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Federal Register

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Friday, August 5, 2011



## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 33

**[ANE–2010–33.7–5A]**

### Aviation Fuel and Oil Operating Limitations; Policy Memorandum

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Issuance of policy memorandum.

**SUMMARY:** This document announces the issuance of policy memorandum for Aviation Fuel and Oil Operating Limitations. This policy memorandum provides guidance for Aircraft Certification Offices (ACOs) and the Engine Certification Office (ECO) when evaluating compliance with the standards for aviation fuel and oil operating limitations. This policy does not create any new requirements, and is not specifically limited to new model type certification.

**DATES:** The Engine and Propeller Directorate issued Policy Memorandum ANE–2010–33.7–5A on July 26, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mark Rumizen, FAA, Engine and Propeller Standards Staff, ANE–111, 12 New England Executive Park, Burlington, MA 01803; e-mail: *mark.rumizen@faa.gov;* telephone: (781) 238–7113; fax: (781) 238–7199. The policy statement is available on the Internet at the following address: *http://www.airweb.faa.gov/rgl.* If you do not have access to the Internet, you may request a copy of the policy by contacting the individual listed in this section.

**SUPPLEMENTARY INFORMATION:** The Engine and Propeller Directorate (EPD) of the Aircraft Certification Service has engaged in discussions with the public regarding compliance with § 33.7 for new fuel and oil certification projects. As a result of those discussions the EPD made a draft policy memorandum available to the public for comment. The draft policy memorandum proposed guidance for Aircraft Certification Offices (ACOs) and the Engine Certification Office (ECO) when evaluating compliance with the standards for aviation fuel and oil operating limitations of Part 33 of Title 14 of the Code of Federal Regulations (14 CFR part 33). The draft policy specifically addressed compliance with paragraphs (b)(2), (b)(3), (c)(2), and (c)(3) of § 33.7 for engine type certification, major design change, and supplemental type certification projects.

The draft was made available on March 8, 2010, and after evaluating the comments received, the EPD posted a final policy memorandum to FAA's Regulatory and Guidance Library (RGL) on July 7, 2011. The final policy memorandum differed from the draft policy in three respects. First, the final policy contained some non-material additions, edits, and formatting changes principally to recognize the role that military standards play in evaluating compliance with § 33.7, and added an additional ATSM International (ASTM) standard to the list of recognized standards. Second, the format of paragraph 4.c. of the final memorandum was changed so as to clarify that the new policy memorandum does not materially alter the current position of the EPD to (1) accept as an adequate demonstration of compliance to § 33.7 an ASTM or Society of Automotive Engineers (SAE) standard, and (2) more precisely define the standard specifications considered equivalent to an ASTM or SAE standard specification. And, third, to add a new paragraph 4.d., which replaced the proposed paragraph 4.d., that more accurately described the EPD's oversight role in such projects by clarifying that all projects to add fuels or lubricants as operating limitations are significant, rather than just those that propose the use of equivalent specifications. That policy memorandum was posted to RGL as policy ANE–2010–33.7–5, dated July 7, 2011.

After the final policy posted to RGL, the FAA received a number of questions from the public concerning the revision to draft paragraph 4.d., which had contained a statement that certification projects that do not propose to use an ATSM or SAE standard would be evaluated by the EPD to determine equivalency to the historically used standards. The final policy memorandum relied on a sentence in paragraph 5 to cover that statement in draft paragraph 4.d. As stated above, this change more accurately described the EPD's role in the oversight of projects to add fuels or lubricants as operating limitations. The EPD intended that the specific guidance for proposals not based on industry consensus standards was accommodated by the existing language in paragraph 5 of the memo, and, therefore, it was unnecessary to duplicate that specific guidance in paragraph 4.d. The elimination of the specific guidance regarding proposals not based on industry consensus standards was not intended to imply that the FAA would summarily reject those so-called non-standard proposals. As significant projects, the EPD would continue to address all projects to add fuels or lubricants as operating limitations on a case by case basis in order to rationally evaluate their demonstration of compliance with § 33.7, which is consistent with the current practice. With the above changes, the published version of the memo neither explicitly accepted nor rejected those projects outside the scope of the specific policy, such as the non-standard proposals. However, Paragraph 5 of the memo maintained the accommodation of those projects by specifying they be coordinated with the EPD, which was consistent with the intent of the original version of the policy memo.

Even though the EPD did not intend any material change in the policy from the revised wording of proposed paragraph 4.d., the EPD has elected to withdraw the final policy memorandum ANE–2010–33.7–5, dated July 7, 2011, and to re-post to the RGL an amended final policy that returns paragraphs 4.c. and 4.d. to the form that appeared in the draft policy and eliminates the new paragraph 4.d. This amended final policy memorandum was posted to the RGL on July 26, 2011, as policy ANE–2010–33.7–5A.

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

Issued in Burlington, Massachusetts on July 29, 2011.

**Colleen M. D'Alessandro,**

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

[FR Doc. 2011–19913 Filed 8–4–11; 8:45 am]

BILLING CODE 4910–13–M

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0631; Directorate Identifier 2011–NM–134–AD; Amendment 39–16759; AD 2011–16–01]**

**RIN 2120–AA64**

## Airworthiness Directives; Dassault Aviation Model FALCON 7X Airplanes

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

**ACTION:** Final rule; request for comments.

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

Recently, a Dassault Aviation Falcon 7X aeroplane experienced an uncontrolled pitch trim runaway during descent. The crew succeeded in recovering a stable situation and performed an uneventful landing.

This condition, if occurring again, could lead to a loss of control of the aeroplane.

* * * * *

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

**DATES:** This AD becomes effective August 22, 2011.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in the AD as of August 22, 2011.

We must receive comments on this AD by September 19, 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.

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–227–1137; fax: 425–227–1149.

**SUPPLEMENTARY INFORMATION:**

### Discussion

On June 16, 2011, we issued AD 2011–12–51, Amendment 39–16735 (76 FR 37251, June 27, 2011). To address an unsafe condition, that AD prohibited operation of the affected airplanes. That AD corresponds to Emergency Airworthiness Directive 2011–0102–E, dated May 26, 2011, issued by the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, to correct an unsafe condition for the specified products.

Since we issued AD 2011–12–51, we have been advised of the development of new modifications that will address the unsafe condition. We have determined that these modifications are necessary to allow these airplanes to resume operation. The EASA issued Emergency AD 2011–0114–E, dated June 16, 2011, to supersede AD 2011–0102–E. The EASA subsequently revised that AD with EASA AD 2011–0114R1, dated June 23, 2011. The EASA subsequently revised that AD with EASA AD 2011–0114R2, dated July 7, 2011 (referred to after this as ''the MCAI''), which states:

Recently, a Dassault Aviation Falcon 7X aeroplane experienced an uncontrolled pitch trim runaway during descent. The crew succeeded in recovering a stable situation and performed an uneventful landing.

This condition, if occurring again, could lead to a loss of control of the aeroplane.

To address this potential unsafe condition, pending investigations by the manufacturer, EASA issued emergency AD 2011–0102–E (which corresponds to FAA AD 2011–12–51) which prohibited further flights from its effective date.

The initial results of the investigations show that there was a production defect in the Horizontal Stabilizer Electronic Control Unit (HSECU) which could have contributed to the cause of the event. There are two different HSECU part numbers (P/N) in use: P/N 051244–02 is not affected by this production defect and P/N 051244–04 is potentially affected by this production defect. The aeroplane that experienced the uncontrolled pitch trim runaway event was equipped with a HSECU P/N 051244–04. Investigations are continuing to confirm this cause.

In the meantime, to allow re-starting flight operations and providing protection against further pitch trim runaway events, Dassault Aviation have developed two modifications (M1235 and M1236) which are implemented through accomplishment of Dassault Aviation Service Bulletin (SB) F7X–211.

Furthermore, the flight envelope must be restricted, compared to the original certified flight envelope. Dassault Aviation have developed the corresponding Aircraft Flight Manual (AFM) limitations and a placard, to be installed in the cockpit (part of the instructions of SB F7X–211) to remind the flight crew of the limitations. In addition, modified operational procedures have been developed for in-flight activation of the new protection.

A Certification Maintenance Requirement (CMR), to repetitively test the new Horizontal Stabilizer Trim Actuator (HSTA) electric motors reversion relays (installed with M1235 and M1236), has been developed and must be introduced into chapter 5.40 of the Aircraft Maintenance Manual (AMM).

Additionally, the Master Minimum Equipment List (MMEL) is temporarily modified by this AD to prohibit dispatch of the aeroplane with some specific identified failures.

To correct this unsafe condition and allow resumption of flights for aeroplanes equipped with HSECU P/N 051244–02, EASA issued AD 2011–0114–E, which superseded EASA AD 2011–0102–E, to require:

1. Accomplishing two Dassault Aviation modifications,
2. Amending the AFM and installing a placard in the cockpit,
3. Amending the Minimum Equipment List (MEL), and
4. Implementing an operational test of the HSTA electric motors reversion relays.

For aeroplanes equipped with HSECU P/N 051244–04, the prohibition of flights was maintained.

Since EASA AD 2011–0114–E was issued, Dassault Aviation have issued SB F7X–212 which gives instructions, for aeroplanes equipped with HSECU P/N 051244–04, to remove the HSECU for verification by Rockwell Collins and replace it with an HSECU that has passed the verification, having a name plate with a stamped V. After replacement of the HSECU P/N 051244–04 with a verified HSECU P/N 051244–04 ''V'', the airplane can resume flights, provided the requirements of this AD are complied with.

For the reasons described above, EASA AD 2011–0114R1 was issued to allow aeroplanes equipped with HSECU P/N 051244–04 to resume flights under the same conditions as those previously established for aeroplanes equipped with HSECU P/N 051244–02, provided an HSECU P/N 051244–04 with stamped ''V'' is installed.

Since EASA AD 2011–0114R1 was issued, Dassault Aviation have developed a modification of HSECU P/N 051244–04 which corrects the production defect found on some of these units inspected during the initial investigation. This modified unit has a new P/N 051244–05 and it is eligible for installation on an aeroplane.

For the reasons described above, this revised AD is issued to allow aeroplanes equipped with HSECU P/N 051244–05 to resume flights under the same conditions as those previously established for aeroplanes equipped with HSECU P/N 051244–02, or HSECU P/N 051244–04 with stamped ''V.''

This revised AD is still considered to be an interim measure. Pending results of the ongoing investigations, further AD action may follow to restore a fully certified flight envelope for aeroplanes of this type design.

Required actions include revising the AFM to limit operation with certain inoperative MEL items, and revising the electronic checklist. You may obtain further information by examining the MCAI in the AD docket.

## Relevant Service Information

Dassault has issued Mandatory Service Bulletin 7X–211, Revision 2, including New Standard Installation Checklist and Appendix A, dated June 22, 2011, including FCS Data Loading Procedure, Issue D, dated May 28, 2010; Mandatory Service Bulletin 7X–212, Revision 2, dated July 7, 2011; Service Bulletin 7X–213, dated June 22, 2011; Falcon 7X Airplane Flight Manual, Revision 12, dated June 16, 2011; and Dassault Aviation, Falcon 7X Maintenance Manual, Falcon 7X—Chapter 5–40–00 after Rev 01, dated June 10, 2011 (Commonly referred to as Dassault Change Proposal (CP) CP009 to Chapter 5–40–00 of Dassault Falcon 7X Maintenance Manual). The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

## FAA's Determination and Requirements of This AD

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

## Differences Between the AD and the MCAI or Service Information

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

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

## FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of the possibility of an uncontrolled pitch trim runaway during descent, which could result in loss of control of the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

## Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0631; Directorate Identifier 2011–NM–134–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Amendment 39–16735 (76 FR 37251, June 27, 2011) and adding the following new AD:

**2011–16–01 Dassault Aviation:** Amendment 39–16759. Docket No. FAA–2011–0631; Directorate Identifier 2011–NM–134–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective August 22, 2011.

**Affected ADs**

(b) This AD supersedes AD 2011–12–51, Amendment 39–16735.

**Applicability**

(c) This AD applies to all Dassault Aviation Model FALCON 7X airplanes, certificated in any category, all serial numbers.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (n)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

**Reason**

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

Recently, a Dassault Aviation Falcon 7X aeroplane experienced an uncontrolled pitch trim runaway during descent. The crew succeeded in recovering a stable situation and performed an uneventful landing.

This condition, if occurring again, could lead to a loss of control of the aeroplane.

* * * * *

**Compliance**

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

**Modification**

(g) Before further flight, do the applicable actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) For airplanes on which Dassault Mandatory Service Bulletin 7X–211, Revision 1, dated June 14, 2011, has not been done as of the effective date of this AD: Modify the airplane by adding an automatic reversion logic and a means for the pilot to override pitch trim control normal modes, and install placards in the cockpit in full view of the pilots, in accordance with paragraph 2., ''Accomplishment Instructions for Aircraft which have not Already Implemented the Revision 1 of the Service Bulletin,'' of Dassault Mandatory Service Bulletin 7X–211, Revision 2, including New Standard Installation Checklist and Appendix A, dated June 22, 2011, including FCS Data Loading Procedure, Issue D, dated May 28, 2010.

(2) For airplanes on which Dassault Mandatory Service Bulletin 7X–211, Revision 1, dated June 14, 2011, has been done as of the effective date of this AD:

Replace the frame of the emergency switch box, in accordance with paragraph 3., ''Accomplishment Instructions for Aircraft which have Already Implemented Revision 1 of this Service Bulletin,'' of Dassault Mandatory Service Bulletin 7X–211, Revision 2, including New Standard Installation Checklist and Appendix A, dated June 22, 2011, including FCS Data Loading Procedure, Issue D, dated May 28, 2010.

(3) For airplanes equipped with any horizontal stabilizer electronic control unit (HSECU) P/N 051244–04, replace the HSECU with any HSECU identified in paragraph (g)(3)(i), (g)(3)(ii), or (g)(3)(iii) of this AD, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–212, Revision 2, dated July 7, 2011.

(i) HSECU P/N 051244–02

(ii) Verified HSECU P/N 051244–04 having a stamped ''V''

(iii) HSECU P/N 051244–05

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(h) An HSECU replacement done before the effective date of this AD in accordance with Dassault Mandatory Service Bulletin 7X–212, Revision 1, dated June 23, 2011, is acceptable for compliance with the requirements of either paragraph (g)(3)(i) or (g)(3)(ii) of this AD.

**Revision of Airplane Flight Manual (AFM)**

(i) As of the effective date of this AD, operate the airplane according to the limitations and procedures in the Dassault Falcon 7X AFM, Revision 12, dated June 16, 2011. Revision 12 introduces revised operational speed limitations and revised procedures accounting for the new TRIM EMERG button.

**Electronic Checklist Database Installation**

(j) Before further flight, install the electronic checklist V0007 database, in accordance with the Accomplishment Instructions of Dassault Service Bulletin 7X–213, dated June 22, 2011.

**Operating Restrictions**

(k) Before further flight, revise the Limitations section of the Dassault Falcon 7X AFM to include the following information. This may be accomplished by inserting a copy of this AD into the AFM.

''Dispatch with any inoperative equipment identified below is prohibited. This prohibition takes precedence over the FAA master minimum equipment list (MMEL) or any operator's MEL.

Air data systems (identified as MEL item 34–9)

Multi functional probe (MFP) heating system (identified as MMEL item 30–1)

ACMU3 and ACMU4 (identified as MMEL item 27–3)

LH REAR POWER #3 (identified as MMEL item 27–5–(–6)

Back-up mode (identified as MMEL item 27–8)''

**Maintenance Program Revision**

(l) Within 30 days after the effective date of this AD, revise the maintenance program to incorporate MPD task 27–40–00–710–801, as specified in Dassault Aviation, Falcon 7X Maintenance Manual, Falcon 7X—Chapter 5–40–00 after Rev 01, dated June 10, 2011 (Commonly referred to as Dassault Change Proposal (CP) CP009 to Chapter 5–40–00 of Dassault Falcon 7X Maintenance Manual). The initial compliance time for doing the operational test of the HSTA electric motors reversion relays is 1,850 flight hours after accomplishment of the applicable actions required by paragraph (g) of this AD.

**Note 2:** The MM revision required by paragraph (l) of this AD may be done by inserting a copy of Dassault CP CP009, dated June 10, 2011, to Chapter 5–40–00 of Dassault Falcon 7X MM into the MM. When Dassault CP CP009 has been included in general revisions of the MM, the general revisions may be inserted into the MM, provided the relevant information in the general revision is identical to that in Dassault CP CP009, and Dassault CP CP009 may be removed.

**No Alternative Procedures or Intervals**

(m) After the maintenance program has been revised as required by paragraph (l) of this AD, no alternative procedure or interval for the operational test may be used unless the procedure and/or interval is approved as an AMOC in accordance with the procedures specified in paragraph (n) of this AD.

**FAA AD Differences**

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

(1) EASA AD 2011–0114R2 requires repetitive operational tests of the HSTA electric motors reversion relays, and specifies that the aircraft maintenance program may be revised in lieu of those repetitive tests. This FAA AD merely mandates revising the maintenance program.

(2) EASA AD 2011–0114R2 does not include any requirement to revise the electronic checklist. Paragraph (j) of this FAA AD requires this action.

(3) EASA AD 2011–0114R2 mandates amending the minimum equipment list (MEL) by removing certain items. This FAA AD instead requires revising the AFM to prohibit dispatch with those items inoperative. The operational effect, however, is the same.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, Transport Airplane Directorate, ANM–116, 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 International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–227–1137; fax: 425–227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically refer to 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 ensure the product is airworthy before it is returned to service.

(3) *Special Flight Permits:* Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are allowed, if conducted in accordance with a method approved by the Manager, ANM–116, International Branch, Transport Airplane Directorate, FAA.

**Related Information**

(o) For related information, refer to MCAI EASA Airworthiness Directive 2011–0114R2, dated July 7, 2011, and the service information identified in table 1 of this AD.

TABLE 1—RELATED INFORMATION

| Document | Revision | Date |
|---|---|---|
| Dassault Mandatory Service Bulletin 7X–211, including FCS Data Loading Procedure, Issue D, dated May 28, 2010, New Standard Installation Checklist, and Appendix A. | 2 | June 22, 2011. |
| Dassault Mandatory Service Bulletin 7X–212 | 2 | July 7, 2011. |
| Dassault Falcon 7X Airplane Flight Manual | 12 | June 16, 2011. |
| Dassault Service Bulletin 7X–213 | .................... | June 22, 2011. |
| Dassault Aviation, Falcon 7x Maintenance Manual, Falcon 7X—Chapter 5–40–00 after Rev 01 (Commonly referred to as Dassault Change Proposal (CP) CP009 to Chapter 5–40–00 of Dassault Falcon 7X Maintenance Manual). | .................... | June 10, 2011. |

**Material Incorporated by Reference**

(p) You must use the service information contained in table 2 of this AD to do the actions required by this AD, unless the AD specifies otherwise. Appendix A and New Standard Installation Checklist of the Dassault Mandatory Service Bulletin 7X–211 are not dated or identified with a document number. The document date can only be found in the List of Revisions section of the Dassault Falcon 7X Airplane Flight Manual.

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

(2) For service information identified in this AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.*

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

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

TABLE 2—MATERIAL INCORPORATED BY REFERENCE

| Document | Revision | Date |
|---|---|---|
| Dassault Mandatory Service Bulletin 7X–211, including FCS Data Loading Procedure, Issue D, dated May 28, 2010, New Standard Installation Checklist, and Appendix A. | 2 | June 22, 2011. |
| Dassault Mandatory Service Bulletin 7X–212 | 2 | July 7, 2011. |
| Dassault Falcon 7X Airplane Flight Manual | 12 | June 16, 2011. |
| Dassault Service Bulletin 7X–213 | .................... | June 22, 2011. |
| Dassault Aviation, Falcon 7x Maintenance Manual, Falcon 7X—Chapter 5–40–00 after Rev 01 (Commonly referred to as Dassault Change Proposal (CP) CP009 to Chapter 5–40–00 of Dassault Falcon 7X Maintenance Manual). | .................... | June 10, 2011. |

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

**Ali Bahrami,**

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

[FR Doc. 2011–19866 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0041; Directorate Identifier 2010–NM–227–AD; Amendment 39–16764; AD 2011–16–06]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 747–400 and –400F Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD requires a general visual inspection for cracks and holes of the main equipment center (MEC) drip shields, and repairs if necessary; installation of a fiberglass reinforcing overcoat; and, for certain airplanes, installation of stiffening panels to the MEC drip shields. This AD was prompted by a report of a loss of bus control unit number 1 and generator control units numbers 1 and 2 while the airplane was on the ground, and multiple operator reports of cracked

MEC drip shields. We are issuing this AD to prevent water penetration into the MEC, which could result in the loss of flight critical systems.

**DATES:** This AD is effective September 9, 2011.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of September 9, 2011.

**ADDRESSES:** 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; phone: 206–544–5000, extension 1; fax: 206–766–5680; e-mail: *me.boecom@boeing.com;* Internet: *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

## Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Francis Smith, Aerospace Engineer, Cabin Safety & Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–917–6596; fax: 425–917–6590; e-mail: *Francis.Smith@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

## Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That NPRM published in the **Federal Register** on February 10, 2011 (76 FR 7513). The NPRM proposed a general visual inspection for cracks and holes of the main equipment center (MEC) drip shields, and repairs if necessary; installation of a fiberglass reinforcing overcoat; and, for certain airplanes, installation of stiffening panels to the MEC drip shields.

## Comments

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

## Request To Reference Latest Service Bulletin Revision

Both UPS and Boeing requested that we revise the NPRM to require that actions be done in accordance with Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011. The NPRM referred to Boeing Alert Service Bulletin 747–25A3588, dated July 19, 2010, as the appropriate source of service information for the required actions.

We agree. Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011, removes airplane RT101 from this service information effectivity and provides operators with additional material options. The procedures remain unchanged. We revised paragraphs (c), (g), (g)(1), and (g)(2) in this final rule to refer to Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011. We added new paragraph (h) to the final rule to give credit for actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 747–25A3588, dated July 19, 2010, and re-identified subsequent paragraphs accordingly.

## Request To Extend the Compliance Time

UPS stated concern with Boeing's ability to provide adequate modification kits to all affected operators within the proposed 24-month compliance time. UPS justified its concern by stating that the NPRM acknowledges it would affect an estimated 41 airplanes of U.S. registry. UPS stated that worldwide, there are more than 150 Model 747–400F airplanes that are affected by the referenced service information and many may attempt to accomplish this modification within the 24-month compliance time. At the time, Boeing had indicated it had materials available to produce only 6 kits, and will require 190 days lead time to replenish the stock. As the referenced service information specifies to install the parts provided in the kit by part number, an alternative method of compliance (AMOC) would be required for any operators needing to fabricate their own modification parts from raw materials, if Boeing is unable to provide the required modification kits in a timely basis for the proposed installation.

We infer that UPS is requesting that we extend the proposed compliance time. Boeing Alert Service Bulletin 747–25A3588, dated July 19, 2010; and Revision 1, dated April 7, 2011; were both coordinated between Boeing and the FAA. Proposed methods of compliance and the compliance time were weighed versus uncorrected risks in determining an acceptable and feasible corrective action. Boeing is most familiar with its ability to supply operators with instructions and kits to meet AD compliance, and determined it would be capable of reasonably achieving a 24-month compliance time with the proposed methods, when both Boeing Alert Service Bulletin 747–25A3588, dated July 19, 2010; and Revision 1, dated April 7, 2011; were drafted and approved. Although kits may not be available immediately for every airplane, Boeing has advised us that it is capable of creating and delivering additional kits for operators to use within the AD compliance time.

Once we issue this AD, any person may request approval of an AMOC under the provisions of paragraph (i) of this AD. We have not changed this AD in this regard.

## Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously. We also determined that this change will not increase the economic burden on any operator or increase the scope of the AD.

## Costs of Compliance

We estimate that this AD affects 41 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspection and installation: Groups 1, 3 (24 airplanes). | 20 work-hours × $85 per hour = $1,700 | $1,109 | $2,809 | $67,416 |
| Inspection and installation: Group 2 (17 airplanes). | 17 work-hours × $85 per hour = $1,445 | Negligible | 1,445 | 24,565 |

We estimate the following costs to do any necessary repairs that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need these repairs.

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per airplane |
|---|---|---|---|
| Hole repair | 1 work-hour × $85 per hour = $85 per hole | Negligible | $85 per hole. |

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**2011–16–06 The Boeing Company:** Amendment 39–16764; Docket No. FAA–2011–0041; Directorate Identifier 2010–NM–227–AD.

**Effective Date**

(a) This AD is effective September 9, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to The Boeing Company Model 747–400 and –400F series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011.

**Subject**

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

**Unsafe Condition**

(e) This AD was prompted by a report of a loss of bus control unit number 1 and generator control units numbers 1 and 2 while the airplane was on the ground, and multiple operator reports of cracked main equipment center (MEC) drip shields. We are issuing this AD to prevent water penetration into the MEC, which could result in the loss of flight critical systems.

**Compliance**

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

**Inspection**

(g) Within 24 months after the effective date of this AD, do the actions specified in paragraph (g)(1) or (g)(2) of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011.

(1) For Group 1 and Group 3 airplanes, as identified in Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011: Do a general visual inspection of the MEC drip shield to detect cracking and holes, do all applicable repairs, and install the MEC drip shield panel stiffeners and the fiberglass reinforcing overcoat to the MEC drip shield, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011. Do all applicable repairs before further flight.

(2) For Group 2 airplanes, as identified in Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011: Do a general visual inspection of the MEC drip shield to detect cracking and holes, do all applicable repairs, and install the fiberglass reinforcing overcoat to the MEC drip shield, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011. Do all applicable repairs before further flight.

**Credit for Actions Accomplished in Accordance With Previous Service Information**

(h) Accomplishing the actions required in paragraph (g) of this AD before the effective date of this AD in accordance with Boeing Alert Service Bulletin 747–25A3588, dated July 19, 2010, is considered acceptable for compliance with the corresponding actions specified in this AD.

**Alternative Methods of Compliance (AMOCs)**

(i)(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**

(j) For more information about this AD, contact Francis Smith, Aerospace Engineer, Cabin Safety & Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–917–6596 ; fax: 425–917–6590; e-mail: *Francis.Smith@faa.gov*.

**Material Incorporated by Reference**

(k) You must use Boeing Alert Service Bulletin 747–25A3588, Revision 1, dated April 7, 2011, to do the actions required by this AD, unless the AD specifies otherwise.

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

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

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

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

Issued in Renton, Washington, on July 26, 2011.

**Ali Bahrami,**

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

[FR Doc. 2011–19828 Filed 8–4–11; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0388; Directorate Identifier 2010–NM–004–AD; Amendment 39–16761; AD 2011–16–03]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A300 B4–600, A300 B4–600R, and A300 F4–600R Series Airplanes, and Model A300 C4–605R Variant F Airplanes (Collectively Called Model A300–600 Series Airplanes); Model A310 Series Airplanes; Model A318 Series Airplanes; Model A319 Series Airplanes; Model A320–211, –212, –214, –231, –232, and –233 Airplanes; Model A321 Series Airplanes; Model A330–200 and A330–300 Series Airplanes; and Model A340–200, A340–300, A340–500, and A340–600 Series Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. For Model A310 and A300–600 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS), the manufacturer of the RAT [ram air turbine], reported the failure during a wind tunnel test of a balance weight fastening screw on the RAT turbine cover. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT Turbine Assembly, has not been subject to the correct heat treatment and are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts and consequent loss of RAT functionality. The loss of the RAT, in combination with a total engine flame out, could result in loss of control of the aeroplane.

* * * * *

For Model A318, A319, A320, and A321 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS) reported the failure of a balance weight fastening screw on the RAT turbine cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, used to attach the balance washers of the RAT Turbine assembly, has not received the correct heat treatment, making them more subject to a potential failure.

This condition, if left uncorrected, could lead to the ejection of screw heads and detachment of the associated balance washers. The loss of balance washers would increase RAT vibrations, which could lead to a possible detachment of RAT parts and loss of RAT functionality. The loss of the RAT, in combination with a double engine failure, or a total loss of normal electrical power generation, could result in loss of control of the aeroplane.

* * * * *

For Model A330 and A340 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS), the manufacturer of the RAT, reported the failure of a balance weight fastening screw on the RAT cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT turbine lower gear box assembly, has not been subject to the correct heat treatment and the screws are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts, and thus to damage to the aeroplane and risk of injury to persons on the ground.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

**DATES:** This AD becomes effective September 9, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 9, 2011.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 4, 2011 (76 FR 25259). That NPRM proposed to correct an unsafe condition for the specified products.

The MCAI for Model A300–600 and A310 series airplanes states:

Hamilton Sundstrand (HS), the manufacturer of the RAT [ram air turbine], reported the failure during a wind tunnel test of a balance weight fastening screw on the RAT turbine cover. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT Turbine Assembly, has not been subject to the correct heat treatment and are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts and consequent loss of RAT functionality. The loss of the RAT, in combination with a total engine flame out, could result in loss of control of the aeroplane.

For the reasons described above, this AD requires the identification of the affected RAT turbine assemblies and replacement of all balance weight screws or, in case balance washer detachment is found, replacement of the RAT turbine assembly.

The MCAI for Model A318, A319, A320, and A321 series airplanes states:

Hamilton Sundstrand (HS) reported the failure of a balance weight fastening screw on the RAT turbine cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, used to attach the balance washers of the RAT Turbine assembly, has not received the correct heat treatment, making them more subject to a potential failure.

This condition, if left uncorrected, could lead to the ejection of screw heads and detachment of the associated balance washers. The loss of balance washers would increase RAT vibrations, which could lead to a possible detachment of RAT parts and loss of RAT functionality. The loss of the RAT, in combination with a double engine failure, or a total loss of normal electrical power generation, could result in loss of control of the aeroplane.

For the reasons described above, EASA AD 2009–0259 was issued in December 2009 to require the replacement of all balance weight screws on the affected RAT turbine assemblies, or replacement of the RAT, if any balancing washer was found missing.

This AD retains some of the requirements of AD 2009–0259, which is superseded, and corrects its applicability by adding Airbus model A320–215 and A320–216 aeroplanes which were inadvertently omitted. Also, this AD requires the replacement of the set of balancing weights screws before the next operational or functional check of the RAT assembly.

The MCAI for Model A330 and A340 series airplanes states:

Hamilton Sundstrand (HS), the manufacturer of the RAT, reported the failure of a balance weight fastening screw on the RAT cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT turbine lower gear box assembly, has not been subject to the correct heat treatment and the screws are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts, and thus to damage to the aeroplane and risk of injury to persons on the ground.

For the reasons described above, this AD requires the identification of the affected RAT turbine lower gear box assemblies and replacement of all balance screws or, in case balance washer detachment is found, replacement of the RAT turbine lower gear box assembly. * * *

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

### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

### Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

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

### Costs of Compliance

Based on the service information, we estimate that this AD will affect about 1,004 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $100 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the AD on U.S. operators to be $271,080, or $270 per product.

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative,

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

### 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 the NPRM, 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.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**2011–16–03 Airbus:** Amendment 39–16761. Docket No. FAA–2011–0388; Directorate Identifier 2010–NM–004–AD.

#### Effective Date

(a) This airworthiness directive (AD) becomes effective September 9, 2011.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to the Airbus airplanes listed in paragraphs (c)(1), (c)(2), (c)(3), (c)(4), and (c)(5) of this AD, certificated in any category.

(1) Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes; and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; all certified models, all manufacturer serial numbers, if equipped with a Hamilton Sundstrand ram air turbine (RAT) turbine assembly, as identified by part number (P/N) in Hamilton Sundstrand Service Bulletin 730816–29–15, dated August 4, 2009 (for Model A310 airplanes), and Hamilton Sundstrand Service Bulletin 732365–29–7, dated August 4, 2009 (for Model A300–600 series airplanes); or equipped with a Hamilton Sundstrand RAT turbine lower gear box assembly on which the part number cannot be determined.

(2) Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes; all manufacturer serial numbers, if equipped with a Hamilton Sundstrand RAT turbine assembly Model ERPS08M, as identified by part number in Hamilton Sundstrand Service Bulletin ERPS08M–29–8, dated June 17, 2009; or equipped with a Hamilton Sundstrand RAT turbine lower gear box assembly on which the part number cannot be determined.

(3) Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; all manufacturer serial numbers, if equipped with a Hamilton Sundstrand RAT turbine lower gearbox assembly, as identified by part number in Hamilton Sundstrand Service Bulletin ERPS06G–29–6, dated July 20, 2009; or equipped with a Hamilton Sundstrand RAT turbine lower gear box assembly on which the part number cannot be determined.

(4) Model A340–211, –212, –213, –311, –312, and –313 airplanes; all manufacturer serial numbers, if equipped with a Hamilton Sundstrand RAT turbine lower gearbox assembly, as identified by part number in Hamilton Sundstrand Service Bulletin ERPS06G–29–6, dated July 20, 2009; or equipped with a Hamilton Sundstrand RAT turbine lower gear box assembly on which the part number cannot be determined.

(5) Model A340–541 and –642 airplanes, all manufacturer serial numbers, if equipped with a Hamilton Sundstrand RAT turbine lower gearbox assembly, as identified by part number in Hamilton Sundstrand Service Bulletin ERPS33G–29–1, dated July 20, 2009; or equipped with a Hamilton Sundstrand RAT turbine lower gear box assembly on which the part number cannot be determined.

#### Subject

(d) Air Transport Association (ATA) of America Code 29: Hydraulic power.

#### Reason

(e) For Model A310 and A300–600 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS), the manufacturer of the RAT, reported the failure during a wind tunnel test of a balance weight fastening screw on the RAT turbine cover. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT Turbine Assembly, has not been subject to the correct heat treatment and are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts and consequent loss of RAT functionality. The loss of the RAT, in combination with a total engine flame out, could result in loss of control of the aeroplane.

* * * * *

For Model A318, A319, A320, and A321 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS) reported the failure of a balance weight fastening screw on the RAT turbine cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, used to attach the balance washers of the RAT Turbine assembly, has not received the correct heat treatment, making them more subject to a potential failure.

This condition, if left uncorrected, could lead to the ejection of screw heads and detachment of the associated balance washers. The loss of balance washers would increase RAT vibrations, which could lead to a possible detachment of RAT parts and loss of RAT functionality. The loss of the RAT, in combination with a double engine failure, or a total loss of normal electrical power generation, could result in loss of control of the aeroplane.

* * * * *

For Model A330 and A340 series airplanes, the MCAI describes the unsafe condition as:

Hamilton Sundstrand (HS), the manufacturer of the RAT, reported the failure of a balance weight fastening screw on the RAT cover during a wind tunnel test. After investigation, it has been discovered that a batch of screws, which are used to attach the balance washers of the HS RAT turbine lower gear box assembly, has not been subject to the correct heat treatment and the screws are consequently exposed to potential fracture.

This condition, if not corrected, might lead to the ejection of screw heads and consequently to the detachment of the associated balance washers. The loss of balance washers could increase RAT vibrations, which might lead to a possible detachment of RAT parts, and thus to damage to the aeroplane and risk of injury to persons on the ground.

* * * * *

#### 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.

#### Actions

(g) At the applicable time specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD: Inspect to determine the part number and serial number of the RAT turbine lower gear box assembly, in accordance with the applicable Airbus all operator telex (AOT) identified in table 1 of this AD. If the RAT turbine lower gear box assembly has a part number and a serial number that are not listed in the applicable Hamilton Sundstrand service bulletin identified in table 2 of this AD, no further action is required by this AD, except as required by paragraph (k) of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the part and serial numbers of the RAT turbine lower gear box assembly can be conclusively determined from that review.

