rule also requires ticket agents (and carriers) to include on e-ticket confirmations information about the free baggage allowance and the applicable fee for the first and second checked bag and carry-on but allows ticket agents, unlike carriers, to do so through a hyperlink. We also want to make clear that when using the term "ticket agents" we are referring not only to agents of the carriers but also others who meet the definition of "ticket agent" contained at 49 U.S.C. 40102 (a)(40), *i.e.,* one who as a principal sells, offers for sale, negotiates for or holds itself out as selling, providing or arranging for air transportation.

B. Disclosure of Baggage Fees

The NPRM: In 2008, the Department's Aviation Enforcement Office issued guidance concerning the disclosure of baggage fees to the public. In that notice, the office stated that it views a carrier's failure to clearly disclose significant conditions applicable to air fares, such as baggage fees, to be an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. 41712. It described steps that carriers should take to ensure that they are providing prominent and timely notice of their baggage policies and charges. For example, the office suggested carriers place a notice on the home page of their website highlighting new baggage policies and charges. See, Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, *Guidance on Disclosure of Policies and Charges Associated with Checked Baggage,* May 13, 2008, *http://airconsumer.dot.gov/rules/guidance.htm.*

In the instant proceeding, the Department proposed to codify this guidance document by requiring carriers that maintain a website that is accessible to the general public to prominently disclose on the homepage of that website for at least three months any increase in the fee for passenger baggage or any change in the free baggage allowance for checked or carry-on baggage. The Department proposed that this notice could appear in its entirety on the home page or could be accomplished through a prominent, conspicuous hyperlink (*e.g.,* "Revised Baggage Fees") that leads to an explanation of the carrier's baggage policies and fees. The Department invited comment on this proposal, including comment on how long the notice should remain on the page and the best options for displaying the information to consumers.

The NPRM also proposed to require carriers that issue e-ticket confirmations to include information on that confirmation regarding the free baggage allowance for that flight and the applicable fee for the first and second checked bag and carry-on bag. The goal of this proposed rule was to provide the specific information regarding a particular consumer's baggage allowance well before that consumer arrives at the airport with bags packed. The Department invited comment on this proposed section.

Comments: Most individual commenters and commenters from consumer groups did not address this proposal specifically, but overwhelmingly commented that, in general, they supported more disclosures. Individual commenters, through the Docket and through Regulation Room, noted how they are sometimes surprised by additional baggage fees when they check-in at the airport. CTA states that two out of three travelers responding to their survey were surprised by fees upon checking in for a flight at the airport. Many commenters wanted the Department to limit the carrier's ability to unbundle certain fees from the base fare, particularly baggage fees for the first checked bag. These commenters feel that carriers are "nickel and diming" passengers instead of trying to improve service. Other commenters found value in the a la carte pricing models of carriers because the models allow travelers to customize their trips. The individual commenters who were not opposed to unbundling fees generally support more disclosure of fees to the consumer before purchase.

ATA and most U.S. carriers support more disclosure regarding changes in baggage fees. ATA supports the proposal to put notice of fee changes on a carrier's homepage and states that the best method for providing this notice is to put a hyperlink on the homepage. ATA notes that three months is a long enough time to require the information on the change to be on the website. Most U.S. carriers submitted comments similar to ATA's on the proposal to disclose baggage fee changes. Virgin America states, however, that the Department should refrain from establishing too much specificity or detail because such a regulation would detract from competitive market forces on how airlines design and set up their own websites. Furthermore, Virgin America notes that many carriers are developing mobile applications where screen space is limited. Allegiant Airlines opposes what it sees as attempts by the Department to micromanage how websites appear and how information is shared with consumers in the absence of a clear attempt by carriers to deceive consumers.

Foreign carriers and carrier associations generally were not in favor of what they view as increased U.S. government regulation of the appearance of websites that are not maintained in the United States. IATA warns that this proposal could be an extraterritorial application of U.S. law. IATA further states that most carriers already have baggage fee information readily available on their website, and most carriers do not charge for one or two checked pieces of baggage to or from the United States, so adding extra notice and advertising requirements to a carrier's website would increase costs greatly. The National Airlines Council of Canada agrees with disclosure of fees on websites, but disagrees with the requirement to place a link to the disclosure on the homepage. Jetstar Airways opposes posting notice about the change directly on the homepage of the carrier, asserting that space issues could limit airlines' ability to clearly disclose the changes and advertise products and services. Qantas raises similar concerns, noting that the Department should not dictate the content of a carrier's website or homepage. Lufthansa believes that the Department did not establish why these disclosure rules are necessary, but does note that it already provides most of this information. Condor Flugdienst notes its objection to requiring changes to baggage allowances to be posted on the homepage, stating that failure to provide notice of a change is a violation of 49 U.S.C. § 41712 under Department guidance and that there is no need, therefore, for the Department to codify this requirement. Air France and KLM contend that having the information regarding baggage fee changes stand alone on the homepage would be costly. Those carriers suggest that this information's location on the website should be left to the airline's discretion and that a time period of one to two months would be enough time for consumers to be aware of the change.

With regard to disclosure of baggage information on e-ticket confirmations, as with the proposal to disclose such information on carriers' websites, most individual consumers and consumer groups support any provision that provides the consumer with more information and prevents consumers from being surprised about hidden fees. Some individuals specifically contend that baggage allowance disclosures should also include information regarding excess weight and excess baggage charges. Many consumers feel that the disclosure of baggage fees should occur earlier in the process, not after purchasing the ticket. One commenter noted that e-ticket confirmations are not required, and that some carriers still use paper tickets. This commenter noted that any requirement for disclosure of baggage fees on an e-ticket confirmation would not help consumers who are provided paper tickets because those consumers would not have that information. This commenter believes that the Department should clearly define what a ticket is, and then require baggage fee disclosures to be in the same method as the purchaser receives the ticket.

ATA and most U.S. airlines do not have an objection to this requirement, as many carriers currently provide this information in the e-ticket confirmation. US Airways and Delta Air Lines support baggage disclosures on e-tickets. Spirit Airlines supports baggage fee disclosures on e-tickets through a hyperlink to baggage information. IATA is not opposed to a provision requiring airlines to include information regarding optional services in e-tickets after a purchase is complete. AEA also states that it is not opposed to providing this information on an e-ticket. AEA points out that EU Regulation 1008/2008 mandates that optional price supplements be communicated in a "clear, transparent and unambiguous way." Some foreign carriers assert that requiring the information on the e-ticket confirmation is regulatory overkill, as a consumer cannot complete a purchase without becoming aware of the fees due to other government regulations. Other carriers state that due to the abundance of disclosure prior to completion of purchase, a carrier should not be required to provide all of the information in full on an e-ticket as that would be costly. All Nippon Airways expressed concerns about the costs of redesigning their e-ticket confirmations, noting that a recent overhaul cost upwards of $145,000. Some carriers, such as Air France and KLM, note that they already have a system in place to provide information about baggage on the e-boarding pass issued via Internet check-in.

DOT Response: The Department has decided to require U.S. and foreign carriers that advertise or sell air transportation in the United States to promptly and prominently disclose any increase in its fees for carry-on or checked baggage and any change in the checked baggage allowance for a passenger on the carrier's homepage. Such notice must remain on the homepage for at least three months after the change becomes effective. This rule is consistent with current enforcement policies regarding the disclosure of changes in baggage fees. Additionally, the Department feels that this rule will prevent passenger surprise about changes in baggage fees or allowances. We agree with consumers and consumer groups, who advocate that greater disclosure of fees, and particularly baggage fees, is needed. Recognizing the concerns raised by carriers, particularly foreign carriers, about space on a carrier's homepage and a carrier's legitimate need to be able to design a website that is competitive and presents information in a clear way, the Department will allow carriers to fulfill the notice requirements by providing a link from the homepage directly to a pop-up or a place on another webpage that details the change in baggage allowance or fees and the effective dates of such changes. The link on the homepage needs to be descriptive, clear and conspicuous, *i.e.,* easy for a consumer to locate. The link need only remain on the homepage for a period of three months after the change becomes effective. Most commenters agreed that three months is a long enough time to ensure that consumers are aware of any change in baggage fees or allowances.

The Department disagrees with Air France and KLM, which suggest that the carriers be allowed to decide where on their website to display the information and that the information should only remain active on the website for one or two months. Changes that occur need to be posted on the website for a sufficient time in order to allow consumers to review the changes not only prior to choosing a flight but also after they chose a flight and are preparing to travel. The Department believes that allowing carriers to decide where the notice should be given may result in some carriers placing the information in an inconspicuous location on the website. If such information is difficult for consumers to find, they may not be aware of the change until after arrival at the airport and the consumer cannot evaluate the impact of the change in baggage fees and allowances on his or her scheduled transportation, which limits consumer choice.

The Department has also determined that there is value in providing a consumer information regarding baggage fees and allowances after the consumer completes a purchase for air travel. Therefore, the final rule requires U.S. carriers and foreign carriers and ticket agents that advertise or sell air transportation in the United States to provide information on e-ticket confirmations regarding the passenger's free baggage allowance and/or the applicable fee for a carry-on bag and the first and second checked bag. By "applicable fee," we mean the baggage fee information provided on the e-ticket confirmation cannot simply be a range of fees but must include information about any price that may exist for a carry-on bag and the first and second checked bag and any differing price that may exist depending on the passenger's status (*e.g.,* frequent flyer, military personnel), on when the payment for the bag is made, or and on whether a consumer checks his or her bag online rather than at the airport. As explained in the section on covered entities, because they may not know the most recent carrier baggage policies, ticket agents may provide details on where to obtain this information by a hyperlink to the locations on the airline websites where specific information may be obtained since the airlines often update and change fees. The Department notes that this requirement will benefit consumers because it will reduce confusion over whether, and, if so, how much they will have to pay to check or carry-on bags. Additionally, this will save the time of both consumers and airline employees at the airport, because consumers will be notified in advance of check-in what the applicable fees are for a carry-on bag and the first and second checked bags. The Department notes that carriers are already providing this information to consumers in compliance with existing enforcement policies. We disagree with the assertion by some carriers that consumers cannot complete a purchase without first becoming aware of the applicable baggage fees. Given the advent of new fees, such as fees for carry-on bags, the differing price for first and second checked bags, and the price difference that sometimes exists if a consumer checks his or her bag online versus checking the bag in at the airport, the Department believes that it is not a simple matter for consumers to determine the total price to transport their baggage. Additionally, the Department disagrees with airlines that assert that the disclosure requirements are burdensome, as most carriers already provide this information in one form or another.

C. Disclosure of all Ancillary Fees

The NPRM: The Department proposed to require carriers that have a website accessible to the general public to disclose all fees for optional aviation services in one central place on their website, so that consumers have an easily accessible reference guide for the cost of these services. This disclosure was proposed to be made through a link from the carrier's homepage directly to a listing of those fees. The Department invited general comment on this proposal. We also asked for comment on whether only "significant" fees for optional services should have to be listed and, if so, how to define a "significant fee." The Department also asked for suggestions for alternatives to the easily accessible link from the homepage for this disclosure.

Comments: Generally, the majority of consumers and consumer groups agreed with requiring carriers to disclose ancillary fees on their website. They contend that airlines hide their fees, and that requiring disclosure will benefit consumers' ability to comparison shop and avoid surprise fees. Many consumer commenters urge the Department to require that the listing of optional fees on carriers' websites be standardized. However, some commenters, commenting through the discussion on Regulation Room, expressed concern that a large fee table could be confusing to inexperienced or unsavvy casual travelers. Some consumers and consumer organizations assert that requiring the disclosure of ancillary fees does not go far enough and ask that the Department establish a list of ancillary services for which airlines are prohibited from charging a fee.

ATA generally supports the proposal requiring airlines to disclose fees for ancillary services on a carrier's website through a link, but feels that disclosure of such fees on e-ticket confirmations would be burdensome. ATA contends that some fees vary based on the flight and itinerary, such as food and beverage items. ATA, as well as industry groups such as ASTA and ITSA, do not see a reason why the disclosure should be limited to significant fees. US Airways generally supports this proposal, but requests sufficient lead time to fully implement the website changes required to list the fee information. US Airways notes that if the Department requires disclosure of these fees earlier in the process, the programming costs would increase to cover the complexity of new programming, and sufficient lead time would be required. Delta states that it already has a page that lists these fees, and does not object to a requirement that all carriers maintain such pages.

DOT Response: The Department has decided to require U.S. and foreign carriers to have one, central webpage on their website, linked from the carrier's homepage, which lists all ancillary fees. The reason for this requirement is that Department considers it too difficult currently for consumers to effectively comparison shop and determine the total cost for travel, including ancillary fees for optional services. Not all carriers provide information regarding charges for various services, such as seat assignments, extra leg room, priority boarding, telephone reservations, and seat upgrades in a centralized location so that it is easily accessible for the consumer to review prior to purchase. The Department considers it to be unfair and deceptive to charge an ancillary fee to a consumer, when that consumer had no simple, practical, and reasonable way of knowing about the fee prior to purchasing the ticket. Having a single listing of all of the ancillary fees that a carrier charges for optional services allows the consumer access to greater information without unduly burdening the carrier or stifling the carrier's need to compete on such services.

The Department agrees with commenters that state that all fees should be listed. We believe that there is no practical way to identify what is "significant," as each traveler, and even airline, might differ over what is significant. Therefore, the Department believes that to ensure adequate protection of consumers, as well as to ensure a level playing field among airlines, it is best to require carriers to list all fees. This includes, but is not limited to, fees for checked baggage, carry-on baggage, overweight bags, meals, on-board entertainment, Internet connections, pillows, blankets, advanced or upgraded seating assignments, telephone reservations, early boarding, canceling or changing reservations, unaccompanied minors, and pet transportation. ATPCO has identified more than a hundred optional services and assigned each of those services a code. While the ATPCO list may not be an exhaustive list of services that are now offered or that will in the future be offered, the Department suggests that carriers may wish to use the ATPCO list of charges as a reference in developing a list of all optional services and fees to put on their websites.