TABLE 1—AIRBUS AOTS

| Model | Document | Date |
| --- | --- | --- |
| Model A300–600 series airplanes | Airbus AOT A300–29A6062 | September 1, 2009. |
| Model A310 series airplanes | Airbus AOT A310–29A2098 | September 1, 2009. |
| Model A318 series airplanes; Model A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; Model A321 series airplanes. | Airbus AOT A320–29A1150 | June 24, 2009. |
| Model A330–200 and A330–300 series airplanes | Airbus AOT A330–29A3110 | September 1, 2009. |
| Model A340–200 and A340n–300 series airplanes | Airbus AOT A340–29A4085 | September 1, 2009. |
| Model A340–500 and A340–600 series airplanes | Airbus AOT A340–500/600–29A5015 | September 1, 2009. |

(1) For airplanes identified in paragraph (c)(1) of this AD: Before the next RAT spin test, or within 1,500 flight hours or 9 months after the effective date of this AD, whichever occurs first.

(2) For airplanes identified in paragraph (c)(2) of this AD: Before the next RAT spin test, or within 3,000 flight hours or 12 months after the effective date of this AD, whichever occurs first.

(3) For airplanes identified in paragraph (c)(3), (c)(4), and (c)(5) of this AD: Before the next RAT spin test, or within 3,000 flight hours or 8 months after the effective date of this AD, whichever occurs first.

(h) If, during the inspection required by paragraph (g) of this AD, the RAT turbine lower gear box assembly has a part number and a serial number identified in the applicable Hamilton Sundstrand service bulletin specified in table 2 of this AD; or if the part number or serial number of the RAT turbine lower gear box assembly cannot be determined: Before further flight, inspect the RAT turbine lower gear box assembly to determine if the nameplate is identified with the applicable symbol specified in table 3 of this AD, in accordance with the applicable Airbus AOT specified in table 1 of this AD. If the RAT turbine lower gear box assembly nameplate has the applicable symbol that is identified in table 3 of this AD, no further action is required by this AD except as required by paragraph (k) of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the symbol identified on the nameplate can be conclusively determined from that review.

TABLE 2—APPLICABLE HAMILTON SUNDSTRAND SERVICE BULLETINS

| Model | Document | Date |
| --- | --- | --- |
| Model A300–600 series airplanes | Hamilton Sundstrand Service Bulletin 732365–29–7. | August 4, 2009. |
| Model A310 series airplanes | Hamilton Sundstrand Service Bulletin 730816–29–15. | August 4, 2009. |
| Model A318 series airplanes; Model A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; Model A321 series airplanes. | Hamilton Sundstrand Service Bulletin ERPS08M–29–8. | June 17, 2009. |
| Model A330–200 and A330–300 series airplanes and Model A340–200 and A340–300 series airplanes. | Hamilton Sundstrand Service Bulletin ERPS06G–29–6. | July 20, 2009. |
| Model A340–500 and A340–600 series airplanes | Hamilton Sundstrand Service Bulletin ERPS33G–29–1. | July 20, 2009. |

TABLE 3—NAMEPLATE IDENTIFICATION

| Model | Symbol |
| --- | --- |
| Model A300–600 series airplanes | 29–7 |
| Model A310 series airplanes | 29–15 |
| Model A318 series airplanes; Model A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; Model A321 series airplanes | 29–8 |
| Model A330–200 and A330–300 series airplanes | 29–6 |
| Model A340–200 and A340–300 series airplanes | 29–6 |
| Model A340–500 and A340–600 series airplanes | 29–1 |

(i) If, during the inspection required by paragraph (h) of this AD, the RAT turbine lower gear box assembly does not have the applicable symbol specified in table 3 of this AD: Before further flight, do a general visual inspection for the missing and fractured balance screws and for missing washers in accordance with the applicable Airbus AOT specified in table 1 of this AD.

(1) If all balance screws are fitted on the turbine and are not fractured or missing, at the applicable time specified in paragraph (i)(1)(i), (i)(1)(ii), or (i)(1)(iii) of this AD: Replace the RAT turbine lower gear box assembly with a new or serviceable RAT turbine lower gear box assembly, or replace all balance screws on the RAT turbine lower gear box assembly with new or serviceable balance screws, in accordance with the applicable Airbus AOT specified in table 1 of this AD.

(i) For airplanes identified in paragraph (c)(1) of this AD: Within 1,500 flight hours or 9 months after the effective date of this AD, whichever occurs first.

(ii) For airplanes identified in paragraph (c)(2) of this AD: Within 3,000 flight hours or 12 months after the effective date of this AD, whichever occurs first.

(iii) For airplanes identified in paragraphs (c)(3), (c)(4), and (c)(5) of this AD: Within 3,000 flight hours or 8 months after the effective date of this AD, whichever occurs first.

(2) If one or more screws are fractured but the associated balance washers are still fitted on the RAT turbine lower gear box assembly, before further flight, do the actions specified in paragraph (i)(2)(i) or (i)(2)(ii) of this AD, in accordance with the applicable Airbus AOT specified in table 1 of this AD.

(i) Replace the RAT turbine lower gear box assembly with a new or serviceable RAT turbine lower gear box assembly.

(ii) Replace all balance screws on the RAT turbine lower gear box assembly with new or serviceable balance screws, including replacing any missing washers.

(3) If one or more screws are fractured and any balance washer is missing, before further flight, replace the RAT turbine lower gear box assembly with new or serviceable RAT turbine lower gear box assembly, in accordance with the applicable Airbus AOT specified in table 1 of this AD.

**Reporting Requirement**

(j) At the applicable time specified in paragraph (j)(1) or (j)(2) of this AD, submit a report of the findings (both positive and negative) of the inspection required by paragraph (i) of this AD to Airbus, as specified in Paragraph 7 of the applicable AOT specified in table 1 of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

**Parts Installation**

(k) As of the effective date of this AD, no person may install, on any airplane, a RAT turbine lower gear box assembly, as identified by part number in the applicable Hamilton Sundstrand service bulletin specified in table 2 of this AD, unless it has been inspected and all applicable corrective actions have been done, in accordance with the requirements of this AD.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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 International Branch, send it to Attn: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(3) *Reporting Requirements:* A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

**Related Information**

(m) Refer to the applicable MCAI European Aviation Safety Agency (EASA) AD specified in table 4 of this AD, the Airbus AOTs specified in table 1 of this AD, and the Hamilton Sundstrand service bulletins specified in table 2 of this AD, for related information.

TABLE 4—EASA ADS

| For model— | EASA AD— | Dated— |
|---|---|---|
| A300–600 and A310 series airplanes | 2009–0258 | December 10, 2009. |
| A318, A319, A320, and A321 series airplanes | 2010–0120 | June 21, 2010. |
| A330 and A340 series airplanes | 2009–0260 | December 10, 2009 (corrected December 14, 2009). |

**Material Incorporated by Reference**

(n) You must use the service information contained in table 5 of this AD, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 5—MATERIAL INCORPORATED BY REFERENCE

| Document | Date |
|---|---|
| Airbus All Operator Telex A300–29A6062 | September 1, 2009. |
| Airbus All Operator Telex A310–29A2098 | September 1, 2009. |
| Airbus All Operator Telex A320–29A1150 | June 24, 2009. |
| Airbus All Operator Telex A330–29A3110 | September 1, 2009. |
| Airbus All Operator Telex A340–29A4085 | September 1, 2009. |
| Airbus All Operator Telex A340–500/600–29A5015 | September 1, 2009. |
| Hamilton Sundstrand Service Bulletin 732365–29–7 | August 4, 2009. |
| Hamilton Sundstrand Service Bulletin 730816–29–15 | August 4, 2009. |
| Hamilton Sundstrand Service Bulletin ERPS08M–29–8 | June 17, 2009. |
| Hamilton Sundstrand Service Bulletin ERPS06G–29–6 | July 20, 2009. |
| Hamilton Sundstrand Service Bulletin ERPS33G–29–1 | July 20, 2009. |

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

(2) For Airbus service information identified in this AD, contact the appropriate office listed below.

(i) For Model A300–600 and A310 series airplanes: Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com*.

(ii) For Model A318, A319, A320, and A321 series airplanes: Airbus, Airworthiness

Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com*.

(iii) For Model A330 and A340 series airplanes: Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; e-mail *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.com*.

(3) For Hamilton Sundstrand service information identified in this AD, contact Hamilton Sundstrand, Technical Publications, Mail Stop 302–9, 4747 Harrison Avenue, P.O. Box 7002, Rockford, Illinois 61125–7002; telephone 860–654–3575; fax 860–998–4564; e-mail *tech.solutions@hs.utc.com;* Internet *http://www.hamiltonsundstrand.com*.

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

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

Issued in Renton, Washington, on July 20, 2011.

**Kalene C. Yanamura,**

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

[FR Doc. 2011–19433 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2011–0516; Airspace Docket No. 11–ANM–12]**

### Modification of Class E Airspace; Forsyth, MT

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action will modify Class E airspace at Forsyth, MT. Controlled airspace is necessary to accommodate aircraft using Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Tillitt Field Airport. This action also corrects a typographical error in the regulatory text for the Class E airspace area. This action improves the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** Effective date, 0901 UTC, October 20, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

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

**SUPPLEMENTARY INFORMATION:**

#### History

On June 7, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to modify controlled airspace at Forsyth, MT (76 FR 32879). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

#### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace extending upward from 700 feet above the surface, at Tillitt Field Airport, Forsyth, MT, to accommodate IFR aircraft executing RNAV (GPS) standard instrument approach procedures at the airport. This action also corrects a typographical error in the regulatory text of the Class E airspace area by correcting 'lat. 46°05′00″ N., long. 106°210′3″ W.' to 'lat. 46°05′ 00″ N., long. 106°21′ 03″ W.'. This action is necessary for the safety and management of IFR operations. Except for administrative changes, and the changes listed above, this rule is the same as that proposed in the NPRM.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Tillitt Field Airport, Forsyth, MT.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

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

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

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

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

#### § 71.1 [Amended]

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

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

* * * * *

**ANM MT E5 Forsyth, MT [Modified]**

Tillitt Field Airport, MT

(Lat. 46°16′16″ N., long. 106°37′26″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Tillitt Field Airport, and within 2.5 miles north and 5.5 miles south of the 075° bearing of the airport extending from the 7-mile radius to 13 miles east of the airport; that airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 46°31′00″ N., long. 107°00′00″ W.; to lat. 46°22′00″ N., long. 106°03′00″ W.; to lat. 46°05′00″ N., long. 106°21′03″ W.; to lat. 46°00′00″ N., long. 107°15′00″ W.; to lat. 46°15′00″ N., long. 107°16′00″ W.; to lat. 46°20′00″ N., long. 107°00′00″ W., thence to the point of beginning.

Issued in Seattle, Washington, on July 26, 2011.

**John Warner,**

*Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2011–19742 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–13–P**

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## CONSUMER PRODUCT SAFETY COMMISSION

## 16 CFR Part 1450

## Virginia Graeme Baker Pool and Spa Safety Act; Incorporation by Reference of Successor Standard

**AGENCY:** U.S. Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission (''Commission,'' ''CPSC,'' or ''we'') finds the successor drain cover standard, ANSI/APSP–16 2011, to be in the public interest, and incorporates the standard by reference into its regulations implementing the Virginia Graeme Baker Pool and Spa Safety Act.

**DATES:** The rule takes effect September 6, 2011. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of September 6, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mark Eilbert, Mechanical Engineer, Directorate for Laboratory Sciences, Consumer Product Safety Commission, 5 Research Place, Rockville, Maryland 20850; telephone (301) 987–2232 or e-mail *meilbert@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. What does the Virginia Graeme Baker Pool and Spa Safety Act do? What standard is involved?

The Virginia Graeme Baker Pool and Spa Safety Act (VGB Act), 15 U.S.C. 8001 *et seq.,* was signed into law on December 19, 2007, and became effective on December 19, 2008. The VGB Act's purpose is to prevent drain entrapment and child drowning in swimming pools and spas.

The VGB Act requires that each swimming pool or spa drain cover manufactured, distributed, or entered into commerce in the United States conform to the entrapment protection standards of the ANSI/ASME A112.19.8 performance standard or any successor standard regulating such swimming pool or spa drain cover. 15 U.S.C. 8003(b). The standard in existence at the time the VGB Act was passed was ANSI/ASME A112.19.8–2007. The VGB Act provides that if a successor standard is proposed, ASME must notify the Commission of the proposed revision. *Id.* The Commission, if it determines that the proposed revision is in the public interest, shall incorporate the revision into the standard, after providing 30 days' notice to the public. *Id.*

On August 11, 2008 and October 22, 2009, ASME approved two addenda to ANSI/ASME A112.19.8–2007, namely, ASME A112.19.8a–2008 and ASME A112.19.8b–2009 (collectively referred to herein as ''addenda''). On February 17, 2011, the Association of Pool and Spa Professionals (APSP) approved the ANSI/APSP/IAPMO–16 2011 standard, a successor standard to ASME/ANSI A112.19.8–2007, which is substantively identical to ANSI/ASME A112.19.8–2007 and its two addenda. (In April 2011, IAPMO terminated its status as co-secretariat to the ANSI/APSP/IAPMO–16 2011 standard, so ANSI/APSP/IAPMO–16 2011 became ANSI/APSP–16 2011.) On March 18, 2011, ANSI/ASME began the process of withdrawing the A112.19.8–2007 standard. We have reviewed the successor standard, ANSI/APSP–16–2011, made comparisons to the requirements in ANSI/ASME A112.19.8–2007, and assessed whether the changes are in the public interest.

### B. What are the changes to the standard, and are the changes in the public interest?

There were two substantive changes between the ANSI/ASME A112.19.8–2007 standard and ANSI/APSP–16 2011, each of which was made in the addenda to ANSI/ASME A112.19.8–2007. The other changes to the standard were minor and were made primarily to add clarity to the standard. We discuss the substantive changes in this part of the preamble.

*a. Ultraviolet Light Exposure Test*

The Ultraviolet Light Exposure Test (UV test) subjects the plastic drain fitting material to the damaging effects of UV rays that accompany sun exposure when the drains are installed in pools and spas. (''Fitting'' is a term used in ANSI/ASME A112.19.8–2007 instead of ''cover.'' ANSI/ASME A112.19.8–2007 indicates that ''cover'' is an obsolete term.) Tests for the structural integrity of the drain fitting are performed after the drain fittings are exposed to UV light degradation. The structural integrity tests subject the drain fitting to forces expected under normal use and to excessive forces expected under extreme conditions.

In ANSI/ASME A112.19.8–2007, the UV test is conducted by a single method. According to section 3.2 of ANSI/ASME A112.19.8–2007, 12 new drain fittings are placed in a UV test chamber and exposed to UV light and water spray, according to the protocol in ASTM G154, *Standard Practices for Operating Fluorescent Light Apparatus for UV Exposure of Non-metallic Materials.* When the drain fitting is too large to fit in a test chamber, representative sections are tested to the intent of the structural integrity tests. This means that the test procedures in the structural integrity tests must be adapted to suit the diminished size/shape of the drain fitting section.

Changes to the UV testing were made in ANSI/ASME A112.19.8a–2008 and were carried over to ANSI/APSP–16 2011. ANSI/ASME A112.19.8a–2008 includes two UV test methods. Test Method 1 follows the general full-sample UV exposure in ASME A112.19.8–2007, with the addition of two more choices for the UV exposure protocol, specifically, ASTM G155, *Standard Practice for Operating Xenon Arc Light Apparatus for Exposure of Non-Metallic Materials;* and ASTM G153, *Standard Practice for Operating Enclosed Carbon Arc Light Apparatus for Exposure of Nonmetallic Materials.* Test Method 2 is an alternate UV exposure test. Here, the fitting polymeric material is molded into small uniform specimens. Half of the specimens are exposed to UV light and water spray, and half are not exposed. The exposed and unexposed (virgin) material specimens are then tested for tensile strength and impact resistance. The samples of the material must retain at least 70% of the virgin value (meaning that the samples, when tested, must retain at least 70% of the tensile strength and impact resistance values of the unexposed material) when the tensile strength and impact resistance tests are performed. The intensification factor, K, is defined as the inverse of the lowest retained portion. Thus, for example, if 80% of the tensile strength is retained in the exposed material and 85% of the impact resistance, then the intensification factor is $K=1/0.80=1.25$.

Complete (as sold) fittings are then tested to the structural integrity tests in sections 3.3 through 3.8 in ANSI/ASME A112.19.8–2007. For Test Method 1, the UV-exposed drain fitting is tested in the structural tests to the forces and pressures specified. This is essentially the same procedure from the ASME A 112.19.8–2007 standard. For Test Method 2, the complete drain fitting, which has not been ''weathered'' in the UV exposure chamber, is tested in the structural tests to the forces and pressures specified, multiplied by the intensification factor, K. Because only the representative sample was weathered in the UV chamber, the intensification factor, K, is then used on the complete (as sold) fittings to simulate the weathering of the complete fitting. ANSI/APSP–16 2011 has substantially the same language and requirements for the Ultraviolet Light Exposure Test as the ASME A112.19.8a–2008 addendum.

The alternate Test Method 2 in ANSI/APSP–16 2011, incorporating the ANSI/ASME A112.19.8a–2008 Addendum, offers more consistent treatment for large drain fittings that do not fit into standard UV exposure chambers. The use of material tests to predict the structural integrity of entire products is an established industry protocol. We find that this change in test methods is in the public interest because it will enhance test repeatability for large drain fittings.

*b. Self-Contained Spa Fittings*

Self-contained spas are manufactured products that include drain fittings and pumps. UL 1563, *Standard for Safety for Electric Spas, Equipment Assemblies, and Associated Equipment,* Sixth Edition, July 16, 2009, requires that all suction fittings are flow rated to ANSI/ASME A112.19.8–2007 and are installed in multiples, such that the suction from the pump cannot be isolated to one blocked fitting. The relevance of UL 1563 is that it contains similar requirements for multiple layers of entrapment protection to those in the VGB Act, but in the controlled environment of a single manufactured system. In addition to multiple drains, UL 1563 requires that the suction fittings be installed with separation on different planes, more than 3 feet apart, or have a suction limiting vent or gravity drainage system. Thus, system flows are split between two or more suction fittings that cannot both be blocked by the same body. Similarly, for hair entanglement, the split flow reduces the flow and entrapment potential at each suction fitting. Because spas have limited available space, the split suction allows smaller suction fittings and at the same time maintains the high flows required for the function of the product.

In ANSI/ASME A112.19.8–2007, the product flow rating is the lesser of the ratings achieved in the hair and body entrapment tests in sections 4 and 5 of the standard. Each suction fitting is tested by direct connection to a test pump. Self-contained spa fittings are tested like any other suction fitting. The multiple-suction fitting requirements in UL 1563 are ignored. In ANSI/ASME A112.19.8–2007, the test flow is the total system flow from the pump and not the flow through individual suction fittings. As a result, suction fittings in self-contained spas that always perform in multiples are tested in isolation in ANSI/ASME A112.19.8–2007, without the mitigating effect of another source of water to the pump. The resultant flow ratings have been significantly lower in the hair tests, typically due to the hair entering and blocking the pipe behind the single spa suction fitting.

In ANSI/ASME A112.19.8b–2009, self-contained spa fittings are treated as a special case in the hair tests. In the new section 4.2.2.1, self-contained spa fittings are installed in pairs. One fitting is tested for hair entrapment, while the other is free flowing. The pull from the water is less because the pump can pull water from the unblocked suction fitting. The new test models the actual installation of self-contained spa fittings, as required in UL 1563. The body block test remains unchanged with no special treatment for spa fittings. ANSI/APSP–16 2011 has substantially the same language and requirements as ASME A112.19.8b–2009 for self-contained spa fittings.

ANSI/APSP–16 2011, incorporating the ASME A112.19.8b–2009 addendum, corrects a severe ratings test in ASME A112.19.8–2007 for self-contained spa fittings. Modeling the requirements in UL 1563 ensures that manufactured spa drains are not isolated with a pump and thus, have multiple layers of safety. This change in test methods recognizes the UL 1563 spa drain requirements and is a more representative test of actual manufactured spas. We find the change to be in the public interest.

**C. Why is the CPSC issuing a final rule?**

Under the Administrative Procedure Act (5 U.S.C. 553(b)(B)), a notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. The successor standard, ANSI/APSP–16–2011, is substantively identical to ANSI/ASME A112.19.8–2007 and its two addenda, and, as stated in part A of this preamble, ASME is in the process of withdrawing ANSI/ASME A112.19.8–2007. It is, therefore, important to have a successor standard in place before ANSI/ASME completes its withdrawal of ANSI/ASME A112.19.8–2007 so that each swimming pool or spa drain cover manufactured, distributed, or entered into commerce in the United States continues to conform to entrapment protection standards. We are giving 30 days' notice of the incorporation of this successor standard by providing for an effective date 30 days following the rule's publication.

**D. Paperwork Reduction Act**

This rule does not impose any information collection requirements. Accordingly, this rule is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

**E. Environmental Considerations**

The Commission's regulations provide a categorical exemption for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement as they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(2). This rule falls within the categorical exemption.

**F. Preemption**

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a ''consumer product safety standard under [the CPSA]'' is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the State requirement is identical to the Federal standard. (Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the Commission for an exemption from this preemption under certain circumstances.) Section 8003(a) of the VGB Act provides that the requirements in section 8003(b) of the VGB Act ''shall be treated as a consumer product safety rule issued by the Consumer Product Safety Commission under the Consumer Product Safety Act.'' Therefore, this rule will invoke the preemptive effect of section 26(a) of the CPSA when it becomes effective.

**List of Subjects in 16 CFR Part 1450**

Consumer protection, Incorporation by reference, Infants and children, Law enforcement.

For the reasons stated above, the Commission amends title 16 of the Code of the Federal Regulations as follows:

## PART 1450—VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT REGULATIONS

■ 1. The authority citation for part 1450 continues to read as follows:

**Authority:** 15 U.S.C. 2051–2089, 86 Stat. 1207; 15 U.S.C. 8001–8008, 121 Stat. 1794.

■ 2. Add § 1450.3 to read as follows:

**§ 1450.3 Incorporation by Reference.**

(a) Each swimming pool or spa drain cover manufactured, distributed, or entered into commerce in the United States shall conform to the entrapment protection standards of ANSI/APSP–16 2011, *Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs,* approved on February 17, 2011. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the Association of Pool & Spa Professionals, 2111 Eisenhower Avenue, Alexandria, Virginia 22314; *http://www.apsp.org,* telephone 703–838–0083. You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) [Reserved]

Dated: August 2, 2011.

**Todd A. Stevenson,**

*Secretary, U.S. Consumer Product Safety Commission.*

[FR Doc. 2011–19861 Filed 8–4–11; 8:45 am]

BILLING CODE 6355–01–P

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 232

**[Release Nos. 33–9246; 34–64996; 39–2477; IC–29740]**

### Adoption of Updated EDGAR Filer Manual

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to retire the offline EDGARLink tool and the associated templates; to support the electronic filing of submission form types 13H, 13H–A, 13H–Q, 13H–I, 13H–T, 13H–R, for large trader registration, and N–PX–CR, N–PX–FM, N–PX–NT, N–PX–VR and their amendments; to update submission form types N–PX and N–PX/A; to update the OMB information on Forms 3, 4, 5, and 25–NSE; to support minor validation updates for Form N–MFP submissions; and to add four new applicant types to the Form ID. The EDGAR system is scheduled to be upgraded to support this functionality on August 1, 2011.

The filer manual is also being revised to address changes previously made in EDGAR.

**DATES:** *Effective Date:* August 5, 2011. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** In the Division of Corporation Finance, for questions concerning Form 8–K Item 1.04, Exhibit 95, and Forms 3, 4, 5 contact Cecile Peters, Chief, Office of Information Technology, at (202) 551–3600; in the Division of Investment Management for questions regarding submission form types N–PX, N–PX/A, N–PX–CR, N–PX–FM, N–PX–NT, N–PX–VR, and Form N–MFP contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551–6989; in the Division of Trading and Markets for questions concerning Form 13H contact Richard R. Holley III, Senior Special Counsel, at (202) 551–5614, for questions concerning addition of new applicant types contact Catherine Moore, at (202) 551–5718, and for questions concerning Submission form type 25–NSE contact Steven Kuan, at (202) 551–5624 ; in the Office of Interactive Disclosure for questions concerning US GAAP 2011 Taxonomy contact Jeffrey Naumann, Assistant Director of the Office of Interactive Disclosure, at (202) 551–5352 and in the Office of Information Technology, contact Rick Heroux, at (202) 551–8800.

**SUPPLEMENTARY INFORMATION:** We are adopting an updated EDGAR Filer Manual, Volume I, Volume II, and Volume III. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink Online,[2] and the Online Forms/XML Web site.

The revisions to the Filer Manual reflect changes within Volume I entitled EDGAR Filer Manual, Volume I: ''General Information,'' Version 10 (August 2011), Volume II entitled EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 17 (August 2011), and Volume III entitled EDGAR Filer Manual Volume III: ''N–SAR Supplement'' Version 2 (August 2011). The updated manual will be incorporated by reference into the Code of Federal Regulations.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

The EDGAR system will be upgraded to Release 11.2 on August 1, 2011 and will retire the offline EDGARLink tool and the associated templates. As communicated in a notice posted on April 26, 2011 on the Information for EDGAR Filers Web page (*http://www.sec.gov/info/edgar.shtml*), starting August 1, 2011, filings created by the offline tool EDGARLink client or those constructed by filers according to the EDGAR XFDL Technical Specification will no longer be accepted by EDGAR. The EDGARLink Online Application, available from the EDGAR Filing Web site (*https://www.edgarfiling.sec.gov/*), must be used to file all submissions previously supported by the offline EDGARLink tool. Those filers that use the EDGAR XFDL Technical Specification to create filer-constructed submissions without the use of the EDGARLink tool, and wish to do the same outside of the EDGARLink Online Application, can do so by following the EDGARLink Online XML Technical Specification, available from the Information for EDGAR Filers Web page.

New submission form types 13H, 13H–A, 13H–Q, 13H–I, 13H–T, and 13H–R will be added to the EDGAR Filing Web site and will be available for use if the Commission adopts a final rule associated with Proposing Release

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on January 11, 2011. *See* Release No. 33–9169 (January 5, 2011) [76 FR 1514].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[4] *See* Release No. 33–9169 (January 5, 2011) [76 FR 1514] in which we implemented EDGAR Release 10.4. For additional history of Filer Manual rules, please see the cites therein.

No.34–61908. If adopted by the Commission, the submission form types will be accessible by selecting a ''File 13H'' link on the EDGAR Filing Web site. These non-public submissions will not be disseminated by EDGAR.

The Commission has proposed rulemaking that would amend Form N–PX so that institutional investment managers would be able to use Form N–PX to report their proxy votes on certain executive compensation matters. For institutional investment managers, new submission form types N–PX–CR, N–PX–NT, N–PX–VR and their amendments will be added on EDGARLink Online for use if the proposed amendments are adopted.

The Commission has also proposed rulemaking that would amend Form N–PX to add a new submission form type N–PX–FM for use by registered management investment companies that include proxy votes of institutional investment managers. New submission form type N–PX–FM will be added to EDGARLink Online for use if the proposed amendments are adopted. Additionally, existing EDGARLink Online submission form types N–PX and N–PX/A, will no longer support co-registrants and can only be filed by registered management investment companies. These submission types will be available to filers on November 1, 2011, or later, pending additional Commission rulemaking related to the amendments to Form N–PX.

The validation rules for submission form type N–MFP and its variants have been updated to require ''Item 5'' (Name of Administrator) and ''Item 6'' (Name of Transfer Agent) and to allow ''Report Date'' to be the last business day of the month or any calendar day of the month after the last business day of the month. Previously, the ''Report Date'' had to be the last business day of the month. In addition, Form N–MFP submissions will be disseminated 60 calendar days after the last calendar day of the Report Date month. Previously, they were disseminated 60 calendar days after the Report Date listed in the submission.

The OMB expiration date on Forms 3, 4, 5, and 25–NSE will be updated. Forms 3 and 4 will be updated to November 30, 2011; Form 5 will be updated to January 31, 2014; and Form 25–NSE will be updated to January 31, 2012.

The Point-to-Point Protocol transmission method, used to connect to the EDGAR Filing Web site using direct dial lines via modem in case Internet is not available, will be terminated. Filers will use the EDGAR Filing Web site, via the Internet, to submit filings in EDGAR.

Four additional applicant types will be available for the filers to select when completing the Form ID to apply for EDGAR access codes. These additional applicant types are Institutional Investment Manager (Form 13F Filer), Investment Company (or insurance product separate account) or Business Development Company, Large Trader, and Non-Investment Company Applicant under the 1940 Act.

The filer manual is also being revised to address software changes made previously in EDGAR. The updates include addition of new 8–K Item 1.04 (Mine Safety—Reporting of Shutdowns and Patterns of Violations) and addition of new Exhibit 95 (Mine Safety Disclosure Exhibit) for submission form types 10–K, 10–K/A, 10–KT, 10–KT/A, 10–Q, 10–Q/A, 10–QT, 10–QT/A, 20–F, 20–F/A, 40–F, and 40–F/A5. The 8–K Item and the Exhibit 95 will be available for use if the Commission adopts a final rule associated with Proposing Release No. 34–63548.

Filers may upload the required notarized authentication document in PDF when completing the process to ''Convert Paper Only Filer to Electronic Filer'' from the EDGAR Filer Management Web site (*https://www.filermanagement.edgarfiling.sec.gov*).

Because the Commission establishes a company record on EDGAR for approved Broker-Dealer Registration Applications and creates a central index key (CIK) for that company, Broker-dealers, who may be required to file certain forms electronically on EDGAR, should complete the process to ''Convert Paper Only Filer to Electronic Filer'', from the EDGAR Filer Management Web site, instead of completing the Form ID (see EDGAR Filer Manual, Volume I, General Information for details). This is because the Form ID should be completed by those for which a CIK has not already been established on EDGAR. Once a Broker-Dealer has completed this process and received the necessary access codes, they will be able to file electronically on EDGAR.

In addition, EDGAR was previously updated to support the US GAAP 2011 Taxonomy. And, Appendix G has been revised to give clearer guidance to Form 13F filers to facilitate the correct preparation, assembling, and submission of these filings.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Room 1543, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.*

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[6] It follows that the requirements of the Regulatory Flexibility Act [7] do not apply.

The effective date for the updated Filer Manual and the rule amendments is August 5, 2011. In accordance with the APA,[8] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 11.2 is scheduled to become available on August 1, 2011. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

**Statutory Basis**

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[9] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[10] Section 319 of the Trust Indenture Act of 1939,[11] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[12]

**List of Subjects in 17 CFR Part 232**

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

**Text of the Amendment**

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

6 5 U.S.C. 553(b).

7 5 U.S.C. 601–612.

8 5 U.S.C. 553(d)(3).

9 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

10 15 U.S.C. 78c, 78*l,* 78m, 78n, 78o, 78w, and 78*ll.*

11 15 U.S.C. 77sss.

12 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

## PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for Part 232 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

### § 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: ''General Information,'' Version 10 (August 2011). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 17 (August 2011). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: ''N–SAR Supplement,'' Version 2 (August 2011). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1543, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

By the Commission.

Dated: August 1, 2011.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19824 Filed 8–4–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[Docket No. USCG–2011–0598]**

## Drawbridge Operation Regulations; Passaic River, Jersey City, NJ

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Route 1 & 9 Bridge across the Passaic River, mile 1.8, at Jersey City, New Jersey. The deviation is necessary to facilitate bridge painting operations at the bridge. This deviation allows the bridge to remain in the closed position for 58 days.

**DATES:** This deviation is effective from August 1, 2011 through September 27, 2011.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0598 and are available online at& *http://www.regulations.gov,* inserting USCG–2011–0598 in the ''Keyword'' and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Mr. Joe Arca, Project Officer, First Coast Guard District, *joe.m.arca@uscg.mil* or telephone (212) 668–7165. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

The Route 1 & 9 Bridge has a vertical clearance of 40 feet at mean high water, and 45 feet at mean low water in the closed position. The existing drawbridge operating regulations are listed at 33 CFR 117.739(b). The waterway is predominantly used by commercial operators.

On December 13, 2010, the owner of the bridge, New Jersey Department of Transportation, requested a temporary deviation to facilitate bridge painting operations.

On January 27, 2011, the Coast Guard published a temporary deviation (76 FR 4819) from the operation regulations. The temporary deviation allowed the bridge owner to require a two hour advance notice for bridge openings and several closures of short duration to facilitate bridge painting.

As a result of severe winter weather in 2011, the bridge painting project fell behind schedule; therefore, the bridge painting work will not be completed by July 31, 2011, when the first temporary deviation will expire.

We received a request for a second temporary deviation from the bridge owner on June 13, 2011, requesting authorization to allow the bridge to remain in the closed position from August 1, 2011 through September 30, 2011, to facilitate completion of the bridge painting work. We were not able to grant a temporary deviation for the additional 60 days requested because that would exceed the maximum of 180 days allowable for temporary deviations from the operation regulations.

Therefore, under this temporary deviation the bridge may remain in the closed position for 58 days from August 1, 2011 through September 27, 2011, to facilitate completion of the bridge painting. Vessels able to pass under the closed draw may do so at any time.

The waterway users were advised of the second 58 day temporary deviation necessary to complete the bridge painting. No objections were received.

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

Dated: July 27, 2011.

**Gary Kassof,**

*Bridge Program Manager, First Coast Guard District.*

[FR Doc. 2011–19858 Filed 8–4–11; 8:45 am]

BILLING CODE 9110–04–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

**[Docket No. USCG–2011–0713]**

**RIN 1625–AA00**

## Safety Zone; Apache Pier Labor Day Weekend Fireworks Display, Atlantic Ocean, Myrtle Beach, SC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the waters of the Atlantic Ocean in the vicinity of Apache Pier in Myrtle Beach, South Carolina during a Labor Day weekend fireworks display on Saturday, September 3, 2011. The safety zone is necessary to protect the public from the hazards associated with launching fireworks over the navigable waters of the United States. Persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Charleston or a designated representative.

**DATES:** This rule is effective from 9 p.m. on September 3, 2011 through 10:15 p.m. on September 4, 2011.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0713 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0713 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 final rule, call or e-mail Chief Warrant Officer Robert B. Wilson, Coast Guard Sector Charleston Waterways Management Division at *telephone:* 843–740–3188, e-mail *Robert.B.Wilson@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 the Coast Guard did not receive necessary information regarding the fireworks display until July 14, 2011. As a result, the Coast Guard did not have sufficient time to publish an NPRM and to receive public comments prior to the fireworks display. Any delay in the effective date of this rule would be contrary to the public interest because immediate action is needed to minimize potential danger to the public during the fireworks display.

### Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and other limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

The purpose of the rule is to protect the public from the hazards associated with the launching of fireworks over navigable waters of the United States.

### Discussion of Rule

On September 3, 2011, a Labor Day weekend fireworks display is scheduled to take place in Myrtle Beach, South Carolina. The fireworks will be launched from Apache Pier, which is located on the Atlantic Ocean. The fireworks display is scheduled to commence at 9:30 p.m. and conclude at 9:45 p.m.

The safety zone encompasses all waters of the Atlantic Ocean within a radius of 1,000 feet of Apache Pier in Myrtle Beach, South Carolina. This safety zone will be enforced from 9 p.m. on September 3, 2011, 30 minutes prior to the scheduled commencement of the fireworks display at approximately 9:30 p.m., to ensure the safety zone is clear of persons and vessels. Enforcement of the safety zone would cease at 10:15 p.m. on November 19, 2011, 30 minutes after the scheduled conclusion of the fireworks display, to account for possible delays. If the event is postponed due to inclement weather, then this rule will be enforced from 9 p.m. until 10:15 p.m. on September 4, 2011.

Persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Charleston or a designated representative. Persons and vessels desiring to enter, transit through, anchor in, or remain within the safety zone may contact the Captain of the Port Charleston by telephone at 843–740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the safety zone is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Charleston or a designated representative. The Coast Guard will provide notice of the safety zone by Marine Safety Information Bulletin, Broadcast Notice to Mariners, and on-scene designated representatives.

### 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.

### Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The economic impact of this rule is not significant for the following reasons: (1) The safety zone will be enforced for less than one hour and 15 minutes; (2) vessel traffic in the area is expected to be minimal during the enforcement period; (3) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the safety zone without authorization from the Captain of the Port Charleston or a designated representative, they may operate in the surrounding area during the enforcement period; (4) persons and vessels may still enter, transit through, anchor in, or remain within the safety zone if authorized by the Captain of the Port Charleston or a designated representative; and (5) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Marine Safety Information Bulletin and Broadcast Notice to Mariners.

**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 may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Atlantic Ocean encompassed within the safety zone from 9 p.m. until 10:15 p.m. on September 3, 2011 and September 4, 2011. For the reasons discussed in the Executive Order 12866 and Executive Order 13563 section above, this rule will not have a significant economic impact on a substantial number of small entities.

**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 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 the establishment of a temporary safety zone that will be enforced for a total of one hour and 15 minutes. 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. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T07–0713 to read as follows:

**§ 165.T07–0713 Safety Zone; Apache Pier Labor Day Weekend Fireworks Display, Atlantic Ocean, Myrtle Beach, SC.**

(a) *Regulated area.* The following regulated area is a safety zone: All waters of the Atlantic Ocean in the vicinity of Apache Pier within a 1000 foot radius from position 33°45′42″ N, 78°46′48″ W. All coordinates are North American Datum 1983.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Charleston in the enforcement of the regulated area.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Charleston or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Charleston by telephone at 843–740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Charleston or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Marine Safety Information Bulletin, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Effective date and enforcement period.* This rule is effective from 9 p.m. on September 3, 2011 through 10:15 p.m. on September 4, 2011. This rule will be enforced from 9 p.m. until 10:15 p.m. on September 3, 2011. If the event is postponed due to inclement weather, then this rule will be enforced from 9 p.m. until 10:15 p.m. on September 4, 2011.

Dated: July 22, 2011.

**M.F. White,**

*Captain, U.S. Coast Guard, Captain of the Port Charleston.*

[FR Doc. 2011–19857 Filed 8–4–11; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R08–OAR–2010–0285; FRL–9276–8]**

### Approval and Promulgation of State Implementation Plans; State of Colorado; Attainment Demonstration for the 1997 8-Hour Ozone Standard, and Approval of Related Revisions

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

**ACTION:** Final rule.

**SUMMARY:** EPA is partially approving and partially disapproving revisions to Colorado's State Implementation Plan (SIP). On June 18, 2009, Colorado submitted proposed SIP revisions intended to ensure attainment of the 1997 ozone National Ambient Air Quality Standards (NAAQS) in the Denver Metro Area/North Front Range (DMA/NFR) nonattainment area by November 20, 2010. The June 18, 2009 submittal consisted of an ozone attainment plan, which included emission inventories, a modeled attainment demonstration using photochemical grid modeling, a weight of evidence analysis, and 2010 motor vehicle emissions budgets for transportation conformity. The submittal also included revisions to Colorado Regulation Numbers 3 and 7 and to Colorado's Ambient Air Quality Standards Regulation. On October 7, 2010, Colorado submitted revised photochemical modeling results to us for the DMA/NFR ozone SIP. The revised modeling corrected the latitude/longitude locations of certain point sources but still projected attainment of the 1997 ozone NAAQS. EPA is approving the attainment demonstration, the rest of the ozone attainment plan, with limited exceptions, and the revisions to Colorado Regulation Number 3, parts A and B. EPA is approving portions of the revisions to Colorado Regulation Number 7 and disapproving other portions. EPA is not acting on Colorado Regulation Number 3, part C, and Colorado's Ambient Air Quality Standards Regulation as Colorado withdrew these submissions on September 10, 2010. EPA is taking these actions pursuant to section 110 and part D of the Clean Air Act (CAA) and EPA's regulations.

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

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2010–0285. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov,* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Scott Jackson, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6107, *jackson.scott@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Colorado* mean the State of Colorado, unless the context indicates otherwise.

(v) The initials *OAP* mean or refer to Colorado's 8-Hour Ozone Attainment Plan, which Colorado submitted on June 18, 2009.

**Table of Contents**



## I. Background

On July 18, 1997, EPA promulgated a revised 8-hour ozone standard of 0.08 parts per million (ppm) (62 FR 38855). Ozone is formed from the photochemical reaction of nitrogen oxides ($NO_X$) with volatile organic compounds (VOCs). Under EPA regulations (40 CFR part 50, Appendix I), the 1997 0.08 ppm 8-hour ozone NAAQS is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ambient ozone concentrations is less than or equal to 0.08 ppm. Forty CFR part 50, Appendix I, section 2.3, directs that the third decimal place of the computed 3-year average be rounded, with values equal to or greater than 0.005 rounding up. Thus, under our regulations, a computed 3-year average ozone concentration of 0.085 ppm is the smallest value that is considered to be greater than 0.08 ppm and a violation of the standard.

On April 30, 2004, we designated areas as attaining or not attaining the 1997 8-hour ozone NAAQS. As part of that rule, we deferred the effective date of nonattainment designations for multiple areas of the country, including the DMA/NFR area. These areas, which were called Early Action Compact (EAC) areas, agreed to follow a program to achieve early reductions of emissions in order to attain the 1997 8-hour standard no later than December 31, 2007 (69 FR 23857). Because the DMA/NFR area violated the 1997 8-hour standard based on air quality data from 2005–2007, the nonattainment designation for the area became effective on November 20, 2007. The DMA/NFR nonattainment area includes Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties, and portions of Larimer and Weld Counties (40 CFR 81.306).

Our regulations addressing EAC areas that failed to attain the 1997 8-hour ozone standard by December 31, 2007 required that Colorado submit an attainment demonstration SIP for the 1997 8-hour standard (40 CFR 81.300(e)(3)(ii)(D)). Colorado submitted its attainment demonstration SIP for the DMA/NFR area on June 18, 2009 as part of a larger SIP submission. This submittal consisted of the following parts:

- 8-Hour Ozone Attainment Plan (OAP), which includes monitoring information, emission inventories, a modeled attainment demonstration using photochemical grid modeling, a weight of evidence analysis, and 2010 motor vehicle emissions budgets (MVEBs) for transportation conformity.
- Revisions to Regulation Number 3, Parts A, B, and C.
- Revisions to Regulation Number 7.[1]
- Revisions to Colorado's Ambient Air Quality Standards Regulation.

On July 21, 2010 (75 FR 42346), we published our proposed action regarding Colorado's revisions. We proposed to approve Colorado's 2010 attainment demonstration for the 1997 8-hour ozone NAAQS, the motor vehicle emissions budgets contained in the OAP, and all other aspects of the OAP except the last paragraph on page IV–1 and the first paragraph on page IV–2, the words ''federally enforceable'' in the second to last paragraph on page V–6, and the reference to Attachment A in the Table of Contents and on page IV–3.

We proposed to approve the revisions to Colorado Regulation Number 3, parts A and B. We proposed to disapprove the revisions to Colorado Regulation Number 3, part C.

We proposed to approve the following portions of the revisions to Colorado Regulation Number 7:

- Revisions to Sections I through XI, except for Colorado's repeal of Section II.D.
- Revisions to Sections XIII through XVI.

We proposed to disapprove the following portions of the revisions to Colorado Regulation Number 7:

- Colorado's proposed repeal of Section II.D.
- Revisions to Section XII.

We proposed to disapprove the revisions to Colorado's Ambient Air Quality Standards Regulation.

In our proposed action, we fully explained the bases for our proposed approvals and disapprovals. See 75 FR 42351 (July 21, 2010). We received one letter commenting on our proposed rule.

On September 10, 2010, Colorado withdrew from our consideration the proposed revisions to Regulation Number 3, Part C, and Colorado's Ambient Air Quality Standards Regulation. Consequently, we are not taking final action on the proposed disapproval of Regulation Number 3, Part C, and Colorado's Ambient Air Quality Standards Regulation.

[1] As we indicated in our proposed rulemaking (75 FR 42353), we are treating provisions in Regulation No. 7 that Colorado designated as ''State Only'' as not having been submitted to us for approval, and we are not acting on those provisions.

In September 2010, Colorado discovered that its 2008 photochemical grid modeling for the OAP contained inaccurate coordinates for some point sources. Colorado re-ran the model with the correct coordinates and submitted the revised modeling results to us in October 2010.

On December 17, 2010 (75 FR 78950), we published a notice in the **Federal Register** in which we announced the availability of Colorado's revised modeling and provided an opportunity for public comment through January 18, 2011, including comment on how the revised modeling might affect our determinations in our July 21, 2010 proposed rulemaking. As we explained in our December 17, 2010 notice, the revised modeling predicted design values for 2010 that remained below the 85.0 ppb ozone NAAQS; for the SIP's 2010 base case, the maximum projected design values were found at the Rocky Flats North and Fort Collins West monitoring sites—84.7 ppb ozone at both locations. This is 0.2 ppb lower than Colorado's 2008 modeling projected using incorrect point source locations. We concluded that the revised modeling supported the conclusions that we proposed in July 2010 regarding the 2008 modeling. See 75 FR 78952. We received no comments in response to our December 17, 2010 notice.

## II. Response to Comments

We received one letter from WildEarth Guardians (WEG) commenting on our July 2010 proposed action. In this section EPA responds to the significant adverse comments made by WEG. We have carefully considered the comments, and nothing in them has caused us to change our action from what we proposed.

*Comment No. 1*—WEG asserts that EPA gave Colorado a ''major break'' by deferring the nonattainment designation for the DMA/NFR area under EPA's EAC program. Instead of having to attain in 2007, Colorado got to defer the attainment date until 2010. According to WEG, EPA allowed the State to delay clearing the air and avoid more stringent clean up requirements.

*EPA Response*—WEG's comments regarding our past deferral of the nonattainment designation are not timely in the context of this rulemaking action because EPA took final action deferring the effective date of the nonattainment designation in 2006 (71 FR 69022 (November 29, 2006)). While WEG challenged EPA's 2006 deferral of the nonattainment designation for the DMA/NFR area, WEG agreed to settle that matter. One element of the settlement agreement, as modified, calls for EPA to act on Colorado's SIP submission by February 28, 2011, and we are meeting that obligation through this action. WEG may not challenge this action based on EPA's prior deferral of the nonattainment designation for the DMA/NFR area; this action solely concerns the adequacy of Colorado's SIP submission. We note, however, that we disagree with WEG's claim that the deferral of the effective date allowed the area to delay cleaning the air. Colorado previously submitted SIP control measures, under EPA's regulations for EAC areas, that achieved reductions of ozone precursors before such reductions were required under the CAA.

*Comment No. 2*—WEG indicates that it supports aspects of EPA's proposal, including EPA's proposed disapproval of certain revisions to Regulation Number 7.

*EPA Response*—We acknowledge WEG's support for aspects of our proposal.

*Comment No. 3*—WEG asserts that EPA's proposed approval of Colorado's attainment demonstration overlooked key modeling information. Specifically, WEG alleges that neither the baseline modeling nor the control strategy modeling demonstrate attainment. WEG's assertion centers on the baseline modeling for an area west of Fort Collins that models a violation of the NAAQS and Colorado's statement that such a violation ''does not seem implausible.'' WEG's position is that EPA cannot approve the attainment demonstration as it overlooked key information, or at least failed to explain why the modeled violations do not matter in the context of the proposed attainment demonstration.

*EPA Response*—EPA disagrees with the commenter's characterization of EPA's analysis and the commenter's interpretation of the modeling information.

Colorado's attainment demonstration is consistent with EPA's modeling guidance. (See ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze,'' EPA–454/B–07–002, April 2007 (''2007 modeling guidance'').) The 2007 modeling guidance describes the modeled attainment test for the 8-hour ozone standard as an exercise in which an air quality model is used to simulate current and future air quality. The guidance recommends that model estimates be used in a ''relative'' rather than ''absolute'' sense. Specifically, the analysis focuses on the ratio of the model's future to current (baseline) predictions *near ambient air quality monitors.* EPA refers to these ratios as ''relative response factors.'' Future ozone concentrations are estimated at existing monitoring sites by multiplying the relative response factor for locations ''near'' each monitor by the observation-based, monitor-specific, ''baseline'' design value. The resulting predicted future ozone concentrations are then compared to the NAAQS. (See 2007 modeling guidance, section 2.1, page 15; section 3.0, pages 20–28; section 4.2, page 40.) Colorado followed this procedure in demonstrating that the DMA/NFR area will attain the ozone NAAQS.[2]

The use of observed concentrations as the base value in the attainment test reduces problems in interpreting model results. In the relative attainment test, observed data is used to define the target concentration. This has the effect of anchoring the future concentrations to a ''real'' ambient value. Although good model performance remains a prerequisite for use of a model in an attainment demonstration, problems posed by less than ideal model performance on individual days are reduced through the use of this procedure.

EPA guidance also recommends an unmonitored area analysis (UAA) in attainment demonstrations. (See 2007 modeling guidance, section 3.4, pages 29–30.) The UAA uses a combination of model output and ambient data to identify areas that might exceed the NAAQS if a monitor were placed in the given location. In general, the UAA review is intended to ensure that a control strategy leads to reductions in ozone at other locations which could have baseline (and future) design values exceeding the NAAQS if a monitor were deployed there. It was this analysis in Colorado's attainment demonstration that indicated potential future concentrations above the level of the NAAQS in the elevated terrain areas west of Fort Collins.

The 2007 modeling guidance indicates that NAAQS violations in the UAA should be handled on a case-by-case basis. However, the guidance stresses that due to the lack of observation-based, measured data, the examination of ozone concentrations as part of the UAA is more uncertain than the monitor-based attainment test. As a result, the guidance recommends that the UAA be treated as a separate test from the monitor-based attainment test. While it is expected that States will implement additional emission controls to eliminate predicted violations of the monitor-based test, the same requirements may not be appropriate in unmonitored areas. The guidance recommends that it may be appropriate to deploy additional monitors in an area where the UAA indicates a potential future year violation. (See 2007 modeling guidance, section 3.4.3, page 32.)

The UAA submitted by Colorado shows potential ozone concentrations above the NAAQS in the elevated terrain area west of Fort Collins.[3] Historical ambient ozone monitoring data are sparse in the foothill and mountain areas west of the Front Range. The complex terrain has a strong influence on wind and pollutant transport patterns in the area and contributes to uncertainty in the model predictions. We have carefully considered the model's predicted concentrations west of the Fort Collins West monitor (FTCW). Given the inherent uncertainty associated with UAA and the uncertainty associated with modeling in this specific location, we conclude that it is not appropriate to insist on additional control measures at this time to address the modeled ozone concentrations west of FTCW. (See 2007 modeling guidance, section 3.4.3, page 33.) Other factors also support our decision.

First, in accordance with our guidance, Colorado installed an additional ozone monitor in the area west of FTCW to determine whether the model-predicted ozone concentrations are, in fact, valid. The special purpose monitor, located in Rist Canyon, began operation on May 14, 2009. The Rist Canyon monitoring station has collected data for two ozone seasons (approximately 20 months) since it began operating. The Rist Canyon monitoring station uses a Federal Equivalent Method (FEM) and follows the quality assurance requirements of 40 CFR part 58, Appendix A.

Ozone data collected at this monitoring station is eligible for comparison to the ozone NAAQS after the monitor has operated for more than 24 months per 40 CFR 58.30(c). Design values, however, are based on the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration (see 40 CFR part 50,

[2] As indicated above, Colorado's October 2010 revised modeling confirmed design values for 2010 below the NAAQS at all monitoring sites.

[3] The original 2008 modeling and the October 2010 revised modeling both predict a value above the NAAQS in 2010 in one grid cell west of the Fort Collins West monitor.

Appendix D). While the monitor has not operated for these periods, the data is informative. An analysis of the data shows the fourth highest daily maximum 8-hour average ozone concentration reading is 69 ppb for May through December of 2009 and 71 ppb for January through December 2010. This data indicates that the area west of FTCW is not currently being exposed to ozone concentrations above the 1997 8-hour ozone standard. Also, these values are lower than the fourth highest daily maximums—73 ppb and 75 ppb—for FTCW for 2009 and 2010.

Second, Colorado's UAA explains that the high design value of 86 ppb at FTCW was based on only two years (2006–2007) of monitoring data, not the normal three years. (See Appendix I of Colorado's technical support document, titled ''Final 2010 Ozone Attainment Demonstration Modeling for the Denver 8-Hour Ozone State Implementation Plan.'') At the time the SIP was prepared, three full years of data were not available because the monitor did not start operating until 2006. This high design value drove the high 2010 projected design values at FTCW and the unmonitored area values west of the monitor. When a third year of monitoring data is included (2008), the 2010 projected design value at FTCW is reduced from 86 ppb to 82 ppb. If Colorado's UAA had used the 82 ppb design value at FTCW instead of 86 ppb, no grid cells would have exceeded the 8-hour ozone NAAQS in the UAA.

Given that Colorado followed our 2007 modeling guidance and the supporting evidence discussed above, Colorado properly modeled attainment.

*Comment No. 4*—WEG asserts that there is no analysis showing that Regulation Number 7 imposes RACM/RACT as required by CAA section 172(c)(1). Regulation Number 7 does not impose RACT requirements for all sources of ozone precursors in the DMA/NFR area and does not impose controls for $NO_X$. RACT cannot mean no air pollution controls for certain sources like refineries or sources of $NO_X$. Regulation Number 7 is contrary to the CAA.

*EPA Response*—Our longstanding interpretation of CAA section 172(c)(1) is that it only requires implementation of control measures that contribute to attainment as expeditiously as practicable; measures that would not advance the attainment date need not be considered RACM/RACT. See, *e.g.,* 57 FR 13498, 13560 (April 16, 1992); 70 FR 71612, 71617, 71653–71654 (November 29, 2005). This interpretation has been upheld by the courts. See, *e.g., NRDC* v. *EPA,* 571 F.3d 1245, 1253 (DC Cir. 2009); *Sierra Club* v. *EPA,* 294 F.3d 155, 162 (DC Cir. 2002); *Sierra Club* v. *EPA,* 314 F.3d 735, 743–745 (5th Cir. 2002). As we noted in our proposed action (75 FR 42351), Colorado's modeling demonstrates attainment in 2010 based on existing SIP-approved control measures, including the measures in Regulation Number 7. Because the submission demonstrates attainment by November 2010, and it is already 2011, these SIP-approved measures represent all measures necessary to demonstrate attainment as expeditiously as practicable. At this point in time, additional control measures, whether for VOCs or for $NO_X$, would not advance the attainment date and are not needed to satisfy the requirements of CAA section 172(c)(1).[4] WEG has not demonstrated that the attainment demonstration is flawed. Additional controls on $NO_X$ and controls in other parts of the nonattainment area may be desirable from WEG's perspective, but WEG has not demonstrated that such controls are necessary to demonstrate attainment as expeditiously as practicable.

*Comment No. 5*—WEG asserts that the requirements in Regulation Number 7, Sections II.C.1.c and II.C.1.d, are unenforceable because these sections defer solely to the discretion of Division staff the establishment of RACT limits at a later date. The proposed SIP revisions do not specify what RACT emission limits will be for each VOC source. In addition, Sections II.C.1.c and II.C.1.d fail to provide for appropriate public notice and involvement in the development and adoption of RACT requirements. EPA must ensure that facility-specific RACT emission limits are adopted through the SIP to ensure the enforceability of any RACT requirements and to ensure that Regulation 7 represents RACT consistent with the CAA.

*EPA Response*—The State designated Sections II.C.1.c and II.C.1.d ''State Only.'' As we indicated in our proposed action, our interpretation is that provisions designated ''State Only'' have not been submitted to us for approval. Instead, we interpret these provisions to have been submitted for informational purposes. See 75 FR 42353. We are not acting on Sections II.C.1.c and II.C.1.d in this action, and, thus, we consider these comments irrelevant to our action. Because we are not acting on Sections II.C.1.c and II.C.1.d, we are not incorporating them by reference into the Code of Federal Regulations. WEG has not indicated any way in which these state-only provisions affect the federally enforceable aspects of Regulation Number 7. As noted above, we have determined that the State has fully met the applicable RACT requirement in section 172(c)(1) and thus this State-only provision is not a necessary component of the attainment demonstration on which we are acting through this rule.

*Comment No. 6*—WEG asserts that Section II.C.2 also imposes unenforceable RACT requirements. WEG does not agree with EPA that Colorado's revisions to Section II.C are minor clerical changes. WEG asserts that the new cross-reference to Regulation Numbers 3 and 7 in Section II.C.2 is unclear.

*EPA Response*—In the current EPA-approved SIP, Section II.C.2 reads, ''All new sources shall utilize controls representing Reasonably Available Control Technology (RACT.)'' The State's revised language reads, ''All new sources shall utilize controls representing RACT, pursuant to Regulation Number 7 and Regulation Number 3, Part B, Section III.D., upon commencement of operation.''[5]

We view the language change to Section II.C.2 as a minor clarifying change. The new reference to Regulation Number 7 is intended to indicate that new sources need to comply with any applicable RACT requirements specified in Regulation Number 7. As we indicated in our proposed action, Regulation Number 7 specifies emission limits for various industries and generic requirements.[6] These limits and requirements already apply to new sources (in addition to existing sources) (see Regulation Number 7, Section I.B.1.a); the added reference to

[4] As evidenced by the following language, we did evaluate this issue in our proposed action: ''Because Colorado's modeling demonstrates attainment in 2010 based on existing SIP-approved measures, and it is now 2010, such SIP-approved measures represent all measures necessary to demonstrate attainment as expeditiously as practicable as per section 172 of the CAA. Additional control measures would not advance the attainment date.'' 75 FR 42351.

[5] WEG mistakenly cites the language as referring to Regulation Number 3, part B, Section II.D.2.

[6] We note that we previously approved Regulation Number 7 requirements as meeting VOC RACT requirements for the 1-hour ozone standard. 60 FR 28055, May 30, 1995. The revisions we approved in that action were intended to address a variety of deficiencies that EPA had identified in Regulation Number 7, including enforceability concerns. In other words, the requirements were established through the SIP revision process to ensure enforceability, and the public had a chance to comment on our rulemaking at that time. Regulation Number 7 contains requirements and limits for a wide range of sources and source categories, based on the Control Techniques Guidelines documents (CTGs) EPA had issued when Colorado adopted the various Regulation Number 7 requirements in 1989 and 1990.

Regulation Number 7 simply clarifies where (*i.e.,* in Regulation Number 7) RACT requirements are specified.

The reference to Regulation Number 3, part B, Section III.D, merely clarifies that new sources need to comply with the permitting requirements in Colorado's ''Construction Permit Review Requirements.'' [7] This revision does not alter the status quo; new sources are required to get permits under Reg. 3 irrespective of the language of Section II.C.2 of Regulation Number 7. Additionally, Colorado has historically used its permit process to establish VOC ''RACT'' limits for new sources covered by Section II.C.2 for those limited cases in which the other sections of Regulation Number 7 do not specify limits or requirements.[8] Thus, we continue to view the change to Section II.C.2 as a minor clerical change.

Finally, the revised rule specifies that the new source must comply with RACT from commencement of operation, as opposed to some later date. This merely reiterates the requirement that is already specified by existing Section I.B.1.a.

WEG's comments reflect a concern about Section II.C.2's alleged deferral of the establishment of RACT limits to the State's permitting process. Our view, however, is that Section II.C.2's requirements are actually surplus to necessary RACT requirements under CAA section 172(c)(1). This is because Regulation Number 7's various source-category-specific VOC limits and requirements apply to sources regardless of Section II.C.2's requirements. Thus, for sources subject to these source-category-specific limits and requirements, Section II.C.2 does not defer the establishment of controls to the State's permitting process. Additionally, as indicated above, we have determined that such limits and requirements, along with other SIP control measures, contribute to attainment as expeditiously as practicable, thus satisfying RACM/RACT under CAA section 172(c)(1). Accordingly, the imposition, pursuant to Section II.C.2, of VOC controls on new sources beyond those contained in the other sections of Regulation Number 7, while potentially beneficial, is not necessary to satisfy RACT requirements under CAA section 172(c)(1), the State's use of the term ''RACT'' in Section II.C.2 notwithstanding.[9]

*Comment No. 7*—WEG asserts that the SIP submission fails to comply with applicable Part D, Subpart 1 and 2 requirements under the CAA. In particular, section 172(c) requires states to enact RACM in their ozone nonattainment SIPs, to the extent more specific RACM requirements are not set forth under Subpart 2. Section 181 requires that marginal nonattainment SIPs meet the requirements of sections 181 and 182 as well as 172. It does not appear as if EPA made any assessment whether Colorado's submission complies with Subpart 1 and 2 requirements. WEG is particularly concerned that the SIP doesn't ensure RACT for $NO_X$ emissions or that RACT corrections are made in areas of the DMA/NFR nonattainment area that were not originally part of the Denver Metro 1-hour ozone nonattainment area. Instead of requiring RACM/RACT, the proposed SIP only focuses on the less stringent requirements for ozone nonattainment areas. The proposed SIP admits that RACM is one of the core elements for an attainment plan but goes on to say that RACT is not required to be applied.

*EPA Response*—EPA's regulation placing certain areas only under the planning provisions of CAA title I, part D, subpart 1 was vacated by the DC Circuit in *South Coast Air Quality Management District, et al.* v *. EPA,* 472 F.3d 882 (DC Cir. 2006) on the basis that it was unreasonable. EPA has not yet finalized a rule in which it either places all of these areas in subpart 2 or in which it provides a reasonable explanation for placing all or some of the areas only under the planning provisions of subpart 1. However, unless and until EPA takes final action classifying the DMA/NFR area under subpart 2, it remains solely subject to the nonattainment planning provisions in subpart 1. Thus, the RACT requirement in subpart 2 does not currently apply to the DMA/NFR area. As explained above, because the State has demonstrated that it has adopted all controls necessary to attain as expeditiously as practicable (*i.e.,* it cannot advance the attainment date from November 2010), we have determined that the area has met the RACM requirement in section 172 (*i.e.,* ''subpart 1''). We note that for purposes of section 172(c) in subpart 1, RACT is a subset of RACM. Thus a determination that an area has met the RACM requirement of section 172(c) means that the area has also met the RACT requirement in that section. See, *e.g., NRDC* v. *EPA,* 571 F.3d 1245, 1253 (DC Cir. 2009).

We note that in response to the court's vacatur, EPA has proposed to place all areas under subpart 2. If EPA finalizes that proposal as proposed, Denver would be classified as marginal under subpart 2. See 74 FR 2936 (January 16, 2009). Even if EPA were to finalize a subpart 2 classification for the DMA/NFR area, we anticipate, as outlined in our proposal, that a SIP addressing subpart 2 requirements (including the RACT corrections applicable to marginal areas) would not be due until one year after a final rule classifying the DMA/NFR area under subpart 2. For these reasons, we did not evaluate the SIP submission against subpart 2 requirements in the proposed rule, nor are we doing so for this final rule.

*Comment No. 8*—WEG asserts that Colorado must update past RACT determinations made for the 1-hour ozone standard in light of the new 8-hour ozone NAAQS nonattainment designation.

*EPA Response*—Per our discussion above, the only RACM/RACT requirement that is applicable at this time is the requirement under CAA section 172(c)(1). That requirement is met if the State has adopted all controls necessary to attain as expeditiously as practicable and thus, that additional controls will not advance the attainment date. As explained above, we believe Colorado has met that requirement.

*Comment No. 9*— WEG asserts that 172(c)(1) coupled with 182(f) requires owners and operators of sources in ozone nonattainment areas to implement RACT requirements for sources that are subject to Control Technology Guidelines issued by EPA and for major sources of VOC and $NO_X$, which are ozone precursors. Significant sources of ozone precursors are to be controlled to a reasonable extent. The proposed SIP does not even contain the bare minimum with regard to RACT, implementing only limited controls to address emissions of VOCs from oil and

[7] There is currently a discrepancy between the numbering of the SIP-approved version of Regulation Number 3 and the State-approved version. In the SIP-approved version, Regulation Number 3, part B, Section III.D specifies exemptions from permitting requirements. But in the State-approved version, Section III.D specifies construction permit review requirements. We interpret the State's reference to Regulation Number 3, part B, Section III.D as referring to the State-approved version of Section III.D. Colorado previously submitted revisions to Regulation Number 3, Part B, that contain the renumbering of the provisions of Part B, Section III; we will be acting on those revisions separately.

[8] We explain below that we do not view these limits as being necessary to satisfy RACM/RACT requirements under CAA section 172(c)(1). This is the reason we have placed the word ''RACT'' in quotes in the text above.

[9] The State's reference to ''RACT'' may be confusing, but we think it merely reflects the State's intent to require that new sources use reasonable controls, even if not covered by the source-category-specific requirements in Regulation Number 7. We note that Colorado's permitting regulations provide for public notice and involvement so that WEG and others have the opportunity to participate in any control technology determinations Colorado makes in the permitting process.

gas production operations in the area and from a limited number of other stationary sources in the Front Range. RACT for emissions of VOCs from other industrial sources is woefully lacking. The SIP contains no RACT requirements for industrial sources of $NO_X$ emissions anywhere in the nonattainment area.

*EPA Response*—As provided above, we have concluded that the SIP submission satisfies applicable RACM/RACT requirements. We note, however, that we disagree with WEG's characterization of the scope of VOC controls as being ''limited.''

*Comment No. 10*—WEG refers to legislative history to support its views regarding VOC and $NO_X$ RACT requirements having to apply to all nonattainment areas. WEG quotes the following language from the Senate Environment and Public Works Committee: ''[s]tate and local agencies are not authorized to ignore [RACT] controls on $NO_X$ and VOC sources for which no CTG has been issued. Sources of the size specified in the bill must be controlled to levels achievable through the use of measures that are technologically and economically feasible for a class or category of sources.''

*EPA Response*—The language WEG cites is from a Senate report discussing the anticipated provisions in section 182(b) of subpart 2, which was added by the 1990 Amendments to the CAA. Specifically, under section 182(b)(2)(C), which applies to areas classified under subpart 2 as moderate or higher, RACT applies to all major stationary sources of VOC that are not covered by subsections (A) and (B). Subsections (A) and (B) address RACT for sources for which a CTG has been issued. Section 182(f) extends the subpart 2 RACT requirements to major stationary sources of $NO_X$. As indicated above, we are not evaluating the SIP submission against subpart 2 requirements because those requirements are not currently applicable. Also as indicated above, courts have upheld our interpretation of RACM/RACT under CAA section 172(c)(1).

*Comment No. 11*—WEG asserts that a SIP that fails to contain RACT for major VOC and $NO_X$commercial sources will significantly increase the likelihood of continued nonattainment and jeopardize maintenance. It does not appear that EPA has assessed the adequacy of the SIP in this light.

*EPA Response*—As we have stated, the SIP demonstrates attainment of the 1997 ozone NAAQS as expeditiously as practicable. The State is not under a current obligation to submit a SIP that demonstrates long-term maintenance of the ozone standard and this SIP was not submitted for that purpose. Under *Union Electric* v. *EPA,* 427 U.S. 246 (1976), EPA's job in reviewing a SIP is to determine whether it meets the minimum requirements of the CAA. The SIP submission demonstrates attainment based on enforceable measures that we previously approved into the existing SIP. While additional controls might be desirable because they would provide additional emission reductions beyond those needed for attainment, we cannot disapprove the attainment demonstration SIP on that basis.

*Comment No. 12*—WEG asserts that if EPA is not assessing whether Colorado's SIP complies with subparts 1 and 2 of the CAA, EPA must make a finding of failure to submit for Colorado's failure to submit a required SIP under subparts 1 and 2.

*EPA Response*—Colorado submitted a SIP revision as required by 40 CFR 81.300(e)(3)(ii)(D), which requires EAC areas that failed to attain the 1997 8-hour ozone standard by December 31, 2007 to submit a revised attainment demonstration SIP. As explained above, EPA has assessed the Colorado SIP under the attainment demonstration and RACM/RACT requirements of section 172(c) in subpart 1. Also, as explained above, Denver is not currently classified under subpart 2 and thus, at this time, no SIP revision is required under subpart 2. Thus, there is no basis at this time for evaluating the SIP under the provisions of subpart 2 or for making a finding of failure to submit a SIP revision under subpart 2.

*Comment No. 13*—WEG asserts that EPA's proposed approval fails to comply with section 110(l) of the CAA. The SIP submission does not demonstrate that it will not interfere with the 2008 ozone NAAQS, which are currently applicable. Thus, EPA cannot approve the revision. It is contrary to section 110(l) for EPA to assume that its duties are limited to protecting the 1997 ozone NAAQS. Section 110(a)(1) provides that a State must submit a SIP for a new NAAQS within three years of promulgation. Where a statutory duty applies within that three year period, the State and EPA are compelled to meet that requirement given that it falls within the three year window provided by section 110(a)(1). WEG also asserts that the revision would significantly interfere with nonattainment of the NAAQS in downwind states.

*EPA Response*—We disagree that our approval does not comply with CAA section 110(l) or that section 110(l) requires disapproval of Colorado's attainment demonstration or other aspects of the SIP submission we are approving. CAA section 110(l) provides that EPA ''shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of'' the CAA. Contrary to WEG's assertion, we do not assume our duties under section 110(l) are limited to protecting the 1997 8-hour ozone NAAQS—we simply do not agree that our approval will interfere with attainment of the 2008 ozone NAAQS or any other requirement of the CAA. Through our action, no SIP-approved control measures for ozone precursors are being relaxed; in fact, we are approving changes to Regulation Number 3 that will strengthen the SIP and disapproving revisions to Regulation Number 7 that would weaken the SIP. WEG has not explained how Colorado's attainment demonstration and the other parts of the SIP we're approving would interfere with the 2008 ozone NAAQS.

At this time, no areas are designated nonattainment for the 2008 ozone NAAQS and no attainment demonstration SIPs are due for that NAAQS. EPA does not interpret section 110(l) to require a full attainment or maintenance demonstration for all NAAQS before any changes to a SIP may be approved. See *Kentucky Resources Council, Inc.* v. *EPA,* 467 F.3d 986 (6th Cir. 2006); see also *e.g.,* 70 FR 53 (Jan. 3, 2005), 70 FR 28429 (May 18, 2005) (proposed and final rules, upheld in *Kentucky Resources,* which discuss EPA's interpretation of section 110(l)). EPA has concluded that preservation of the status quo air quality prior to the time new attainment or maintenance demonstrations are due will prevent interference with CAA requirements, including the States' obligations to develop timely demonstrations. Thus, areas do not have to produce a complete attainment demonstration to make any revisions to the SIP, provided the status quo air quality is preserved.

As noted above, as a result of today's action, the SIP will be strengthened and air quality maintained. This conclusion is sufficient to satisfy the requirements of section 110(l) with respect to the 2008 ozone standard. We have not and are not required to evaluate whether the current attainment demonstration also demonstrates attainment for the 2008 ozone standard or the SIP contains measures to attain that standard. The CAA and our regulations designate specific time frames for areas to submit SIPs and demonstrate attainment following a nonattainment designation for a new standard. See, *e.g.,* CAA sections 110(a)(1) and 172(b). Since this action will not interfere with status quo air quality, and thus with Colorado's ability to develop a SIP to attain the 2008 ozone standard, it is appropriate under the CAA to approve this action and allow Colorado to address the 2008 ozone standard according to the statutory framework.