The Department understands the carriers' concern that the availability and price of some items vary depending on a number of factors such as the type of aircraft being used, the frequent flyer elite status of a passenger, the flight on which a passenger is booked, or the time at which a passenger pays for the optional service. For non-baggage related optional services, carriers can provide a range of fees, acknowledging that they vary based on those types of factors. For example, if food and beverage service prices vary among flights, an airline can state that meals or snacks are available for purchase, and then give a range of prices for such meals and snacks.

This use of a range of fees would not, however, be acceptable under the rule with regard to fees in connection with checked or carry-on baggage, which are so fundamental to air travel and have until relatively recently been included in the price paid for travel on all carriers. With regard to those fees, we are specifically requiring that carriers, at a minimum, provide information about (1) any differing price that may exist for the first, second, third, or more checked and carry-on bag or overweight/oversized bag and (2) any differing price and allocation (*e.g.,* whether or not a bag checked for free counts toward overall allowance) that may exist for each bag depending on the passenger's status (*e.g.,* frequent flyer, military personnel), on when the payment for the bag is made, or whether a consumer checks his or her bag online versus checking the bag at the airport. If an airline offers discounted baggage fees through status as a member in a paid or unpaid membership "club," information regarding these programs should be offered as well. The Department believes that listing the fees in one place will allow consumers greater access to information, prevent the problem of hidden fees, and prevent confusion at the airport or in-flight due to an unexpected charge. It should also enhance competition, as consumers will be better able to compare costs among carriers for the trip that they plan to take with the services that they would like to have. With regard to commenters who wanted the Department to mandate certain ancillary items that must be free, the law does not provide us the authority to do so.

D. Global Distribution Systems

The NPRM: The Department stated in the NPRM that it was considering requiring carriers to make information about charges for optional services available to global distribution systems (GDSs). The Department considered this proposal due to the fact that a significant portion of consumers purchase their air travel and air tours though travel agencies, both online and traditional brick-and-mortar agencies. The Department invited comments on the ability of carriers to provide this information in a usable format and the potential costs and benefits associated with providing this information to GDSs.

Comments: ATA and most of its members strongly oppose a requirement that forces airlines to provide ancillary fee information to GDSs. First, ATA notes that this is a competitive issue and would interfere with ongoing negotiations among carriers, GDSs, and travel agents, and would inject government regulation into private market decision making. ATA notes that GDSs already have a great share of the market for air transportation bookings, and warns that fares could increase to cover the charges the GDSs would likely levy on carriers that are required to provide this information to them. ATA also questions the existence of any unfair or deceptive practice this requirement would prevent.

Most U.S. carriers agree with ATA's position. US Airways does not believe the Department should mandate disclosure in a particular format, seeing this as interference with market forces. Delta Air Lines believes that this rule would affect its bargaining position with the GDSs and their ability to explore different options for sharing of this information with the GDSs. American Airlines contends that a carrier should have the ability and power to decide how to market its ancillary services. American states that requiring disclosure would unfairly bolster the GDS market power. In a joint filing, American Airlines, Continental Airlines, Delta Air Lines, United Air Lines, and US Airways reiterate the carriers' commitment to providing fee information to consumers, but assert that interfering in market negotiations would harm competition and ultimately would harm consumers. These airlines note that providing fee information about optional services to consumers is good for the airlines because airlines are in the business of selling tickets and selling these ancillary services. They assert that carriers should be allowed to market their services how they see fit and to decide how to provide their customers with the greatest access to information and choice. The carriers reiterate ATA's point that requiring airlines to furnish this information to GDSs would harm consumers by increasing airline distribution costs, arguing that GDSs would charge the airlines fees to upload the information into the GDS system. The carriers note that many travel agents, including online travel agents, already have access to and disclose fee information, referring to the Expedia website which has a chart of baggage fees. The carriers contend that the GDS distribution system is anti-competitive and not efficient, and that requiring the airlines to provide fee information will further bolster the market power of the GDSs without allowing for substantive competition from third-party vendors.

Two U.S. carriers did not object to providing ancillary fee information to GDSs. Spirit Airlines does not oppose the proposal, unless it would impose significant costs on carriers to change the format the carriers already use to provide the information to the GDSs. Southwest Airlines supports limited transmittal of fee information to GDSs in order to provide information to all consumers, regardless of how they book their flights. Southwest states, however, that the requirement should only obligate carriers to furnish this information to existing GDS partners. Southwest opposes allowing GDSs to charge fees for collecting data on ancillary services. Southwest notes that carrier participation in GDSs and other distribution channels for selling air transportation is a strategic business decision by each carrier. The carrier also supports a provision that would require all carrier-imposed surcharges, such as seasonal fare adjustments, to be included in the fare information provided to GDSs.

IATA and most of the other foreign air carrier organizations oppose requiring carriers to provide ancillary fee information to GDSs as well, although they support carriers providing information about ancillary fees and services on carrier websites. The National Airlines Council of Canada agrees with the disclosure of fees in general, but recommends that the Department not mandate the method of disclosure. It notes that this information is most effective when presented to the customer within the flow of the transaction, as Air Canada does on its website. Some carriers, such as Jetstar Airways and Qantas, oppose providing the fees for optional services to consumers via a static webpage, stating that it is more helpful for consumers and airlines to focus ancillary fee information to a particular booking. Other carriers, such as Virgin Atlantic, note that they already file this information with ATPCO, thus allowing for access by GDSs.

The vast majority of consumers and consumer groups (*e.g.,* BTC, CTA, Flyersrights.org) support the Department requiring airlines to disclose their ancillary fee information to the GDSs. BTC and CTA urge the Department to establish uniform standards for fee disclosures, on the basis that airlines may add new fees in the future. Both of those organizations state that airlines artificially deflate the cost of a fare so that they can tack on high ancillary fee charges that are hidden from the consumer during an initial fare search.

ITSA and ASTA implore the Department to require airlines to share ancillary fees with the GDSs. ITSA notes that a passenger who wants to search for a fare that includes a checked bag and a pre-assigned seat will have to spend a great deal of time and have to be especially computer savvy to find the total amount he or she would have to pay for their travel because the fees are hidden on carriers' websites. ITSA, representing GDSs, states that at least 50% and possibly as high as 60% of the traveling public relies on travel agents to comparison shop for fares. ITSA argues that without this information from GDSs, brick and mortar travel agencies and online travel agencies cannot adequately state the total cost of travel to their clients. ITSA notes that the Department already requires information beyond the base fare to be provided to the GDSs such as code-share information and change of gauge information. ITSA asserts that the costs of this requirement would be low as it believes the technology is already in place to distribute the fee information. ITSA further adds that the Department's mandate to prevent unfair and deceptive practices trumps claims that disclosure should be left to private market negotiations. ITSA believes that merely requiring carriers to post the fee information on a webpage is not adequate to alleviate the problems of hidden fares or reduce the time it takes to comparison shop. Uniglobe Travel, Travizon, Inc., and individual travel agents that commented in the docket support the proposal to require that carriers provide ancillary fee information to GDSs.

Many third party commenters submitted comments related to providing ancillary fee information to GDSs. Several members of Congress wrote in support of a requirement obligating carriers to submit their ancillary fee information to GDSs. A member of the European Parliament also expressed his support for issuing a rule so that passengers booking through a GDS system are aware of the total price of the ticket before purchase. The New York State Consumer Protection Board states a similar position that information about fees should be distributed to consumers through a wide variety of channels, not just through a link on the carrier's website.

Farelogix, a third party distribution and management technology firm, opposes the proposal to require that the carriers provide information to GDSs. Farelogix believes that GDSs should coordinate directly with the airline. The firm does not think that the GDSs should be able to mandate the format of the information. Farelogix notes that the GDSs are resistant to third party technology to transfer information in order to preserve their place in the travel market, and states that this proposed requirement will further limit third parties from entering the travel technology marketplace. An airline consultant makes several similar points. This consultant points out that if the Department requires carriers to provide information about fees for optional services to GDSs, the airlines' bargaining leverage is eroded and the higher distribution costs the airlines will face will be passed on to consumers. The consultant notes that negotiations to sell ancillary services are working in some respects, using examples of United Airlines selling Economy Plus service through Sabre, Midwest Airlines selling seat assignments through Sabre, and Finnair selling ancillary services through Amadeus. This individual believes that these fees are not hidden, and notes that most of these fees are not charged until check-in or onboard the flight. A professor at Harvard Business School comments that compelling airlines to provide fee information to GDSs will have far-reaching and unintended consequences on existing contractual structures between airlines and GDSs. He believes that if a requirement to provide fees for optional services is adopted, the GDSs will mark up prices considerably because airlines will be forced to disclose pursuant to government rule. The Airline Tariff Publishing Company (ATPCO), without taking a position on the merits of the proposal, notes that it has systems in place that could help implement any requirement regarding carriers sharing fee information with GDSs.

DOT Response: We have decided to defer final action on this proposal. The Department's goal to protect consumers from hidden and deceptive fees and to allow consumers to price shop for air transportation in an effective manner remains paramount. The Department's goal is to provide all air travel consumers with easy access to information about fares and optional fees, particularly baggage fees. As discussed earlier, this final rule requires U.S. and foreign carriers to disclose on their website information about changes in baggage fees or allowances and to list on their website all of the airlines' fees for optional services. The final rule also requires both carriers and ticket agents to provide information on the first screen in which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to access these baggage fees. In addition, ticket agents and carriers must include on e-ticket confirmations information about the free baggage allowance and the applicable fee for the first and second checked bag and carry-on. We believe that these steps partially address the problem of hidden and deceptive fees and allow consumers to price shop for air transportation. The Department is cognizant that some parties feel that requiring carriers to provide information on their ancillary fees to GDSs would be a reasonable way, if not the best way, to ensure consumers can easily comparison shop for air fares. We cannot at this time agree that it is in the public interest to mandate that step, since we lack information critical to a decision on the issue. Thus, in order to permit us time to obtain additional information about costs, benefits and consequences of requiring U.S. and foreign carriers to provide ancillary fee information to GDSs, including those involving competition, the Department is deferring final action on this matter. The Department wants to ensure that any action it takes does not have unintended consequences, particularly given the sensitive nature of the market and the negotiations currently taking place between carriers and the GDSs.

E. Display of Two Fares in Advertising

The NPRM: The Department asked for comment on the costs and benefits of displaying two fares in airfare advertising. The first price would be the full fare (*i.e.,* fare with all mandatory charges) and the second price would be that full fare plus the cost of baggage charges that traditionally have been included in the price of the ticket, if these prices differ. The Department asked whether the second fare should only include the price of baggage charges or whether it should also include other services traditionally included in air travel such as obtaining a seat assignment in advance. The Department also solicited comment on the cost and feasibility of requiring sellers of air transportation to allow consumers to conduct fare queries for their specific needs (*e.g.,* airfare and two checked bags, or airfare, one checked bag and extra legroom) and select the services they wish to include in the price of the travel.

Comments: Individual consumers and consumer groups are divided on the helpfulness of any requirement for a carrier to display two fares in response to a fare inquiry. Some commenters and groups assert that this type of fare display system could be helpful for comparison shopping. Commenters who participated in the discussion on the Regulation Room site were divided. Some state that such a dual fare display could be helpful, but others claim it would be confusing. Individuals commenting to the docket expressed similar opinions. Most were in favor of more robust disclosure, especially regarding baggage fees. Many who favored a dual fare disclosure disagreed, however, on what should be included in the second fare of a two-fare display system. Some state that just the cost of baggage should be included. Others contend that baggage, blankets, pillow, and a seat assignment should also be included. The idea that consumers could select the ancillary services they wished before receiving a fare quote had many supporters. CTA supports the approach to airfare searching that would allow a consumer to select the services and fees they wish to be included in their travel.

ATA does not support the two-fare model. ATA states it would be confusing for passengers. It adds that the Department does not have enough information to impose this requirement. ATA and certain U.S. carriers note that there are questions and ambiguities as to what is "traditionally included in the price of a ticket." As many U.S. carriers noted, each passenger's needs are different, so the second fare would be confusing or of little help to many consumers.

IATA contends that a two-fare display system could be confusing and should not be mandated, as many carriers already have an established online advertising regime that includes an online menu of optional services presented to the consumer through the course of their purchase. IATA asserts that requiring a two-fare model would be an unwarranted government intrusion on business practices. The Arab Air Carriers Organization states that a two-fare model would be unworkable and prohibitively expensive, as most carriers' reservations systems would have to be reworked to accommodate a two-fare requirement. Many individual foreign carriers echoed the sentiments of IATA, including South African Airways and Lufthansa, which note that a carrier can always choose to adopt a two-fare system. British Airways states that if this proposal were to become a requirement, the requirement should only apply to fares that do not include one checked bag, and this requirement should apply to GDSs and travel agents as well as carriers. ITSA is not opposed to a two-fare system, as long as the Department is clear about what would be included in the price. ATPCO notes that it has technology that could implement any required two-fare pricing model or a consumer self-selection model.

DOT Response: The Department agrees with the commenters who feel that a "two-fare" display system would be too confusing for travelers. We agree that each traveler is unique with regard to what ancillary services he or she needs or wants on a particular flight, and therefore one "all-inclusive" price that includes baggage and a seat assignment may not be helpful to most passengers. The Department will also not require, at this time, that sellers of air transportation revise their online systems to allow consumers to conduct queries for specific optional services and the fees for those services before displaying a price. Although the Department understands that some Web sites may exist that have these capabilities and that some carriers utilize online menus for consumers from which to choose services during the booking process, the Department does not have enough information regarding the costs of implementing such a system to require that every carrier implement such an online system.

F. Services Provided by Code-Share Partners

The NPRM: The Department sought comments as to whether in a code-share situation the marketing/ticketing carrier should be required to disclose through reservation agents, Web sites, and/or e-ticket confirmations any differences in services and fees applicable to a consumer between the marketing carrier and the operating carrier. The Department also asked whether there were any ancillary fees for services that should not be permitted to vary among code-share partners, such as the allowances and charges for baggage. The Department noted that its policy states that, for passengers whose ultimate ticketed origin or destination is a U.S. point, the baggage rules that apply at the beginning of the itinerary apply throughout the itinerary and provides that the marketing carrier's rules take precedence.