We do not understand WEG's comment about the deadline under CAA section 110(a)(1). It appears WEG may be asserting that the State had to submit a 110(a)(1) SIP for the 2008 standard at the same time it submitted its SIP for the 1997 standard simply because the deadline for the SIP for the 1997 standard fell within the three-year period specified by section 110(a)(1) for submission of a SIP for the 2008 standard. WEG cites no legal or policy support for this theory, and it is not supported by section 110(a)(1), section 110(l), or any other provision of the CAA. To the extent WEG is claiming that our approval action will interfere with the SIP required by CAA section 110(a)(1), we disagree. Section 110(a)(1) SIPs are merely infrastructure SIPs, not complete attainment demonstration SIPs, and, as noted by WEG, these infrastructure SIPs are not due until three years after designation. Approval of the 1997 ozone attainment demonstration will in no way interfere with the State's obligation or ability to submit an infrastructure SIP for the 2008 standard.

WEG provides no support for its assertion that the revision would significantly interfere with nonattainment of the NAAQS in downwind states. We are not required to respond to unsupported assertions. In any event, because our action will not result in an increase in emissions, we disagree with WEG that the revision will significantly interfere with attainment of the NAAQS in downwind states.

## III. Final Action

### *A. Approval*

For the reasons provided in our July 21, 2010 proposal (75 FR 42351), our December 17, 2010 notice of availability of revised modeling (75 FR 78950), and herein, we are approving the following elements of the 1997 8-hour ozone SIP revisions that Colorado submitted on June 18, 2009:

(1) Colorado's 2010 attainment demonstration for the 1997 8-hour ozone NAAQS.

(2) The MVEBs contained in the OAP, which are identified in the following table:

| Area of applicability | 2010 $NO_X$ emissions (tons per day) | 2010 VOC emissions (tons per day) |
|---|---|---|
| Northern Subarea | 20.5 | 19.5 |
| Southern Subarea | 102.4 | 89.7 |
| Total Nonattainment Area | 122.9 | 109.2 |

The Northern Subarea is defined in the OAP as the area denoted by the ozone nonattainment area north of the Boulder County northern boundary and extended through southern Weld County to the Morgan County line. The Southern Subarea is defined in the OAP as the area denoted by the ozone nonattainment area south of the Boulder County northern boundary and extended through southern Weld County to the Morgan County line. Both subareas are further identified in Figure 2: ''8-hour Ozone Emission Budget Subareas'' at page VI–6 in the OAP.

In addition to approving the MVEBs, we are also approving the process described in the OAP for use of the Total Nonattainment Area MVEBs and the subarea MVEBs. Per the OAP, the initial conformity determination must use the Total Nonattainment Area MVEBs for $NO_X$ and VOCs. After the initial conformity determination, the Denver Regional Council of Governments and North Front Range Transportation and Air Quality Planning Council may switch from using the Total Nonattainment Area MVEBs to using the subarea MVEBs for determining conformity. To switch to use of the subarea MVEBs (or to subsequently switch back to use of the Total Nonattainment Area MVEBs), the Denver Regional Council of Governments and the North Front Range Transportation and Air Quality Planning Council must use the process described in the OAP at pages VI–4 and VI–5.

(3) All other aspects of the OAP except the last paragraph on page IV–1 and the first paragraph on page IV–2, the words ''federally enforceable'' in the second to last paragraph on page V–6, and the reference to Attachment A in the Table of Contents and on page IV–3.

(4) The revisions to Parts A and B of Colorado Regulation Number 3.

(5) The revisions to Sections I through XI and XIII through XVI of Colorado Regulation Number 7, except for the repeal of Section II.D.

Regarding part B of Regulation Number 3, as we noted in our July 21, 2010 proposal, there is a discrepancy between the numbering of the submitted revisions and the EPA-approved SIP. Colorado added new Sections II.D.1.k, l, m, and n to Part B to specify the four types of emissions points that will continue to be exempt from minor source construction permitting requirements. However, in the current EPA-approved SIP, Section III.D.1 of part B lists the types of emissions points that are exempt from minor source construction permitting requirements.[10] These emissions points are listed in Sections III.D.1.a through j. For purposes of this action, we are interpreting Colorado's proposed revisions to Part B, in the form of Sections II.D.1.k through n, as being an addition to Section III.D.1, and following immediately after Section III.D.1.j of part B of the EPA-approved SIP.

### *B. Disapproval*

For the reasons provided in our July 21, 2010 proposal, we are disapproving the following elements of the 1997 8-hour ozone SIP revisions that Colorado submitted on June 18, 2009:

(1) In the OAP: the last paragraph on page IV–1 and the first paragraph on page IV–2, the words ''federally enforceable'' in the second to last paragraph on page V–6, and the reference to Attachment A in the Table of Contents and on page IV–3.

(2) The repeal of Section II.D of Colorado Regulation Number 7.

(3) The revisions to Section XII of Colorado Regulation Number 7.

Our disapproval of these provisions does not trigger sanctions or a FIP obligation because our disapproval does not leave a deficiency in the SIP. The effect of our disapproval is to excise proposed SIP revisions that would

[10] Colorado previously submitted revisions to part B that contain changes to the numbering of part B provisions; we will be acting on those revisions separately.

weaken the SIP and potentially undermine the attainment demonstration. The provisions we are approving today and provisions that will remain in the SIP as a result of our action today fully support the attainment demonstration and meet all applicable requirements of the Clean Air Act. Thus, our action does not trigger sanctions or a FIP obligation.[11]

## IV. Statutory and Executive Order Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves some state law as meeting Federal requirements and disapproves other state law because it does not meet Federal requirements; this action 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 Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 4, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

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

Dated: February 18, 2011.

**Carol Rushin,**

*Acting Regional Administrator, Region 8.*

40 CFR part 52 is amended to read as follows:

## PART 52 [AMENDED]

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

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

## Subpart G—Colorado

■ 2. Section 52.320 is amended by adding paragraphs (c)(72)(i)(G) and (c)(117) to read as follows:

### § 52.320 Identification of plan.

* * * * *

(c) * * *

(72) * * *

(i) * * *

(G) 1001–5, Colorado Regulation No. 3, Air Contaminant Emissions Notices, Part A, Concerning General Provisions Applicable to Reporting and Permitting, Sections II.D.1.m, II.D.1.ee, II.D.1.uu, II.D.1.ddd, and II.D.1.eeee, previously approved in paragraph (c)(72)(i)(D) of this section, were repealed by the State of Colorado effective January 30, 2009 and are removed without replacement.

* * * * *

(117) On June 18, 2009, the State of Colorado submitted an 8–Hour Ozone Attainment Plan for the Denver Metro Area/North Front Range area to meet the requirements of 40 CFR 81.300(e)(3)(ii)(D) for the 1997 8-hour ozone NAAQS. On the same date, the State of Colorado also submitted revisions to portions of Part A, ''Concerning General Provisions Applicable to Reporting and Permitting,'' and Part B, ''Concerning Construction Permits,'' of Colorado's Regulation No. 3, ''Air Contaminant Emissions Notices,'' and to Sections I through XVI of Colorado's Regulation No. 7, ''Control of Ozone Via Ozone Precursors (Emissions of Volatile Organic Compounds and Nitrogen Oxides).'' EPA is approving the Ozone Attainment Plan except for the last paragraph on page IV–1 and the first paragraph on page IV–2, the words ''federally enforceable'' in the second to last paragraph on page V–6, and the reference to Attachment A in the Table of Contents and on page IV–3. EPA is disapproving the excepted language from the Ozone Attainment Plan. EPA is approving the revisions to portions of Parts A and B of Colorado's Regulation No. 3. For purposes of this action, Colorado Regulation No. 3, Part B, Sections II.D.1.k, l, m, and n, as incorporated below, should be considered an addition to and as immediately following Colorado Regulation Number 3, Part B, Sections III.D.1.a through j, as previously approved by EPA. EPA is approving the revisions to Sections I through XI and

[11] See our July 21, 2010 proposal for further discussion on this issue (75 FR 42351).

XIII through XVI of Colorado's Regulation No. 7, except for Colorado's repeal of section II.D. EPA is disapproving Colorado's repeal of Section II.D and Colorado's revisions to Section XII of Regulation No. 7. EPA is not acting on the provisions in Regulation No. 7 that are designated ''State Only.''

(i) *Incorporation by reference.*

(A) 5 CCR 1001–5, Colorado Regulation No. 3, ''Air Contaminant Emissions Notices,'' Part A, ''Concerning General Provisions Applicable to Reporting and Permitting,'' Sections II.D.1.m, II.D.1.ee, II.D.1.uu, II.D.1.ccc, II.D.1.ddd, II.D.1.uuu, and II.D.1.eeee, effective January 30, 2009.

(B) 5 CCR 1001–5, Colorado Regulation No. 3, ''Air Contaminant Emissions Notices,'' Part B, ''Concerning Construction Permits,'' Sections II.D.1.k, l, m, and n, effective January 30, 2009.

(C) Letter dated November 18, 2009 from the Office of the Colorado Attorney General, signed by Jerry Goad, to Candy Herring, Office of the Colorado Secretary of State, regarding clerical errors in Regulation No. 7, and those portions of 5 CCR 1001–9, Colorado Regulation No. 7, ''Control of Ozone Via Ozone Precursors (Emissions of Volatile Organic Compounds and Nitrogen Oxides),'' Section II.C.1 that accompanied such letter, except for the following: the parenthetical phrase ''(State Only: Located in any Ozone Nonattainment Area or Attainment Maintenance Area)'' at II.C.1; Section II.C.1.a.(v); Section II.C.1.c; and Section II.C.1.d.

(D) 5 CCR 1001–9, Colorado Regulation No. 7, ''Control of Ozone Via Ozone Precursors (Emissions of Volatile Organic Compounds and Nitrogen Oxides),'' Sections I through XI and XIII through XVI, effective January 30, 2009, except for the following: Section I.A.1.b; Section I.B.1.b; Section I.B.2.b; Section I.B.2.d; Section II.A.12; Section II.C.1; and the repeal of Section II.D.

■ 3. Section 52.350 is amended by adding paragraph (c) to read as follows:

**§ 52.350 Control strategy: ozone.**

* * * * *

(c) Revisions to the Colorado State Implementation Plan for the 1997 8-hour ozone NAAQS entitled ''Denver Metro Area & North Front Range 8–Hour Ozone Attainment Plan,'' excluding the last paragraph on page IV–1, the first paragraph on page IV–2, the words ''federally enforceable'' in the second to last paragraph on page V–6, and the reference to Attachment A in the Table of Contents and on page IV–3, as adopted by the Colorado Air Quality Control Commission on December 12, 2008, and submitted by the Governor to EPA on June 18, 2009.

[FR Doc. 2011–19807 Filed 8–4–11; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

### [EPA–HQ–OAR–2010–1040; FRL–9448–4]

### RIN 2060–AQ82

## Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export

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

**ACTION:** Interim final rule.

**SUMMARY:** EPA is adjusting the allowance system controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs) as a result of a recent court decision vacating a portion of the rule titled ''Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export; Final Rule.'' EPA interprets the court's vacatur as applying to the part of the rule that establishes the company-by-company baselines and calendar-year allowances for HCFC–22 and HCFC–142b. This action relieves the regulatory ban on production and consumption of these two chemicals following the court's vacatur by establishing new company-by-company HCFC–22 and HCFC–142b baselines and allocating production and consumption allowances for 2011.

**DATES:** This rule is effective August 5, 2011. While the urgent need for certainty regarding the consumption allowance allocations in the 2011 control period precludes the Agency from considering any adjustments to the consumption allowances allocated in this action, EPA will consider all written comments received by September 6, 2011 to determine whether to issue additional production allowances for the time period covered by this action. Commenters may also submit comments on the issues addressed in this action as they pertain to future control periods.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–1040, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* 202–566–1741.
- *Mail:* Docket # EPA–HQ–OAR–2010–1040, Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mail code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* Docket #EPA–HQ–OAR–2010–1040 Air and Radiation Docket at EPA West, 1301 Constitution Avenue NW., Room B108, Mail Code 6102T, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2010–1040. 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.*

**FOR FURTHER INFORMATION CONTACT:** Luke H. Hall-Jordan by telephone at (202) 343–9591, or by e-mail at *hall-jordan.luke@epa.gov,* or by mail at U.S. Environmental Protection Agency, Stratospheric Protection Division, Stratospheric Program Implementation

Branch (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. You may also visit the Ozone Protection Web site of EPA's Stratospheric Protection Division at *http://www.epa.gov/ozone/strathome.html* for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and related topics.

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

APA—Administrative Procedure Act;
CAA—Clean Air Act;
CAAA—Clean Air Act Amendments of 1990;
CFC—Chlorofluorocarbon;
CFR—Code of Federal Regulations;
EPA—Environmental Protection Agency;
FR—**Federal Register**;
HCFC—Hydrochlorofluorocarbon;
HVAC—Heating, Ventilating, and Air Conditioning;
Montreal Protocol—*Montreal Protocol on Substances that Deplete the Ozone Layer;*
MOP—Meeting of the Parties;
MT—Metric Ton;
ODP—Ozone Depletion Potential;
ODS—Ozone-Depleting Substances;
Party—States and regional economic integration organizations that have consented to be bound by the *Montreal Protocol on Substances that Deplete the Ozone Layer.*

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



## I. Regulated Entities

This rule will affect the following categories:

| Category | NAICS code | SIC code | Examples of regulated entities |
|---|---|---|---|
| Industrial Gas Manufacturing | 325120 | 2869 | Fluorinated hydrocarbon gases manufacturers and reclaimers. |
| Other Chemical and Allied Products Merchant Wholesalers. | 422690 | 5169 | Chemical gases and compressed gases merchant wholesalers. |
| Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing. | 333415 | 3585 | Air-conditioning equipment and commercial and industrial refrigeration equipment manufacturers. |
| Air-Conditioning Equipment and Supplies Merchant Wholesalers. | 423730 | 5075 | Air-conditioning (condensing unit, compressors) merchant wholesalers. |
| Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers. | 423620 | 5064 | Air-conditioning (room units) merchant wholesalers. |
| Plumbing, Heating, and Air-Conditioning Contractors | 238220 | 1711, 7623 | Central air-conditioning system and commercial refrigeration installation; HVAC contractors. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that could potentially be regulated by this action. Other types of entities not listed in this table could also be affected. To determine whether your facility, company, business organization, or other entity is regulated by this action, you should carefully examine these regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

## II. Background

EPA is undertaking this rulemaking as a result of the decision issued by the U.S. Court of Appeals for the District of Columbia Circuit (Court) in *Arkema* v. *EPA* (618 F.3d 1, DC Cir. 2010) regarding the December 15, 2009 final rule titled ''Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export,'' published at 74 FR 66413 (2009 Final Rule). Certain allowance holders affected by the 2009 Final Rule filed petitions for judicial review of the rule under section 307(b) of the Clean Air Act. Among other arguments, the petitioners contended that the rule was impermissibly retroactive because in setting the baselines for the new regulatory period, EPA did not take into account certain inter-pollutant baseline transfers that petitioners had performed during the prior regulatory period.

The Court issued a decision on August 27, 2010, agreeing with petitioners that ''the [2009] Final Rule unacceptably alters transactions the EPA approved under the 2003 Rule'' (*Arkema* v. *EPA,* 618 F.3d at 3). The Court vacated the rule in part, ''insofar as it operates retroactively,'' and remanded to EPA ''for prompt resolution,'' (618 F.3d at 10). The Court withheld the mandate for the decision pending the disposition of any petition for rehearing. EPA's petition for rehearing was denied on January 21, 2011. The mandate issued on February 4, 2011. More detail is provided on the case and EPA's interpretation of the Court's decision in Section II.D.

*A. How does the Montreal Protocol phase out HCFCs?*

The *Montreal Protocol on Substances that Deplete the Ozone Layer* is the international agreement aimed at reducing and eventually eliminating the production and consumption of stratospheric ozone-depleting substances (ODS). The U.S. was one of the original signatories to the 1987 Montreal Protocol and the U.S. ratified the Protocol on April 12, 1988. Congress then enacted, and President George H.W. Bush signed into law, the Clean Air Act Amendments of 1990 (CAAA), which included Title VI on Stratospheric Ozone Protection, codified as 42 U.S.C. chapter 85, Subchapter VI, to ensure that the U.S. could satisfy its obligations under the Montreal Protocol. Title VI includes restrictions on production, consumption, and use of ODS that are subject to acceleration if ''the Montreal Protocol is modified to include a schedule to control or reduce production, consumption, or use * * * more rapidly than the applicable schedule'' prescribed by the statute (CAA § 606). Both the Montreal Protocol and the Clean Air Act (CAA) define consumption as production plus imports minus exports.

In 1990, as part of the London Amendment to the Montreal Protocol, the Parties identified HCFCs as ''transitional substances'' to serve as temporary, lower ozone depletion potential (ODP) substitutes for CFCs and other ODS. EPA similarly viewed HCFCs as ''important interim substitutes that will allow for the earliest possible phaseout of CFCs and other Class I substances'' [1] (58 FR 65026). In 1992, through the Copenhagen Amendment to the Montreal Protocol, the Parties created a detailed phaseout schedule for HCFCs beginning with a cap on consumption for industrialized (Article 2) Parties, a schedule to which the U.S. adheres. The consumption cap for each Article 2 Party was set at 3.1 percent (later tightened to 2.8 percent) of a Party's CFC consumption in 1989, plus a Party's consumption of HCFCs in 1989 (weighted on an ODP basis). Based on this formula, the HCFC consumption cap for the U.S. was 15,240 ODP-weighted metric tons (MT), effective January 1, 1996. This became the U.S. consumption baseline for HCFCs.

The 1992 Copenhagen Amendment created a schedule with graduated reductions and the eventual phaseout of HCFC consumption (Copenhagen, 23–25 November, 1992, Decision IV/4). Prior to a later adjustment in 2007, the schedule initially called for a 35 percent reduction of the consumption cap in 2004, followed by a 65 percent reduction in 2010, a 90 percent reduction in 2015, a 99.5 percent reduction in 2020 (restricting the remaining 0.5 percent of baseline to the servicing of existing refrigeration and air-conditioning equipment), with a total phaseout in 2030.

The Copenhagen Amendment did not cap HCFC production. In 1999, the Parties created a cap on production for Article 2 Parties through an amendment to the Montreal Protocol agreed by the Eleventh Meeting of the Parties (Beijing, 29 November–3 December 1999, Decision XI/5). The cap on production was set at the average of: (a) 1989 HCFC production plus 2.8 percent of 1989 CFC production, and (b) 1989 HCFC consumption plus 2.8 percent of 1989 CFC consumption. Based on this formula, the HCFC production cap for the U.S. was 15,537 ODP-weighted MT, effective January 1, 2004. This became the U.S. production baseline for HCFCs.

To further protect human health and the environment, the Parties to the Montreal Protocol adjusted the Montreal Protocol's phaseout schedule for HCFCs at the 19th Meeting of the Parties in September 2007. In accordance with Article 2(9)(d) of the Montreal Protocol, the adjustment to the phaseout schedule was effective on May 14, 2008.[2]

As a result of the 2007 Montreal Adjustment (reflected in Decision XIX/6), the U.S. and other industrialized countries are obligated to reduce HCFC production and consumption 75 percent below the established baseline by 2010, rather than 65 percent as previously required. The other milestones remain the same. The adjustment also resulted in a phaseout schedule for HCFC production that parallels the consumption phaseout schedule. All production and consumption for Article 2 Parties is phased out by 2030.

Decision XIX/6 also adjusted the provisions for Parties operating under paragraph 1 of Article 5 (developing countries): (1) To set HCFC production and consumption baselines based on the average 2009–2010 production and consumption, respectively; (2) to freeze HCFC production and consumption at those baselines in 2013; and (3) to add stepwise reductions of 10 percent below baselines by 2015, 35 percent by 2020, 67.5 percent by 2025, and 97.5 percent by 2030—allowing, between 2030 and 2040, an annual average of no more than 2.5 percent to be produced or imported solely for servicing existing air-conditioning and refrigeration equipment. All production and consumption for Article 5 Parties will be phased out by 2040.

In addition, Decision XIX/6 adjusted Article 2F to allow industrialized countries to produce ''up to 10 percent of baseline levels'' for export to Article 5 countries ''in order to satisfy basic domestic needs'' until 2020.[3] Paragraph

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[1] Class I refers to the controlled substances listed in appendix A to 40 CFR part 82 subpart A. Class II refers to the controlled substances listed in appendix B to 40 CFR part 82 subpart A.

[2] Under Article 2(9)(d) of the Montreal Protocol, an adjustment enters into force six months from the date the depositary (the Ozone Secretariat) circulates it to the Parties. The depositary accepts all notifications and documents related to the Protocol and examines whether all formal requirements are met. In accordance with the procedure in Article 2(9)(d), the depositary communicated the adjustment to all Parties on November 14, 2007. The adjustment entered into force and become binding for all Parties on May 14, 2008.

[3] Paragraphs 4–6 of adjusted Article 2F read as follows:

''4. Each Party shall ensure that for the twelve-month period commencing on 1 January 2010, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, twenty-five percent of the sum referred to in paragraph 1 of this Article. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the controlled substances in Group I of Annex C does not exceed, annually, twenty-five percent of the calculated level referred to in paragraph 2 of this Article. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten percent of its calculated level of production of the controlled substances in Group I of Annex C as referred to in paragraph 2.

5. Each Party shall ensure that for the twelve-month period commencing on 1 January 2015, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex C does not exceed, annually, ten percent of the sum referred to in paragraph 1 of this Article. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the controlled substances in Group I of Annex C does not exceed, annually, ten percent of the calculated level referred to in paragraph 2 of this Article. However, in order to satisfy the basic domestic needs of the Parties operating under paragraph 1 of Article 5, its calculated level of production may exceed that limit by up to ten percent of its calculated level of production of the controlled substances in Group I of Annex C as referred to in paragraph 2.

6. Each Party shall ensure that for the twelve-month period commencing on 1 January 2020, and in each twelve-month period thereafter, its

Continued

14 of Decision XIX/6 notes that no later than 2015, the Parties would consider ''further reduction of production for basic domestic needs'' in 2020 and beyond. Under paragraph 13 of Decision XIX/6, the Parties will review in 2015 and 2025, respectively, the need for the ''servicing tails'' for industrialized and developing countries. The term ''servicing tail'' refers to an amount of HCFCs used to service existing equipment, such as certain types of air-conditioning and refrigeration appliances.

*B. How does the Clean Air Act phase out HCFCs?*

The U.S. has chosen to implement the Montreal Protocol phaseout schedule on a chemical-by-chemical basis. In 1992, environmental and industry groups petitioned EPA to implement the required phaseout by eliminating the most ozone-depleting HCFCs first. Based on the available data at that time, EPA believed the U.S. could meet, and possibly exceed, the required Montreal Protocol reductions through a chemical-by-chemical phaseout that employed a ''worst-first'' approach focusing on certain chemicals earlier than others. In 1993, as authorized by section 606 of the CAA, the U.S. established a phaseout schedule that eliminated HCFC–141b first and would greatly restrict HCFC–142b and HCFC–22 next, followed by restrictions on all other HCFCs and ultimately a complete phaseout (58 FR 15014, March 18, 1993; 58 FR 65018, December 10, 1993).

On January 21, 2003 (68 FR 2820), EPA promulgated regulations (2003 Final Rule) to ensure compliance with the first reduction milestone in the HCFC phaseout: the requirement that by January 1, 2004, the U.S. reduce HCFC consumption by 35 percent and freeze HCFC production. In the 2003 Final Rule, EPA established chemical-specific consumption and production baselines for HCFC–141b, HCFC–22, and HCFC–142b for the initial regulatory period ending December 31, 2009. Section 601(2) states that EPA may select ''a representative calendar year'' to serve as the company baseline for HCFCs. In the 2003 Final Rule, EPA concluded that because the entities eligible for allowances had differing production and import histories, no single year was representative for all companies. Therefore, EPA assigned an individual consumption baseline year to each company by selecting its highest ODP-weighted consumption year from among the years 1994 through 1997. EPA assigned individual production baseline years in the same manner. EPA also provided an exception allowing new entrants provided that they began importing after the end of 1997 but before April 5, 1999, the date the advanced notice of proposed rulemaking was published. EPA believed that such small businesses might not have been aware of the impending rulemaking that would affect their ability to continue in the HCFC market.

The 2003 Final Rule apportioned production and consumption baselines to each company in amounts equal to the amounts in the company's highest ''production year'' or ''consumption year,'' as described above. It completely phased out the production and import of HCFC–141b by granting 0 percent of that substance's baseline for production and consumption in the table at 40 CFR 82.16. EPA did, however, create a petition process to allow applicants to request very small amounts of HCFC–141b beyond the phaseout. The 2003 Final Rule also granted 100 percent of the baselines for production and consumption of HCFC–22 and HCFC–142b for each of the years 2003 through 2009. EPA was able to allocate allowances for HCFC–22 and HCFC–142b at 100 percent of baseline because, in light of the concurrent complete phaseout of HCFC–141b, the allocations for HCFC–22 and HCFC–142b, combined with projections for consumption of all other HCFCs, remained below the 2004 cap of 65 percent of the U.S. baseline.

EPA allocates allowances for specific years; they are valid between January 1 and December 31 of a given control period (*i.e.,* calendar year). Prior to December 15, 2009, EPA had not allocated any HCFC allowances for year 2010 or beyond. The regulations at section 82.15(a) and (b) only addressed the production and import of HCFC–22 and HCFC–142b for the years 2003–2009. Through the 2009 Final Rule (74 FR 66412), EPA addressed the production and import of HCFC–22 and HCFC–142b for the 2010–2014 control periods. Absent the granting of calendar-year allowances, section 82.15 would have prohibited the production and import of HCFC–22 and HCFC–142b after December 31, 2009. The 2009 Final Rule allowed for continued production and consumption, at specified amounts, of HCFC–142b, HCFC–22, and other HCFCs not previously included in the allowance system, for the 2010–2014 control periods.

In the U.S., an allowance is the unit of measure that controls production and consumption of ODS. EPA establishes company-by-company baselines (also known as ''baseline allowances'') and allocates calendar-year allowances equal to a percentage of the baseline for specified control periods. A calendar-year allowance represents the privilege granted to a company to produce or import one kilogram (not ODP-weighted) of the specific substance. EPA allocates two types of calendar-year allowances—production allowances and consumption allowances. ''Production allowance'' and ''consumption allowance'' are defined at section 82.3. To produce an HCFC for which allowances have been allocated, an allowance holder must expend both production and consumption allowances. To import an HCFC for which allowances have been allocated, an allowance holder must expend consumption allowances. An allowance holder exporting HCFCs for which it has expended consumption allowances may obtain a refund of those consumption allowances upon submittal of proper documentation to EPA.

Since EPA is implementing the phaseout on a chemical-by-chemical basis, it allocates and tracks production and consumption allowances on an absolute kilogram basis for each chemical. Upon EPA approval, an allowance holder may transfer calendar-year allowances of one type of HCFC for calendar-year allowances of another type of HCFC, with transactions weighted according to the ODP of the chemicals involved. Pursuant to section 607 of the CAA, EPA applies an offset to each HCFC transfer by deducting 0.1 percent from the transferor's allowance balance. The offset benefits the ozone layer since it ''results in greater total reductions in the production in each year of * * * class II substances than would occur in that year in the absence of such transactions'' (42 U.S.C. 7671f).

The U.S. remained comfortably below the aggregate HCFC cap through 2009. The 2003 Final Rule announced that EPA would allocate allowances for

calculated level of consumption of the controlled substances in Group I of Annex C does not exceed zero. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the controlled substances in Group I of Annex C does not exceed zero. However:

i. Each Party may exceed that limit on consumption by up to zero point five percent of the sum referred to in paragraph 1 of this Article in any such twelve-month period ending before 1 January 2030, provided that such consumption shall be restricted to the servicing of refrigeration and air conditioning equipment existing on 1 January 2020;

ii. Each Party may exceed that limit on production by up to zero point five percent of the average referred to in paragraph 2 of this Article in any such twelve-month period ending before 1 January 2030, provided that such production shall be restricted to the servicing of refrigeration and air conditioning equipment existing on 1 January 2020.''

2010–2014 in a subsequent action and that those allowances would be lower in aggregate than for 2003–2009, consistent with the next stepwise reduction for HCFCs under the Montreal Protocol. EPA stated its intention to determine the number of allowances that would be needed for HCFC–22 and HCFC–142b, bearing in mind that other HCFCs would also contribute to total HCFC consumption. EPA noted that it would likely achieve the 2010 reduction step by applying a percentage reduction to the HCFC–22 and HCFC–142b baselines. EPA subsequently monitored the market to estimate servicing needs and market adjustments in the use of HCFCs, including HCFCs for which EPA did not establish baselines in the 2003 Final Rule.

In the 2009 Final Rule, EPA determined both the estimated demand for HCFC–22 during the 2010–2014 regulatory period and the percentage of that estimated demand for which it was appropriate to allocate allowances. As described in Section V.B. of this action, EPA determined that the percentage of the estimated demand allocated in the form of allowances should not remain constant from year to year but rather should decline on an annual basis. For 2010, EPA allocated allowances equal to 80 percent of the estimated demand for HCFC–22, concluding that reused, recycled, and reclaimed material could meet the remaining 20 percent. Under the 2009 Final Rule, the percentage of estimated demand for which there was no allocation, and therefore would need to be met through recycling and reclamation, rose from 20 percent in 2010 to 29 percent in 2014 to ensure the U.S. market would have a viable reclamation industry and could meet the 2015 stepwise reduction under the Montreal Protocol. The determinations EPA made in the 2009 Final Rule regarding (1) The total estimated demand for HCFC–22 in 2010–2014 and (2) the percentage of that estimated demand that EPA would address through an allowance allocation were not at issue in the litigation and are unaffected by the Court's decision. EPA is not revisiting either determination with respect to 2011 in this interim final action, but rather is relying on the existing record for the 2009 Final Rule. However, EPA welcomes comment on whether it should revisit these determinations in the future. EPA is also interested in comments on whether it could and should allocate a different percentage of baseline for calendar-year production than for calendar-year consumption, while still meeting U.S. obligations under the Montreal Protocol and complying with the CAA.

*C. What sections of the Clean Air Act apply to this rulemaking?*

Several sections of the CAA apply to this rulemaking. Section 605 of the CAA phases out production and consumption and restricts the use of HCFCs in accordance with the schedule set forth in that section. As discussed in the 2009 Final Rule (74 FR 66416), section 606 provides EPA authority to set a more stringent phaseout schedule than the schedule in section 605 based on an EPA determination regarding current scientific information or the availability of substitutes, or to conform to any acceleration under the Montreal Protocol. EPA previously set a more stringent schedule than the section 605 schedule through a rule published December 10, 1993 (58 FR 65018). Through the 2009 Final Rule, EPA made a further adjustment to the section 605 schedule based on the acceleration under the Montreal Protocol as agreed to at the Meeting of the Parties in September 2007. The more stringent schedule established in that rule is unaffected by the recent Court decision and is therefore still in effect.

Section 606 provides authority for EPA to promulgate regulations that establish a schedule for production and consumption that is more stringent than what is set forth in section 605 if: ''(1) Based on an assessment of credible current scientific information (including any assessment under the Montreal Protocol) regarding harmful effects on the stratospheric ozone layer associated with a class I or class II substance, the Administrator determines that such more stringent schedule may be necessary to protect human health and the environment against such effects, (2) based on the availability of substitutes for listed substances, the Administrator determines that such more stringent schedule is practicable, taking into account technological achievability, safety, and other relevant factors, or (3) the Montreal Protocol is modified to include a schedule to control or reduce production, consumption, or use of any substance more rapidly than the applicable schedule under this title.'' It is only necessary to meet one of the three criteria. In the 2009 Final Rule, EPA determined that all three criteria had been met with respect to the schedule for phasing out production and consumption of HCFC–22 and HCFC–142b.

As noted in the 2009 Final Rule, while section 606 is sufficient authority for establishing a more stringent schedule than the section 605 phaseout schedule, section 614(b) of the CAA provides that in the case of a conflict between the CAA and the Montreal Protocol, the more stringent provision shall govern. Thus, section 614(b) requires the Agency to establish phaseout schedules at least as stringent as the schedules contained in the Montreal Protocol. To meet the 2010 stepdown requirement, EPA is continuing to allocate HCFC allowances at a level that will ensure the aggregate HCFC production and consumption will not exceed 25 percent of the U.S. baselines. For more discussion of this point, see 74 FR 66416.

Finally, section 607 addresses transfers of allowances both between companies and chemicals. EPA is further clarifying its policy on inter-pollutant transfers in this action.

*D. How does this action relate to the recent court decision?*

Certain allowance holders affected by the 2009 Final Rule filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit. Among other arguments, the petitioners, Arkema Inc., Solvay Fluorides, LLC, and Solvay Solexis, Inc., contended that the rule was impermissibly retroactive because in setting the baselines for the new regulatory period, EPA did not take into account certain inter-pollutant baseline transfers that petitioners had performed during the prior regulatory period. The transfers at issue occurred in 2008. Solvay Solexis, Inc. submitted two Class II Controlled Substance Transfer Forms for consumption allowance transfers to Solvay Fluorides, LLC on February 15, 2008, and March 4, 2008. Arkema, Inc. submitted two Class II Controlled Substance Transfer Forms for consumption and production allowance transfers on April 18, 2008. Each company requested EPA's approval to convert HCFC–142b allowances to HCFC–22 allowances, and checked a box on the EPA transfer form indicating that ''baseline'' allowances would be transferred. EPA sent non-objection notices to both Solvay Solexis and Solvay Fluorides on February 21, 2008 and March 20, 2008 and to Arkema, Inc. in April 2008. The transfer requests and EPA's approvals were attached to petitioners' court filings and are available in the docket for this action.

In the Notice of Proposed Rulemaking titled ''Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export,'' published in the **Federal Register** at 73 FR 78680 on December 23, 2008 (2008 Proposed Rule), EPA requested comments on establishing baselines for the 2010–2014 regulatory period ''with or without'' taking into account baseline inter-pollutant transfers made during the 2003–2009 regulatory period (73 FR 78687). The proposed regulatory text accounted for the inter-pollutant transfers discussed above. The increase in HCFC–22 baseline allowances for Arkema, Inc. and Solvay Fluorides, LLC presented in the 2008 Proposed Rule resulted in a larger amount of HCFC–22 baseline allowances overall and therefore a lower percentage of HCFC–22 baselines allocated across the board in each control period. Specifically, the proposed shift resulted in a 16 percent decrease in market share for all other allowance holders, and increases for the petitioners: Arkema and Solvay. For more detail on the impact of these transfers, see Section V.C. of this preamble.

In the 2009 Final Rule, after considering comments, EPA determined that allowing inter-pollutant transfers to carry forward from one regulatory period to the next could undermine the Agency's chemical-by-chemical phaseout approach and could encourage market manipulation. For a more detailed discussion, see Section V.A.1. EPA also concluded that section 607 of the CAA was best read as limiting inter-pollutant transfers to those conducted on an annual basis. For these reasons, EPA did not take the 2008 inter-pollutant transfers into account in establishing the baselines for the 2009 Final Rule covering 2010–2014.

The Court issued a decision on August 27, 2010, agreeing with petitioners that ''the [2009] Final Rule unacceptably alters transactions the EPA approved under the 2003 Rule'' (*Arkema* v. *EPA,* 618 F.3d at 3). The Court vacated the rule in part, ''insofar as it operates retroactively,'' and remanded to EPA ''for prompt resolution,'' (618 F.3d at 10). The Court withheld the mandate for the decision pending the disposition of any petition for rehearing. On November 12, 2010, EPA filed a petition for rehearing, which was denied on January 21, 2011. The mandate issued on February 4, 2011.

Because the Court vacated the rule only in part, without specifying which part or parts were vacated, EPA may adopt a reasonable interpretation of the vacatur's extent. In doing so, EPA is relying on its expertise in administering the HCFC phaseout regulations under Title VI of the CAA. First, EPA notes that the rule contains elements that were not at issue in the litigation. EPA concludes that the vacatur has no effect on allowances for any substances other than HCFC–142b and HCFC–22, since the petitioners' claims and the opinion itself discuss only those two substances. Similarly, EPA concludes that other discrete portions of the rule, such as the provisions on use and introduction into interstate commerce, are unaffected by the vacatur.

The baselines for HCFC–142b and HCFC–22 were clearly at issue in the litigation and indeed are the focus of the Court's opinion. The Court found that ''the Agency's refusal to account for the Petitioners' baseline transfers of inter-pollutant allowances in the Final Rule is impermissibly retroactive,'' (618 F.3d at 9). Because baseline and calendar year allowances are inextricably linked,[4] EPA has determined that the Court's vacatur voids the HCFC–22 and HCFC–142b baselines in 40 CFR 82.17 and 82.19 as well as the percentage of baseline allocated for those specific substances in 40 CFR 82.16 for all companies listed in those sections.[5] This means that until EPA establishes new baselines and allocates new calendar-year allowances, production and import of these two substances is prohibited under 40 CFR 82.15. Recognizing this scenario, on January 28, 2011, EPA sent letters to affected stakeholders informing them that the Agency would exercise enforcement discretion for a limited period provided their production and import did not exceed specified levels and provided that they adhered to additional conditions.

In determining the meaning of the Court's vacatur, EPA considered whether this interpretation was consistent with what the Court intended and a good fit for the specific circumstances, which include the goals and design of the HCFC allowance program and the basic structure of the 2009 Final Rule. While this interpretation is appropriate in this instance, it is possible that another interpretation would be more appropriate in a case involving a program with different goals, design, or structure.

In the 2009 Final Rule, EPA relied on its assessment of the amount of virgin and recovered HCFC–22 and HCFC–142b needed to service existing equipment and transition to the 2015 stepdown under the Montreal Protocol. The Court did not take issue with this assessment. At this time, EPA has not received information indicating that demand will be higher than the Agency's assessment predicted. On the contrary, EPA has heard from several anecdotal sources that the amount of actual market demand for HCFC–22 may in fact be lower than the amount identified in the *Servicing Tail Report.* However, since EPA does not have sufficient data to support this conclusion at this time, and recognizes the urgent need to act quickly to establish allowances for the 2011 control period, the Agency is relying on the record for the 2009 Final Rule, which includes the Agency's prior assessment of demand for HCFC–22 and HCFC–142b in 2011. Therefore, through this action, EPA is establishing new baselines for 2011 reflecting the court's decision and allocating the percentage of baseline needed to ensure that the total allocation for 2011 remains the same as in the 2009 Final Rule. If sufficient information becomes available in future, EPA may adjust the aggregate allocation level for future control periods.

1. Addressing 2010 Allowances

EPA interprets the Court's decision as applying, at a minimum, to the HCFC–22 and HCFC–142b baseline and calendar-year allowances for 2011–2014. EPA is not addressing 2010 allowances in this action. The Agency plans to take comment in a future notice-and-comment rulemaking on whether the vacatur and remand should be interpreted as applying to the 2010 allocations, and if so, how allowances in future control periods might be adjusted to reflect this. The 2011 control period is already well underway, and as discussed in the good cause finding in Section III, it is important that EPA establish a definitive 2011 allocation now to dispel confusion and allow normal business activities to proceed. In particular, EPA believes the urgent need for certainty regarding the consumption

[4] The reason baseline and calendar-year allocations are inextricable is because calendar-year allocations are expressed as a percentage of baseline, and the percentage of baseline allocated for a specific substance varies depending on the sum of all company baselines for that substance. The process works as follows for each specific HCFC: First, all the company-specific baselines listed in the tables at 40 CFR 82.17 and 82.19 are added to determine the aggregate amount of baseline production and consumption, respectively. Second, EPA determines how many consumption allowances the market needs for a given year, taking into account recycled, reused, and reclaimed material, and divides that amount by the aggregate amount of baseline allowances. The resulting percentage listed in the table at section 82.16 becomes what each company is allowed to consume in a given control period. For example, a company with 100,000 kg of HCFC–22 baseline allowances would multiply that number by the percentage allowed for 2011 (for example, 32 percent) to determine its calendar-year allowance is 32,000 kg. Historically and in this interim final rule, EPA has allocated the same percentage of baseline allowances for production as it does for consumption.

[5] The companies' allocations are inter-related because, as noted in footnote 4, the percentage of baseline allocated varies according to the sum of the company-specific baselines.

allowance allocations in the 2011 control period precludes the Agency from considering any adjustments during 2011. However, EPA intends to address this issue in detail in a separate notice-and-comment rulemaking with respect to future control periods.

**III. Justification for This Interim Final Rule**

EPA is taking this action as an interim final rule without prior proposal and public comment because EPA finds that the good cause exemption from the notice-and-comment rulemaking requirement of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* applies here. Section 307(d) of the CAA states that in the case of any rule to which section 307(d) applies, notice of proposed rulemaking must be published in the **Federal Register** (CAA § 307(d)(3)). The promulgation or revision of regulations under Title VI of the CAA is generally subject to section 307(d). However, section 307(d) does not apply to any rule referred to in subparagraphs (A) or (B) of section 553(b) of the APA. Section 553(b)(B) of the APA, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice-and-comment public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.

EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary, impracticable, and contrary to the public interest. In reaching this determination, EPA considered several factors: (1) Taking interim final action for 2011 avoids regulatory confusion, disruption of normal business activities, and effects on consumers pending development of a notice-and-comment rulemaking (see, *e.g., Brae Corp.* v. *United States,* 740 F.2d 1023 (DC Cir. 1984)); (2) the Agency is relying on the existing record from the 2009 Final Rule for this action (see, *e.g., Chamber of Commerce* v. *SEC,* 443 F.3d 890 (DC Cir. 2006)); and (3) the rule's duration is limited (see, *e.g., Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506 (DC Cir. 1983)).

First, it is in the public interest to dispel confusion, allow normal business activities to proceed, and avoid adverse effects on consumers. EPA has received numerous questions from industry about what, if any, allowances companies currently hold in light of the Court's decision. The primary purpose of this interim final rule is to dispel confusion and provide regulatory certainty for the near term. EPA interprets the vacatur as voiding company baselines and calendar-year allowances for HCFC–22 and HCFC–142b, and because entities are prohibited from producing or importing HCFCs without allowances, quick action is necessary to ensure the continued production and import of those two HCFCs. This interim final action will provide industry with certainty for 2011, and allow normal business operations to continue. It also gives EPA time to develop notice-and-comment rules that will cover subsequent control periods.

This action will also avoid unintended consequences for consumers and businesses who own appliances containing HCFC–22 and/or HCFC–142b (*e.g.,* refrigerators and air conditioners), as well as the businesses that service these appliances. Absent this rulemaking, there could be a shortage of these HCFCs. Consumers and businesses unable to service their existing HCFC–22 equipment with HCFCs would instead have to retrofit their existing appliances before the end of their useful life to use a refrigerant other than that which was intended for the appliance, or purchase new equipment to replace existing appliances. Not only would this be expensive and unexpected, especially for those who bought a new unit shortly before January 1, 2010, but the shortage could lead to improper retrofits that decrease a unit's effectiveness and energy efficiency, cost the consumer more to operate, and result in further refrigerant emissions to the atmosphere. Considering the current state of the economy, shortages of HCFC–22 could lead appliance owners, who likely do not have the same level of experience as a licensed professional, to recharge their units on their own. Improper retrofits and recharging could raise the potential for mixing refrigerants, which could damage systems and increase the likelihood of mixed refrigerants being vented into the atmosphere, since mixtures may not work properly and likely could not be reclaimed.

At worst, these scenarios could lead to an unanticipated changeover of significant quantities of equipment, which would be at odds with EPA's goal of minimizing impacts to business and consumers by supporting a gradual turnover of the installed base of equipment as individual equipment reaches the end of its useful life, allowing existing equipment to continue to operate properly. In the preamble to the 2009 Final Rule, EPA stated: ''Congress intended to permit the continued use of previously-manufactured appliances'' (74 FR 66438). EPA discussed this issue in detail at that time, in the context of the section 605(a) ban on the ''use'' of HCFCs (74 FR 66437–66438). In this action, the Agency is not revisiting its analysis or conclusions with respect to this issue. Accordingly, EPA is allocating production and consumption allowances for HCFC–22 and HCFC–142b in a way that avoids shortening the useful lifetime of appliances that were manufactured prior to the effective date of the use ban (January 1, 2010).

Furthermore, a supply shortage could raise the price of affected gases, thereby increasing incentives for entities to illegally smuggle HCFC–22 into the country to meet the demand of consumers and businesses. There are numerous cases cited on the EPA Web site (*http://www.epa.gov/ozone/enforce/index.html*) documenting the smuggling of CFCs and HCFCs. Not only would this hurt entities that are abiding by the law, it could even hurt consumers and businesses that unknowingly receive inferior material. For all these reasons, it is important that EPA take action quickly. Since it is impracticable to complete a notice-and-comment rulemaking prior to the 2011 summer season, when working air conditioners are most important, and delay would be contrary to the public interest, interim final action is necessary.

The second reason for invoking the good cause exemption is that EPA is relying on the existing record for the 2009 Final Rule, which is still applicable and sufficiently current for the purposes of this action. In this interim final rule, EPA is not revisiting the determination made in the 2009 Final Rule regarding the total amount of HCFC production and import that the Agency will allow for 2011. EPA is simply addressing what share of that total amount should be allocated to particular companies. The 2008 Proposed Rule (73 FR 78680) provided all interested parties an opportunity to comment on the total HCFC production and import amount for 2011. Thus, it is unnecessary to provide a second opportunity to comment on that amount prior to issuing this interim final rule.

Third, this interim final rule only addresses 2011—the current control period—and is thus limited in duration. The specific duration is defined by the structure of the stratospheric ozone protection program, which operates in control periods that correspond to calendar years. Allowances are allocated for a specific control period. EPA intends to initiate a notice-and-comment rulemaking or rulemakings as soon as possible to address subsequent control periods.

For the reasons explained above, and given the Court's statement that it was remanding to EPA ''for prompt resolution,'' notice and public procedure are impracticable, unnecessary, and contrary to the public interest. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B). Nonetheless, EPA is providing 30 days for submission of public comments following this action. EPA will consider all written comments submitted in the allotted time period to determine whether to issue additional production allowances for 2011.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. APA section 553(d) excepts from this provision any action that grants or recognizes an exemption or relieves a restriction. Since today's action relieves a restriction from the regulatory ban on the production and consumption of HCFC–22 and HCFC–142b in the U.S., EPA is making this action effective immediately upon publication to ensure the availability of these HCFCs for servicing air conditioning and refrigeration equipment in 2011.

## IV. Summary of This Final Action

In response to the Court's decision, EPA is (1) Establishing 2011 company-by-company consumption and production baselines for HCFC–22 and HCFC–142b in the tables at 40 CFR 82.17 and 82.19 in a manner that reflects the 2008 inter-pollutant baseline transfers and (2) allocating company-by-company production and consumption allowances for these substances for 2011 by establishing percentages of baseline in the table at section 82.16. EPA is also updating the tables at sections 82.17 and 82.19 to reflect 2010 inter-company, single-pollutant baseline transfers and revising the list of allowance holders to update company names. These actions are consistent with actions taken in the 2009 Final Rule. To reflect the court's vacatur, EPA is removing the allocation percentages from the table at section 82.16 for the years 2011–2014. In this rulemaking, EPA is adding an allocation percentage for 2011. In a separate notice-and-comment rulemaking or rulemakings, EPA will address the allocations for the control periods 2012–2014. All aspects of the 2009 Final Rule promulgated on December 15, 2009 (74 FR 66412) that are not addressed in this interim final rule are unchanged.

As a Party to the Montreal Protocol, and having ratified the Montreal Protocol and all of its amendments, the U.S. was required to decrease its amount of HCFC consumption and production to 25 percent of the U.S. baseline in 2010. The cap is the same for the years 2010–2014 before it drops down to 10 percent of baseline in 2015. Under the cap, the aggregate allowances for all U.S. HCFC consumption in 2011 cannot exceed 3,810 ODP-weighted MT (25 percent of the aggregate U.S. consumption baseline) annually, and the aggregate allowances for all U.S. HCFC production in 2011 cannot exceed 3,884.25 ODP-weighted MT (25 percent of the aggregate U.S. production baseline) annually.

To stay below the cap set by the Montreal Protocol for the 2011 control period addressed in this rulemaking, EPA is using the historical production and consumption baselines as adjusted in the 2009 Final Rule, with further adjustments to reflect the 2008 inter-pollutant baseline transfers and inter-company, single-pollutant baseline transfers that occurred after issuance of the 2009 Final Rule.

EPA determined in the 2009 Final Rule that for HCFC–22, it was necessary to allocate a percentage of baseline that would decrease on an annual basis to reflect a projected decrease in demand as well as to promote recycling and reclamation. EPA is not revisiting that determination in this rulemaking. EPA concluded in the 2009 Final Rule that this approach would help prevent shortages that might otherwise occur upon the stepdown in 2015. In this action, EPA is allocating 32.0 percent of baseline for HCFC–22 in 2011, which reflects an annual decline from the 2010 amount. EPA is allocating 4.9 percent of baseline for HCFC–142b in 2011. The HCFC–142b number relates solely to the aggregate baselines for this substance and does not reflect an annual decline. The reasons for establishing these allocation percentages for 2011 are discussed in Section V.

EPA's allocations for both HCFC–22 and HCFC–142b meet U.S. obligations under the Montreal Protocol and reflect the use restrictions under section 605(a) of the CAA while providing for servicing needs consistent with those restrictions. The allocations for HCFC–22 and HCFC–142b reflect EPA's analysis of market data for these chemicals, as prepared in advance of the 2009 Final Rule. The allocation levels for these HCFCs meet the demand for virgin material and avoid shortages during 2011.

In this action, EPA is not changing the methodology used in the 2009 Final Rule to calculate the total number of calendar-year consumption and production allowances. While the number of total calendar-year consumption allowances is unchanged, the number of production allowances is slightly lower (less than two percent lower) than in the 2009 Final Rule due to the changes in aggregate baseline allowances. This is explained in more detail in Section V.C. The only other difference is in the distribution of those allowances.

At this time, EPA is allocating a total of 2,504 ODP-weighted MT of HCFC–22 and HCFC–142b calendar-year consumption allowances and 2,302 ODP-weighted MT of HCFC–22 and HCFC–142b calendar-year production allowances for 2011. Both allocations remain below the limit established by the Montreal Protocol for the 2010–2014 phasedown step of 75 percent below baseline. The difference between the cap and the total allocation reflects EPA's estimate (developed for the 2009 Final Rule) of the demand for HCFCs during these control periods. It also will accommodate minor adjustments in the market, particularly to allow potential market growth for other allowed HCFCs. As discussed in more detail in Section V.B.3. and in the preamble to the 2009 Final Rule, it will also encourage greater reclamation of recovered refrigerant and thus facilitate preparation for the 2015 step down in the consumption cap to 10 percent of baseline.

This action also clarifies EPA's policy on inter-pollutant transfers for 2011 and all future control periods in Section V.A.1.

## V. Allocation of Allowances for the 2011 Control Period

### *A. Baselines for HCFC–22 and HCFC–142b Allowances*

In the 2009 Final Rule, EPA presented the allocation structure for HCFC–22 and HCFC–142b for the control periods 2010–2014: allocating a percentage of the baseline production and consumption allowances. The rationale for this system is discussed further at 74 FR 66412. The Court found no fault with EPA's framework for allocating HCFCs in the 2009 Final Rule, except the aspects of the rule they deemed to be retroactive, *i.e.,* not taking into account inter-pollutant baseline transfers that occurred in the prior regulatory period in establishing company-specific baseline allowances. To address this, EPA is establishing HCFC–22 and HCFC–142b baseline allowances for 2011 that reflect past inter-pollutant baseline transfers deemed permanent by the Court.

1. Adjusting the Baseline for Inter-Company and Inter-Pollutant Transfers

Sections 607(b) and (c) of the CAA address inter-pollutant and inter-company transfers of allowances, respectively. Inter-pollutant transfers are the transfer of an allowance of one substance to an allowance of another substance on an ODP-weighted basis. Inter-company transfers are transfers of allowances for the same ODS from one company to another company. Section 607(c) also authorizes inter-company transfers combined with inter-pollutant transfers, so long as the requirements of both are met. The corresponding regulatory provisions for HCFCs appear at 40 CFR 82.23.

The 2009 Final Rule updated the baselines for HCFC–22 and HCFC–142b to reflect name changes and inter-company baseline transfers, *i.e.,* transfers of baseline for a specific type of HCFC from one company to another. Doing so reflected the changes in the marketplace that had occurred since EPA promulgated the 2003 Final Rule. Inter-company baseline transfers provide a mechanism for new entrants to join the HCFC market and for other companies to expand their business. EPA recognizes that in some cases, entities are no longer actively involved in HCFC production, import, and/or export activities. EPA retained the baseline for such entities, noting that this had been a mechanism by which new entrants had entered the HCFC allowance system in the past.

The 2009 Final Rule also addressed four inter-pollutant baseline transfers made during the prior regulatory period (see Section II.D. of this action for more detail). EPA had proposed to adjust the company baselines to reflect these four inter-pollutant baseline transfers in the 2008 Proposed Rule. Eight commenters opposed, and two commenters supported, these proposed adjustments. At issue was whether the inter-pollutant baseline transfers should carry forward as part of the companies' baseline allowances in the next regulatory period.

After reviewing the comments, EPA concluded that adjusting the baselines to reflect inter-pollutant baseline transfers could create incentives for future manipulation of the allocation system in anticipation of future control periods. EPA remains concerned about the potential for such future manipulation if inter-pollutant baseline transfers during the current regulatory period are carried forward as a change in a company's baseline for future regulatory periods. For example, in 2020 EPA will no longer be issuing HCFC–22 production or consumption allowances (see section 82.16(e)). EPA expects that companies with HCFC–22 allowances would no longer be in the HCFC market at that date if they did not hold allowances for other HCFCs that may still be produced after 2020. If EPA were to allow inter-pollutant baseline transfers that carried forward into the new regulatory period, companies with HCFC–22 baselines in 2019 could convert them all to baselines for HCFC–123. Perpetuating the HCFC–22 baselines in a new form would be counter to the design of the chemical-by-chemical phaseout, under which the baseline allowances for a particular chemical are intended to drop out of the system upon the phase-out of that chemical. As another example, in 2015, a producer or importer that previously had not participated in the HCFC–123 market could dominate that market by converting its HCFC–22 baseline in 2014 to HCFC–123 baseline. Given the different ODPs of HCFC–22 and HCFC–123 (0.055 and 0.02, respectively), converting one baseline allowance of HCFC–22 would result in 2.75 baseline allowances of HCFC–123. Also, since companies hold many more HCFC–22 baseline allowances than HCFC–123 baseline allowances, converting those HCFC–22 baseline allowances would have an overwhelming effect on the current HCFC–123 baseline allowance holders and the overall market. EPA agrees with commenters on the 2008 Proposed Rule that taking inter-pollutant baseline transfers into account in setting baselines could have the effect of moving the U.S. HCFC phasedown from a chemical-by-chemical phaseout, as established under the ''worst-first'' approach in the 1993 Final Rule, towards an ODP-weighted phasedown. Thus, there are important policy reasons going forward for not taking inter-pollutant transfers into account in establishing baselines for new regulatory periods.

Some commenters on the 2008 Proposed Rule stated that modifying the baselines by taking into account inter-pollutant transfers would be contrary to the CAA. One commenter argued that section 607 of the CAA allows EPA to approve inter-pollutant transfers of allowances only on a year-to-year basis. That commenter pointed to language in section 607(b) stating that EPA regulations are to permit ''a production allowance for a substance for any year to be transferred for a production allowance for another substance for the same year on an ozone depletion weighted basis.'' The commenter also discussed the legislative history of the 1990 CAA Amendments.

EPA does not agree with the commenter that the language of section 607(b) is clear on its face. However, where the statutory language is ambiguous, EPA has discretion to choose a reasonable interpretation of that language. EPA determined in the 2009 Final Rule that section 607(b) is best read as permitting only year-by-year inter-pollutant transfers. EPA continues to believe that this is the best interpretation of the statutory language. Section 607(b) states that EPA's rules are to permit ''a production allowance for a substance for any year to be transferred for a production allowance for another substance for the same year.'' This language emphasizes the year-by-year nature of such transactions. No parallel language appears in section 607(c). That section does, however, provide that any inter-pollutant transfers between two or more persons must meet the requirements of section 607(b).

As the Court noted, ''the Agency is certainly entitled to * * * institute a program that forbids baseline inter-pollutant transfers in the future,'' (*Arkema* v. *EPA,* 618 F.3d at 9). Hence, EPA concludes that requiring all inter-pollutant transfers to be conducted on a yearly—and thus temporary—basis going forward is the approach most consistent with the wording of section 607(b). Further discussion of the reasons for limiting inter-pollutant transfers to those conducted on a calendar-year basis is available in the Response to Comments on the 2008 Proposed Rule (included in the docket for this rulemaking).

Consistent with the Court's decision regarding *past* inter-pollutant transfers (those conducted during the prior regulatory period), the baselines established in this action for 2011 take into account the 2008 inter-pollutant baseline transfers discussed earlier in this notice. EPA is clarifying, however, that it has not approved any inter-pollutant transfers of baseline allowances in the current regulatory period, and for the reasons given in the 2009 Final Rule and in this action, in future EPA intends to approve inter-pollutant transfers only on a year-by-year basis. Thus, in the context of the protection of stratospheric ozone allowance system, companies should not expect that any inter-pollutant transfers they conduct will affect their baselines either in the current regulatory period or any future regulatory period.

As it did in the 2009 Final Rule, EPA is adjusting baseline allowances to reflect inter-company, single-pollutant baseline transfers that occurred since the last final rule was signed.

In summary, this interim final rule reflects the changes in consumption and production baseline allowances from (1) The 2008 inter-pollutant transfers deemed permanent by the Court and (2) inter-company, single-pollutant baseline transfers that have occurred since the 2009 Final Rule was signed, and (3) clarifies the types of inter-pollutant transfers that will be permitted in the future. The consumption and production baseline amounts for HCFC–22 and HCFC–142b for 2011 are shown below in Table 3.

*B. Factors for Considering Allocation Amounts for HCFC–22 and HCFC–142b*

In the 2009 Final Rule, EPA decided to allocate HCFC–22 and HCFC–142b allowances based on the projected servicing needs for those compounds, taking into account the amount of those needs that can be met through recycling and reclamation. EPA is not changing that approach in this interim final rule. However, the specific amounts allocated per company are different due to the changed baselines and the need to apply a different allocation percentage to company baselines in order to keep the aggregate amount allocated the same. Because it is necessary to promote use of reused, recycled, and reclaimed material in anticipation of the 2015 phasedown step, EPA does not intend to allocate the difference between the consumption allocation authorized by the Parties to the Montreal Protocol and the consumption allocation authorized by this rule except under unforeseen extenuating circumstances.

1. The Importance of HCFC–22 Relative to HCFC–142b Servicing Needs for Existing Equipment

HCFC–22 is the most widely-used HCFC. The demand for its use in servicing existing equipment was the primary factor affecting EPA's allocation of production and consumption allowances of HCFCs for the current regulatory period. Prior to issuing the 2009 Final Rule, EPA issued and sought comment on three versions of a draft report analyzing servicing demand for the HCFC appliances in the U.S. refrigeration and air-conditioning sector projected to be in service from 2010–2019 (all versions available at Docket EPA–HQ–OAR–2008–0496: Published November 4, 2005 at 70 FR 67172; released at a stakeholder meeting on September 29, 2006; published December 23, 2008, with 2008 Proposed Rule). The *Servicing Tail Report* focuses on air-conditioning and refrigeration appliances because such equipment represents the bulk of the servicing need. In addition, the servicing exception to the use ban for HCFC–22 and HCFC–142b pertains only to use as a refrigerant in such equipment. Under section 605(a) of the CAA and EPA's implementing regulations, nearly all other uses of these two HCFCs were banned effective January 1, 2010. The projected servicing need for HCFC–22 in 2011 is approximately 57,900 MT (3,185 ODP-weighted MT), or approximately 84 percent of the consumption cap for all HCFCs in 2011 under the Montreal Protocol, which is 3,810 ODP-weighted MT. HCFC–142b has primarily been used as a foam blowing agent, a use that was phased out in 2010. The projected servicing demand for existing refrigeration equipment containing HCFC–142b is extremely low: Approximately 100 MT (7 ODP-weighted MT). EPA therefore focused the analysis on HCFC–22 because that compound is the predominant HCFC in the installed base of air-conditioning and refrigerant equipment for which servicing in the U.S. will likely continue.

As discussed in the 2009 Final Rule, the majority of HCFC–22 equipment that is projected to be in use from this point onward will be air-conditioning applications, including window units, packaged terminal units, unitary air-conditioning, chillers, dehumidifiers, water and ground source heat pumps, and motor vehicle air-conditioning in buses and trains. The report projected that approximately 145.6 million units of all such types of HCFC–22 air-conditioning equipment were in use in 2010, decreasing by about 41 percent in 2015 and 86 percent in 2020. In addition, approximately 3.8 million units of HCFC–22 refrigeration equipment were in use in 2010. The installed base of HCFC–22 refrigeration equipment is projected to decrease from 2010 levels by about 44 percent in 2015 and 75 percent in 2020. For more on the *Servicing Tail Report* and the Vintaging Model, which was used to develop the report, see 74 FR 66424 and the *Servicing Tail Report* included in the docket.

EPA estimates that the servicing need for HCFC–22 will continue to decrease each year, and consistent with the 2009 Final Rule, this interim final rule accounts for this by allocating a smaller amount for 2011 than was allocated for 2010. This approach is described in Section V.B.3. In this interim final action, EPA is maintaining the overall HCFC–22 allocation levels for 2011 that the Agency determined were appropriate in the 2009 Final Rule. EPA's decision not to allocate above the need projected in the *Servicing Tail Report* is discussed in the preamble to the 2009 Final Rule.

2. Meeting Servicing Needs With Virgin and Recovered Material

In the 2009 Final Rule, the Agency recognized that servicing demand can be met with a combination of newly-manufactured or imported HCFCs (virgin HCFCs) and HCFCs that have been recovered and either reused, recycled or reclaimed. Therefore, EPA did not anticipate that virgin HCFC–22 would need to be produced or imported to meet the entire HCFC–22 servicing demand (estimated to be 3,185 ODP-weighted MT in 2011). The *Servicing Tail Report* analyzes various scenarios regarding reclamation. EPA continues to believe that reused, recycled, and reclaimed material can help meet HCFC–22 servicing needs and is therefore not changing course at this time. Should new data be presented, EPA reserves the option of increasing the amount of demand for servicing existing equipment that should be met by reused, recycled, and reclaimed material in future control periods.

3. Annual Reduction in Allocated Amounts

As explained in the preamble to the 2009 Final Rule, without year-to-year reductions in the allocations for virgin HCFC–22, the HCFC–22 market could be oversaturated, and the contribution of reused, recycled, and reclaimed refrigerant would decrease, both in the total number of kilograms and as the proportion of overall need.

EPA is particularly concerned with encouraging a smooth transition to the 2015 stepdown. At that date, the U.S. must meet a 90 percent reduction below the baseline for all HCFCs, which is equivalent to 1,524 ODP-weighted MT. EPA's *Servicing Tail Report* shows that even a 20 percent recovery rate would be insufficient to meet the demand for HCFC–22 in 2015. As shown in Table 4–5 in the report, demand for HCFC–22 in 2015 is projected to be 38,800 MT while the cap for all HCFCs equates to 27,709 MT of HCFC–22 (assuming no allocation for any other HCFCs). A 20 percent recovery rate would allow for the additional use of 8,800 MT but would still leave a shortfall of 2,291 MT in 2015. In developing the 2009 Final Rule, EPA calculated that to meet the total demand in 2015, the recovery rate would have to increase to 26 percent (representing 29 percent of total servicing demand).

In the 2009 Final Rule, EPA determined that it was desirable to institute a year-by-year reduction for the period 2010–2014. The Agency is maintaining that policy in this interim final action for 2011. A smooth transition for stakeholders—including continued availability of needed material for approved uses—has historically been an essential aspect of U.S. success in implementing the Montreal Protocol and CAA requirements. To ease the transition to 2015 and avoid disruptions to the market and shortages in HCFC–22 at that date, it is necessary to take steps now to foster the development of a robust recovery and recycling industry in the U.S.

EPA determined in the 2009 Final Rule the level of allocation that would meet the servicing demand over 2010–2014. In this interim final action, EPA is maintaining the overall HCFC–22 allocation levels for 2011 that the Agency determined were appropriate in the 2009 Final Rule. Since EPA is not banning the use of existing HCFC–22 appliances manufactured prior to January 1, 2010, reused, recycled, and reclaimed HCFC–22 will become more valuable as the phaseout progresses. The demand for HCFC–22 to service existing equipment will provide an economic incentive to increase the quantities of recovered HCFC–22 available for reuse, recycling, and reclamation. The docket for the 2009 Final Rule (EPA–HQ–OAR–2008–0496) provides further information on EPA's assumptions regarding the availability of reused, recycled and reclaimed HCFC–22 to meet servicing demand.

Because the primary benefit of annually reducing the allocation is to ensure demand in 2015 is met through greater recovery and reclamation, EPA continues to believe that it is appropriate to base the allocation on that goal. In developing the 2009 Final Rule, EPA estimated demand in 2015 for HCFC–22 would be 38,800 MT. Were the allocations to consist entirely of HCFC–22, the cap would limit the 2015 HCFC–22 allocation to only 27,709 MT, a difference of 11,091 MT that would have to be made up with recovered material. Furthermore, it is likely that the allocation in 2015 will not consist entirely of HCFC–22, as EPA will need to reserve room under the cap for other HCFCs. In the 2009 Final Rule, EPA determined it was appropriate to establish an annual step-down such that the amount of total demand to be met from recovered HCFC–22 would equal 12,500 MT each year. This is approximately the amount EPA projected would be needed to meet the servicing demand in 2015. EPA is retaining this approach for 2011 in the interim final rule. Under this approach, the allocations equal approximately 45,400 MT in 2011. These values, shown in the table below, are derived by subtracting 12,500 MT from the estimated demand each year. EPA will not issue HCFC–22 and HCFC–142b allowances for 2012 or later until a future rulemaking. Consistent with the 2009 Final Rule, EPA plans to reduce the allocation amount annually in future rulemakings to reflect the declining servicing demand.

| | 2010 | 2011 |
|---|---|---|
| Estimated Demand (MT) | 62,500 | 57,900 |
| Total Allocation (MT) | 50,000 | 45,400 |
| Recovered Amount (MT) | 12,500 | 12,500 |

As the total demand decreases, maintaining the supply of recovered HCFCs at a constant level results in recovered material comprising a greater proportion of the total demand each year. Under this approach, the percentage of the total demand to be met with recovered material will rise from 20 percent of total demand in 2010 to 21.6 percent in 2011, though the total amount of recovered material needed remains at 12,500 MT for both years. EPA still believes this is appropriate as it facilitates meeting the demand in 2015, of which at least 29 percent must be met with recovered material, but takes comment on whether demand for HCFC–22 has changed since the 2009 Final Rule was published. Additionally, EPA is taking comment on whether there is surplus HCFC–22 on the U.S. market. In particular, EPA is interested in learning more about: (1) The current amount of recovered HCFC–22 that is available for reclamation or reuse in another HCFC–22 system; (2) the amount of surplus HCFC–22 (virgin and reclaimed) in inventory; and (3) the amount of recovered HCFC–22 abroad awaiting import into the U.S. for reclamation and/or reuse. If new information shows a different amount of HCFC–22 should be allocated in future control periods to encourage reclamation and ensure a smooth transition, EPA will explore options to address this in a later proposed rule.

*C. Allocations of HCFC–22 and HCFC–142b*

EPA is revising the tables in 40 CFR 82 that together specify the production and consumption allowances available to allowance holders during specified control periods. The tables at sections 82.17 and 82.19 apportion baseline production allowances and baseline consumption allowances, respectively, to individual companies for individual HCFCs during a particular regulatory period. Complementing these tables, the table at section 82.16 lists the percentage of baseline allocated to allowance holders for specific control periods. In the interim final rule, EPA is retaining this framework of complementary tables, revising them to reflect the Court's vacatur, responding to the Court's remand by making adjustments to the previous baselines consistent with the Court's ruling, and granting percentages of baselines in a manner that achieves the 2010 phaseout step and lays the groundwork for the next phaseout step in 2015.

In the 2009 Final Rule, the percent allocation for HCFC–22 for 2011 was 38.0 percent of baseline. In the interim final rule, the value is 32.0 percent. The percent allocation for HCFC–142b for 2011 was 0.47 percent of baseline in the 2009 Final Rule and is 4.9 percent of baseline in this interim final rule. These changes do not reflect a change in the total consumption allocation amounts for each substance, as the total allocation for HCFC–22 in 2011 remains approximately 45,400 MT (the same as the 2009 Final Rule), and the total allocation for HCFC–142b in 2011 remains at approximately 100 MT. Using the same percentage of baseline to allocate production allowances as consumption allowances, the total HCFC–22 production allocation is smaller than in the 2009 final rule by less than two percent. The lower amount is due to the change in company baselines to reflect the Court's decision on the 2008 inter-pollutant baseline transfers, and not a change in the methodology used to determine allowances. More information is available on this subject in Section V.C.2.

The 2009 Final Rule, which did not treat the 2008 transfers of HCFC–142b to HCFC–22 baseline allowances as carrying forward into the next regulatory period, had a total HCFC–22 consumption baseline of 119,384 MT. In this interim final rule, EPA is reflecting the baseline transfers in section 82.19 in accordance with the Court's decision. As a result, the aggregate HCFC–22 consumption baseline has increased to 141,865 MT. Since the aggregate HCFC–22 baseline is now higher due to the increase in the number of HCFC–22 baseline allowances for Arkema, Inc. and Solvay Fluorides, LLC, EPA is allocating a smaller percentage of the company-specific baselines than in the 2009 Final Rule to achieve the same total number of allowances. Thus, 45,400 MT of HCFC–22 consumption (the aggregate allocation amount in 2011) is equal to 38.0 percent of 119,384 MT (baseline) of HCFC–22 in the 2009

Final Rule, and 32.0 percent of 141,865 MT (baseline) in this interim final rule. The aggregate HCFC–22 production baseline is also increasing from 110,619 MT in the 2009 Final Rule to 129,093 MT in this interim final rule to reflect Arkema, Inc.'s transfer of HCFC–142b baseline production allowances to HCFC–22 baseline production allowances.

The opposite is true for HCFC–142b, which had a larger aggregate consumption baseline in the proposed rule (21,089 MT), but now has a smaller baseline (2,047 MT) since EPA is accounting for inter-pollutant transfers from HCFC–142b to HCFC–22. Thus, 100 MT of HCFC–142b consumption allowances (the aggregate allocation amount in 2011) are equal to 0.47 percent of 21,089 MT of HCFC–142b in the 2009 Final Rule, and 4.9 percent of 2,047 MT in this interim final rule. Aggregate HCFC–142b baseline production allowances are decreasing from 25,090 MT in the 2009 Final Rule to 9,444 MT in this interim final rule to reflect Arkema, Inc.'s transfer of HCFC–142b baseline production allowances.