Comments: Most individual commenters and consumer groups, including Flyersrights.org, favor a rule that would require the marketing or ticketing carrier's fees to apply for the whole trip. Some commenters, through Regulation Room, expressed the opinion that the lesser of the two fees should apply if the marketing carrier's fees differ from the operating carrier's fees. Most commenters support greater notice requirements regarding differing fee structures between code-share partners. Some commenters on Regulation Room specifically felt that the marketing carrier should provide greater information, especially if the operating carrier has more stringent or restrictive luggage requirements.

ATA believes that disclosure of fees between code-share partners can be accomplished effectively through a hyperlink on the marketing carrier's website directly to the operating carrier's fee list. It opposes any attempt by the Department to standardize optional fees amongst code-share partners. ATA notes that attempts at standardization would be counter to the goals of deregulation and could be anti-competitive. It further states that standardization of fees could be impractical and costly for flights that have multiple code-share partners selling tickets on the same flight. US Airways comments that applying the marketing carrier's rule is not feasible and would create different classes of passengers on the same aircraft. Delta states that ancillary fees should not be uniform amongst carriers and code-share partners as that requirement would stifle competition.

IATA states that requiring the marketing carrier to disclose fees of operating carriers is consistent with the Department's policy regarding code-share situations. IATA believes this notice can be accomplished through a hyperlink to the code-share partner's website that details their fees. Singapore Airlines notes that it already provides information to consumers regarding significant differences in services and fees among partners. It states that the best way to accomplish this is to provide a link to the partner's listing. The carrier also notes that its call center agents are trained to provide this information. However, Singapore Airlines states that if the Department proposes a harmonized scheme it should incorporate reasonable and commercially viable allowances and fees. Qatar Airways refers the Department to IATA Resolution 302 ("Baggage Provisions Selection Criteria") which will go into effect in April 2011. The carrier states that under this resolution, there will be no standard baggage allowances or charges, and each carrier will publish its own rules. Qatar Airways notes that in the event of a conflict between baggage allowances, the provision of the "Most Significant Carrier," as determined by the Resolution, would apply. Qatar Airways urges the Department to adopt a similar proposal. Many foreign carriers such as Qantas, Air France, and KLM oppose a Department rule that would prohibit differences in baggage fees between the marketing and operating carrier, but do support disclosure of any differences between the carriers.

DOT Response: After considering the comments regarding the differences between the ancillary services and fees between code-share and interline carriers, the Department has decided not to require code-share carriers to standardize their optional services and fees but to specify with respect to baggage which carrier's allowances and fees apply. We believe that baggage rules and fees should be treated differently from fees for other optional services, as variations in baggage fees among code-share and interline partners are likely to result in significant inconvenience and confusion for many passengers. The Department has received complaints from consumers who have been faced with multiple, differing, and uncertain baggage allowances and charges on both code-share and interline flights. Passengers experience significant difficulties when the baggage allowances and fees that apply at the beginning of their trip differ from what is applied later because their itineraries include sectors where the baggage rules differ, notwithstanding the fact that the passenger was traveling on a single, code-share or interline ticket, service that carriers continue to tout as "seamless."

This final rule requires that for passengers whose ultimate ticketed origin or destination is a U.S. point, the baggage allowances and fees that apply at the beginning of the itinerary apply throughout the itinerary. In the case of code-share flights that form part of an itinerary whose ultimate ticketed origin or destination is a point in the U.S., the final rule requires that the baggage allowances and fees of the marketing carrier apply throughout the itinerary to the extent that they differ between the marketing carrier and the operating carrier. The Department is aware that these requirements may result in the situation foreseen by ATA and US Airways of consumers on the same flight being subject to different baggage allowances or fees. The Department does not find anything unfair or deceptive about passengers on the same flight being subject to different baggage provisions — just as many passengers on the flight would have typically paid different fares. Further, we believe this method of determining baggage rules is consistent with Department policy and affords the greatest protection to consumers from unfair application of baggage rules throughout their itineraries. The Department also believes these requirements align with the goals of IATA Resolution 302, which was adopted by IATA members to bring transparency and clarity to baggage rules on code-share and interline itineraries.

As to whether in the case of code-share flights whether the marketing/ticketing carrier should be required to disclose all of the operating carrier's fees for optional services, we have decided to require the marketing carrier to disclose on its website any difference between its optional services and fees and those of the carrier operating the flight. This disclosure may be made through providing a hyperlink to the operating carriers' websites that detail the operating carriers' fees for optional services, or to a page on its website that lists the differences in policies amongst code-share partners. A marketing/ticketing carrier may also choose to make this information available to consumers through notice on its own website of differences between its optional services and fees and those of the carrier operating the flight. We are not requiring disclosure of the fees for optional services of the operating carrier through reservation agents or e-ticket confirmations because we believe the costs to carriers of providing this information in those formats far outweigh the benefit to consumers, particularly since this final rule already requires U.S. and foreign carriers to list on their website all of their fees for optional services. Further, of all the fees for optional services charged by airlines, consumers are generally most interested in fees charged for baggage and the final rule already requires ticket agents and carriers to disclose baggage fees and allowances on e-ticket confirmations. As discussed earlier, the final rule also requires carriers and ticket agents to inform passengers on the first screen in which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to see these baggage fees.

9. Post-Purchase Price Increase

The NPRM: The Department proposed to revise its current regulation in 14 CFR 253.7 which allows post purchase price increases as long as the consumer receives direct notice on or with the ticket of any contract of carriage term that allows a carrier to increase the price after purchase. Under the proposed rule, the Department would prohibit all post-purchase price increases by carriers, tour operators, or other sellers of air transportation, tours or tour components. The seller would be prohibited from increasing the price after the consumer completes the purchase. The Department asked for comment on the proposal to ban post-purchase price increases as well as two alternatives. The first proposed alternative would allow post-purchase price increases, as long as the seller of air transportation conspicuously disclosed to the consumer the potential for such an increase and the maximum amount of such increase before the consumer purchased the air transportation, and the consumer affirmatively agreed to such an increase prior to the completion of the purchase. The second alternative would allow post-purchase price increases (with disclosure) that the consumer agrees to in advance of purchasing the ticket, but would prohibit such an increase within thirty or sixty days of the first flight in the purchased itinerary.

Comments: Individual travelers and consumer organizations representing travelers support the proposal to ban post-purchase price increases in air transportation or tours by carriers and ticket agents. Most consumer commenters state that an outright ban on post-purchase price increases is fair. One commenter asserts that the practice of increasing the price after purchase is egregious, especially in the case of tour operators that raise prices due to fuel surcharges. Another commenter asks for clarification on what an increase in the price of the ticket means, because the commenter is concerned about change fees being applied to an already purchased ticket. Most commenters participating in Regulation Room favor an outright ban, rejecting the alternatives that allow for conspicuous disclosure of a potential price increase. A small number felt that the proposed alternative of requiring conspicuous notice of a potential maximum amount of an increase would adequately protect consumers.

We also received comments from carriers and carrier organizations regarding this proposal. ATA and its members support the primary proposal to ban post-purchase price increases outright, and do not feel that any alternative is necessary. ATA states that this is consistent with industry practice. IATA and many foreign carriers are not opposed to this proposal, but they do request that an exception be made for post-purchase imposition of government-imposed taxes and fees. AEA, ALTA, and AACO all support a limited exception to a complete ban in the case of an increase in government-imposed taxes and fees. IACA states that an outright ban on post-purchase increases is not consistent with the European Union regulations which allow post-purchase price increases in limited circumstances and with certain disclosures. IACA seems to support one of the alternatives which would allow some increase in the purchase price after purchase is completed.

Air France, KLM and Qantas generally support the proposal with the exception of government-imposed taxes and fees. Additionally Air France, KLM and Qantas ask for clarification on when a "purchase" is complete. Both airlines suggest that a booking that is being "held" by the airline but has not been purchased should not be a completed purchase for purposes of this rule. Air New Zealand further comments that change fees should be allowed because those apply when a consumer is purchasing a new ticket and not traveling on the same ticket.

USTOA is against the proposal for an outright ban without some contingency built into the rule regarding tax increases and partial customer payments. USTOA views a purchase as being complete if the consumer has paid in full. USTOA also states that an exception to a ban on post-purchase increases should be made for increases in government taxes and fees, provided that the consumer is made aware of such a potential increase. USTOA points out that the tour operators have no control over the increase of the price of scheduled air transportation. USTOA supports the alternatives, but believes that sellers should not be required to state the maximum amount of a price increase because the tour operator will not know the maximum amount.

ASTA contends that in order to protect all sellers, a post-purchase price increase should only be applied on ticketed reservations, contracted group travel arrangements, and business to business transactions between tour operators and airlines. ASTA states that a travel agent does not impose the additional increases in price; rather, the government or carriers impose taxes, fees and fuel surcharges. ASTA prefers the first alternative which allows a post-purchase price increase with specific notice of the increase and a maximum amount of such increase identified to the consumer. ASTA suggests modifying the first alternative so that the sellers of air transportation also identify when they have imposed such post-purchase price increases in the past.

DOT Response: After fully considering the comments received, the Department has decided to adopt the rule as proposed, but allow for an exception related to an increase in government-imposed taxes and fees. Although taxes and fees are not retroactively applied in the United States, the Department is aware that government-imposed taxes and fees levied by entities outside of the United States might be applied retroactively to a completed ticket purchase. As these fees and taxes are outside of the control of the seller of air transportation, the Department agrees with ASTA and foreign carriers that sellers should be protected from having to absorb the costs imposed by retroactive application of government taxes and fees. This exception to a total ban on post-purchase price increases is limited to government-imposed taxes and fees imposed on a per-passenger basis. It does not include increases in fuel surcharges or other carrier or ticket agent imposed charges. The Department recognizes that changes may be necessary in the way a tour operator prices or advertises packages to comply with the prohibition on post-purchase prices increases with an exception only for government-imposed taxes and fees imposed on a per-passenger basis.

The final rule also requires sellers of air transportation to disclose the potential for a post-purchase price increase related to an increase in a government-imposed tax or fee in a clear and conspicuous manner to the consumer. The consumer must affirmatively agree to the potential for such an increase prior to the purchase, for example by checking a box on the final page prior to purchase. After purchase, the seller of air transportation can only impose an increase due to government-imposed taxes or fees if such an increase applies to that particular consumer (*e.g.,* the increase cannot be collected from consumers to whom a general increase did not apply because they had purchased and fully paid for their ticket months earlier, and/or because an increase has been announced but is not yet in effect). For purposes of this section, a purchase is not deemed to have occurred until the full amount agreed upon has been paid by the consumer. Therefore, in the context of a tour that contains an air component, a purchase is complete when the consumer tenders the entire amount paid for the tour to the tour operator. The Department finds it to be unfair for consumers to bear the brunt of any increase in price after they have paid the full amount agreed upon for air transportation or a tour.

To further protect consumers, the final rule requires sellers of air transportation, tours or tour components to notify a consumer of the potential for a price increase that could take place prior to the time that the full amount agreed upon has been paid by the consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, an increase in an applicable fuel surcharge, or an increase in a government-imposed tax or fee. These entities must provide the consumer an opportunity to decline the purchase without penalty or affirmatively agree to the potential for such an increase prior to making any payment for the scheduled air transportation, or tour or tour component that includes scheduled air transportation. The Department believes that such a disclosure will provide consumers with important information to help them determine whether they want to purchase the air transportation or tour and if so, the appropriate time to make payment.

With regard to the comments relating to change fees, the Department agrees with commenters that change fees do not constitute an increase in the price of an already-purchased ticket, as technically the consumer is purchasing a new ticket for new travel. However, the Department considers it to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for a seller of air transportation to impose any fee on a consumer to change a travel itinerary unless this possibility was disclosed to the consumer prior to purchase. Additionally, to address the comments about the applicability of this section to tickets marketed and sold in Europe, the final rule specifies that with respect to ticket agents and foreign air carriers, these requirements only apply to advertising or selling in the United States of air transportation or tours.

10. Flight Status Change

The NPRM: In the NPRM we proposed to require U.S. carriers that account for at least 1 percent of domestic scheduled passenger revenues (reporting carriers) to promptly provide passengers and other interested parties notice of flight status changes, defined as a cancellation of a flight or a delay of 30 minutes or more, for their domestic scheduled passenger flights. We proposed to require that this notification take place within 30 minutes after the carrier becomes aware or should have become aware of the status change. A carrier would be required to provide such information updates at boarding gate areas, on airport display boards that are under a carrier's control, on the homepage of a carrier's websites and through a carrier's telephone reservation systems. To the extent that carriers permit passengers and other interested persons to subscribe to receive flight information updates, we proposed that carriers provide those updates in a timely fashion, *i.e.,* providing the information and subsequent updates within 30 minutes after the carrier becomes aware or should have become aware of such information.

We sought comments on whether these flight status notification requirements should be extended to smaller U.S. carriers and/or international operations of U.S. and foreign carriers, particularly since we proposed to require U.S. and foreign air carriers conducting scheduled passenger service with at least one aircraft with 30 or more seats to adopt a customer service plan that pledged to notify consumers in the boarding gate area, on board aircraft, via a carrier's telephone reservation system and on a carrier's website of known delays, cancellations and diversions. We specifically asked for information about the cost or benefit of applying these requirements to smaller carriers. We also asked for comments on whether the proposed means of notification, *i.e.,* website, telephone reservation system, airport display boards under carriers' control, and boarding area, should be mandatory, or whether we should leave it to the carriers to determine what means they prefer to use. With respect to the timeliness standard, we invited the public to comment on whether "within 30 minutes after the carrier becomes aware or should have become aware" is a reasonable standard. We also sought public opinion on whether the proposed requirement that updated information should be provided for flight delays of 30 minutes or more is an appropriate standard.

Comments: Comments from consumers and consumer rights advocacy groups overwhelmingly support our proposal for the largest U.S. carriers to promptly notify passengers of changes in the status of particular flights as a result of delays or cancellations. The New York State Consumer Protection Board, AAPR, FlyersRights.org, Consumers Union, and most commenters on RegulationRoom.org support expanding the requirements to cover smaller U.S. carriers and international operations of U.S. and foreign carriers. ACI–NA suggests that the rule should include small carriers that serve small and non-hub airports, arguing that the impact of delays and cancellation occurring at those airports may have great adverse effect on larger connection hubs.

Several foreign carriers specifically oppose applying the notification requirements to foreign carriers. IACA states that the proposed rule may potentially be an extraterritorial application of U.S. law to activities in a foreign jurisdiction. Qantas and JetStar Airways aver that the rule should not apply to foreign marketing code-share partners, as the operating carriers are in the best position to notify passengers of any flight status changes. ATA, on the other hand, states that the marketing carrier should have the responsibility to update flight information up until the date of flight departure, at which point the operating carrier should be responsible for the notification. ANA raises the issue of technical difficulties faced by foreign carriers in complying with the electronic notification rule when they must conduct extensive automation modifications including sharing data with code-share partners. Many carriers contend that when information is not timely transmitted to carriers by FAA, carriers should not be held liable. TUI Travel asks that foreign leisure travel charter operators be exempted from the rule based on its assertion that there are already established communication channels between passengers and carriers through the tour operators.

With respect to the means of notification, many commenters from the consumer side urge the Department to mandate all four methods (*i.e.,* at gate boarding areas, on airport display boards that are under carrier's control, and through carriers' website and telephone reservation systems). The New York State Consumer Protection Board also recommends that we require carriers to offer passengers the opportunity to subscribe to flight status service updates via voicemail and electronic media. Industry commenters, however, argue that the Department should provide carriers flexibility in choosing what means they use. ATA specifically requests that the Department not require any new technology or program that is not currently implemented by the carriers.

ATA raises concern that our proposal on flight status change notification may conflict with the Federal Communication Commission (FCC)'s Telephone Consumer Protection Act rule. In a March 2010 NPRM, the FCC proposed to require consumers' prior written consent for prerecorded calls, eliminating the exemption for parties that have already established business relationships (75 FR 13471, March 22, 2010). If adopted, the FCC rule would prohibit carriers from leaving prerecorded telephone messages concerning flight delays and cancellations with any passengers from whom carriers do not have prior written consent.

Regarding the proposed timeliness standard, the New York State Consumer Protection Board states that the 30-minute standard is good but urges the Department to adopt a more stringent standard that requires notification to be provided "no later than 20 minutes" after the carrier is aware or should have become aware of the flight status change. Other commenters from the consumer side generally welcome the 30-minute standard as being reasonable and not too burdensome to the carriers. Among the carriers and carrier associations that commented on this proposal, there is little objection to the "30 minutes after the carrier becomes aware" requirement. However, most of those commenters are concerned about the "30 minutes after the carrier should have become aware of the flight status change" standard. IATA asks the Department to clarify the meaning of this standard, and ATA argues that this is a subjective standard that makes compliance difficult. Southwest Airlines supports ATA's position and states that this standard is too vague and is likely to be inconsistently applied and enforced.

Regarding the proposal that notification should be provided to passengers for any flight delays that are expected to last for 30 minutes or more, both consumers and carrier commenters are supportive of this standard. ATA also recommends that the Department require the airports to update display boards under the airports' control every 30 minutes when a flight's status changes. ASTA supports ATA's position and states that it is important that the information provided by the carriers and airports be current in order to avoid passenger confusion.

DOT Response: The final rule requires U.S. and foreign carriers conducting scheduled passenger service to and from the U.S. with any aircraft with 30 or more seats to make information available to passengers and other interested parties about a change in flight status. It is important for passengers as well as persons dropping passengers off for outbound flights or meeting passengers on incoming flights to stay informed on a timely basis of delays, diversions or cancellations affecting their flights in order to avoid unnecessary waits at, or pointless trips to, an airport. The need for, and importance of timely notification regarding flight delays, diversions and cancellations exists whether it is a U.S. or foreign carrier operating the flight and whether it is a non-reporting or reporting carrier operating the flight. On code-shares, the final rule leaves it up to the carriers to determine whether the marketing or operating carrier will provide the required notification about change in flight status. We expect that foreign carriers and non-reporting U.S. carriers will work with their code-share reporting-carrier partners, most of which already have the necessary systems in place, to comply with the notification requirements contained in this final rule. For enforcement purposes, the Department's Aviation Enforcement Office will hold both the code-share marketing carrier and the operating carrier responsible, jointly and severally, for failure to comply with this rule.

The final rule mandates that the flight status notifications be provided through the four methods proposed: at the boarding gate area, on carriers' websites, through carriers' telephone reservations systems, and by airport display boards that are under the carriers' control. If an airport-controlled display system accepts flight status updates from carriers, covered carriers must furnish this information to that airport within the timeframes provided in this rule. We do not believe mandating all four methods is burdensome to carriers as it is our opinion that these four methods represent the most common ways used by carriers to communicate with passengers and other interested parties who seek and obtain information about the status of the schedules for their flights.

These varied flight status notification methods make it more likely that passengers and other interested parties will be able to access this information when they need it. For example, individuals who do not have access to the Internet may call a carriers' reservation telephone system to learn about delays, cancellations, or diversions. Notification at the airports through the airport display boards and in the boarding gate area is also essential when passengers are already at the airports. Regarding notification at the boarding gate area, the responsibility of a carrier to notify passengers does not begin until the gate is staffed for the specific flight in question. With respect to notification provided through carriers' telephone reservation systems, we clarify that such notification is only required upon the request by a consumer.

In addition to these four methods, we are also requiring carriers that offer passengers the opportunity to subscribe to a flight status update service to ensure that required information is provided promptly and accurately. We note that many carriers already have in place subscription services for passengers to receive flight status notifications through various widely used media, including computer-generated telephone/voicemail, text messages and emails. To the extent such services are offered to the public, this final rule requires that the notifications be delivered to the passenger by whatever means is available to the carrier and of the passenger's choice within 30 minutes after the carrier becomes aware of a change in the status of a flight. We do not believe, as asserted by some commenters, that applying this standard will dissuade carriers from voluntarily providing such subscription services for fear of the potential enforcement consequences. We are confident that market forces and competition will continue to be the driving force for carriers to improve the quality of their customer care.

In response to ATA's concern that the Department's flight status notification requirement may conflict with the FCC's rule, the Department wishes to provide the following clarification. The Department has submitted comments on the FCC's rulemaking, requesting the FCC to maintain its current "established business relationship" exemption to the extent necessary to permit carriers to notify their customers of flight status changes through telephone messages without obtaining each customer's prior written consent. To the extent FCC adopts a final rule as it proposed, the Department does not see a direct conflict between the FCC rule and our rule. In this final rule, we do not require carriers to call each passenger on the affected flight to notify them about the flight status change. Likewise we do not mandate subscription services. Therefore, if carriers choose to provide subscription services, they could either eliminate the voice message choice from the choices of contact available to subscribers, or obtain the subscribers' written consent at the time of subscription.

Most carriers that commented on the proposals objected to the "30 minutes after the carrier should have become aware of flight status change" standard for notifying consumers about the flight irregularity, arguing that it is vague and subjective. The Department agrees with the concerns expressed that this standard may become challenging to comply with and enforce. Therefore, we are removing the "should have become aware" standard from the final rule. With respect to the "30 minutes after the carrier becomes aware" standard, we believe further clarification is necessary. For enforcement purpose, we consider that the carrier has become aware of the flight status change as soon as the carrier's system operation control center (SOCC) or equivalent facility, if it goes by another name, learns of it. We recognize that carriers cancel, delay and divert flights based on information from many sources, both internal as well as from third parties, such as FAA and airports. Whatever the source of information leading to the decision for a flight status change, it is the carrier's sole responsibility to distribute the information, within 30 minutes, to the downstream operational staff, such as webmasters, airport station managers, reservation system managers, and gate agents. A carrier has an affirmative duty at all times to keep track of flight status changes and maintain open channels of communication. We consider it an unfair and deceptive practice when the carrier's failure to obtain and pass on to consumers up-to-date and accurate information is caused by the carrier's own procedural shortcomings.

Much less contested is our proposed standard that carriers notify passengers and other interested parties regarding flight delays of 30 minutes or more. Many consumer and industry commenters agree that this is a reasonable standard that strikes a balance between providing the most useful and accurate update to the passengers and the costs incurred by the carriers associated with providing such information. Consequently, the final rule maintains this standard. We emphasize that this is a minimum standard and carriers are free to and urged to provide notification about briefer delays, as many already have done for their subscription services.

Under the final rule, the "30 minutes after the carrier becomes aware of the flight status change" standard also applies to any information updates provided to passengers who have already received previous notification regarding the status change of their flights. We disagree with some commenters' contention that updating flight status change every 30 minutes if the flight is delayed again is not necessary if it is close to the scheduled departure time and passengers are already at the airport. This information is important for passengers whose flights downline depend on the schedule of aircraft used for the flight experiencing the irregularity, as well as for persons who may be meeting passengers on the affected flight. Finally, we note that the Department does not directly have the authority to require airports to provide flight status information to consumers as some commenters suggested.

11. Choice-of-Forum Provisions

The NPRM: The Department proposed to codify the policy of the Department's Aviation Enforcement Office that choice-of-forum provisions are unfair and deceptive for air transportation sold in the U.S. when used to limit a passenger's legal forum to a particular inconvenient venue. The proposed rule would specifically permit consumers to file suit where they live provided that the carrier does business within that jurisdiction. The Department requested comments on this proposal and on the use of such choice-of-forum provisions in contracts of carriage.

Comments: Consumer groups and individual consumers support this proposal. Flyersrights.org, while supporting the proposal, does not think the proposal goes far enough to address the real barrier to legal relief for consumers in court, which they say is Federal preemption of state laws. ATA and most carriers support this proposal, most noting that they do not have such restrictive choice-of-forum provisions in their contracts of carriage. Spirit Airlines opposes this provision. Spirit believes small carriers should not have to face the costs and burdens associated with litigating complaints in jurisdictions far from their headquarters location. IATA and IACA, in addition to many foreign airlines, expressed concerns about this provision's applicability to foreign airlines and interference with European rules governing the forum for claims. The Air Transport Association of Canada does not feel the use of choice-of-forum restrictions should be banned and feels that making clear the forum in which consumers must litigate consumer complaints is helpful to consumers.

DOT Response: The Department has decided to adopt the rule as proposed, *i.e.,* to prohibit a U.S. carrier from including language in its contract of carriage precluding a passenger from bringing a consumer-related claim involving a domestic flight against the carrier in any court of competent jurisdiction. The Department feels that if a carrier reaches out to do business in a particular jurisdiction, *i.e.,* reaches out to solicit business within that jurisdiction, and sells tickets in a jurisdiction, then it is fair and reasonable to expect that the carrier can defend itself against litigation brought by a consumer who resides in that jurisdiction. The cost of this proposal is minimal, as most U.S. carriers already face litigation throughout the United States. As a point of clarification, the forum for consumer claims related to travel on international flights to or from the United States is governed by the Montreal Convention or Warsaw Convention, depending on the type of flight and its origination/destination. Additionally this change does not apply to charter flights. The choice of forum for charter flights can be addressed in the individual contracts between the charter operator and the participant.

12. Peanut Allergies

The NPRM: In the NPRM, the Department described various measures to provide greater access to air travel for individuals with severe peanut allergies. The Department solicited comment on several alternatives to accommodate air travelers with severe peanut allergies including (1) banning the serving of peanuts and all peanut products by both U.S. and foreign carriers on flights covered by the Department's disability rule; (2) banning the serving of peanuts and all peanut products on all such flights where a passenger with a peanut allergy is on board and has requested a peanut-free flight in advance; or (3) requiring a peanut-free buffer zone in the immediate area of a passenger with a medically documented severe allergy to peanuts if the passenger has requested a peanut-free flight in advance. The Department asked several questions associated with accommodating passengers who have a severe peanut allergy on flights. For instance, we asked about the likelihood of a person with a severe allergy experiencing a serious adverse health reaction due to exposure to airborne peanut particles onboard an aircraft. The Department asked about steps a person with a severe peanut allergy could take to prepare for a flight. We also asked about how we should define a peanut product if we chose to take action on the issue.

Comments: Most of the comments regarding accommodations for persons with peanut allergies were from individual consumers who favor a total ban on peanuts and peanut products on aircraft, including peanut products that other passengers bring on board aircraft. Most of these consumers either suffer from a peanut allergy or are related to someone with an allergy. A smaller number of individual commenters oppose any ban on peanut products while others support prohibiting carriers from serving peanuts or peanut products on aircraft. Commenters who oppose a ban on peanut and peanut products as well as commenters who favor only a service ban on peanut and peanut products contend that a total ban on peanuts and peanut products is impractical and unenforceable because there is no way to stop passengers from bringing peanut products into the cabin. There was also disagreement as to whether peanut-free flights or peanut buffer zones are a viable option. Many commenters assert that neither peanut-free flights nor peanut buffer zones are a feasible option since the peanut protein could be present in the buffer zones or on the 'peanut free' flight as residue from previous flights. These consumers state that it is unreasonable to expect, and unlikely, that a carrier would thoroughly clean the aircraft between each flight to ensure that all peanut residue is removed from the cabin.

The peanut trade organizations, led by the American Peanut Council (APC), Peanut & Tree Nut Processors Association (PTNPA) and the Western Peanut Growers Association (WPGA), oppose any Department action that would limit the availability of peanuts on commercial aircraft. All three organizations point out the Department is restricted from issuing any regulation regarding the service of peanuts on aircraft per Public Law 106–69, which is discussed below. APC also states that research indicates that a severe anaphylactic reaction to peanuts can only occur when there is oral ingestion.

The Food Allergy & Anaphylaxis Network (FAAN) states that the scientific literature does not, at this time, address whether a passenger would have a severe adverse reaction by being exposed to airborne peanut particles but notes that airborne reactions have been anecdotally reported. FAAN, and other allergy support organizations, believe that the most practical solution is for carriers not to serve packaged peanut snacks on flights. FAAN acknowledges that many carriers, both U.S. and foreign, are already taking this approach. FAAN is opposed to the creation of "buffer zones" as it believes that to be effective the seats in a buffer zone would need to be peanut-free for all flights on a particular aircraft.

Twenty-five members of the U.S. House of Representatives submitted a joint letter expressing their opposition to any ban on peanuts and peanut products and requesting that the Department not proceed with a rulemaking or any other anti-peanut measures pending the completion of a peer-reviewed study as described in Public Law 106–69. Senator Christopher Dodd also commented, stating that a complete ban on peanuts and tree nuts would be the most direct solution but that this step is drastic in nature and impractical. Senator Dodd suggests that DOT encourage a focus on further education and training for airline employees regarding passengers with peanut allergies as well as a consistent application of policies by individual airlines.