EPA is removing the vacated text relating to HCFC–22 and HCFC–142b from the tables in sections 82.16, 82.17, and 82.19; adding new production and consumption baselines for those substances for 2011 to the tables at sections 82.17 and 82.19; and adding new specified percentages of baseline for those substances to the table in section 82.16 for the 2011 control period.

TABLE 1—PHASEOUT SCHEDULE FOR CLASS II CONTROLLED SUBSTANCES IN 40 CFR 82.16

| Control period | Percent of HCFC–141b | Percent of HCFC–22 | Percent of HCFC–142b | Percent of HCFC–123 | Percent of HCFC–124 | Percent of HCFC–225ca | Percent of HCFC–225cb |
|---|---|---|---|---|---|---|---|
| 2003 | 0 | 100 | 100 | | | | |
| 2004 | 0 | 100 | 100 | | | | |
| 2005 | 0 | 100 | 100 | | | | |
| 2006 | 0 | 100 | 100 | | | | |
| 2007 | 0 | 100 | 100 | | | | |
| 2008 | 0 | 100 | 100 | | | | |
| 2009 | 0 | 100 | 100 | | | | |
| 2010 | 0 | 41.9 | 0.47 | 125 | 125 | 125 | 125 |
| 2011 | 0 | 32.0 | 4.9 | 125 | 125 | 125 | 125 |
| 2012 | 0 | | | 125 | 125 | 125 | 125 |
| 2013 | 0 | | | 125 | 125 | 125 | 125 |
| 2014 | 0 | | | 125 | 125 | 125 | 125 |

Consistent with the 2009 Final Rule, EPA is allocating different baseline percentages for HCFC–22 and HCFC–142b because EPA projects that the needs will differ for servicing air-conditioning and refrigeration appliances during the 2011 control period. As discussed in Section V.B.1., the analysis prepared for the 2009 Final Rule showed there will be a significantly greater need for HCFC–22 than for HCFC–142b during 2011. Based on the *Servicing Tail Report* and reporting information already required by EPA regulations, the needs for individual HCFCs are not uniform. EPA determined in the 2009 Final Rule that allocating the same percentage of baseline for HCFC–22 and HCFC–142b would result in too few allowances for HCFC–22 and too many allowances for HCFC–142b. While annual inter-pollutant transfers in accordance with section 82.23(b) could be used to transfer allowances of one HCFC for another on a temporary basis, EPA continues to believe it is not appropriate to rely on such transfers as a mechanism for large-scale corrections. Instead, EPA anticipates that the continued availability of annual, temporary inter-pollutant transfers will permit the market to self-correct for unforeseen changes in demand and allow entities to consider a range of options for their allowances. EPA seeks to avoid unnecessary disruptions in the marketplace and to promote a smooth transition for society.

1. HCFC–22 Consumption Allowances for 2011

For 2011, EPA is allocating HCFC–22 consumption allowances to meet about 78 percent of the servicing need, assuming the remainder will be met by recovered HCFC–22 that is either reused, recycled, or reclaimed. This translates into approximately 45,400 MT (2,497 ODP-weighted MT), or 66 percent of the total HCFC consumption cap for the 2011 control period.

2. HCFC–22 Production Allowances for 2011

For purposes of the 2011 interim final rule, EPA is not revisiting its determination in the 2009 Final Rule to use the same percentages for production and consumption allocations—deriving the percentages based on estimated need for each individual HCFC. Therefore, this rule allocates 41,310 MT (2,272 ODP-weighted MT of the 3,884.25 ODP-weighted metric ton production cap) to HCFC–22 production in 2011. The 2011 aggregate allocation is 1.7 percent lower than the amount allocated in the 2009 Final Rule (41,310 MT in this Interim Final Rule vs. 42,035 MT in the 2009 Final Rule) because the aggregate amount of baseline production allowances in this rulemaking did not increase by the same relative amount as aggregate baseline consumption allowances. Because Solvay did not transfer its HCFC–142b production allowances to HCFC–22 production allowances, consumption allowances are 18.8 percent higher in this rule, while production allowances are only 16.7 percent higher. The memo to the docket for this rulemaking (EPA–HQ–OAR–2010–1040) titled ''HCFC–22 and HCFC–142b Allocation Adjustments: 2009 Final Rule vs. 2011 Interim Final Rule,'' discusses the slight differences in allocation amounts in more detail.

While some allowance holders have encouraged EPA to increase the number of production allowances allocated in 2011, EPA is not allocating additional production allowances in this interim final rule for several reasons. First, EPA is relying on the existing record for the 2009 Final Rule, in which the Agency determined it was appropriate to allocate production and consumption allowances at the same percentage of baseline. EPA believes it is important to obtain public comment on this issue before changing course. Second, in the 2009 Final Rule, EPA stated that allocating the same percentage of baseline for production and consumption was ''consistent with section 605(c) of the Clean Air Act, which requires that the phaseout schedule for HCFC consumption be the same as that for HCFC production'' (74 FR 66429). EPA has given further thought to this provision and is seeking public comment on its interpretation before any changes in policy. Third, EPA has not previously taken comment on whether there would be environmental implications associated with such a change. Given these three considerations, EPA believes it would not be appropriate to increase the production amount without providing notice and an opportunity to comment.

While this interim final rule contains the same allocation percentages for production and consumption, EPA welcomes comment on whether it should use different percentages to allocate HCFC–22 production and consumption allowances in 2011 and/or future control periods. From a policy perspective, EPA is interested in comments on whether an increase in the total number of HCFC–22 production allowances would result in greater total HCFC production, either in the U.S. or globally. EPA notes that production of 1 kilogram of an HCFC requires both a production allowance and a consumption allowance (82.15(a)(1),(2)). Thus, an increase in production allowances without a corresponding increase in consumption allowances does not automatically result in greater production. The most likely scenario is that an increase in production allowances would result in greater U.S. production for export. This is because as stated in § 82.20(a), ''A person may obtain at any time during the control period * * * consumption allowances equivalent to the quantity of class II controlled substances that the person exported from the U.S. and its territories to a foreign state * * * when that quantity of class II controlled substance was produced in the U.S. * * * with expended consumption allowances.'' In effect, current EPA regulations allow exporters to receive a refund of one consumption allowance for each kilogram they export if they show one consumption and one production allowance were expended for the material exported. Therefore, EPA would not expect an increase in production allowances to result in greater amounts of HCFCs being used in the U.S. EPA welcomes comment on whether an increase in the level of production allowances would result in more U.S. production, either for domestic use or for export, and whether any additional U.S. production for export would result in greater worldwide production of HCFCs.

From a legal perspective, EPA is interested in comments on whether section 605(c) would preclude allocating a different percentage of baseline for production than for consumption. Section 605(c) states that EPA must ''promulgate regulations phasing out the production * * * of class II substances in accordance with [section 605],'' subject to any acceleration under section 606. It further states that EPA must ''promulgate regulations to insure that the consumption of class II substances in the United States is phased out and terminated in accordance with the same schedule * * * as is applicable to the phase-out and termination of production of class II substances under [Title VI].'' EPA is considering three possible interpretations of the term ''schedule'' as referenced in section 605(c): (1) The schedule that appears on the face of section 605, which contains no deadlines until 2015; (2) the schedule that appears on the face of section 605, as accelerated under section 606; and (3) the specific allocation percentages or amounts established by EPA through rulemaking for each control period. EPA believes that the second interpretation is the most consistent with the statutory language and purpose.

In past actions, the Agency has accelerated the initial schedule in section 605 to reflect modifications to the Montreal Protocol phaseout schedule for HCFCs. Under the 2007 Montreal Adjustment (reflected in Decision XIX/6), the U.S. is obligated to reduce HCFC production and consumption 75 percent below its aggregate baseline by 2010. EPA is not proposing to increase production to an amount that would be inconsistent with that obligation. Instead, EPA is taking comment on whether to allow production to increase relative to consumption, without encroaching on the cap. Specifically, EPA is taking comment on whether to issue additional production allowances in the amount of 7,746 MT when compared to this interim final rule.

If EPA were to decide to increase production allowances in 2011, its preferred approach would be to decouple the percentage of baseline allocated for production from the percentage of baseline allocated for consumption. EPA would effectuate this change in its regulations by replacing the table at 40 CFR 82.16 with two tables. One would allocate 32 percent of baseline for consumption allowances in 2011. The other would allocate 38 percent of baseline for production allowances in 2011. This approach would still provide the petitioners in Arkema v. EPA the benefit of their 2008 baseline transfers while giving other companies with production baselines approximately the same number of production allowances as they received in the 2009 Final Rule. Compared to the 2009 Final Rule, the net result would be 7,020 MT (386 ODP-weighted MT) additional HCFC–22 production allowed in 2011 for a total of 49,055 MT (2,698 ODP-weighted MT). Under this scenario, the U.S. would be 1,021 ODP-weighted MT below the production cap and in compliance with its obligations under the Montreal Protocol. EPA is seeking comment on whether this increase would hinder the transition to the 2015 phaseout step, under which the U.S. is obligated to reduce HCFC production and consumption 90 percent below its aggregate baseline. EPA's preference is to continue to use the same percentages for production and consumption allocations. This is because EPA is concerned this action could increase U.S. production of HCFCs, might decrease the U.S.'s ability to transition to the 2015 stepdown under the Montreal Protocol, and potentially increase global production of HCFCs. Nevertheless, the Agency welcomes comment on this option for increasing 2011 and/or future HCFC–22 production allowances. After reviewing comments, EPA may either issue a supplemental allocation of production allowances for 2011 or leave the 2011 production allocation in this interim final rule unchanged.

3. HCFC–142b Allowances for 2011

Establishing HCFC–142b baseline allowances that take into account the 2008 inter-pollutant transfers discussed in Section II.D. results in 2,047 MT of aggregate baseline consumption allowances and 9,444 MT of aggregate baseline production allowances. Consistent with the 2009 Final Rule, EPA is allocating 100 percent of the projected servicing need for HCFC–142b identified in that rule: 100 MT (7 ODP-weighted MT) of consumption. To get to that level of consumption, EPA is allocating 4.9 percent of the aggregate consumption baseline, as reflected in the table at section 82.16. The aggregate allocation number for consumption is the same as in the 2009 Final Rule.

Using the same percentage (4.9 percent), EPA is allocating 463 MT (30.1 ODP-weighted MT) of HCFC–142b production allowances for 2011. The 2011 aggregate allocation for production is higher than the amount allocated in the 2009 Final Rule (463 MT in this interim final rule vs. 118 MT in the 2009 Final Rule). The allocated amount is 292 percent higher than in the 2009 Final Rule because the aggregate amount of baseline HCFC–142b consumption allowances in this rulemaking decreased by a significantly larger amount than aggregate baseline HCFC–142b production allowances. Baseline consumption allowances are 90.3 percent lower in this rule, while baseline production allowances are only 62.4 percent lower. This occurred because Solvay did not transfer its HCFC–142b production allowances to HCFC–22 production allowances. This higher amount of calendar-year production does not affect the U.S.'s ability to meet its obligations under the Montreal Protocol. The memo to the docket for this rulemaking (EPA–HQ–OAR–2010–1040) titled ''HCFC–22 and HCFC–142b Allocation Adjustments: 2009 Final Rule vs. 2011 Interim Final Rule,'' discusses the differences in exact allocation amounts in more detail.

4. How the Aggregate for HCFC–22 and HCFC–142b Translates Entity-by-Entity

EPA is allocating (1) approximately 45,400 MT of HCFC–22 consumption allowances, (2) 41,310 MT of HCFC–22 production allowances, (3) approximately 100 MT of HCFC–142b consumption allowances, and (4) 463 MT of HCFC–142b production allowances for 2011. However, EPA actually allocates allowances to individual companies (*i.e.*, legal entities).

Company-specific production and consumption baselines (also referred to as ''baseline allowances'') for HCFC–142b and HCFC–22 are listed at sections 82.17 and 82.19, respectively. The percentage of baseline each entity will receive in 2011 appears at section 82.16(a), as shown in Table 1 above.

Allowances allocated for individual control periods are called ''calendar-year allowances'' to distinguish them from the baseline production or consumption. For 2011, EPA is apportioning production and consumption baselines for HCFC–22 and HCFC–142b on the same basis as in the 2009 Final Rule, except that EPA is making adjustments to reflect (1) The 2008 inter-pollutant transfers of baseline allowances deemed permanent by the Court, (2) inter-company, single-pollutant transfers of baseline allowances that occurred in 2010, and (3) changes in company names that occurred after the 2009 Final Rule was signed. Applying the approach described above, EPA is apportioning production and consumption baselines for HCFC–22 and HCFC–142b to the following entities in the following amounts:

TABLE 2—BASELINE PRODUCTION ALLOWANCES OF HCFC–22 AND HCFC–142B IN 40 CFR 82.17

| Person | Controlled substance | Allowances (kg) |
| --- | --- | --- |
| Arkema | HCFC–22 | 46,692,336 |
| | HCFC–142b | 484,369 |
| DuPont | HCFC–22 | 42,638,049 |
| Honeywell | HCFC–22 | 37,378,252 |
| | HCFC–142b | 2,417,534 |
| MDA Manufacturing | HCFC–22 | 2,383,835 |
| Solvay Solexis | HCFC–142b | 6,541,764 |

TABLE 3—BASELINE CONSUMPTION ALLOWANCES OF HCFC–22 AND HCFC–142B IN 40 CFR 82.19

| Person | Controlled substance | Allowances (kg) |
| --- | --- | --- |
| ABCO Refrigeration Supply | HCFC–22 | 279,366 |
| Altair Partners | HCFC–22 | 302,011 |
| Arkema | HCFC–22 | 48,637,642 |
| | HCFC–142b | 483,827 |
| Carrier Corporation | HCFC–22 | 54,088 |
| Coolgas Investment Property | HCFC–22 | 1,040,458 |
| DuPont | HCFC–22 | 38,814,862 |
| | HCFC–142b | 52,797 |
| H.G. Refrigeration Supply | HCFC–22 | 40,068 |
| Honeywell | HCFC–22 | 35,392,492 |
| | HCFC–142b | 1,315,819 |
| Mexichem Fluor Inc | HCFC–22 | 2,546,305 |
| Kivlan & Company | HCFC–22 | 2,081,018 |
| MDA Manufacturing | HCFC–22 | 2,541,545 |
| Mondy Global | HCFC–22 | 281,824 |
| National Refrigerants | HCFC–22 | 5,528,316 |
| Refricenter of Miami | HCFC–22 | 381,293 |
| Refricentro | HCFC–22 | 45,979 |
| R-Lines | HCFC–22 | 63,172 |
| Saez Distributors | HCFC–22 | 37,936 |
| Solvay Fluorides | HCFC–22 | 3,781,691 |
| Solvay Solexis | HCFC–142b | 194,536 |
| USA Refrigerants | HCFC–22 | 14,865 |

*D. HCFC–141b, HCFC–123, HCFC–124, HCFC–225ca, and HCFC–225cb Allowances*

Other than adjustments for inter-company, single-pollutant transfers of baseline allowances, baselines and percentages of baseline allocated as calendar-year allowances for HCFC–141b, HCFC–123, HCFC–124, HCFC–225ca, and HCFC–225cb are unchanged from the 2009 Final Rule. In the case of HCFC–141b, EPA is continuing to allocate 0 percent of baseline for U.S. consumption and production, consistent with 40 CFR 82.16(b).

*E. Other HCFCs*

As a result of EPA's allocation process, which is largely based on projected demand for HCFC–22 and HCFC–142b, minus an amount of HCFC–22 that is assumed to be reused, recycled, or reclaimed, the total allocation is lower than the aggregate HCFC cap under the Montreal Protocol. EPA recognizes that there could be some additional need for HCFCs not specifically included in this rule. While some niche applications in the U.S. use other HCFCs, such as HCFC–21, EPA is not aware of additional need for production or import of these substances at this time, as adequate amounts appear to be in inventory. However, EPA is not foreclosing the possibility of additional production or import for these niche uses. Also, some amount of HCFC–141b will likely continue to be produced or imported via the petition process during 2011. EPA believes there is sufficient room under the cap for such continued production and import. The current regulations at 40 CFR 82.15 ban the production and import of class II substances for which EPA has apportioned baseline production and consumption allowances in excess of allowances held by the producer or importer, but do not ban the production and import of class II substances for which EPA has not apportioned baseline production and consumption allowances. This rule does not alter the current regulations in that respect. The producer or importer of an HCFC that is not subject to the allowance system would be required to report to EPA consistent with the existing recordkeeping and reporting requirements. If necessary, EPA could amend the regulations to set and apportion baselines and issue allowances for these HCFCs. Therefore, retaining room under the cap provides the benefit of accounting for unanticipated growth in HCFCs that do not have allocations or other unforeseen events. However, EPA is not reserving room under the cap for the above-described reasons. EPA is allocating allowances based on modeled demand for virgin and recovered material in preparation for the next major stepdown period under the Montreal Protocol in 2015.

## VI. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' since it raises ''novel legal or policy issues.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA did not conduct a specific analysis of the benefits and costs associated with this action. Many previous analyses provide a wealth of information on the costs and benefits of the U.S. HCFC phaseout including:

- The 1993 *Addendum to the 1992 Phaseout Regulatory Impact Analysis: Accelerating the Phaseout of CFCs, Halons, Methyl Chloroform, Carbon Tetrachloride, and HCFCs.*
- The 1999 Report *Costs and Benefits of the HCFC Allowance Allocation System.*
- The 2000 Memorandum *Cost/Benefit Comparison of the HCFC Allowance Allocation System.*
- The 2005 Memorandum *Recommended Scenarios for HCFC Phaseout Costs Estimation.*
- The 2006 ICR *Reporting and Recordkeeping Requirements of the HCFC Allowance System.*
- The 2007 Memorandum *Preliminary Estimates of the Incremental Cost of the HCFC Phaseout in Article 5 Countries.*
- The 2007 Memorandum *Revised Ozone and Climate Benefits Associated with the 2010 HCFC Production and Consumption Stepwise Reductions and a Ban on HCFC Pre-charged Imports.*

A memorandum summarizing these analyses is available in the docket.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. EPA already requires recordkeeping and reporting for HCFCs, and this action does not amend those provisions. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 82, subpart A under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0498. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act (RFA)*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. Because this rule is not subject to notice-and-comment rulemaking requirements, the RFA does not apply and the Agency is not required to conduct a regulatory flexibility analysis.

Nevertheless, in the spirit of the RFA, we have considered the economic impacts of this interim final rule on small entities. For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This action will affect the following categories:

| Category | NAICS code | SIC code | Examples of regulated entities |
|---|---|---|---|
| Industrial Gas Manufacturing | 325120 | 2869 | Fluorinated hydrocarbon gases manufacturers and reclaimers. |

| Category | NAICS code | SIC code | Examples of regulated entities |
|---|---|---|---|
| Other Chemical and Allied Products Merchant Wholesalers. | 422690 | 5169 | Chemical gases and compressed gases merchant wholesalers. |
| Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing. | 333415 | 3585 | Air-conditioning equipment and commercial and industrial refrigeration equipment manufacturers. |
| Air-Conditioning Equipment and Supplies Merchant Wholesalers. | 423730 | 5075 | Air-conditioning (condensing unit, compressors) merchant wholesalers. |
| Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers. | 423620 | 5064 | Air-conditioning (room units) merchant wholesalers. |
| Plumbing, Heating, and Air-Conditioning Contractors | 238220 | 1711, 7623 | Central air-conditioning system and commercial refrigeration installation; HVAC contractors. |

After considering the economic impacts of this interim final rule on small entities, I certify this action will not have a significant economic impact on a substantial number of small entities as it relieves a regulatory ban on production and consumption that would otherwise apply in the wake of the Court's vacatur. EPA is continuing to allocate production and consumption allowances using the same approach described in the 2009 Final Rule with adjustments to reflect (1) 2008 inter-pollutant transfers of baseline allowances deemed permanent by the Court, (2) inter-company, single-pollutant transfers of baseline allowances that occurred in 2010, and (3) changes in company names that occurred after the 2009 Final Rule was signed. EPA is not modifying the recordkeeping or reporting provisions and thus is not increasing the burden to small businesses.

*D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. First, UMRA does not apply to rules that are necessary for the implementation of international treaty obligations. This rule implements the 2010 milestone for the phaseout of HCFCs under the Montreal Protocol. Second, this action relieves the regulatory ban on production and consumption that would otherwise apply. This action will not have any significant direct impacts or State, local and tribal governments or private sector entities. Therefore, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action apportions production and consumption allowances and establishes baselines for private entities, not small governments.

*E. Executive Order 13132: Federalism*

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

This action does not have federalism implications. It 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. This action is expected to primarily affect producers, importers, and exporters of HCFCs. Thus, the requirements of section 6 of the Executive Order do not apply.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not significantly or uniquely affect the communities of Indian tribal governments. It does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866. The Agency nonetheless has reason to believe that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. Depletion of stratospheric ozone results in greater transmission of the sun's ultraviolet (UV) radiation to the earth's surface. The following studies describe the effects of excessive exposure to UV radiation on children: (1) Westerdahl J, Olsson H, Ingvar C. ''At what age do sunburn episodes play a crucial role for the development of malignant melanoma,'' Eur J Cancer 1994: 30A: 1647–54; (2) Elwood JM Japson J. ''Melanoma and sun exposure: an overview of published studies,'' Int J Cancer 1997; 73:198–203; (3) Armstrong BK, ''Melanoma: childhood or lifelong sun exposure,'' In: Grobb JJ, Stern RS Mackie RM, Weinstock WA, eds. ''Epidemiology, causes and prevention of skin diseases,'' 1st ed. London, England: Blackwell Science, 1997: 63–6; (4) Whiteman D., Green A. ''Melanoma and Sunburn,'' Cancer Causes Control, 1994: 5:564–72; (5) Heenan, PJ. ''Does intermittent sun exposure cause basal cell carcinoma? A case control study in Western Australia,'' Int J Cancer 1995; 60: 489–94; (6) Gallagher, RP, Hill, GB, Bajdik, CD, *et. al.* ''Sunlight exposure, pigmentary factors, and risk of nonmelanocytic skin cancer I, Basal cell carcinoma,'' Arch Dermatol 1995; 131: 157–63; (7) Armstrong, DK. ''How sun exposure causes skin cancer: an epidemiological perspective,'' Prevention of Skin Cancer. 2004. 89–116.

This action implements the U.S. commitment to reduce the total basket of HCFCs produced and imported to a level that is 75 percent below the respective baselines. While on an ODP-weighted basis, this is not as large a step as previous actions, such as the 1996 Class I phaseout, it is one of the most significant remaining actions the U.S. can take to complete the overall phaseout of ODS and further decrease impacts on children's health from stratospheric ozone depletion.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The rule issues allowances for the production and consumption of HCFCs.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (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 U.S.

EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because the 2010 phaseout step increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This action continues the implementation of the U.S. commitment to reduce the total basket of HCFCs produced and imported to a level that is 75 percent below the respective baselines. While on an ODP-weighted basis, this is not as large a step as previous actions, such as the 1996 Class I phaseout, it is one of the most significant remaining actions the U.S. can take to complete the overall phaseout of ODS and further lessen the adverse human health effects for the entire population.

*K. The Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the U.S.. 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 U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective August 5, 2011.

**List of Subjects in 40 CFR Part 82**

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Exports, Hydrochlorofluorocarbons, Imports.

Dated: July 29, 2011.

**Lisa P. Jackson,**

*Administrator.*

40 CFR part 82 is amended to read as follows:

## PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7601, 7671–7671q.

■ 2. Revise § 82.16(a) to read as follows:

**§ 82.16 Phaseout schedule of class II controlled substances.**

(a) In each control period as indicated in the following table, each person is granted the specified percentage of baseline production allowances and baseline consumption allowances for the specified class II controlled substances apportioned under §§ 82.17 and 82.19:

| Control period | Percent of HCFC–141b | Percent of HCFC–22 | Percent of HCFC–142b | Percent of HCFC–123 | Percent of HCFC–124 | Percent of HCFC–225ca | Percent of HCFC–225cb |
|---|---|---|---|---|---|---|---|
| 2003 | 0 | 100 | 100 | | | | |
| 2004 | 0 | 100 | 100 | | | | |
| 2005 | 0 | 100 | 100 | | | | |
| 2006 | 0 | 100 | 100 | | | | |
| 2007 | 0 | 100 | 100 | | | | |
| 2008 | 0 | 100 | 100 | | | | |
| 2009 | 0 | 100 | 100 | | | | |
| 2010 | 0 | 41.9 | 0.47 | 125 | 125 | 125 | 125 |
| 2011 | 0 | 32.0 | 4.9 | 125 | 125 | 125 | 125 |
| 2012 | 0 | | | 125 | 125 | 125 | 125 |
| 2013 | 0 | | | 125 | 125 | 125 | 125 |
| 2014 | 0 | | | 125 | 125 | 125 | 125 |

* * * * *

3. Revise § 82.17 to read as follows:

**§ 82.17 Apportionment of baseline production allowances for class II controlled substances.**

The following persons are apportioned baseline production allowances for HCFC–22, HCFC–141b, HCFC–142b, HCFC–123, HCFC–124, HCFC–225ca, and HCFC–225cb, as set forth in the following table:

| Person | Controlled substance | Allowances (kg) |
|---|---|---|
| AGC Chemicals Americas | HCFC–225ca | 266,608 |
| | HCFC–225cb | 373,952 |
| Arkema | HCFC–22 | 46,692,336 |
| | HCFC–141b | 24,647,925 |
| | HCFC–142b | 484,369 |
| DuPont | HCFC–22 | 42,638,049 |
| | HCFC–124 | 2,269,210 |
| Honeywell | HCFC–22 | 37,378,252 |
| | HCFC–141b | 28,705,200 |
| | HCFC–142b | 2,417,534 |
| | HCFC–124 | 1,759,681 |
| MDA Manufacturing | HCFC–22 | 2,383,835 |
| Solvay Solexis | HCFC–142b | 6,541,764 |

3. Section 82.19 is revised to read as follows:

**§ 82.19 Apportionment of baseline consumption allowances for class II controlled substances.**

The following persons are apportioned baseline consumption allowances for HCFC–22, HCFC–141b, HCFC–142b, HCFC–123, HCFC–124, HCFC–225ca, and HCFC–225cb, as set forth in the following table:

| Person | Controlled substance | Allowances (kg) |
|---|---|---|
| ABCO Refrigeration Supply | HCFC–22 | 279,366 |
| AGC Chemicals Americas | HCFC–225ca | 285,328 |
| | HCFC–225cb | 286,832 |
| Altair Partners | HCFC–22 | 302,011 |
| Arkema | HCFC–22 | 48,637,642 |
| | HCFC–141b | 25,405,570 |
| | HCFC–142b | 483,827 |
| | HCFC–124 | 3,719 |
| Carrier | HCFC–22 | 54,088 |
| Continental Industrial Group | HCFC–141b | 20,315 |
| Coolgas, Inc | HCFC–141b | 16,097,869 |
| Coolgas Investment Property | HCFC–22 | 1,040,458 |
| | HCFC–123 | 19,980 |
| | HCFC–124 | 3,742 |
| Discount Refrigerants | HCFC–141b | 994 |
| DuPont | HCFC–22 | 38,814,862 |
| | HCFC–141b | 9,049 |
| | HCFC–142b | 52,797 |
| | HCFC–123 | 1,877,042 |
| | HCFC–124 | 743,312 |
| H.G. Refrigeration Supply | HCFC–22 | 40,068 |
| Honeywell | HCFC–22 | 35,392,492 |
| | HCFC–141b | 20,749,489 |
| | HCFC–142b | 1,315,819 |
| | HCFC–124 | 1,284,265 |
| ICC Chemical Corp | HCFC–141b | 81,225 |
| ICOR | HCFC–124 | 81,220 |
| Mexichem Fluor Inc | HCFC–22 | 2,546,305 |
| Kivlan & Company | HCFC–22 | 2,081,018 |
| MDA Manufacturing | HCFC–22 | 2,541,545 |
| Mondy Global | HCFC–22 | 281,824 |
| National Refrigerants | HCFC–22 | 5,528,316 |
| | HCFC–123 | 72,600 |
| | HCFC–124 | 50,380 |
| Perfect Technology Center, LP | HCFC–123 | 9,100 |
| Refricenter of Miami | HCFC–22 | 381,293 |
| Refricentro | HCFC–22 | 45,979 |
| R-Lines | HCFC–22 | 63,172 |
| Saez Distributors | HCFC–22 | 37,936 |
| Solvay Fluorides | HCFC–22 | 3,781,691 |
| | HCFC–141b | 3,940,115 |
| Solvay Solexis | HCFC–142b | 194,536 |
| Tulstar Products | HCFC–141b | 89,913 |
| | HCFC–123 | 34,800 |
| | HCFC–124 | 229,582 |
| USA Refrigerants | HCFC–22 | 14,865 |

[FR Doc. 2011–19896 Filed 8–4–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 64

## CG Docket No. 10–51; FCC 11–118]

## Structure and Practices of the Video Relay Service Program

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission adopts modifications to its certification process for all Internet-based telecommunications relay service (iTRS) providers to ensure that all entities seeking certification in the future—or currently certified entities seeking re-certification—are fully qualified to provide iTRS in compliance with its rules and requirements, to reduce waste, fraud and abuse, and to improve the Commission's oversight of these providers once they have been certified.

**DATES:** Effective September 6, 2011, except 47 CFR 64.606(a) (2), (g), (h) (2) and (3) which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date. Written comments on the Paperwork Reduction Act (PRA) modified information collection requirements must be submitted by the public, OMB and other interested parties on or before September 6, 2011.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Comments on the information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, via e-mail at *PRA@fcc.gov* and *Cathy.Williams@fcc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Gregory Hlibok, Consumer and Governmental Affairs Bureau at (202) 559–5158 (VP), or *e-mail: Gregory.Hlibok@fcc.gov*. For additional information concerning the information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918, or *e-mail: Cathy.Williams@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Structure and Practices of the Video Relay Service Program,* Second Report and Order (*Second Report and Order*), document FCC 11–118 adopted July 28, 2011, and released July 28, 2011, in CG Docket No. 10–51, adopting modifications to its certification process for all iTRS providers. The full text of FCC 11–118 and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. FCC 11–118 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), at Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC 20554. Customers may contact BCPI at its Web site, *http://www.bcpiweb.com,* or by calling 202–488–5300. FCC 11–118 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro/trs.html#orders.*

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Final Paperwork Reduction Act of 1995 Analysis

Document FCC 11–118 contains modified information collection requirements subject to the PRA. It will be submitted to OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, the Commission previously sought specific comment on how it might further reduce the information collection burden on small business concerns with fewer than 25 employees.

In document FCC 11–118, the Commission has assessed the effects of imposing various requirements on iTRS providers to obtain certification from the Commission in order to be eligible for compensation from the Interstate TRS Fund (Fund). The Commission has determined that any additional data filing requirements imposed by document FCC 11–118 on iTRS providers are reasonable and necessary in order to ensure compliance with the Commission's rules. The Commission has taken steps to address the concerns of commenters stating that some of the Commission's proposed rules were overly burdensome. For example, the Commission initially proposed to require that a provider file a deed or lease for every service center operated. The Commission has modified this requirement in its final rule to allow for providers with more than five centers to submit a representative sampling of deeds and leases. In addition, the Commission has declined to adopt its proposed requirement for providers to submit documentation of all financing arrangements pertaining to the provision of iTRS. The Commission has also declined to adopt the requirement that providers submit copies of all subcontracting agreements for services not directly essential for the provision of iTRS. The Commission concludes that it has taken steps to further reduce the burdens on affected entities to apply for certification to receive compensation from the Fund for the provision of iTRS, and that the remaining filing requirements are not overly burdensome.

### Congressional Review Act

The Commission will send a copy of document FCC 11–118 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A).

### Synopsis

1. In document FCC 11–118, the Commission modifies its process for certifying iTRS providers as eligible for payment from the Fund for their provision of iTRS, as proposed in the Commission's *Structure and Practices of the Video Relay Service Program,* Report and Order and Further Notice of Proposed Rulemaking (*VRS Practices Report and Order and Certification FNPRM*), document FCC 11–54, published at 76 FR 24393, May 2, 2011 and 76 FR 24437, May 2, 2011. In the *Certification FNPRM,* the Commission sought comment on ways to modify the current certification process to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers.

### Eligibility for Compensation From the TRS Fund

2. Under the Commission's current rules, an iTRS provider is eligible to provide relay services and receive compensation from the Fund if it is: (1)

Operated under contract with and/or by a certified state TRS program; (2) owned or operated under contract with an interstate common carrier; (3) an interstate common carrier offering TRS under the Commission's rules; or (4) certified by the Commission pursuant to § 64.606 of the Commission's rules.

3. The Commission now adopts a requirement for all iTRS providers to receive certification from the Commission to be eligible to receive compensation from the Fund. As the Commission stated in the *Certification FNPRM,* the current alternative eligibility methods have failed to ensure that all providers are qualified to provide service that complies with the Commission's rules, or to facilitate Commission oversight of all entities eligible under these criteria. Because the Commission bears the responsibility for managing the Fund and ensuring the integrity of its iTRS programs, it should have the exclusive authority to ensure that iTRS is provided by qualified providers and to exercise effective oversight over the operations of these providers. The Commission finds that requiring all iTRS providers to become Commission-certified is a reasonable and appropriate way to achieve these objectives and further the Commission's goals of promoting effective, efficient, and sustainable iTRS services, and reducing fraud and abuse in the VRS program. The Commission further finds that applying this requirement to all iTRS will help to ensure that the difficulties the Commission has encountered in the VRS program will less likely be repeated for other iTRS programs.

4. Accordingly, an iTRS provider will no longer be permitted to receive compensation from the Fund unless it is certified by the Commission. The requirement for Commission certification will apply to new applicants, and to existing providers who have been eligible to provide iTRS under one of the previous alternative methods for eligibility. It likewise will apply to all forms of iTRS, and to all iTRS providers seeking recertification after their certifications expire, including those providers currently eligible under an existing Commission certification.

**Requirements to Operate Call Center and Employ Communications Assistants (CAs)**

5. The Commission will require that entities wishing to be eligible for compensation from the Fund for the provision of VRS be certified by the Commission, operate the core facilities necessary to provide VRS service and employ their own communications assistants (CAs). The requirements adopted in the *VRS Practices Report and Order,* including those requiring VRS providers to lease, license or acquire and operate their own facilities and employ their own CAs, emanated from the Commission's goals of establishing better oversight of the VRS program, in order to ensure compliance with the Commission's rules and reduce fraud. Requiring VRS providers to operate their own call centers and to employ their own CAs will ensure that certified providers exercise necessary oversight of their own operations and compliance with Commission rules, and enable the Commission to better oversee the core operations of these providers.

6. *ACD Platforms.* By the term ''ACD platform,'' the Commission means the hardware and/or software that comprise the essential call center function of call distribution, and that are a necessary core component of iTRS. The Commission will require that any VRS provider that is leasing an automatic call distribution (ACD) platform from an eligible provider or from a third-party non-provider must have a written lease for such ACD platform and must include a copy of such written lease with its application for certification. The terms of the lease may not include (i) Compensation of the lessor by the lessee related to minutes of use or (ii) revenue sharing agreements between the lessor and the lessee. All references to leasing, leases, lessors, and lessees in this discussion of ACD platforms shall be construed to refer correspondingly to licensing, licenses, licensors, and licensees.