ATA, the Air Transport Association of Canada, and IACA are against a ban on peanuts, stating that carriers cannot ensure that other passengers will not bring their own peanut products on board for consumption. ATA and IACA also state that carriers have adopted their own policies and procedures to handle accommodations for peanut allergies. In general, individual carriers have deferred this topic to their respective trade organizations. However, some carriers such as Southwest and Delta point out that they already have voluntarily adopted policies regarding buffer-zones for peanut allergy sufferers. Some foreign carriers, such as Lufthansa, Air France and KLM, state that a service ban on peanut products is not efficient and would create increased burdens and costs for airlines. Additionally Lufthansa points out that the creation of a service ban on peanut products could give a passenger the false impression that the flight is totally safe and free of peanuts.

DOT Response: On June 25, 2010, DOT published a clarification notice stating that the Department will comply with the requirements of the Department of Transportation and Related Agencies Appropriations Act of 2000, Public Law 106–69—Oct. 9, 1999. This law states:

> Hereafter, none of the funds made available under this Act, or any other Act, may be used to implement, carry out, or enforce any regulation issued under section 41705 of title 49, United States Code, including any regulation contained in Part 382 of title 14, Code of Federal Regulations, or any other provision of law (including any Act of Congress, regulation, or Executive order or any official guidance or correspondence thereto), that requires or encourages an air carrier (as that term is defined in section 40102 of title 49, United States Code) to, on intrastate or interstate air transportation (as those terms are defined in section 40102 of title 49, United States Code)—(1) provide a peanut-free buffer zone or any other related peanut-restricted area; or (2) restrict the distribution of peanuts, until 90 days after submission to the Congress and the Secretary of a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft.

At this time, given the provisions of Public Law 106–69, the Department will decline to take action due to a lack of the peer-reviewed study referred to in the law.

13. Effective Date of Rule

The NPRM: In the NPRM, we proposed that the final rule take effect 180 days after its publication in the **Federal Register.** We stated that we believe 180 days would allow sufficient time for carriers to comply with the various proposed requirements and invited comment on whether 180 days is the appropriate interval for completing the changes.

Comments: We received few comments on the effective date of the final rule. Among carrier and carrier association commenters, RAA states that its members need a minimum of 180 days to implement the new rule. On the consumer side, AAPR supports the Department's 180-day proposal. FlyersRights.org and its supporters suggest that the effective date should be no longer than 120 days after the final rule's publication date. CTA believes the rule should become effective 120–150 days after the publication date so it will become effective before the summer travel season starts. One consumer stated that 180 days is reasonable for implementing most items but carriers may need additional time for some of the proposed changes.

DOT Response: Based on our experience in implementing the December 2009 final rule, which became effective on April 29, 2010, we believe that 120 days is sufficient for

U.S. and foreign carriers to implement the various requirements in this final rule, with the exception of the requirements pertaining to full-fare advertising. The new full fare advertising requirements will not take effect until 180 days after the publication of this final rule in the **Federal Register** to mitigate the costs of print advertising revision by reducing the amount of advertising slated for use that will have to be pulled. We are imposing a 120-day effective date for the other requirements in the final rule to enable consumers to begin benefiting from these requirements as soon as possible.

Regulatory Analyses And Notices

A. Executive Order 12866 (Regulatory Planning and Review), DOT Regulatory Policies and Procedures, and Executive Order 13563 (Improving Regulation and Regulatory Review)

This action has been determined to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. It has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review) and is consistent with the requirements in both orders. Executive Order 13563 refers to nonquantifiable values, including equity and fairness. This rule promotes such values by improving transparency, and by preventing unexpected charges to passengers. The final Regulatory Evaluation concludes that the monetized benefits of the final rule exceed its monetized costs, even without considering non-quantifiable benefits. The expected present value of monetized passenger benefits from the final rule over a 10 year period using a 7% discount rate is estimated at $45.0 million and the expected present value of monetized costs incurred by carriers and other sellers of air transportation to comply with the final rule over a 10 year period using a 7% discount rate is $30.7 million. The present value of monetized net benefits over a 10 year period at a 7% discount rate is $14.3 million.

Below, we have included a table outlining the costs and benefits of the requirements in this final rule. A copy of the final Regulatory Evaluation has been placed in the docket.

COMPARISON OF REQUIREMENT-SPECIFIC BENEFITS AND COSTS, 2012–2021

[Discounted at 7 percent annually to 2012 $ millions]

	Total
Area 1: Expansion of tarmac contingency plan requirements and extension of EAPP1 requirements to cover foreign carriers:	
Monetized Benefits	$1.2
Monetized Costs	3.0
Monetized Net Benefits	−1.8
Additional unquantifiable benefits and costs that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Improved Management of Flight Delays	
Decreased Anxiety With Regard to Flying	
Reduced Stress Among Delayed Passengers and Crew	
Improved Overall Carrier Operations	
Improved Customer Good Will Toward Carriers	
Additional Gate Return Costs Incurred by Carriers	
Time Required for Airport/Terminal Authorities, CBP/TSA to Coordinate Plans	
Area 2: Expanded tarmac delay reporting and application to foreign carriers:	
Monetized Benefits*	0.0
Monetized Costs	0.8
Monetized Net Benefits	−0.8
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Increased Efficiency of US DOT Oversight and Enforcement Office Operations	
Improved Management of Flight Delays	
Area 3: Establishment of minimum standards for customer service plans (CSPs) and extension of EAPP1 Final Rule Areas to cover foreign carriers:	
Monetized Benefits	7.7
Monetized Costs	7.4
Monetized Net Benefits	0.3
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Decreased Confusion and Uncertainty Regarding Department CSP Requirements	
Improved Customer Service From Foreign Carrier Self-Auditing of Adherence to CSPs	
Improved Customer Good Will Toward Carriers	
Area 4: Foreign carrier posting of tarmac delay contingency plans, CSPs, and contracts of carriage on websites:	
Monetized Benefits*	0.0
Monetized Costs	1.0
Monetized Net Benefits	−1.0
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Decreased Occurrence of and Improved Resolution of Customer Complaints	
Area 5: Extension of EAPP1 Final Rule Areas for carriers to respond to consumer complaints to cover foreign carriers:	
Monetized Benefits	0.0
Monetized Costs	1.9
Monetized Net Benefits	−1.9
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	

COMPARISON OF REQUIREMENT-SPECIFIC BENEFITS AND COSTS, 2012–2021—Continued

[Discounted at 7 percent annually to 2012 $ millions]

	Total
Decreased Anger Toward Carriers During Resolution of Complaints	
Area 6: Changes in denied boarding compensation (DBC) requirements:	
Monetized Benefits*	0.0
Monetized Costs	1.0
Monetized Net Benefits	−1.0
Additional unquantifiable benefits and costs that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Decreased Confusion Regarding DBC Provisions	
Decreased Resentment Among Some Passengers Regarding Different Compensation Received	
Programming and Training Costs for Foreign Carriers	
Area 7: Full-fare advertising and prohibition on opt-out provisions:	
Monetized Benefits	29.0
Monetized Costs	6.8
Monetized Net Benefits	22.2
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Travelers Less Likely to Mistakenly Purchase Unwanted Services and Amenities	
Improved Customer Good Will Toward Carriers	
Area 8: Expanded disclosure of baggage and other optional fees:	
Monetized Benefits*	0.0
Monetized Costs	7.9
Monetized Net Benefits	−7.9
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Decreased Time at Check-in	
Improved Customer Good Will Toward Carriers	
Area 9: Limitations on post-purchase price increases:	
Monetized Benefits	7.2
Monetized Costs	1.1
Monetized Net Benefits	6.1
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Improved Customer Good Will Toward Carriers	
Area 10: Prompt passenger notification of flight status changes:	
Monetized Benefits*	0.0
Monetized Costs*	0.0
Monetized Net Benefits	0.0
Additional unquantifiable benefits that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Greater Comfort and Certainty From Knowing That Information Will Be Available in Timely Manner	
Area 11: Limitations on venue provisions in contracts of carriage:	
Monetized Benefits*	0.0
Monetized Costs*	0.0
Monetized Net Benefits	0.0
Additional unquantifiable benefits and costs that are directly or indirectly related to this rulemaking, which result in benefits that the Department has determined justify the costs:	
Improved Customer Good Will Toward Carriers	
Reduced Costs for Consumers to File/Adjudicate Claims	
Increased Costs for Carriers to Settle/Adjudicate Claims	
Requirement Areas 1–11 Total:	
Monetized Benefits	45.0
Monetized Costs	30.7
Monetized Net Benefits	14.3

* Monetized estimates could not be developed from the information available on the record.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. Our analysis identified a total of 50 small U.S. air carriers (*i.e.,* carriers that provide air transportation exclusively with aircraft that seat no more than 60 passengers), 50 small airports (*i.e.,* privately-owned airports that have annual revenues of no more than $7 million or publicly-owned airports owned by jurisdictions with less than 50,000 inhabitants), as many as 11,625 small travel agencies (*i.e.,* travel agencies with no more than $3.5 million in annual revenues) and as many as 2,720 small tour operators (*i.e.,* tour operators with no more than $7.0 million in annual revenues) potentially affected by the requirements of the final rule. While most regulation of the air transportation sector is concerned with carriers, certain elements of this final rule impose new requirements on small travel agents and tour operators. Small U.S. carriers will need to comply with additional requirements relating to coordination of tarmac contingency plans, reporting tarmac delays, specific customer service plan provisions, denied boarding compensation, advertising of air fares, and disclosure of baggage and other optional fees. Small travel agents and tour operators will have to comply with the requirements relating to advertising of air fares, disclosure of baggage and other optional fees, and pre-purchase disclosures on price increases.

The Department believes that the economic impact will not be significant for a number of reasons. First, most small U.S. air carriers operate passenger service exclusively with aircraft that have fewer than 30 seats. The requirements relating to tarmac contingency plans, reporting tarmac delays, specific customer service plan provisions, and denied boarding compensation will not apply to these carriers. In addition, the per-carrier and per-ticket agent compliance costs estimated in the final regulatory analysis for the remaining requirements are very small—less than $17,000 per affected small carrier operating aircraft with between 30 and 60 seats, less than $4,500 per small carrier operating aircraft with fewer than 30 seats, and about $3,500 per small travel agent or tour operator with online booking capability to achieve compliance during the first year the final rule takes effect and no more than a few hundred dollars to maintain compliance in subsequent years. On the basis of this examination, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. A copy of the Final Regulatory Flexibility Analysis has been placed in docket.

C. Executive Order 13132 (Federalism)

This Final Rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule does not include any provision that: (1) Has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) abstracted below to the Office of Management and Budget (OMB). Before OMB decides whether to approve those proposed collections of information that are part of this final rule and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collection information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to: Department of Transportation, Office of Aviation Enforcement and Proceedings, Office of the General Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. OST may not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. OST intends to renew current OMB control numbers for the three new information collection requirements resulting from this rulemaking action. The OMB control number, when renewed, will be announced by separate notice in the **Federal Register**.

The ICRs were previously published in the **Federal Register** as part of NPRM (75 FR 32318, June 8, 2010) and the Department invited interested persons to submit comments on any aspect of each of these three information collections, including the following: (1) The necessity and utility of the information collection, (2) the accuracy of the estimate of the burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of collection without reducing the quality of the collected information.

The final rule contains three new information collection requirements. The first is a requirement that foreign air carriers that operate passenger service (scheduled and charter) to or from the U.S. using any aircraft with 30 or more seats collect and retain for two years the following information about any ground delay that lasts at least three hours: the length of the delay, the precise cause of the delay, the actions taken to minimize hardships for passengers, whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and an explanation for any tarmac delay that exceeded 3 hours. The Department plans to use the information to investigate instances of long delays on the ground and to identify any trends and patterns that may develop. The assumptions upon which the calculations for this requirement are based as well as the information collection burden hours have changed. We have increased our estimate for the maximum number of tarmac delays that a single carrier may experience.

The second is a requirement that U.S. carriers and foreign carriers that operate any aircraft originally designed to have a passenger capacity of 30 or more seats report monthly tarmac delay data to the Department with respect to their operations at a U.S. airport for any tarmac delay of three hours or more, including diverted flights. This requirement would apply to reporting carriers under 14 CFR part 234 only with respect to their public charter service and international service, as reporting carriers already submit tarmac delay data to the Department for their domestic scheduled passenger service. The Department plans to use this information to obtain more precise data to compare tarmac delay incidents by carrier, by airport, and by specific time frame, for use in making future policy decisions and developing rulemakings. We have modified the information collection burden hours for this requirement because carriers are not required to file negative reports as proposed in the NPRM. Covered carriers will only need to submit the report if one or more flights experience delays that exceed 3 hours.

The third is a requirement that any foreign air carrier that operates scheduled passenger service to and from the U.S. using any aircraft with 30 or more seats adopt a customer service plan, audit its adherence to the plan annually, and retain the results of each audit for two years. The Department plans to review the audits to monitor carriers' compliance with their plans and take enforcement action when appropriate. Although we have made some modest changes to the customer service plan requirements from what was proposed in the NPRM, these changes do not impact the assumption upon which the calculations for retaining the results of each audit are based. The information collection burden hours have increased slightly as our estimate of the number of carriers covered by this requirement has changed.

For each of these information collections, the title, a description of the respondents, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below:

1. Requirement to retain for two years information about any ground delay that lasts at least three hours.

Respondents: Foreign air carriers that operate passenger service to and from the U.S. using any aircraft originally designed to have a passenger capacity of 30 or more seats.

Estimated Annual Burden on Respondents: A maximum of 54 hours per respondent.

Estimated Total Annual Burden: 2,226 hours for all respondents.

Frequency: One information set to retain per three hour plus tarmac delay for each respondent.

2. Requirement that carrier report certain tarmac delay data for tarmac delays exceeding 3 hours to the Department on a monthly basis.

Respondents: U.S. carriers that operate passenger service using any aircraft with 30 or more seats, and foreign air carriers that operate passenger service to and from the United States using any aircraft originally designed to have a passenger capacity of 30 or more seats.

Estimated Annual Burden on Respondents: 0.5 to 10 hours per domestic respondent and 0.5 to 4.5 hours per foreign respondent.

Estimated Total Annual Burden: 134 4 hours for all respondents.

Frequency: One information set to submit per month for each respondent that experiences a tarmac delay of more than 3 hours at a U.S. airport.

3. Requirement that carrier retain for two years the results of its annual self-audit of its compliance with its Customer Service Plan.

Respondents: Foreign air carriers that operate scheduled passenger service to and from the U.S. using any aircraft originally designed to have a passenger capacity of 30 or more seats.

Estimated Annual Burden on Respondents: 15 minutes per year for each respondent.

Estimated Total Annual Burden: A maximum of 25 hours and 15 minutes for all respondents.

Frequency: One information set to retain per year for each respondent.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this notice.

Issued this 18th day of April 2011, in Washington, DC.

Ray LaHood,

Secretary of Transportation.

List of Subjects

14 CFR Parts 250 and 259

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 244

Air carriers, Consumer protection, Tarmac delay data.

14 CFR Part 253

Air carriers, Consumer protection, Contract of carriage.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

For the reasons set forth in the preamble, the Department amends 14 CFR Chapter II as follows:

■ 1. Add part 244 to read as follows:

PART 244—REPORTING TARMAC DELAY DATA

Sec.

244.1 Definitions.
244.2 Applicability.
244.3 Reporting of tarmac delay data.

Authority: 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, and 41712.

§ 244.1 Definitions.

Arrival time is the instant when the pilot sets the aircraft parking brake after arriving at the airport gate or passenger unloading area. If the parking brake is not set, record the time for the opening of the passenger door. Also, for purposes of section 244.3 carriers using a Docking Guidance System (DGS) may record the official "gate-arrival time" when the aircraft is stopped at the appropriate parking mark.

Cancelled flight means a flight operation that was not operated, but was listed in an air carrier or a foreign air carrier's computer reservation system within seven calendar days of the scheduled departure.

Certificated air carrier means a U.S. carrier holding a certificate issued under 49 U.S.C. 41102 to conduct passenger service or holding an exemption to conduct passenger operations under 49 U.S.C. 40109.

Commuter air carrier means a U.S. carrier that has been found fit under 49 U.S.C. 41738 and is authorized to carry passengers on at least five round trips per week on at least one route between two or more points according to a published flight schedule using small aircraft as defined in 14 CFR 298.2.

Covered carrier means a certificated carrier, a commuter carrier, or a foreign air carrier operating to, from, or within the United States, conducting scheduled passenger service or public charter service with at least one aircraft having a designed passenger seating capacity of 30 or more seats.

Diverted flight means a flight which is operated from the scheduled origin point to a point other than the scheduled destination point in the carrier's published schedule. For example, a carrier has a published schedule for a flight from A to B to C. If the carrier were to actually fly an A to C operation, the A to B segment is a diverted flight, and the B to C segment is a cancelled flight. The same would apply if the flight were to operate from A to an airport other than B or C.

Foreign air carrier means a carrier that is not a citizen of the United States as defined in 49 U.S.C. 40102(a) that holds a foreign air carrier permit issued under 49 U.S.C. 41302 or an exemption issued under 49 U.S.C. 40109 authorizing direct foreign air transportation.

Gate departure time is the instant when the pilot releases the aircraft parking brake after passengers have boarded and aircraft doors have closed. In cases where the flight returned to the departure gate before wheels-off time and departs a second time, the reportable gate departure time for purposes of this Part is the last gate departure time before wheels-off time. In cases of a return to the gate after wheels-off time, the reportable gate departure time is the last gate departure time before the gate return. If passengers were boarded without the parking brake being set, the reportable gate departure time is the time that the last passenger door was closed. Also, the official "gate-departure time" may be based on aircraft movement for carriers using a Docking Guidance System (DGS). For example, one DGS records gate departure time when the aircraft moves more than 1 meter from the appropriate parking mark within 15 seconds. Fifteen seconds is then subtracted from the recorded time to obtain the appropriate "out" time.

Gate Return time means the time that an aircraft that has left the boarding gate returns to a gate or other position at an airport for the purpose of allowing passengers the opportunity to disembark from the aircraft.

Large hub airport means an airport that accounts for at least 1.00 percent of the total enplanements in the United States.

Medium hub airport means an airport accounting for at least 0.25 percent but less than 1.00 percent of the total enplanements in the United States.

Non-hub airport means an airport with 10,000 or more annual enplanements but less than 0.05 percent of the total enplanements in the United States.

Small hub airport means an airport accounting for at least 0.05 percent but less than 0.25 percent of the total enplanements in the United States.

Tarmac delay means the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane.

§ 244.2 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to U.S. certificated air carriers, U.S. commuter air carriers and foreign air carriers that operate passenger service to or from a U.S. airport with at least one aircraft that has an original manufacturer's design capacity of 30 or more seats. Covered carriers must report all passenger operations that experience a tarmac time of 3 hours or more at a U.S. airport.

(b) For foreign air carriers that operate charter flights from foreign airports to U.S. airports, and return to foreign airports, and do not pick up any new passengers in the U.S., the charter flights are not flights subject to the reporting requirements of this part.

(c) U.S. carriers that submit Part 234 Airline Service Quality Performance Reports must submit 3-hour tarmac delay information for public charter flights and international passenger flights to or from any U.S. large hub airport, medium hub airport, small hub airport and non-hub airport. These carriers are already required to submit such information for domestic scheduled flights to or from U.S. large hub airports under art 234 of this chapter. These carriers that are covered by part 234 need only submit information for flights with tarmac delays of more than 3 hours under this part 244 for domestic scheduled passenger flights to or from any U.S. medium hub airport, small hub airport and non-hub airport to the extent they do not report such information under 14 CFR 234.7.

§ 244.3 Reporting of tarmac delay data.

(a) Each covered carrier shall file BTS Form 244 "Tarmac Delay Report" with the Office of Airline Information of the Department's Bureau of Transportation Statistics on a monthly basis, setting forth the information for each of its covered flights that experienced a tarmac delay of three hours or more, including diverted flights and cancelled flights on which the passengers were boarded and then deplaned before the cancellation. The reports are due within 15 days after the end of the month during which the carrier experienced any tarmac delay of three hours or more. The reports shall be made in the form and manner set forth in accounting and reporting directives issued by the Director, Office of Airline Information, and shall contain the following information:

(1) Carrier code

(2) Flight number

(3) Departure airport (three letter code)

(4) Arrival airport (three letter code)

(5) Date of flight operation (year/month/day)

(6) Gate departure time (actual) in local time

(7) Gate arrival time (actual) in local time

(8) Wheels-off time (actual) in local time

(9) Wheels-on time (actual) in local time

(10) Aircraft tail number

(11) Total ground time away from gate for all gate return/fly return at origin airports including cancelled flights

(12) Longest time away from gate for gate return or canceled flight

(13) Three letter code of airport where flight diverted

(14) Wheels-on time at diverted airport

(15) Total time away from gate at diverted airport

(16) Longest time away from gate at diverted airport

(17) Wheels-off time at diverted airport

(b) The same information required by paragraph (a)(13) through (17) of this section must be provided for each subsequent diverted airport landing.

PART 250—OVERSALES

■ 2. The authority citation for 14 CFR Part 250 continues to read as follows:

Authority: 49 U.S.C. chapters 401, 411, 413 and 417.

■ 3. Section 250.1 is amended by removing the definition of "sum of the values of the remaining flight coupons" and "comparable air transportation," revising the definition for "confirmed reserved space," and adding a definition for "alternate transportation," "class of service," "fare," and "zero fare ticket" to read as follows:

§ 250.1 Definitions.

* * * * *

Alternate transportation means air transportation with a confirmed reservation at no additional charge, operated by a carrier as defined below, or other transportation accepted and used by the passenger in the case of denied boarding.

* * * * *

Class of service means seating in the same cabin class such as First, Business, or Economy class, or in the same seating zone if the carrier has more than one seating product in the same cabin such as Economy and Premium Economy class.

Confirmed reserved space means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger, including a passenger with a "zero fare ticket," and which the carrier or its agent has verified, by appropriate notation on the ticket or in any other manner provided therefore by the carrier, as being reserved for the accommodation of the passenger.

Fare means the price paid for air transportation including all mandatory taxes and fees. It does not include ancillary fees for optional services.

* * * * *

Zero fare ticket means a ticket acquired without a substantial monetary payment such as by using frequent flyer miles or vouchers, or a consolidator ticket obtained after a monetary payment that does not show a fare amount on the ticket. A zero fare ticket does not include free or reduced rate air transportation provided to airline employees and guests.

■ 4. Section 250.2b is amended by adding paragraph (c) to read as follows:

§ 250.2b Carriers to request volunteers for denied boarding.

* * * * *

(c) If a carrier offers free or reduced rate air transportation as compensation to volunteers, the carrier must disclose all material restrictions, including but not limited to administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer before the passenger decides whether to give up his or her confirmed reserved space on that flight in exchange for the free or reduced rate transportation.

■ 5. Section 250.5 is revised to read as follows:

§ 250.5 Amount of denied boarding compensation for passengers denied boarding involuntarily.

(a) Subject to the exceptions provided in § 250.6, a carrier to whom this part applies as described in § 250.2 shall pay compensation in interstate air transportation to passengers who are denied boarding involuntarily from an oversold flight as follows:

(1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight;

(2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of $650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and

(3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight.

(b) Subject to the exceptions provided in § 250.6, a carrier to whom this part applies as described in § 250.2 shall pay compensation to passengers in foreign air transportation who are denied boarding involuntarily at a U.S. airport from an oversold flight as follows:

(1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight;

(2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of $650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and

(3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination less than four hours after the planned arrival time of the passenger's original flight.

(c) Carriers may offer free or reduced rate air transportation in lieu of the cash or check due under paragraphs (a) and (b) of this section, if—

(1) The value of the transportation benefit offered, excluding any fees or other mandatory charges applicable for using the free or reduced rate air transportation, is equal to or greater than the cash/check payment otherwise required;

(2) The carrier fully informs the passenger of the amount of cash/check compensation that would otherwise be due and that the passenger may decline the transportation benefit and receive the cash/check payment; and

(3) The carrier fully discloses all material restrictions, including but not limited to, administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer, on the use of such free or reduced rate transportation before the passenger decides to give up the cash/check payment in exchange for such transportation.

(d) The requirements of this section apply to passengers with "zero fare tickets." The fare paid by these passengers for purposes of calculating denied boarding compensation shall be the lowest cash, check, or credit card payment charged for a ticket in the same class of service on that flight.

(e) The Department of Transportation will review the maximum denied boarding compensation amounts prescribed in this part every two years except for the first review, which will take place in 2012 in order to put the reviews specified in this section on the same cycle as the reviews of domestic baggage liability limits specified in 14 CFR 254.6. The Department will use any increase in the Consumer Price Index for All Urban Consumers (CPI–U) as of July of each review year to calculate the increased maximum compensation amounts. The Department will use the following formula:

(1) Current Denied Boarding Compensation limit in section 250.5(a)(2) multiplied by (a/b) rounded to the nearest $25 where:

a = July CPI–U of year of current adjustment
b = the CPI–U figure in August, 2011 when the inflation adjustment provision was added to Part 250.

(2) The Denied Boarding Compensation limit in § 250.5(a)(3) shall be twice the revised limit for § 250.5(a)(2).

(f) In addition to the denied boarding compensation specified in this part, a carrier shall refund all unused ancillary fees for optional services paid by a passenger who is voluntarily or involuntarily denied boarding. The carrier is not required to refund the ancillary fees for services that are provided with respect to the passenger's alternate transportation.

■ 6 . In § 250.9, the section heading and paragraph (b) are revised and paragraph (c) is added to read as follows:

§ 250.9 Written explanation of denied boarding compensation and boarding priorities, and verbal notification of denied boarding compensation.

* * * * *

(b) The statement shall read as follows:

Compensation for Denied Boarding

If you have been denied a reserved seat on (name of air carrier), you are probably entitled to monetary compensation. This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the *U.S. Department of Transportation.*

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for compensation of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily in accordance with the following boarding priority of (name of air carrier): (In this space the carrier inserts its boarding priority rules or a summary thereof, in a manner to be understandable to the average passenger.)

Compensation for Involuntary Denied Boarding

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:

(1) you have not fully complied with the airline's ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the airline's usual rules and practices; or

(2) you are denied boarding because the flight is canceled; or

(3) you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or

(4) on a flight operated with an aircraft having 60 or fewer seats, you are denied boarding due to safety-related weight/balance restrictions that limit payload; or

(5) you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or

(6) the airline is able to place you on another flight or flights that are planned to reach your next stopover or final destination within one hour of the planned arrival time of your original flight.

Amount of Denied Boarding Compensation

Domestic Transportation

Passengers traveling between points within the United States (including the territories and possessions) who are denied boarding involuntarily from an oversold flight are entitled to: (1) No compensation if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight; (2) 200% of the fare to the passenger's destination or first stopover, with a maximum of $650, if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and (3) 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300, if the carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than two hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay.	No compensation.
1 to 2 hour arrival delay.	200% of one-way fare (but no more than $650).
Over 2 hours arrival delay.	400% of one-way fare (but no more than $1,300).

International Transportation

Passengers traveling from the United States to a foreign point who are denied boarding involuntarily from an oversold flight originating at a U.S. airport are entitled to: (1) No compensation if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight; (2) 200% of the fare to the passenger's destination or first stopover, with a maximum of $650, if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and (3) 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300, if the carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay.	No compensation.
1 to 4 hour arrival delay.	200% of one-way fare (but no more than $650).
Over 4 hours arrival delay.	400% of one-way fare (but no more than $1,300).

Alternate Transportation

"Alternate transportation" is air transportation with a confirmed reservation at no additional charge (by any scheduled airline licensed by DOT), or other transportation accepted and used by the passenger in the case of denied boarding.