7. In addition, a VRS provider leasing an ACD platform from an eligible provider must locate the ACD platform on its own premises and must use its own employees to manage the ACD platform. In other words, an eligible VRS provider may lease the ACD platform from an eligible provider on a stand-alone basis, but may not lease capacity on another provider's ACD. The Commission will deny any application for certification that does not comply with the ACD platform requirements. In addition, if the Commission later discovers that a certified VRS provider is leasing from an eligible provider an ACD platform subject to an arrangement (whether in writing or verbal) that does not comply with the ACD platform requirements, the Fund Administrator shall immediately suspend all payments to both the lessor and the lessee.

8. The Commission finds that ACD leases with eligible providers calling for revenue sharing, compensation related to minutes of use, sharing of the ACD platform, or sharing the management of the ACD platform may give providers an increased incentive and ability to generate illegitimate minutes to bill to the Fund, and thus could result in continuation of the types of unlawful activities that the Commission has already seen on the part of many white label providers, undermining the Commission's efforts to reduce waste, fraud and abuse. In order to prevent fraud and ensure that only providers certified by the Commission provide the core components of VRS and exercise oversight of, and are accountable for, their own operations, the Commission prohibits these practices.

9. For VRS providers that lease their ACD platforms from manufacturers or equipment distributors not affiliated with VRS providers, the Commission requires a written lease for such ACD platform that conforms to the same restrictions on lease terms discussed above (*i.e.,* no compensation related to minutes of use and no revenue sharing between lessor and lessee), and that the applicant include a copy with its application for certification. The ban on revenue sharing and compensation based upon minutes of use should remove any incentive on the part of the non-provider lessor to facilitate any scheme by a provider to generate illegitimate minutes.

10. *IP Relay and IP CTS Providers.* In the *VRS Practices Report and Order,* the Commission adopted requirements that VRS providers own and operate their own facilities and employ their own CAs as part of a package of rules designed to reduce fraud, establish better oversight of the VRS program, and address the unauthorized revenue sharing arrangements that have escalated in the VRS program. Though IP Relay and IP CTS providers frequently use subcontractors to operate call centers, to date there has been no public record of significant waste, fraud and abuse in those programs from the use of subcontractors as there is in the VRS program, where there have been dozens of indictments related to fraud. The Commission therefore finds that to apply these requirements to IP Relay and IP CTS providers at this time could force such providers to expend significant sums to restructure their businesses to own and operate their own facilities, and thereby result in disproportionate industry disruption as compared to regulatory benefit. Nevertheless, the Commission will monitor the provision of IP Relay and IP CTS services and revisit this issue should the need arise.

**Evidentiary Documentation for Submission for Certification Application**

11. The Commission has modified some of the documentation requirements originally proposed in the *Certification FNPRM* to minimize the burden on applicants to the extent consistent with the Commission's responsibility to ensure that only qualified providers are certified and that the Commission is able to exercise adequate oversight of providers. All of the requirements adopted in document FCC 11–118 are adopted pursuant to one or more of the Commission's objectives to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers.

12. *Deeds or Leases for Call Centers.* The Commission modifies its proposal that a certification applicant file a copy of ''each'' deed or lease for ''each'' of its call centers. Instead, the Commisison will require VRS providers that maintain five or fewer domestic call centers to submit the deeds or leases for all of those call centers, while requiring providers with more than five domestic call centers to submit a representative sampling of the deeds or leases for five of their centers, together with a list of all other call centers that they operate. The Commission notes that the *VRS Practices Report and Order* already requires that providers, twice per year, submit a list to the Commission and the TRS Fund administrator of the locations of all of their call centers that handle VRS calls. Specifically, the list must contain the street address of each call center, the number of individual CAs and CA managers employed at each call center, and the name and contact information (phone number and e-mail address) for the managers at each call center. The Commission directs that the list we require here contain the same information. In addition, all providers must submit copies of deeds or leases for all international call centers that they operate, regardless of the number of such centers; these supplement the five (or fewer, if applicable) domestic deeds or leases. Because the Commission does not require at this juncture that IP Relay or IP CTS providers actually own or operate call centers, the Commission does not apply this documentation requirement to them.

13. *Entities with Financial Interest in Applicant.* The Commission requires that all iTRS applicants for certification or renewal submit a list of individuals or entities that hold at least a 10 percent equity interest in the provider, have the power to vote 10 percent or more of the securities of the provider, or exercise *de jure* or *de facto* control over the provider. In addition, the Commission requires applicants to submit a description of its organizational structure, and the names of its executives, officers, general partners (if the applicant is structured as a partnership), and members of its board of directors. The Commission declines to adopt its proposal in the *Certification FNPRM* that certification applicants submit a list of all financing arrangements pertaining to the provision of iTRS, including documentation on loans for equipment, inventory, property, promissory notes, and liens.

14. *List of Employees and Copies of Employment Agreements.* The Commission adopts substantially modified versions of its proposals in the *Certification FNPRM* that certification applicants provide a list of names of all their employees, and that applicants furnish copies of employment agreements for all of their executives and CAs. With respect to employee lists, the Commission requires only that providers submit a list of numbers of full-time and part-time employees involved in TRS operations, that includes, divided by the following positions: the executives and officers; video phone installers; CAs; and persons involved in marketing and sponsorship activities. In response to several comments objecting to the scope of the Commission's original proposal, Commission is not requiring the submission of information on employees, such as janitorial staff, who do not have any direct involvement with relay services. Nevertheless, the Commission will require applicants to retain the more comprehensive documentation that the Commission originally asked for regarding employees, including names and copies of employment agreements—to the extent they are involved in TRS operations—and to furnish it to the Commission upon the Commission's request. Likewise, instead of submitting agreements for all of its executives and CAs, iTRS certification applicants must retain employment agreements for its executives responsible for the provision of iTRS, including senior operations and marketing personnel, and copies of CA employment contracts. Consistent with record retention requirements that the Commission adopted in the *VRS Practices Report and Order,* the Commission likewise adopts a five-year duration period for the employment agreements and other employee records that it requires providers to retain in this *Second Report and Order.*

15. *Proofs of Purchase or Lease for Use of All Equipment and/or Technologies.* The Commission adopts a slightly modified version of the Commission's proposal to require applicants for certification to submit proofs of purchase or license agreements for all equipment and/or technologies, including hardware and software, used for the applicant's VRS call center functions. The Commission will require applicants, in their submissions, to describe the technology and equipment used to support their call center functions—including, but not limited to, ACD, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration—and for each core call center function, state whether it is owned or leased (and from whom if leased or licensed), and provide proofs of purchase, license agreements, or leases. This requirement's scope is limited to equipment and/or technologies to be used by the applicant for its call center functions, *i.e.,* to provide the core components (other than CAs) of VRS. Because the Commission does not require at this juncture that IP Relay or IP CTS providers actually own or operate their own facilities, the Commission does not apply this documentation requirement to them.

16. *List of Sponsorship Arrangements.* The Commission adopts a slightly modified version of its proposal to require that applicants submit a list of all sponsorship or marketing arrangements and associated agreements. Now the Commission requires only those related to iTRS.

17. *Copies of Subcontracting Agreements for Non-Essential Services.* The Commission now believes that the scope of such documentation would be overly broad and only marginally useful, and declines to adopt this requirement.

18. *Copies of All Other Agreements Related to Provision of iTRS.* In the *Certification FNPRM,* the Commission proposed to require applicants for certification to submit copies of ''all other agreements'' associated with the provision of iTRS. Although the Commission declines to adopt a requirement that applicants submit copies of all other such agreements that are not included in any of the above categories, the Commission may seek additional relevant information from individual applicants that the Commission deems to be directly relevant to the applicant's ability to

comply with the Commission's rules, on an as-needed basis.

19. *Common Carrier Status.* The Commission will eliminate the requirement that iTRS providers demonstrate their status as common carriers in order to receive certification. The Commission notes, however, that all providers, regardless of whether they are common carriers, are required to provide service in a manner that is both compliant with the Communications Act of 1934, as amended (Communications Act) and the Commission's rules and orders, and consistent with the Commission's policies and goals to prevent fraud and abusive practices. To that end, the Commission will seek comment in a forthcoming Notice of Proposed Rulemaking on whether it is necessary to adopt a rule to make non-common carrier iTRS providers subject to the same prohibitions against unjust or unreasonable practices that common carriers are subject to under the Communications Act. *See* 47 U.S.C. 201(b), 202(a).

**On-Site Visits**

20. The Commission finds that on-site visits may uncover deficiencies in an application or noncompliance in a provider's operations, which will decrease opportunities for and may, in turn, prevent, waste, fraud and abuse. Accordingly, the Commission reserves the right to include, as part of the iTRS certification process, an on-site visit to the applicant's headquarters, offices or call centers. The Commission also reserves the right to make subsequent, unannounced on-site visits of iTRS providers once they receive certification, for the purpose of ensuring continued compliance with certification requirements.

21. In order to avoid an interruption of service by those VRS providers who are already providing service via subcontracting, but who seek to become eligible providers through Commission certification, the Commission reserves the right to conditionally grant certification, subject to a subsequent optional on-site visit of any applicant where the Commission, upon initial review of the application, determines that the application facially meets the certification requirements, but that the Commission needs to verify some of the information contained in the application. Such grant of conditional certification will be without prejudice to the Commission's final determination of the applicant's qualifications, and will be dependent on the Commission verifying the information provided in the application for certification. Ultimate conversion to a full certification will occur when the Commission finds, based on review of the application, that the conditional grantee is in compliance with the Commission's rules and is qualified to receive compensation from the Fund for the provision of iTRS services. In other words, the Commission will complete its review of the applicant's qualifications subsequent to the on-site visit, and if the Commission finds the applicant to be qualified based on the complete review, then the Commission will issue full certification. If the Commission finds the applicant not to be qualified based on the complete review, the application will be denied and the conditional certification will automatically terminate 35 days after the denial. In such a case, the provider must give at least 30 days notice to its customers that the provider will no longer provide service.

**Annual Reports and Certification Renewals**

22. Due to the evolving nature of the technologies and market for iTRS services, it is essential for the Commission to be informed on an annual basis of any updates to the information provided in the certification application. Therefore, the Commission will now require certified iTRS providers to append to their annual reports any documentary evidence required for certification that has changed since the date that certification was granted, and that has not been included in annual reports filed since the date of certification, and to provide a summary of such changes. If all documents that a provider supplied to the Commission at the time of its certification application and with subsequent annual reports remain accurate and current, a provider is instead required to append to its annual report an attestation that it has no updates to its certification documentation and subsequent annual reports. The Commission also declines to eliminate the current rule requiring iTRS providers to apply for recertification every five years.

**Notification of Substantive Change**

23. In order to ensure that the Commission has complete and up-to-date information about the types of technologies and equipment used by VRS and IP Relay providers, the Commission amends its rules to require that each provider notify the Commission within 60 days of its launch of any new equipment or technology, including hardware and software, that it offers to consumers to the extent that such equipment or technology changes the way in which consumers access the provider's VRS or IP Relay services or has a bearing on the provider's compliance with the Commission's mandatory minimum standards.

24. The Commission determines that providing services from a new facility not previously identified to the Commission or the Fund administrator and discontinuation of service from any facility are types of substantive changes warranting notification to the Commission. In order to ensure that all VRS and IP Relay providers comply with the Commission's rules, the Commission must have in its records the existence and location of all VRS and IP Relay facilities established by the providers. Without such information, it will be more difficult to monitor compliance with the Commission's rules and to reduce waste, fraud and abuse.

25. The Commission takes this opportunity to reiterate that if a Commission-certified provider purchases, acquires, or merges with another iTRS provider, such transaction constitutes a substantive change under § 64.606(f)(2) of the Commission's rules, and therefore requires notice to the Commission within 60 days of its consummation. The Commission further notes that a Commission certification is not transferable to an entity not already certified by the Commission as eligible for compensation from the Fund.

26. The Commission finds that this 60-day notification requirement should be limited to those changes that likely impact a provider's ability to provide service in compliance with the Commission's rules. At this time, the Commission does not find it necessary to apply this 60-day notification requirement to changes in a provider's management, name branding of its product, or marketing and outreach activities to ensure compliance with the Commission's rules, but will revisit the issue if the need arises. Moreover, the rule changes the Commission adopts, including the substance of the annual reporting requirements, will enable the Commission to better monitor compliance with its rules and help reduce waste, fraud and abuse.

**Temporary Cessation of Service**

27. The Commission will adopt its proposal to require Commission approval in advance of planned service outages by VRS providers and to require notification to consumers in advance of such outages. Because Commission requirements that service be provided 24 hours a day, seven days a week,

currently apply to VRS but not to IP Relay and IP CTS, the Commission adopts these requirements for VRS and not for the other iTRS services. As proposed in the *Certification FNPRM,* applications for temporary cessation of service must be filed at least 60 days in advance of such planned outage, and the Commission will act on any such application at least 35 days in advance of the planned service interruption date to afford providers a sufficient opportunity to notify consumers.

28. The Commission adopts a *de minimis* exception to its initial proposal to require prior Commission consent for all planned service outages. Planned outages of less than 30 minutes will not require prior consent of the Commission or prior notification to consumers, but the Commission must be notified of such outages within two business days after the outage. The Commission clarifies that it will not construe load-shifting among call centers as an interruption in service if service is not affected by such load shifting.

29. The Commission will require that unforeseen service interruptions of any iTRS service beyond the control of the provider be reported to the Consumer and Governmental Affairs Bureau (CGB) within two business days of the start of such service interruption. The Commission also requires that notification of service outages be provided to consumers on an accessible Web site, and that the Web site also include timely updates of service status.

**Timeframe for Existing Providers To Apply for New Certification**

30. In order to ensure the seamless delivery of iTRS during the transition period following Commission establishment of the new eligibility requirements and certification procedures, any provider currently eligible to receive compensation from the TRS Fund via a means other than Commission certification is required to apply for certification within 30 days after publication in the **Federal Register** of notice of OMB approval of the rules in document FCC 11–118 containing information collections, if it wishes to continue receiving compensation from the Fund without interruption pending review of its certification application. The Commission hereby grants interim eligibility to any iTRS provider currently eligible to receive compensation directly from the TRS Fund to continue to be eligible to receive compensation from the Fund. Such interim eligibility shall expire (1) 35 days after this application deadline, in the event no application is timely filed; (2) 35 days after Commission dismissal or denial of the application for certification in the event of Commission dismissal or denial; or (3) upon Commission grant of the application for certification in the event of Commission grant. Where interim eligibility expires under (1) or (2), the Commission requires the provider to give its customers at least 30 days notice that the provider will no longer provide service.

31. For those providers with Commission certifications that would have expired before the new certification requirements adopted in document FCC 11–118 go into effect had they not been extended to November 4, 2011, the Commission requires that they submit applications for recertification under the new requirements adopted in document FCC 11–118 after the requirements become effective but at least 30 days prior to the expiration of their currently extended certifications—that is, no later than October 5, 2011, provided that the rules are effective by that date.

32. The current stay of the Commission's rule which prohibits revenue sharing arrangements expires on October 1, 2011. For those iTRS providers who are not currently eligible to receive compensation directly from the TRS Fund but are currently providing service under a revenue sharing arrangement, and are interested in seeking a seamless transition to certified iTRS provider, the Commission urges that they file their certification applications on, or as soon as possible after, the day the rules adopted in this *Second Report and Order* become effective, so that review of their applications can commence as soon as possible.

**Final Regulatory Flexibility Certification**

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' *See* 5 U.S.C. 601(6). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Small Business Act, 15 U.S.C. 632.

In document FCC 11–118, the Commission amends its process for certifying iTRS providers as eligible for payment from the Fund for their provision of iTRS, as proposed in the Commission's *Certification FNPRM.* In the *Certification FNPRM,* the Commission sought comment on ways to revise the current certification process to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers. Specifically, in document FCC 11–118, the Commission requires all iTRS providers to obtain certification from the Commission in order to be eligible to receive compensation from the Fund; requires all VRS applicants for Commission certification to lease, license or own, as well as operate, essential facilities associated with TRS call centers and to employ interpreters to staff those centers at the date of the application; and requires each iTRS applicant for certification to submit specific types of documentary evidence of its ability to comply with all of the Commission's rules, including those adopted in the *VRS Practices Report and Order.* In addition, the Commission adopts rules governing on-site visits by Commission staff to the premises of applicants for certification, as well as to iTRS providers' premises after they are certified. The Commission also revises its rules governing annual compliance reports filed by certified providers, and substantive TRS program changes that must be reported to the Commission. Finally, the Commission requires prior approval for planned cessations of VRS service of 30 minutes or longer.

The Commission has assessed the effects of imposing various requirements on iTRS providers to obtain certification from the Commission in order to be eligible for compensation from the TRS Fund. The Commission has determined that any additional data filing requirements imposed by document FCC 11–118 on iTRS providers are reasonable and necessary in order to ensure compliance with the Commission's rules, particularly in light of the widespread fraud currently being investigated in the VRS industry. VRS is a form of iTRS. The Commission has taken steps to address the concerns of commenters stating that some of the Commission's proposed rules were overly burdensome. For example, the Commission initially proposed to require that a provider file a deed or lease for every service center operated. The Commission has modified this requirement in its final rule to allow for providers with more than five centers to submit a representative sampling of deeds and leases. In addition, the Commission has declined to adopt its proposed requirement for providers to submit documentation of all financing arrangements pertaining to the provision of iTRS. The Commission has also declined to adopt the proposed requirement that providers submit copies of all subcontracting agreements for services not directly essential for the provision of iTRS. The Commission concludes that it has taken steps to further reduce the burdens on affected entities to apply for certification to receive compensation from the TRS Fund for the provision of iTRS services, and that the remaining filing requirements are not overly economically burdensome.

In order to be compensated, TRS providers are already required to comply with all of the Commission's rules governing the provision of TRS. All reasonable costs of providing service in compliance with document FCC 11–118 are compensable from the Fund. Thus, because certified providers will recoup the costs of compliance within a reasonable period, the Commission asserts that such providers will not be detrimentally burdened. This applies to currently eligible iTRS providers, as well as potential future applicants to provide iTRS.

Applications to become a certified iTRS provider are voluntarily submitted. Therefore, the Commission is not imposing an expense on a potential applicant that it cannot avoid by either declining to apply for certification, or by complying with the Commission's rules. If a small entity, as defined by the SBA, makes the latter business decision and applies for certification by showing that it can comply with all of the Commission's rules, its expenses will be indirectly reimbursed from the Fund once it becomes a certified provider. Therefore, for the small business entities receiving certification there is no adverse economic impact, and the question of whether there is a negative impact on a significant number of small entities is moot.

Therefore, the Commission certifies that the requirements of document FCC 11–118 will not have a significant economic impact on a substantial number of small entities.

The Commission will send a copy of document FCC 11–118, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A).

**Ordering Clauses**

Pursuant to sections 1, 4(i), (j) and (o), 225, and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j) and (o), 225, and 303(r), document FCC 11–118 *is adopted.*

Pursuant to § 1.427(a) of the Commission's rules, 47 CFR 1.427(a), document FCC 11–118 and the rules adopted herein shall be effective September 6, 2011, except 47 CFR 64.606(a)(2), (g), (h)(2), and (h)(3) of the Commission's rules, which require approval by OMB under the PRA and which shall become effective after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of document FCC 11–118 including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 64**

Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

## PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, 254(k), and 620, unless otherwise noted.

## SUBPART F—TELECOMMUNICATIONS RELAY SERVICES AND RELATED CUSTOMER PREMISES EQUIPMENT FOR PERSONS WITH DISABILITIES

■ 2. Section 64.604 is amended by adding new paragraph (b)(4)(iv) and by revising paragraph (c)(5)(iii)(F) to read as follows:

### § 64.604 Mandatory minimum standards.

* * * * *

(b) * * *

(4) * * *

(iv) A VRS provider leasing or licensing an automatic call distribution (ACD) platform must have a written lease or license agreement. Such lease or license agreement may not include any revenue sharing agreement or compensation based upon minutes of use. In addition, if any such lease is between two eligible VRS providers, the lessee or licensee must locate the ACD platform on its own premises and must utilize its own employees to manage the ACD platform.

* * * * *

(c) * * *

(5) * * *

(iii) * * *

(F) *Eligibility for payment from the TRS Fund.* (*1*) TRS providers, except Internet-based TRS providers, eligible for receiving payments from the TRS Fund must be:

(*i*) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to § 64.606; or

(*ii*) TRS facilities owned or operated under contract with a common carrier providing interstate services operated pursuant to this section; or

(*iii*) Interstate common carriers offering TRS pursuant to this section.

(*2*) Internet-based TRS providers eligible for receiving payments from the TRS fund must be certified by the Commission pursuant to § 64.606.

* * * * *

■ 3. Section 64.606 is amended by revising the section heading and paragraph (a)(2), by adding new paragraph (a)(3), by revising paragraphs (b)(2), (c)(2), (e)(2), (f)(2) and (g), and by adding new paragraph (h) to read as follows:

### § 64.606 Internet-based TRS provider and TRS program certification.

(a) * * *

(2) Internet-based TRS provider. Any entity desiring to provide Internet-based TRS and to receive compensation from the Interstate TRS Fund, shall submit documentation to the Commission addressed to the Federal Communications Commission, Chief, Consumer and Governmental Affairs Bureau, TRS Certification Program, Washington, DC 20554, and captioned ''Internet-based TRS Certification Application.'' The documentation shall include, in narrative form:

(i) A description of the forms of Internet-based TRS to be provided (*i.e.,* VRS, IP Relay, and/or IP captioned telephone relay service);

(ii) A detailed description of how the applicant will meet all non-waived mandatory minimum standards applicable to each form of TRS offered, including documentary and other evidence, and in the case of VRS, such documentary and other evidence shall demonstrate that the applicant leases, licenses or has acquired its own facilities and operates such facilities associated with TRS call centers and employs communications assistants, on a full or part-time basis, to staff such call centers at the date of the application. Such evidence shall include, but not be limited to:

(A) In the case of VRS applicants or providers,

(*1*) Operating five or fewer call centers within the United States, a copy of each deed or lease for each call center operated by the applicant within the United States;

(*2*) Operating more than five call centers within the United States, a copy of each deed or lease for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States, together with a list of all other call centers that they operate that includes the information required under § 64.604(c)(5)(iii)(N)(*2*);

(*3*) Operating call centers outside of the United States, a copy of each deed or lease for each call center operated by the applicant outside of the United States;

(*4*) A description of the technology and equipment used to support their call center functions—including, but not limited to, automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration—and for each core call center function, a statement whether such technology and equipment is owned, leased or licensed (and from whom if leased or licensed); and

(*5*) Proofs of purchase, leases or license agreements for all technology and equipment used to support their call center functions, including a complete copy of any lease or license agreement for automatic call distribution.

(B) For all applicants, a list of individuals or entities that hold at least a 10 percent equity interest in the applicant, have the power to vote 10 percent or more of the securities of the applicant, or exercise de jure or de facto control over the applicant, a description of the applicant's organizational structure, and the names of its executives, officers, members of its board of directors, general partners (in the case of a partnership), and managing members (in the case of a limited liability company);

(C) For all applicants, a list of the number of applicant's full-time and part-time employees involved in TRS operations, including and divided by the following positions: executives and officers; video phone installers (in the case of VRS), communications assistants, and persons involved in marketing and sponsorship activities;

(D) For all applicants, copies of employment agreements for all of the provider's employees directly involved in TRS operations, executives, and communications assistants, and a list of names of employees directly involved in TRS operations, need not be submitted with the application, but must be retained by the applicant for five years from the date of application, and submitted to the Commission upon request; and

(E) For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including any associated written agreements;

(iii) A description of the provider's complaint procedures; and

(iv) A statement that the provider will file annual compliance reports demonstrating continued compliance with these rules.

(3) *Assessment of Internet-based TRS Provider Certification Application.* In order to assess the merits of a certification application submitted by an Internet-based TRS provider, the Commission may conduct one or more on-site visits of the applicant's premises, to which the applicant must consent.

(b) * * *

(2) *Requirements for Internet-based TRS Provider FCC certification.* After review of certification documentation, the Commission shall certify, by Public Notice, that the Internet-based TRS provider is eligible for compensation from the Interstate TRS Fund if the Commission determines that the certification documentation:

(i) Establishes that the provision of Internet-based TRS will meet or exceed all non-waived operational, technical, and functional minimum standards contained in § 64.604;

(ii) Establishes that the Internet-based TRS provider makes available adequate procedures and remedies for ensuring compliance with the requirements of this section and the mandatory minimum standards contained in § 64.604, including that it makes available for TRS users informational materials on complaint procedures sufficient for users to know the proper procedures for filing complaints.

(c) * * *

(2) *Internet-based TRS Provider FCC certification period.* Certification granted under this section shall remain in effect for five years. An Internet-based TRS provider applying for renewal of its certification must file documentation with the Commission containing the information described in paragraph (a)(2) of this section at least 90 days prior to expiration of its certification.

* * * * *

(e) * * *

(2) *Suspension or revocation of Internet-based TRS Provider FCC certification.* The Commission may suspend or revoke the certification of an Internet-based TRS provider if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. The Commission may, on its own motion, require a certified Internet-based TRS provider to submit documentation demonstrating ongoing compliance with the Commission's minimum standards if, for example, the Commission receives evidence that a certified Internet-based TRS provider may not be in compliance with the minimum standards.

(f) * * *

(2) VRS and IP Relay providers certified under this section must notify the Commission of substantive changes in their TRS programs, services, and features within 60 days of when such changes occur, and must certify that the interstate TRS provider continues to meet Federal minimum standards after implementing the substantive change. Substantive changes shall include, but not be limited to:

(i) The use of new equipment or technologies to facilitate the manner in which relay services are provided;

(ii) Providing services from a new facility not previously identified to the Commission or the Fund administrator; and

(iii) Discontinuation of service from any facility.

(g) Internet-based TRS providers certified under this section shall file with the Commission, on an annual basis, a report demonstrating that they are in compliance with § 64.604. Such reports must update the information required in paragraph (a)(2) of this section and include updated documentation and a summary of the updates, or certify that there are no changes to the information and documentation submitted with the application for certification, application for renewal of certification, or the most recent annual report, as applicable.

(h) *Unauthorized service interruptions.* (1) Each certified VRS provider must provide Internet-based TRS without unauthorized voluntary service interruptions.

(2) A VRS provider seeking to voluntarily interrupt service for a period of 30 minutes or more in duration must first obtain Commission authorization by submitting a written request to the Commission's Consumer and Governmental Affairs Bureau (CGB) at least 60 days prior to any planned service interruption, with detailed information of:

(i) Its justification for such interruption;

(ii) Its plan to notify customers about the impending interruption; and

(iii) Its plans for resuming service, so as to minimize the impact of such disruption on consumers through a smooth transition of temporary service to another provider, and restoration of its service at the completion of such interruption. CGB will grant or deny such a request and provide a response to the provider at least 35 days prior to the proposed interruption, in order to afford an adequate period of notification to consumers. In evaluating such a request, CGB will consider such factors as the length of time of the proposed interruption, the reason for such interruption, the frequency with which such requests have been made by the provider in the past, the potential impact of the interruption on consumers, and the provider's plans for a smooth service restoration.

(3) In the event of an unforeseen service interruption due to circumstances beyond an Internet-based TRS service provider's control, or in the event of a VRS provider's voluntary service interruption of less than 30 minutes in duration, the provider must submit a written notification to CGB within two business days of the commencement of the service interruption, with an explanation of when and how the provider has restored service or the provider's plan to do so imminently. In the event the provider has not restored service at the time such report is filed, the provider must submit a second report within two business days of the restoration of service with an explanation of when and how the provider has restored service. The provider also must provide notification of service outages covered by this paragraph to consumers on an accessible Web site, and that notification of service status must be updated in a timely manner.

(4) A VRS provider that fails to obtain prior Commission authorization for a voluntary service interruption or fails to provide written notification after a voluntary service interruption of less than 30 minutes in duration, or an Internet-based TRS provider that fails to provide written notification after the commencement of an unforeseen service interruption due to circumstances beyond the provider's control in accordance with this subsection, may be subject to revocation of certification, suspension of payment from the TRS Fund, or other enforcement action by the Commission, as appropriate.

[FR Doc. 2011–19795 Filed 8–4–11; 8:45 am]

**BILLING CODE 6712–01–P**

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## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 64

**[CG Docket No. 10–51; FCC 11–118]**

## Structure and Practices of the Video Relay Service Program

**AGENCY:** Federal Communications Commission.

**ACTION:** Interim rule.

**SUMMARY:** In this document, the Commission adopts interim rules requiring that Internet-based Telecommunications Relay Service (iTRS) providers certify, under penalty of perjury, that their certification applications and annual compliance filings are truthful, accurate, and complete. These rules are necessary to help ensure that the Commission has true and complete information, thereby ensuring that only qualified providers are eligible for compensation from the Interstate TRS Fund (Fund).

**DATES:** Effective September 6, 2011, except 47 CFR 64.606 (a)(2)(v) and (g)(2) which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date. Written comments on the Paperwork Reduction Act (PRA) new information collection requirements must be submitted by the public, OMB and other interested parties on or before August 30, 2011.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Comments on the information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, via e-mail at *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Gregory Hlibok, Consumer and Governmental Affairs Bureau at (202) 559–5158 (VP), or e-mail: *Gregory.Hlibok@fcc.gov*. For additional information concerning the information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918, or e-mail: *Cathy.Williams@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Structure and Practices of the Video Relay Service Program,* Order (*Order*), document FCC 11–118 adopted July 28, 2011, and released July 28, 2011, in CG Docket No. 10–51, adopting interim rules related to the Commission certification process for iTRS providers. The full text of FCC 11–118 and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. FCC 11–118 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), at Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI at its Web site, *http://www.bcpiweb.com,* or by calling 202–488–5300. FCC 11–118 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro/trs.html#orders.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Congressional Review Act

The Commission will send a copy of document FCC 11–118 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A).

### Final Paperwork Reduction Act of 1995 Analysis

The interim rules adopted in document FCC 11–118 contain new information collection requirements subject to the PRA. Document FCC 11–118 will be submitted to OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. While the interim rules in document FCC 11–118 are being adopted without notice and comment, and therefore are not subject to Regulatory Flexibility Act analysis under 5 U.S.C. 604(a), the Commission believes that the information collection burden on small businesses from the interim rules is *de minimis.* Specifically, to the extent they require that providers support their certification applications and annual compliance filings with a certification, under penalty of perjury, as to the truthfulness, accuracy, and completeness of the filings, this merely entails adding the language specifically provided in the interim rules and having the filing signed by a senior executive. The Commission therefore concludes that the information collection burden associated with the interim rules is *de minimis.*

**Synopsis**

In document FCC 11–118, the Commission adopts interim rules requiring that providers certify, under penalty of perjury, that their certification applications and annual compliance filings required under § 64.606(g) of the Commission's rules are truthful, accurate, and complete. The Commission finds good cause to adopt the interim rules to ensure that providers seeking certification and providers holding certifications may be held accountable for their submissions as they seek to secure or retain certification under the rules adopted in the Second Report and Order portion of document FCC 11–118.

The Commission previously has found that requiring a signed statement sworn to be true under penalty of perjury is a vehicle long and regularly used in a myriad of legal contexts to guarantee the veracity of the declarations, as well as to provide a means for civil enforcement and criminal prosecution to hold high level officials accountable for the actions and submissions of their companies. In addition, any applicant for, or holder of, any Commission authorization already is required to ensure that its statements to the Commission are truthful, accurate, and complete under the Commission's rules. Consistent with these existing requirements, the Commission concludes that interim rules requiring certification by a senior executive, under penalty of perjury, to the truthfulness, accuracy, and completeness of certification applications and annual compliance filings are a necessary and critical component of the Commission's efforts to curtail fraud and abuse. In particular, these interim rules will help to ensure that the Commission has true and complete information, thereby ensuring that only qualified providers are eligible for compensation from the Fund.

The Commission finds good cause to adopt the interim rules without notice and comment, pursuant to 5 U.S.C. 553(b)(3)(B), in light of the impending deadlines for initial and re-certification applications. The current stay of the Commission's rule which prohibits revenue sharing arrangements expires on October 1, 2011, and iTRS providers who are not eligible to receive compensation directly from the Fund but are currently providing service under a revenue sharing arrangement will no longer be able to provide service through such arrangements. Similarly, providers currently eligible for compensation from the Fund via a means other than Commission certification must apply for certification within 30 days after the final rules adopted in document FCC 11–118 become effective, and providers with Commission certifications expiring November 4, 2011 must apply for recertification after the rules become effective but at least 30 days prior to their expirations provided that the rules are effective by that date, or risk having to shut down their operations and being denied compensation from the Fund. The Commission therefore finds that interim rules are consistent with the public interest, given the importance of ensuring that only qualified providers are certified to become eligible for compensation from the Fund. The Commission concludes that notice and comment, in this instance, are impracticable given the impending certification application deadlines. In a forthcoming Notice of Proposed Rulemaking, the Commission will seek additional comment on whether to make these rules permanent.

**Final Regulatory Flexibility Analysis**

The interim rules adopted in document FCC 11–118 are being adopted without notice and comment, and therefore are not subject to Regulatory Flexibility Act analysis under 5 U.S.C. 604(a). The Commission will perform the appropriate regulatory flexibility analyses for any permanent rules adopted at a later date.

**Ordering Clauses**

Pursuant to sections 1, 4(i), (j) and (o), 225, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j) and (o), 225, and 303(r), and section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), document FCC 11–118 IS ADOPTED. Pursuant to § 1.427(a) of the Commission's rules, 47 CFR 1.427(a), document FCC 11–118 shall be effective September 6, 2011, except 47 CFR 64.606 (a)(2)(v) and (g)(2), which require approval by OMB under the PRA and which shall become effective after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of document FCC 11–118 to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 64**

Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Rule Changes**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

## PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, 254(k), and 620, unless otherwise noted.

■ 2. Section 64.606 is amended by revising paragraph (a)(2)(v) and paragraph (g) to read as follows:

**§ 64.606 Internet-based TRS provider and TRS program certification.**

(a) * * *

(2) * * *

(v) The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an applicant for Internet-based TRS certification under this section with first hand knowledge of the accuracy and completeness of the information provided, when submitting an application for certification under paragraph (a)(2) of this section, must certify as follows: I swear under penalty of perjury that I am ____ (name and title), ____an officer of the above-named applicant, and that I have examined the foregoing submissions, and that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in this submission, are true, accurate, and complete.

* * * * *

(g) Internet-based TRS providers certified under this section shall file with the Commission, on an annual basis, a report demonstrating that they are in compliance with § 64.604.

(1) Such reports must update the information required in paragraph (a)(2) of this section and include updated documentation and a summary of the updates, or certify that there are no changes to the information and documentation submitted with the application for certification, application for renewal of certification, or the most recent annual report, as applicable.

(2) The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an Internet-based TRS provider under this section with first hand knowledge of the accuracy and completeness of the information provided, when submitting an annual report under paragraph (g) of this section, must, with each such submission, certify as follows: I swear under penalty of perjury that I am ____ (name and title), an officer of the above-named reporting entity, and that I have examined the foregoing submissions, and that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in this submission, are true, accurate, and complete.

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[FR Doc. 2011–19793 Filed 8–4–11; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### National Highway Transportation Safety Administration

### 49 CFR Part 563

**[Docket No. NHTSA–2011–0106]**

**RIN 2127–AK71**

### Event Data Recorders

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** On January 14, 2008, the agency published a final rule [1] amending the requirements for event data recorders (EDRs). The January 2008 document responded to petitions for reconsideration of the original August 2006 final rule that established the EDR standardization requirements for those voluntarily installed. In response to the January 14, 2008, final rule, the agency received three petitions for reconsideration from the Alliance of Automobile Manufacturers (Alliance), the Association of International Automobile Manufacturers, Inc. Technical Affairs Committee (AIAM), and Mr. Thomas Kowalick, a private citizen. After careful consideration, the agency is granting some aspects of the petitions, and denying others.