Method of Payment

Except as provided below, the airline must give each passenger who qualifies for involuntary denied boarding compensation a payment by cash or check for the amount specified above, on the day and at the place the involuntary denied boarding occurs. If the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment shall be sent to the passenger within 24 hours. The air carrier may offer free or discounted transportation in place of the cash payment. In that event, the carrier must disclose all material restrictions on the use of the free or discounted transportation before the passenger decides whether to accept the transportation in lieu of a cash or check payment. The passenger may insist on the cash/check payment or refuse all compensation and bring private legal action.

Passenger's Options

Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

(c) In addition to furnishing passengers with the carrier's written statement as specified in paragraphs (a) and (b) of this section, if the carrier orally advises involuntarily bumped passengers that they are entitled to receive free or discounted transportation as denied boarding compensation, the carrier must also orally advise the passengers of any material restrictions or conditions applicable to the free or discounted transportation and that they are entitled to choose a check instead (or cash if that option is offered by the carrier).

■ 7. Section 250.10 is revised to read as follows:

§ 250.10 Report of passengers denied confirmed space.

Every reporting carrier as defined in § 234.2 of this chapter and any carrier that voluntarily submits data pursuant to § 234.7 of this chapter shall file, on a quarterly basis, the information specified in BTS Form 251. The reporting basis shall be flight segments originating in the United States. The reports are to be submitted within 30 days after the end of the quarter covered by the report. The calendar quarters end March 31, June 30, September 30 and December 31. "Total Boardings" on Line 7 of Form 251 shall include only passengers on flights for which confirmed reservations are offered. Data shall not be included for inbound international flights.

PART 253—NOTICE OF TERMS OF CONTRACT OF CARRIAGE

■ 8. The authority citation for 14 CFR Part 253 continues to read as follows:

Authority: 49 U.S.C. 40113; 49 U.S.C. Chapters 401, 415 and 417.

■ 9. Section 253.7 is revised to read as follows:

§ 253.7 Direct notice of certain terms.

A carrier may not impose any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or raising the ticket price consistent with § 399.87 of the chapter, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.

■ 10. Section 253.10 is added to read as follows:

§ 253.10 Notice of contract of carriage choice-of-forum provisions.

No carrier may impose any contract of carriage provision containing a choice-of-forum clause that attempts to preclude a passenger, or a person who purchases a ticket for air transportation on behalf of a passenger, from bringing a claim against a carrier in any court of competent jurisdiction, including a court within the jurisdiction of that passenger's residence in the United States (provided that the carrier does business within that jurisdiction).

PART 259—ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

■ 11. The authority citation for 14 CFR Part 259 continues to read as follows:

Authority: 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, and 41712.

■ 12. Section 259.2 is revised to read as follows:

§ 259.2 Applicability.

This part applies to all the flights of a certificated or commuter air carrier if the carrier operates scheduled passenger service or public charter service using any aircraft originally designed to have a passenger capacity of 30 or more seats, and to all flights to and from the U.S. of a foreign carrier if the carrier operates scheduled passenger service or public charter service to and from the U.S. using any aircraft originally designed to have a passenger capacity of 30 or more seats, except as otherwise provided in this part. This part does not apply to foreign carrier charters that operate to and from the United States if no new passengers are picked up in the United States.

■ 13. Section 259.3 is revised to read as follows:

§ 259.3 Definitions.

Certificated air carrier means a U.S. carrier holding a certificate issued under 49 U.S.C. 41102 to conduct passenger service or holding an exemption to conduct passenger operations under 49 U.S.C. 41102.

Commuter air carrier means a U.S. carrier that has been found fit under 49 U.S.C. 41738 and is authorized to carry passengers on at least five round trips per week on at least one route between two or more points according to a published flight schedule using small aircraft as defined in 14 CFR 298.2.

Covered carrier means a certificated carrier, a commuter carrier, or a foreign air carrier operating to, from or within the United States, conducting scheduled passenger service or public charter service with at least one aircraft having a designed seating capacity of 30 or more seats.

Foreign air carrier means a carrier that is not a citizen of the United States as defined in 49 U.S.C. 40102(a) that holds a foreign air carrier permit issued under 49 U.S.C. 41302 or an exemption issued under 49 U.S.C. 40109 authorizing direct foreign air transportation.

Large hub airport means an airport that accounts for at least 1.00 percent of the total enplanements in the United States.

Medium hub airport means an airport accounting for at least 0.25 percent but less than 1.00 percent of the total enplanements in the United States.

Non-hub airport means an airport with 10,000 or more annual enplanements but less than 0.05 percent of the country's annual passenger boardings.

Small hub airport means an airport accounting for at least 0.05 percent but less than 0.25 percent of the total enplanements in the United States.

Tarmac delay means the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane.

■ 14. Section 259.4 is revised to read as follows:

§ 259.4 Contingency Plan for Lengthy Tarmac Delays.

(a) *Adoption of Plan.* Each covered carrier shall adopt a Contingency Plan for Lengthy Tarmac Delays for its scheduled and public charter flights at each U.S. large hub airport, medium hub airport, small hub airport and non-hub airport at which it operates or markets such air service and shall adhere to its plan's terms.

(b) *Contents of Plan.* Each Contingency Plan for Lengthy Tarmac Delays shall include, at a minimum, the following:

(1) For domestic flights, assurance that the covered U.S. air carrier will not permit an aircraft to remain on the tarmac for more than three hours before allowing passengers to deplane unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason (e.g. weather, a directive from an appropriate government agency) why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.

(2) For international flights operated by covered carriers that depart from or arrive at a U.S. airport, assurance that the carrier will not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours before allowing passengers to deplane, unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.

(3) For all flights, assurance that the carrier will provide adequate food and potable water no later than two hours after the aircraft leaves the gate (in the case of a departure) or touches down (in the case of an arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service;

(4) For all flights, assurance of operable lavatory facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac;

(5) For all flights, assurance that the passengers on the delayed flight will receive notifications regarding the status of the delay every 30 minutes while the aircraft is delayed, including the reasons for the tarmac delay, if known;

(6) For all flights, assurance that the passengers on the delayed flight will be notified beginning 30 minutes after scheduled departure time (including any revised departure time that passengers were notified about before boarding) and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists;

(7) Assurance of sufficient resources to implement the plan; and

(8) Assurance that the plan has been coordinated with airport authorities (including terminal facility operators where applicable) at each U.S. large hub airport, medium hub airport, small hub airport and non-hub airport that the carrier serves, as well as its regular U.S. diversion airports;

(9) Assurance that the plan has been coordinated with U.S. Customs and Border Protection (CBP) at each large U.S. hub airport, medium hub airport, small hub airport and non-hub airport that is regularly used for that carrier's international flights, including diversion airports; and

(10) Assurance that the plan has been coordinated with the Transportation Security Administration (TSA) at each U.S. large hub airport, medium hub airport, small hub airport and non-hub airport that the carrier serves, including diversion airports.

(c) *Code-Share Responsibility.* The tarmac delay contingency plan of the carrier under whose code the service is marketed governs, if different from the operating carrier, unless the marketing carrier specifies in its contract of carriage that the operating carrier's plan governs.

(d) *Amendment of plan.* At any time, a carrier may amend its Contingency Plan for Lengthy Tarmac Delays to decrease the time for aircraft to remain on the tarmac for domestic flights covered in paragraph (b)(1) of this section, for aircraft to remain on the tarmac for international flights covered in paragraph (b)(2) of this section, and for the trigger point for food and water covered in paragraph (b)(3) of this section. A carrier may also amend its plan to increase these intervals (up to the limits in this rule), in which case the amended plan shall apply only to departures that are first offered for sale after the plan's amendment.

(e) *Retention of records.* Each carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays shall retain for two years the following information about any tarmac delay that lasts more than three hours:

(1) The length of the delay;

(2) The precise cause of the delay;

(3) The actions taken to minimize hardships for passengers, including the provision of food and water, the maintenance and servicing of lavatories, and medical assistance;

(4) Whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and

(5) An explanation for any tarmac delay that exceeded 3 hours (i.e., why the aircraft did not return to the gate by the 3-hour mark).

(f) *Unfair and deceptive practice.* A carrier's failure to comply with the assurances required by this rule and contained in its Contingency Plan for Lengthy Tarmac Delays will be considered to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 that is subject to enforcement action by the Department.

■ 15. Section 259.5 is revised to read as follows:

§ 259.5 Customer Service Plan.

(a) *Adoption of Plan.* Each covered carrier shall adopt a Customer Service Plan applicable to its scheduled flights and shall adhere to the plan's terms.

(b) *Contents of Plan.* Each Customer Service Plan shall address the following subjects and comply with the minimum standards set forth:

(1) Disclosing on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation, that the lowest fare offered by the carrier may be available elsewhere if that is the case;

(2) Notifying consumers of known delays, cancellations, and diversions as required by 14 CFR 259.8 of this chapter;

(3) Delivering baggage on time, including making every reasonable effort to return mishandled baggage within twenty-four hours, compensating passengers for reasonable expenses that result due to delay in delivery, as required by 14 CFR part 254 for domestic flights and as required by applicable international agreements for international flights, and reimbursing passengers for any fee charged to transport a bag if that bag is lost;

(4) Allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure;

(5) Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and 12 CFR part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation;

(6) Properly accommodating passengers with disabilities, as required by part 382 of this chapter, and other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays;

(7) Meeting customers' essential needs during lengthy tarmac delays as required by § 259.4 of this chapter and as provided for in each covered carrier's contingency plan;

(8) Handling "bumped" passengers with fairness and consistency in the case of oversales as required by part 250 of this chapter and as described in each carrier's policies and procedures for determining boarding priority;

(9) Disclosing cancellation policies, frequent flyer rules, aircraft seating configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff;

(10) Notifying consumers in a timely manner of changes in their travel itineraries;

(11) Ensuring responsiveness to consumer problems as required by § 259.7 of this chapter; and

(12) Identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.

(c) *Self-auditing of plan and retention of records.* Each carrier that is required to adopt a Customer Service Plan shall audit its own adherence to its plan annually. Carriers shall make the results of their audits available for the Department's review upon request for two years following the date any audit is completed.

■ 16. Section 259.6 is revised to read as follows:

§ 259.6 Posting of Contracts of Carriage, Tarmac Delay Contingency Plans and Customer Service Plans on websites.

(a) Each U.S. air carrier that has a website and each foreign air carrier that has a website marketed to U.S. consumers, and that is required to adopt a contingency plan for lengthy tarmac delays, shall post its current contingency plan on its website in easily accessible form.

(b) Each U.S. air carrier that has a website and each foreign air carrier that has a website marketed to U.S. consumers, and that is required to adopt a customer service plan, shall post its current customer service plan on its website in easily accessible form.

(c) Each U.S. air carrier that has a website and each foreign air carrier that has a website marketed to U.S. consumers shall post its current contract of carriage on its website in easily accessible form.

■ 17. Section 259.7 is revised to read as follows:

§ 259.7 Response to consumer problems.

(a) *Designated advocates for passengers' interests.* Each covered carrier shall designate for its scheduled flights an employee who shall be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers. This employee shall have input into decisions on which flights to cancel and which will be delayed the longest.

(b) *Informing consumers how to complain.* Each covered carrier shall make available the mailing address and e-mail or web address of the designated department in the airline with which to file a complaint about its scheduled service. This information shall be provided on the U.S. carrier's website (if any) and the foreign carrier's website (if marketed to U.S. consumers), on all e-ticket confirmations and, upon request, at each ticket counter and boarding gate staffed by the carrier or a contractor of the carrier.

(c) *Response to complaints.* Each covered carrier shall acknowledge in writing receipt of each complaint regarding its scheduled service to the complainant within 30 days of receiving it and shall send a substantive written response to each complainant within 60 days of receiving the complaint. A complaint is a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline's services.

(d) *Social networking sites.* Each covered carrier that uses a social networking site (e.g. Facebook, Twitter) and that does not intend for that site to be a vehicle for receipt of written consumer complaints subject to this section shall clearly indicate on the carrier's primary page on that social networking site that it will not reply to consumer complaints on that site and shall direct consumers to the carrier's mailing address and e-mail or website location for filing written complaints.

■ 18. Section 259.8 is added to read as follows:

§ 259.8 Notify passengers of known delays, cancellations, and diversions.

(a) Each covered carrier for its scheduled flights to, from or within the U.S. must promptly provide to passengers who are ticketed or hold reservations, and to the public, information about a change in the status of a flight within 30 minutes after the carrier becomes aware of such a change in the status of a flight. A change in the status of a flight means, at a minimum, cancellation of a flight, a delay of 30 minutes or more in the planned operation of a flight, or a diversion. The flight status information must at a minimum be provided in the boarding gate area for the flight at a U.S. airport, on the carrier's website, and via the carrier's telephone reservation system upon inquiry by any person.

(1) With respect to any U.S. carrier or foreign air carrier that permits passengers to subscribe to flight status notification services, the carrier must deliver such notification to such passengers, by whatever means is available to the carrier and of the passenger's choice, within 30 minutes after the carrier becomes aware of such a change in the status of a flight.

(2) The U.S. carrier or foreign air carrier shall incorporate such notification service commitment into its Customer Service Plan as specified in section 259.5 of this chapter.

(b) For its scheduled flights to, from or within the U.S, within 30 minutes after the carrier becomes aware of a flight cancellation, a flight delay of 30 minutes or more, or a flight diversion, each covered carrier must update all flight status displays and other sources of flight information that are under the carrier's control at U.S. airports with information on that flight irregularity.

(c) If an airport-controlled display system at a U.S. airport accepts flight status updates from carriers, covered carriers must provide flight irregularity information to that airport for the carrier's scheduled flights to, from or within the U.S. within 30 minutes after the carrier becomes aware of such a change in the status of a flight. Flight irregularity refers to flight cancellations, flight delays of 30 minutes or more, and diversions.

PART 399—STATEMENTS OF GENERAL POLICY

■ 19. The authority citation for 14 CFR Part 399 continues to read as follows:

Authority: 49 U.S.C. 40101 *et seq.*

■ 20. Effective October 24, 2011, § 399.84 is revised to read as follows:

§ 399.84 Price advertising and opt-out provisions.

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component. Although charges included within the single total price listed (e.g., government taxes) may be stated separately or through links or "pop ups" on websites that display the total price, such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as the total price, and must provide cost information on a per passenger basis that accurately reflects the cost of the item covered by the charge.

(b) The Department considers any advertising by the entities listed in paragraph (a) of this section of an each-way airfare that is available only when purchased for round-trip travel to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless such airfare is advertised as "each way" and in such a manner so that the disclosure of the round-trip purchase requirement is clearly and conspicuously noted in the advertisement and is stated prominently and proximately to the each-way fare amount. The Department considers it to be an unfair and deceptive practice to advertise each-way fares contingent on a round-trip purchase requirement as "one-way" fares, even if accompanied by prominent and proximate disclosure of the round trip purchase requirement.

(c) When offering a ticket for purchase by a consumer, for passenger air transportation or for a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation, a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, may not offer additional optional services in connection with air transportation, a tour, or tour component whereby the optional service is automatically added to the consumer's purchase if the consumer takes no other action, i.e., if the consumer does not opt out. The consumer must affirmatively "opt in" (i.e., agree) to such a service and the fee for it before that fee is added to the total price for the air transportation-related purchase. The Department considers the use of "opt-out" provisions to be an unfair and deceptive practice in violation of 49 U.S.C. 41712.

■ 21. Section 399.85 is added to read as follows:

§ 399.85 Notice of baggage fees and other fees.

(a) If a U. S. or foreign air carrier has a website accessible for ticket purchases by the general public in the U.S., the carrier must promptly and prominently disclose any increase in its fee for carry-on or first and second checked bags and any change in the first and second checked bags or carry-on allowance for a passenger on the homepage of that website (e.g., provide a link that says "changed bag rules" or similarly descriptive language and takes the consumer from the homepage directly to a pop-up or a place on another webpage that details the change in baggage allowance or fees and the effective dates of such changes). Such notice must remain on the homepage for at least three months after the change becomes effective.

(b) If a U.S. carrier, a foreign air carrier, an agent of either, or a ticket agent has a website accessible for ticket purchases by the general public in the U.S., the carrier or agent must clearly and prominently disclose on the first screen in which the agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can see these baggage fees. An agent may refer consumers to the airline websites where specific baggage fee information may be obtained or to its own site if it displays airlines' baggage fees.

(c) On all e-ticket confirmations for air transportation within, to or from the United States, including the summary page at the completion of an online purchase and a post-purchase email confirmation, a U.S. carrier, a foreign air carrier, an agent of either, or a ticket agent that advertises or sells air transportation in the United States must include information regarding the passenger's free baggage allowance and/or the applicable fee for a carry-on bag and the first and second checked bag. Carriers must provide this information in text form in the e-ticket confirmation. Agents may provide this information in text form in the e-ticket confirmations or through a hyperlink to the specific location on airline websites or their own website where this information is displayed. The fee information provided for a carry-on bag and the first and second checked bag must be expressed as specific charges taking into account any factors (e.g., frequent flyer status, early purchase, and so forth) that affect those charges.

(d) If a U.S. or foreign air carrier has a website marketed to U.S. consumers where it advertises or sells air transportation, the carrier must prominently disclose on its website information on fees for all optional services that are available to a passenger purchasing air transportation. Such disclosure must be clear, with a conspicuous link from the carrier's homepage directly to a page or a place on a page where all such optional services and related fees are disclosed. For purposes of this section, the term "optional services" is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. In general, fees for particular services may be expressed as a range; however, baggage fees must be expressed as specific charges taking into account any factors (e.g., frequent flyer status, early purchase, and so forth) that affect those charges.

(e) For air transportation within, to or from the United States, a carrier marketing a flight under its identity that is operated by a different carrier, otherwise known as a code-share flight, must through its website disclose to consumers booked on a code-share flight any differences between its optional services and related fees and those of the carrier operating the flight. This disclosure may be made through a conspicuous notice of the existence of such differences on the marketing carrier's website or a conspicuous hyperlink taking the reader directly to the operating carrier's fee listing or to a page on the marketing carrier's website that lists the differences in policies among code-share partners.

(f) The Department considers the failure to give the appropriate notice described in paragraphs (a) through (e) of this section to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.

■ 22. Section 399.87 is added to read as follows:

§ 399.87 Baggage allowances and fees.

For passengers whose ultimate ticketed origin or destination is a U.S. point, U.S. and foreign carriers must apply the baggage allowances and fees that apply at the beginning of a passenger's itinerary throughout his or her entire itinerary. In the case of code-share flights that form part of an itinerary whose ultimate ticketed origin or destination is a U.S. point, U.S. and foreign carriers must apply the baggage allowances and fees of the marketing carrier throughout the itinerary to the extent that they differ from those of any operating carrier.

■ 23. Section 399.88 is added to read as follows:

§ 399.88 Prohibition on post-purchase price increase.

(a) It is an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for any seller of scheduled air transportation within, to or from the United States, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, to increase the price of that air transportation, tour or tour component to a consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, or an increase in an applicable fuel surcharge, after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee. A purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer.

(b) A seller of scheduled air transportation within, to or from the United States or a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, must notify a consumer of the potential for a post-purchase price increase due to an increase in a government-imposed tax or fee and must obtain the consumer's written consent to the potential for such an increase prior to purchase of the scheduled air transportation, tour or tour component that includes scheduled air transportation. Imposition of any such increase without providing the consumer the appropriate notice and without obtaining his or her written consent of the potential increase constitutes an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.

■ 24. Section 399.89 is added to read as follows:

§ 399.89 Disclosure of potential for price increase before payment.

Any seller of scheduled air transportation within, to or from the United States, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, must notify a consumer of the potential for a price increase that could take place prior to the time that the full amount agreed upon has been paid by the consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, an increase in an applicable fuel surcharge, or an increase in a government-imposed tax or fee and must obtain the consumer's written consent to the potential for such an increase prior to accepting any payment for the scheduled air transportation, or tour or tour component that includes scheduled air transportation. Imposition of any such increase without providing the consumer the appropriate notice and obtaining his or her written consent to the potential increase constitutes an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.

[FR Doc. 2011–9736 Filed 4–20–11; 8:45 am]

BILLING CODE P

Reader Aids

Federal Register

Vol. 76, No. 79

Monday, April 25, 2011

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **www.ofr.gov.**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, APRIL

18001–18346	1
18347–18630	4
18631–18860	5
18861–19264	6
19265–19682	7
19683–19898	8
19899–20214	11
20215–20488	12
20489–20834	13
20835–21220	14
21221–21612	15
21613–21804	18
21805–21998	19
21999–22292	20
22293–22602	21
22603–22784	22
22785–23168	25

CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1 CFR

304 18635

2 CFR

Proposed Rules:

Ch. III 20568
Ch. IX 22058
Ch. XXX 20568

3 CFR

Proclamations:

8641 18629
8642 18631
8643 18633
8644 19259
8645 19261
8646 19262
8647 19265
8648 19899
8649 20215
8650 20829
8651 20831
8652 20833
8653 21221
8654 21223
8655 21999
8656 22001

Executive Orders:

12824 (amended by 13569) 19891
12835 (amended by 13569) 19891
12859 (amended by 13569) 19891
13507 (revoked by 13569) 19891
13532 (amended by 13569) 19891
13569 19891
13570 22291

Administrative Orders:

Memorandums:
Memorandum of April 6, 2011 19893
Memorandum of April 14, 2011 22003
Notices:
Notice of April 7, 2011 19897

5 CFR

4401 19901
Ch. LXX 22293

Proposed Rules:

Ch. XXIII 18954
Ch. XXIV 18954
Ch. XLII 18104
Ch. XLV 20568
Ch. LXXIII 22058

6 CFR

Proposed Rules:

5 18954

7 CFR

12 22785
46 20217
210 .... 22603, 22785
215 .... 22603, 22785
220 .... 22603, 22785
225 .... 22603, 22785
226 .... 22603, 22785
245 22785
253 18861
301 21613
622 19683
624 19683
625 19683
916 21615
917 21615
924 21618
925 21620
946 18001
989 18003
1217 22752
1465 19683
1470 19683
4280 .... 21110, 22608

Proposed Rules:

Ch. I 22058
Ch. II 22058
Ch. III 22058
301 18419
319 18419
Ch. IV 22058
Ch. V 22058
Ch. VI 22058
Ch. VII 22058
1217 22757
1260 18422
Ch. XIV 22058
1463 19710
Ch. XV 22058
Ch. XVI 22058
Ch. XVII 22058
Ch. XVIII 22058
1942 22631
Ch. XX 22058
Ch. XXVI 22058
Ch. XXVII 22058
Ch. XXVIII 22058
Ch. XXIX 22058
Ch. XXX 22058
Ch. XXXI 22058
Ch. XXXII 22058
Ch. XXXIII 22058
Ch. XXXIV 22058
Ch. XXXV 22058
Ch. XXXVI 22058
Ch. XXXVII 22058
Ch. XXXVIII 22058
Ch. XLI 22058
Ch. XLII 22058

8 CFR

274a 21225

9 CFR

56 22295
91 18347
145 22295
146 22295
147 22295
201 18348
391 20220
590 20220
592 20220

Proposed Rules:

Ch. I 22058
11 20569
Ch. II 22058
Ch. III 22058

10 CFR

26 22802
430 .... 19902, 22454
431 21580
835 20489

Proposed Rules:

Ch. II 18965
429 21813
430 .... 18105, 18425, 19913, 20090, 22324
431 .... 18127, 18428, 21673
Ch. III 18954
Ch. X 18954

12 CFR

213 18349
226 .... 18354, 22948
563e 20490
717 18365
748 18365
965 18367
966 18367
969 18367
987 18367
1270 18367

Proposed Rules:

42 21169
48 22633
Ch. II 22662
204 20892
217 20892
230 20892
234 18445
236 21169
252 22648
327 21256
329 21265
330 21265
372 21169
381 22648
563h 21169
741 21169
751 21169
1232 21169

13 CFR

109 18007
120 18376

14 CFR

23 19903
27 20490
39 .... 18020, 18022, 18024, 18029, 18031, 18033, 18038, 18376, 18865, 20229, 20231, 20493, 20496, 20498, 20501, 20503, 22005, 22007, 22296, 22298, 22302, 22305, 22308, 22311, 22316, 22319
61 19267
71 .... 18040, 18041, 18378, 20233, 20835, 22009, 22010, 22011, 22012, 22013, 22014, 22015, 22016
95 21622
97 .... 18379, 18382, 21232, 21234
244 23110
250 23110
253 23110
259 23110
399 23110

Proposed Rules:

33 18130
39 .... 18454, 18664, 18957, 18960, 18964, 19278, 19710, 19714, 19716, 19719, 19721, 19724, 20894, 20898, 21675, 21815, 21820, 21822, 22059, 22828, 22830
71 .... 19281, 20279, 20280, 20281, 21266, 21268, 21269, 21825, 21826, 21827, 21828, 21830, 21831, 21832
121 21270
139 20570

15 CFR

730 21628
744 21628
774 22017

Proposed Rules:

806 19282

16 CFR

305 20233
306 19684
1217 .... 22019, 22030
1303 18645
1610 22608

Proposed Rules:

1224 19914
1500 19926

17 CFR

Ch. I 20835
240 20506

Proposed Rules:

46 22833
229 18966
240 18966
248 21169

18 CFR

358 20838

Proposed Rules:

Ch. I 18954
284 20571

19 CFR

101 22804

Proposed Rules:

4 18132
24 18132

20 CFR

404 .... 18383, 19692
416 .... 18383, 19692

Proposed Rules:

404 20282
416 20282
Ch. IV 18104
Ch. V 18104
Ch. VI 18104
Ch. VII 18104
Ch. IX 18104

21 CFR

179 20509
520 18648
522 22610
610 20513
866 22322
878 .... 20840, 22805
884 21237
1314 20518

Proposed Rules:

Ch. I 20568, 20588
1 20901
7 20901
11 .... 19192, 19238
16 .... 20575, 20901
101 .... 19192, 19238
312 20575
511 20575
812 20575

22 CFR

Proposed Rules:

120 20590
124 20590

23 CFR

1340 18042

25 CFR

Proposed Rules:

Ch. I 20287
Ch. III 18457
Ch. V 20568

26 CFR

1 .... 19268, 19907, 20524
300 21805
301 .... 18059, 18385, 22611

Proposed Rules:

1 .... 20593, 20595, 22064, 22336
31 .... 20595, 22064
301 18134

27 CFR

19 19908
30 19908

Proposed Rules:

9 22338

28 CFR

0 21239
51 21239
94 19909

29 CFR

4 18832
516 18832
531 18832
553 18832
778 18832
779 18832
780 18832
785 18832
786 18832
790 18832
2520 18649
4022 21252
4042 18388
4044 18869

Proposed Rules:

Ch. II 18104
Ch. IV 18104
Ch. V 18104
Ch. XVII 18104
Ch. XXV 18104
2520 19285
Ch. XL 18134

30 CFR

Proposed Rules:

Ch. I 18104
104 18467
938 18467

31 CFR

306 18062
356 18062
357 18062
363 18062

Proposed Rules:

538 22339
560 22339

32 CFR

311 .... 22612, 22613
321 22807
322 .... 22614, 22615
323 22808
701 22616
706 22322

Proposed Rules:

83 22848
223 22849

33 CFR

100 22033
110 .... 20524, 21633
117 .... 19910, 19911, 20843, 21253, 21636
165 .... 18389, 18391, 18394, 18395, 18398, 18869, 19698, 20530, 20532, 20843, 21253, 21637, 22033, 22035, 22809, 22812

Proposed Rules:

100 .... 19926, 20595
110 20287
165 .... 18669, 18672, 18674, 19290, 20287, 21677, 22064

34 CFR

600 20534
602 20534
603 20534
668 20534
682 20534
685 20534
686 20534
690 20534
691 20534

Proposed Rules:

99 19726

36 CFR

Proposed Rules:

Ch. II 22058
294 21272

37 CFR

1 18400

Proposed Rules:

Ch. I 22854
1 18990
370 21833
382 21833

39 CFR

3020 22618

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 4/P.L. 112–9

Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 (Apr. 14, 2011; 125 Stat. 36)

H.R. 1473/P.L. 112–10

Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Apr. 15, 2011; 125 Stat. 38)

Last List April 13, 2011

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.