**DATES:** *Effective Date:* The amendments in this rule are effective October 4, 2011.

*Compliance Dates:* Except as provided below, light vehicles manufactured on or after September 1, 2012, that are equipped with an EDR and manufacturers of those vehicles must comply with this rule. However, vehicles that are manufactured in two or more stages or that are altered (prior to first sale) are not required to comply with the rule until September 1, 2013. Voluntary compliance is permitted before that date.

*Petitions:* If you wish to submit a petition for reconsideration of this rule, your petition must be received by September 19, 2011.

**ADDRESSES:** Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, 4th Floor, Washington, DC 20590. Please see the Privacy Act heading under Rulemaking Analyses and Notices.

**FOR FURTHER INFORMATION CONTACT:** For technical and policy issues, contact: David Sutula, Office of Crashworthiness Standards, NVS–112. *Telephone:* (202) 366–3273. *Facsimile:* (202) 366–7002.

For legal issues, contact:

Mr. David Jasinski, Office of the Chief Counsel, NCC–112. *Telephone:* (202) 366–2992. *Facsimile:* (202) 366–3820.

Both persons may be reached by mail at the following address:

National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, 4th Floor, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

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## I. Background

In August 2006, NHTSA issued a final rule [2] to establish uniform performance requirements for the accuracy, collection, storage, survivability, and retrievability of onboard motor vehicle crash event data recorders (EDRs) voluntarily installed in passenger cars and other light vehicles. This final rule was intended to standardize the data obtained through EDRs so that such data would be put to the most effective future use.

Specifically, the regulation, 49 CFR part 563 (Part 563), applies to passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating (GVWR) of 3,855 kg (8,500 pounds) or less and an unloaded vehicle weight of 2,495 kg (5,500 pounds) or less, except for walk-in van-type trucks or vehicles designed to be sold exclusively to the U.S. Postal Service, that are equipped with an event data recorder and to the manufacturers of these vehicles. The final rule is intended to be technology-neutral, so as to permit compliance with any available EDR technology that meets the specified performance requirements.

In January 2008 (73 FR 2168), the agency amended the EDR final rule in the following ways:

- We clarified the event storage definitions to alleviate any uncertainties in multiple event crashes,
- Revised certain sensor ranges and accuracies to reflect current state of the art technologies,
- Clarified the recorded data reporting format,
- Specified vehicle storage conditions during compliance testing,
- Clarified the required data elements and scope of covered sensors, and
- Revised the effective date to provide additional time for manufacturers and suppliers to comply with the rule.

The agency made these technical changes to encourage broad application of EDR technologies in motor vehicles and maximize the usefulness of EDR data for vehicle designers, researchers, and the medical community, without imposing unnecessary burdens or deterring future improvements to EDRs that have been voluntarily installed. The final rule also changed the effective date to September 1, 2012, to provide manufacturers more time to implement the necessary changes to EDR architectures within their normal product development cycles. NHTSA also issued a **Federal Register** notice on February 8, 2008, (73 FR 8408) to correct the placement of decimal points for data in Table II of the final rule.

[1] On February 8, 2008 the **Federal Register** issued a correction notice for the data in Table II of the final rule. See 73 FR 8408.

[2] See 71 FR 50998.

## II. Summary of Petitions for Reconsideration

The agency received three petitions for reconsideration [3] and two requests for interpretation in response to the January 2008 final rule. The petitions for reconsideration were submitted by the Alliance of Automobile Manufacturers (Alliance), the Association of International Automobile Manufacturers, Inc. Technical Affairs Committee (AIAM), and Mr. Thomas Kowalick. The requests for interpretation were submitted by the Automotive Occupant Restraints Council (AORC) and Robert Bosch, LLC (Bosch). To the extent possible, the agency will address these requests for interpretation in this notice.

The Alliance petitioned the agency to remove collection of acceleration data from part 563. It commented that acceleration could be reasonably estimated from delta-V data collected by the EDR, and that the 250 millisecond time interval required in Part 563 would increase the cost of memory for storage of acceleration data. It further commented that the revised acceleration data accuracy requirements do not sufficiently address the effects of data clipping. It recommended that the agency amend § 563.6 to be consistent with the agency's intent to exclude peripheral sensors as described in the preamble of the final rule. The Alliance recommended that the agency establish a test procedure for compliance with the delta-V accuracy requirement. Finally, the Alliance commented on several technical and editorial corrections to clarify the regulatory text for certain data elements such as suppression switch status, occupant classification, antilock braking system (ABS) status, stability control status, and seat track position.

The AIAM requested that the agency make an allowance in the final rule for the possibility of reduced accelerometer accuracy resulting from data clipping. It commented that clipping can occur at higher impact speeds even with sensors of fairly wide range capability. It requested that the agency clarify its intent with regard to the capture and lock of data collected from certain air bag deployment events. In addition, the AIAM requested that the agency clarify certain data elements and definitions such as time zero, end of event, multi-event status, and accelerometer range.

Mr. Thomas Kowalick petitioned the agency to reconsider a mechanical lock out system for the download port of EDRs that could only be accessed by the owner of the vehicle. He stated that devices are being offered to consumers to alter odometer readings, erase EDR data, or prevent EDR data from being recorded by the vehicle.

In its request for interpretation, the AORC stated its belief that manufacturers will forego recording of acceleration data and lateral delta-V data if the agency does not allow for additional inaccuracy due to data clipping. It requested that the agency clarify the accuracy requirements in Table III, specifically for accelerometers, and all parameters calculated from the accelerometer data. Additionally, the AORC requested that the agency clarify:

- That events involving deployable restraints other than air bags could be treated as an event trigger at the option of the manufacturer,
- That the data lock may apply to either the individual event data or the entire EDR at the option of the manufacturer,
- Whether the acceleration/angular rate data elements in Table II are single sampled (raw) data or time averaged data, and
- That newer steering systems with active intervention may allow cases where the steering angle and tire position may not correlate.

Bosch requested that the agency clarify that the lateral acceleration data element requirement in Table III is based on the need for data from lateral sensors with a relatively large range (high-G), having a typical range of ± 50 g and used for side crash events, rather than lateral sensors with a relatively small range (low-G) having a typical range of ± 5 g and used for rollover events. It assumed that the lateral acceleration data used for side crash events are the main scope of the final rule, and therefore that the range for the data element would be more appropriately set at ± 50 g. Bosch also requested that the agency interpret the accuracy and resolution for the steering input data element in Table III so that the range, resolution, and accuracy are consistent.

## III. Discussion and Analysis

### *A. Request To Delete Acceleration Data From Requirements of Part 563*

Part 563 specifies that if the EDR records acceleration data ''in non-volatile memory for the purpose of subsequent downloading,'' then the data must be reported under the minimum conditions and format specified in Tables II and III. Acceleration data has been introduced as a desired component of the EDR rulemaking as early as the June 14, 2004 [4] Notice of Proposed Rulemaking (NPRM). Originally proposed as a required data element, we revised the requirement to an optional data element in the August 28, 2006 [5] final rule in favor of the requirement to record delta-V data. However, we retained the acceleration data elements in recognition of the value of this data when reconstructing a crash. In response to the 2006 final rule, the Alliance stated that acceleration data could be derived from the delta-V data and petitioned the agency to delete the collection requirements for accelerometer data. In the January 14, 2008 final rule, we denied the Alliance petition stating that ''acceleration is a common data element collected in engineering studies and crash tests to determine crash severity and the shape of the crash pulse in frontal and rear crashes.'' However, for reporting acceleration data, we reduced the sampling rate from 500 samples/second to 100 samples/second, reduced the accuracy from ± 5 percent to ± 10 percent, reduced the resolution from 0.01 g to 0.5 g and removed filtering protocols to better reflect current accelerometer technologies.

In response to the January 14, 2008 final rule, the Alliance again petitioned the agency to remove the acceleration data element from part 563. It commented that there are several reasons for the agency to reconsider its decision. First, the Alliance stated that given the revisions adopted in the January 14, 2008 final rule, retaining acceleration data in the regulation provides no incremental crash assessment information since the acceleration data can be readily derived from delta-V data. It suggested that through simple arithmetic manipulation of the delta-V data, the agency could derive acceleration data. Second, the Alliance stated that a 70 millisecond acceleration data element time interval is typically used in EDRs for evaluating air bag performance, not the 250 millisecond interval required in Part 563. It commented that the increased cost of data storage to meet the regulation could potentially lead to the unintended consequence of manufacturers opting not to capture and record acceleration data. Third, the Alliance commented that it is unaware of any way to practically assess or comply with the ± 10 percent accuracy requirement for the acceleration data elements.

The AIAM commented that while the agency provided allowance for

[3] See Docket number NHTSA–2008–0004, submissions 0005 through 0007.

[4] See Docket number NHTSA–2004–18029.

[5] See Docket number NHTSA–2006–25666.

accelerometers with ranges greater than the minimums specified in Table III, it did not provide any additional allowance for resolution based on an extended range. The AIAM thus believes that manufacturers will incur additional costs to increase the resolution of accelerometers with ranges in excess of the minimums. It recommended that the agency reconsider the Alliance approach [6] proposed in its petition for reconsideration to the August 28, 2006 final rule. The Alliance proposed that the accelerometer resolution be revised to ''the range of the sensor divided by the number of available states in one byte.'' In this manner, a sensor capable of measuring 100 g would have a resolution of 0.39 g (100 g/255 states in a byte).

Similarly, the AORC stated their belief that vehicle manufacturers will forgo recording acceleration data due to concerns about inaccuracies from sensor saturation or data clipping. The AORC requested that the agency clarify that the accuracy requirement for the acceleration data elements applies to the full scale physical application sensor, rather than the minimum range shown in Table III.

*Agency Response:* We are denying the petition to remove acceleration from Part 563. The agency continues to believe, as it has twice stated (in the August 28, 2006 and January 14, 2008 final rules), that acceleration is a common data element collected in engineering studies and crash tests. Vehicle accelerations are among the first sets of data collected by the EDR, and are subsequently used for determining vehicle delta-V data. We are aware that several vehicle manufacturers, such as Ford Motor Company (Ford) and General Motors (GM), currently record acceleration data via the EDR in addition to delta-V data. The agency has also stated that the acceleration data element is important in understanding and evaluating air bag deployment algorithms and vehicle crash pulses for the purposes of better understanding occupant restraint performance and predicting injury in crash reconstructions. The Alliance has also recognized the value of accelerometer data [7] for such purposes.

In its petition for reconsideration, the Alliance first stated that ''* * * it is pointless to separately record acceleration data at a rate and interval that matches the rate and interval of delta-V data, given that these acceleration data can be derived by simple arithmetic manipulation of the delta-V data.'' Secondly, it suggested that the cost increase involving Part 563 acceleration data could provide strong incentive for not recording acceleration data at all.

We partially agree with the Alliance regarding the need to separately record acceleration data at a rate and interval that matches the rate and interval of delta-V data. Our interest in acceleration data extends beyond the simple arithmetic manipulation of delta-V data for the reasons cited above. However, we note that for other reasons described below, we have revised the acceleration data element in a manner that addresses the Alliance's concerns about the recording intervals and potential for increased costs.

The remaining concerns expressed by the Alliance and other petitioners dealt with persistent technical issues that affect compliance with the acceleration data element requirements. The Alliance stated that the accuracy of the acceleration data collected by the EDR would not necessarily coincide with the laboratory acceleration data at any given moment in time. Specifically, the Alliance stated that EDR acceleration data is typically filtered at a different level than laboratory accelerometers, and thus results in recorded acceleration data that is phase-shifted in time. Information shared during an ex parte meeting with GM [8] on May 8, 2008, also illustrated this issue: the data showed that at given points in time, the 10 percent accuracy requirement was not met.

Three organizations, the Alliance, the AORC, and the AIAM stated that the revised acceleration data accuracy requirements do not sufficiently address the effects of data clipping. The Alliance stated that during crash tests specified for Part 563 compliance, it is not uncommon to experience brief periods of deceleration exceeding 50 g. The AORC stated that such clipped data and resulting inaccuracies could deter manufacturers recording acceleration. The AIAM also agreed with the Alliance in that manufacturers would need to switch to sensors of very high ranges (in excess of ± 100 g) in order to meet the accuracy requirements in Part 563. Consequently, the AIAM suggested that vehicle manufacturers would need to redesign their EDR systems with higher range sensors that could result in degradation in air bag system performance. The AIAM submitted data from five crash tests to illustrate that clipping occurs at the higher impact speeds even with sensors of a fairly wide range. It requested that the agency make an allowance in the rule for the possibility of reduced accelerometer accuracy resulting from data clipping.

In the January 2008 final rule, we relaxed the required accelerometer resolution capability because we recognized that current EDR technology would not achieve acceleration data element resolutions of 0.01 g. We agreed that there would be no significant loss in acceleration data quality if the acceleration resolution was revised to 0.5 g. However, we did not adopt the Alliance proposal for data element resolution, favoring instead a set resolution of 0.5 g. Our reasoning for adopting this set resolution limit was that we intended to standardize EDR output data. We believed that adopting the Alliance proposal would encourage a proliferation of acceleration data element output resolutions rather than a standardized single reported resolution.

At that time, we believed that the revised acceleration data element accuracy and resolution requirements would provide sufficient relief to avoid any unnecessary rise in manufacturing costs. We did not fully anticipate the effects of sensor saturation or clipping on the choice of accelerometer ranges to comply with the EDR rule. However, because of this clipping, manufacturers that wished to continue capturing acceleration data would be left with no alternative but to increase the sensing range of accelerometers beyond what is practical for EDRs. This, in part, contributed to the Alliance request to either remove the acceleration data elements or revise the acceleration data element resolution requirements.

The data presented by the petitioners and during the ex parte meeting with GM indicated that clipping can occur for brief periods even during Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' compliance testing. It is during these brief periods that the accuracy of the acceleration measurement cannot be maintained within ± 10 percent. The Alliance and the AIAM commented that the only countermeasure available to manufacturers to solve the clipping problem would be to expand the range of the accelerometers such that any clipping or saturation would be minimized. The AORC comments supported these claims. The petitioners suggested that the trade-off in expanding the accelerometer detection range is a decreased sensitivity which could negatively affect the performance of air bag systems.

[6] See Docket No. NHTSA–2006–25666–441.

[7] See Alliance Comments in Docket Nos. NHTSA–2004–18029, NHTSA–2006–25666, and NHTSA–2008–0004.

[8] See Docket number NHTSA–2008–0004.

One of the primary concerns the agency considered in developing this final rule was to ensure that air bags continue to deploy properly. We did not intend to require the data element accuracies listed in Table III to extend beyond the capabilities of the sensors used in EDRs, specifically in sensors that are designed to meet critical safety roles and optimized for those purposes. Likewise, we find the Alliance comments on filtering and phase-shifting persuasive. However, we wish to continue collecting accelerometer data so that the agency might better understand crash scenarios and deployment decisions made during crashes. Based on our evaluation of these comments, in lieu of removing acceleration from Part 563, we have instead decided to remove the reporting specifications for acceleration data elements in Table III, including minimum range, accuracy and resolution.

We have also added a provision for the EDR report to indicate when sensor clipping has occurred. We believe that an indicator of when inertial sensors have become saturated during a crash will aid the agency in understanding when measurements from the sensors have begun to exceed their design ranges, and potentially exceed the accuracy requirements in Part 563. The manner by which clipping is indicated is at the option of the manufacturer.[9] This appears as Footnote 1 in Table III.

We believe that through our actions, manufacturers may continue to use current EDR technologies and not incur any significant cost increases due to use of extended accelerometer ranges. We have determined that the acceleration data element is important to the agency's data collection goals. Therefore, we wish to continue receiving the ''reported'' acceleration data, regardless of the format with which it is captured.

As such, we have revised the acceleration data elements reported by the download tool and the accuracy of the acceleration data elements to be at the option of the manufacturer. For example, if a vehicle manufacturer elected to record 70 msec of acceleration data at 2 msec time increments with an accuracy of ± 0.5 g, we would expect the reported acceleration data to follow that format. We believe that this would alleviate concerns about certification accuracies, while preserving a means of reporting acceleration data from the EDR for crash reconstruction purposes.

We acknowledge that in making this change, the reported acceleration output would not be standardized among EDRs. The duration of the reported output and the resolution may vary depending upon the EDR design of the vehicle. However, given the aforementioned concerns, having acceleration data reported by the download tool with an indicator of when sensor clipping or saturation occurs, would assist crash reconstructionists with a means of computing a momentum balance on the crash event and provide a better understanding of vehicle crash behavior. Furthermore, the agency plans to monitor the acceleration reported by the EDR download tool through various means, including comparing the reported output with a differentiated delta-V time history, and/or by comparing the reported output to laboratory instrumentation during crash tests. This information will allow the agency to better understand the significance and variation of data clipping and filtering experienced in recorded acceleration data. If the agency finds that the acceleration information from the EDR is not useful as reported, we may revisit the need for further standardization.

Thus, for the reasons discussed above, we are denying the petition to delete the acceleration data elements from part 563. We do not believe it unreasonable to report acceleration data during download if a manufacturer voluntarily records acceleration data during a crash. It would also mitigate data storage concerns since no additional storage would be required by the EDR over what has already been established in the design of the EDR.

*B. The Effects of Data Clipping on Delta-V Calculation and Accuracy*

The Alliance agreed that data clipping is a rare occurrence in real world conditions, but that during the FMVSS No. 208 tests that will be used to determine if EDRs have met the requirements in Part 563, there may exist brief periods of deceleration that can exceed 100 g. It recommended that the agency revise the delta-V accuracy requirement to ± 10 percent for events in which no sensor saturation or data clipping occurs.

*Agency Response:* In the January 14, 2008 final rule, we denied petitions to allow additional inaccuracy due to sensor saturation or data clipping. Our belief at that time was that

* * * in certain rare extreme crash scenarios, the crash pulse may exceed the sensor detection capacity and result in data saturation, even in sensors that have been optimized for their given purpose. In these situations, the crash pulse may cause additional reported data inaccuracy or clipping; however, by doubling the tolerance on the acceleration data, we believe this has been sufficiently addressed.[10]

We believed then that the revised data element accuracy and resolution requirements would provide sufficient relief to avoid any unnecessary rise in manufacturing costs, but we did not fully anticipate the effects of sensor saturation or clipping on the choice of sensor ranges to comply with the EDR rule. Since we do not wish at this time to force manufacturers to increase the range of sensors beyond what is optimal for air bag performance, we have added a footnote to the data element accuracy requirement in Table III to apply only within the range of the physical sensor utilized by the EDR. This would be a minimum output range of −100 km/h to +100 km/h. We note that previous agency research[11] has shown that the delta-V data collected from EDRs during FMVSS No. 208 crash tests are reliable and accurate when compared with the delta-V data collected from reference sensors in the laboratory. We believe that the additional requirement for a sensor saturation or data clipping indicator will aid the agency in understanding when such measurements exceed the range of the sensor.

*C. Incorporation of Preamble Explanations in Regulatory Text*

The Alliance identified two items that were clarified in the preamble to the January 14, 2008 final rule, but not reflected in the regulatory text: exclusion of peripheral sensors from the scope of Part 563, and clarification of recording closely timed subsequent events when the EDR power source is damaged. The AIAM similarly petitioned that the agency clarify the requirements for storage and locking of data from air bag deployment events.

1. Exclusion of Peripheral Sensors

In support of the agency's position on exclusion of peripheral sensors, we stated the following in the January 2008 final rule:

In the final rule, the agency expressed its intent for the EDR to capture the rigid body motion of vehicles in crashes. As the petitioners noted, the rigid body motion is

[9] Examples of possible indicators would be a flag on the acceleration measurement trace, or a new report field indicating when clipping began from time zero.

[10] See 73 FR 2174.

[11] Niehoff, P., Gabler, H.C., Brophy, J., Chidester, C., Hinch, J., Ragland, C., (2005), ''Evaluation of Event Data Recorders in Full Systems Crash Tests,'' Paper No. 05–0271, 19th International Technical Conference on Enhanced Saftey of Vehicles, U.S. DOT.

best captured by collecting data centrally located in the occupant compartment of the vehicle. Data from satellite or peripheral sensors are not used for these purposes, but rather help the air bag control module and other occupant protection systems to perform optimally. We recognize that sensors located in vehicles' crushable zones may not meet the survivability standards set forth in the final rule, and therefore exclude them from those standards.[12]

The Alliance petitioned the agency to add the following text to the end of § 563.6, ''Requirements for Vehicles,'' as follows: ''Peripheral sensors that do not produce 'rigid body' centroid acceleration signals are excluded from the requirements of this part.''

*Agency Response:* We are denying the Alliance request to add this exclusion to Part 563. We believe that our definitions in the regulatory text are sufficiently clear. We understand, since this rule was first promulgated, manufacturers have adopted sophisticated sensing strategies to determine when air bag deployments are warranted. Moreover, we also understand vehicle electrical architectures have become more sophisticated and data from these peripheral sensors may be captured and ''recorded in non-volatile memory'' in the event of crash. It was not our intent to capture this level of data when we first began the EDR rulemaking, nor was it considered. Given the sophistication of EDRs at that time, it was our intent to capture data as collected by the restraint control module located inside the vehicle. However, we note that the Alliance concerns are partially addressed through our actions to remove the time interval, range, and accuracy requirements for accelerometer measurements. By removing the requirements for acceleration measurements, any peripheral acceleration data[13] collected by an EDR is at the option of the manufacturer. We believe that these revisions will relieve reporting requirements for any data from peripheral accelerometers on the vehicle.

2. Damage to EDR Power Source

In the January 2008 final rule, we stated the following with regard to damaged EDR power sources and the recording of subsequent events:

We agree with AIAM that subsequent events need not be recorded if the external power source and sensors are damaged in the first event, but we do not believe that a change to the regulatory text is necessary. The regulation does not contain test requirements to determine if an EDR could survive two consecutive severe crashes. For the test requirements which are included, if an event is severe enough to interrupt the power source to the EDR, the EDR must be able to finish capturing that event, but is not required to be in a condition such that it could capture subsequent events.[14]

The Alliance requested that the agency amend § 563.9 to clarify the agency's intent with regard to power sources damaged in a first event by adding the following new paragraph (c) stating: ''If power source(s) or sensor(s) are damaged during an initial event, it is not necessary to record data associated with subsequent event(s).'' The Alliance commented that NHTSA's test procedures have historically stated that the absence of a test provision from the agency's procedures does not exempt manufacturers from their obligation to meet all requirements specified in the standard.

*Agency Response:* We are denying this petition. We are not compelled by the petitioner's rationale to add the requested language to the regulatory text. Part 563 does not contain multi-impact test procedures for determining what would constitute ''damage'' to the power source or other sensors.

3. Clarification of the Storage and Locking of Data From Air Bag Deployment Events

The AIAM petitioned the agency to clarify the requirements for storage and locking of data from air bag deployment events. It interpreted the August 2006 final rule as meaning that once data from an air bag deployment event has been stored and locked, it is not necessary to record a subsequent event, but if no air bag is deployed in the first event, two events could be stored. It cited § 563.9(a), which states that, in a frontal or side air bag deployment crash, an EDR must capture and record the current deployment data, ''up to two events,'' and that the memory for each air bag deployment event must be locked to prevent any future overwriting of these data. The AIAM stated that this could be read to mean that the EDR must be capable of recording up to two air bag deployments, which would be a departure from the intent of the August 2006 final rule. The AIAM petitioned the agency to explain its rationale and include a resulting cost estimate analysis, if the agency intends to adopt such a change.

*Agency Response:* The AIAM correctly interpreted § 563.9(a) to mean that after the EDR has captured, recorded, and locked data from an air bag deployment event, the EDR is not required to record any subsequent events. In the preamble to the August 2006 final rule, we stated: ''If the first event is the deployment of an inflatable restraint, these data are recorded to memory and the file is locked. No further analyses (*i.e.,* looking for subsequent triggers) or recording occurs.''[15]

We noted in the preamble to the August 2006 final rule that while not required to do so, an EDR may capture multi-event data during a crash that involves an air bag deployment. To clarify the issue, we have amended § 563.9(a) by removing the phrase ''up to two events,'' and we have clarified the language regarding side air bag deployment crashes (as discussed in section H. below). The paragraph now states ''In a frontal air bag deployment crash, capture and record the current deployment data. In a side or side curtain/tube air bag deployment crash, where lateral delta-V is recorded by the EDR, capture and record the current deployment data. The memory for the air bag deployment event must be locked to prevent any future overwriting of the data.'' Thus, any frontal air bag deployment, or any side, or side curtain/tube air bag deployment where lateral delta-V is recorded by the EDR, would not require the EDR to record a second, subsequent event, although it would allow such recording. We note that the phrase ''up to two events'' remains in § 563.9(b) and so there continues to be an obligation to record multiple non-air bag deployment events.

*D. Time Zero for Events Involving Other Non-Reversible Deployment of Restraints*

The AIAM commented that the January 2008 final rule does not explicitly state how ''time zero'' would be determined in the case of a non-reversible restraint that is deployed despite a crash that does not meet the ''trigger threshold.'' It recommended that the agency clarify the definition for ''time zero'' to include other types of non-reversible deployable restraints (*e.g.,* pyrotechnic pretensioners). Additionally, it recommended that the definition for ''event'' include other non-reversible deployable devices. Specifically, the AIAM proposed defining ''event'' as ''a crash or other physical occurrence that causes the trigger threshold to be met or exceeded, or an air bag *or other non-reversible deployable device* to be deployed, whichever occurs first.'' AIAM

[12] See 73 FR 2175.

[13] For example, we note that some manufacturers have begun collecting acceleration data at the A, B, and C-pillar locations for lateral deployment decisions.

[14] See 73 FR 2171.

[15] See 71 FR 51019.

proposed including ''deployment of another type of non-reversible deployable device'' in the definition of ''time zero.''

*Agency Response:* We agree with the need to change the definition of event to include other non-reversible deployable devices. However, we have used the word ''restraint'' rather than ''device'' in order to maintain the focus on occupant protection. Such non-reversible deployable restraints would be inclusive of frontal, side and side curtain/tube air bags, but also could include devices such as knee air bags and pretentioners. We believe this change is needed to make the definition of event consistent with the data recording triggers found in § 563.9(a) and (b). In the January 2008 final rule, the agency carefully considered the definition of an event. We agreed with the industry that an air bag deployment could be considered an event trigger, but were concerned about proliferation of trigger threshold strategies that would lock the data and prevent capture of subsequent crashes in which an air bag is deployed. For purposes of § 563.9(a) as currently written, we are primarily interested in the collection of EDR data from high delta-V crashes. We ultimately decided that frontal and side air bag deployments were consistent with our intent and did not extend this to other types of deployable restraints. We continue to believe that § 563.9(a) is clear in stating that the locked recorded data should be tied to a high delta-V event by virtue of a frontal or side air bag deployment. However, to further clarify that other non-reversible deployable restraints are considered events, *i.e.,* those covered by § 563.9(b), we have amended the definition of ''event'' as follows: ''Event means a crash or other physical occurrence that causes the trigger threshold to be met or exceeded, or any non-reversible deployable restraint to be deployed, whichever occurs first.'' Consistent with this, we address clarification of § 563.9 later in this document.

We further believe that Part 563 is clear that algorithm wake-up strategies, and thus time zero, are at the option of the manufacturer. These wake-up strategies may include such things as pretensioner activation, or other non-air bag related deployments. However, to address the AIAM concern and to clarify our strategy, we have replaced ''an air bag deployment'' in the definition of ''time zero'' with ''deployment of a non-reversible deployable restraint.''

*E. Clarification of the Definition for End of Event*

The AIAM commented that the definition for end of event does not specify which delta-V mode(s) should be used to determine the end of the event. It noted that many vehicles measure both longitudinal and lateral delta-V, and in some cases can measure both concurrently as one multi-directional event. Our definition for end of event states '' * * * the moment at which the cumulative delta-V within a 20 ms time period becomes 0.8 km/h (0.5 mph) or less * * *'' but does not define the direction of the delta-V mode. Additionally, the AIAM commented that the definition is not clear as to which of the criteria to use to determine the end of the event, *i.e.,* the cumulative delta-V or the algorithm reset. It stated that the event should end based on the later of the two end of event conditions being met. It requested that the agency revise the definition to clarify how the end of event should be determined.

The AORC also commented that the regulatory text does not specify if the end of event criteria includes both longitudinal and lateral delta-V components. It stated that both lateral and longitudinal should be used if available.

*Agency Response:* In development of the August 2006 final rule, the agency was mainly focused on events involving frontal impacts since those types of impacts represent most of the crashes investigated. Therefore, the agency originally intended to specify that the end of event is determined by a drop in the longitudinal delta-V component, as evidenced by our requirement for EDRs to capture the longitudinal delta-V component, but making the lateral delta-V component an optional data element.

In responding to the petitions for reconsideration to the August 2006 final rule, the agency agreed that deployment of a frontal or side air bag could be considered an event trigger. This consideration required changes in the definitions (*e.g.,* event, time zero, and end of event) that relate to how the event recording interval is determined. However, we inadvertently neglected to consider how measurement of lateral delta-V would impact the determination of when an event has ended.

We have carefully considered the comments of the AIAM and the AORC and agree that the definition for the end of an event must account for the directional component of the delta-V measurement. Therefore, we have revised the definition of end of event time to mean ''the moment at which the *resultant* cumulative delta-V within a 20 ms time period becomes 0.8 km/h (0.5 mph) or less, or the moment at which the crash detection algorithm of the air bag control unit resets.'' (Emphasis added). We believe adopting this change will provide the manufacturers with necessary clarity on determining when an event has ended.

*F. Clarification of Frontal Air Bag Suppression Switch Status*

The Alliance commented that the data element in Table II for the frontal air bag suppression switch status appears to only apply to vehicles equipped with manual frontal air bag suppression switches. It asked that the agency confirm this interpretation.

*Agency Response:* We agree that the suppression switch status data element only applies to vehicles equipped with manual frontal air bag suppression switches and is meant to indicate the position of a manual frontal air bag suppression switch at the time of the event as designated in S4.5.4 of FMVSS No. 208.

*G. Compliance Test Procedures*

The Alliance requested that the agency develop and publish a test procedure for compliance with Part 563 as soon as possible. It suggested that a test procedure would have the potential to elaborate and clarify the regulatory requirements. It provided the example of computing the delta-V accuracy requirement as an example of how this would be helpful. It commented that it is not clear if the requirement applies to point-by-point delta-V data, or the average of delta-V data over the 250 ms interval, or to the cumulative delta-V at the end point of 250 ms. It suggested that the accuracy requirement be a root mean square average of the recorded delta-V values. The Alliance stated that the publication of a test procedure could resolve this and other issues.

The AORC suggested that the accuracy could be evaluated based on 10 percent of the full scale range of the physical application sensor and would be evaluated after applying filtering and range characteristics of the physical application sensor to the reference data.

*Agency Response:* In developing the agency's compliance crash test procedure for Part 563, the agency considered the various methods proposed by the petitioners in evaluating delta-V accuracy. The agency found that a delta-V accuracy requirement applied on a point-by-point basis proved to be suitably repeatable. This was based on testing that NHTSA's Office of Vehicle Safety Compliance (OVSC) conducted with a pair of triaxial accelerometers installed on, and near, the EDR during frontal crash tests. The computed delta-V from these accelerometers provided the agency with signals that could be directly compared to the delta-V measured by the EDR. The results of these tests demonstrated a sufficient correlation with the two laboratory sensors and a means for testing compliance.[16]

NHTSA has published the Part 563 test procedure in response to this request.

*H. Data Capture for Events Involving Side Air Bags*

The AIAM recommended that the agency clarify its intent with regard to the capture and lock of data collected from a side air bag versus a side curtain/tube air bag. It recommended that section 563.9(a) be clarified to include explicit reference to the separate definitions for side air bags and side curtain/tube air bags. It commented that because of the separate definitions for side and side curtain/tube air bags in § 563.5(b), a manufacturer could interpret § 563.9 to regulate crash events involving only a side air bag. It added that this appears to be at odds with the definition for ''time zero'' which cites that an EDR must capture any crash event that deploys any air bag (front, side, or side curtain/tube).

*Agency Response:* We concur with clarifying the applicability of § 563.9(a) as suggested by the AIAM. The agency intended for § 563.9(a) to capture air bag deployments in frontal crashes or side crashes that involve either side or side curtain/tube air bags. We consider the definitions for ''side air bag'' and ''side curtain/tube air bag'' in § 563.5(b) to be subsets of inflatable occupant restraint devices designed to be deployed in any side impact crash or rollover event. Therefore, a ''side curtain/tube air bag'' would simply be a specific type of ''side air bag,'' and as such would be subject to the requirements of § 563.9(a).

We have also since recognized that it may not be appropriate to require the locking of a side or side curtain/tube air bag deployment event when the lateral delta-V information is not recorded. For example, in the case of a purely lateral crash, an EDR that minimally complies with Part 563 would not record any of the lateral crash information that would be useful for reconstructing a side impact event. It would also lock the frontal data element information relative to this side impact event in memory and would require the consumer to repair (or reset) the EDR, if the consumer would like to restore the ability to record 2 events in the future.

Therefore, to clarify our intent in the final rule, we are amending § 563.9(a) to read as follows:

> In a frontal air bag deployment crash, capture and record the current deployment data. In a side or side curtain/tube air bag deployment crash, where lateral delta-V is recorded by the EDR, capture and record the current deployment data. The memory for the air bag deployment event must be locked to prevent any future overwriting of the data.

*I. Prevention of EDR Data Tampering*

In response to the August 2006 final rule, Mr. Thomas Kowalick submitted a petition requesting that the agency require manufacturers to provide mechanical locks for the on-board diagnostic (OBD2) port for the sole use and control of the owner/operator of the vehicle. In response to his 2006 petition for reconsideration, the agency stated that while Mr. Kowalick presented information that devices exist that may be used to erase or tamper with EDR data, he did not provide any information that these devices were in fact being used for this purpose. We concluded that there were several other ways (*e.g.,* door locks, ignition keys) that protect access to the OBD2 port. Further, we required that EDR data from a crash that involves an air bag deployment be locked to prevent overwriting of these data.

In response to the January 2008 final rule, Mr. Kowalick again petitioned the agency to reconsider a mechanical lockout system for the download port of EDRs that could only be accessed by the owner of the vehicle. He again submitted information that indicates that devices are being offered to consumers to alter odometer readings, erase EDR data, or prevent EDR data from being recorded by the vehicle. Mr. Kowalick cited the agency position that if tampering were to become apparent, then the agency would reconsider its position on the tampering issue. He commented that the agency should reconsider its denial of a requirement for a mechanical lockout tool because the current rule is inadequate to protect vehicle owners and operators from tampering, and because the agency did not provide a definition for the term ''lock.''

*Agency Response:* We are denying this petition. Despite the purported availability of such devices, we have still not seen evidence of tampering during our real world data collections, and the petitioner provided no new information that would suggest that we should reconsider our previous denial of this request. We note that the preponderance of information submitted by Messrs. Kowalick, Rosenbluth, and Thompson[17] dealt with odometer fraud issues which are outside the scope of this rule.

Further, we do not believe that the rule is inadequate to protect vehicle owners/operators from data tampering. Mr. Kowalick commented that the agency should require a mechanical lockout device to be installed on the OBD2 port. We clearly state in § 563.9(a) that ''the memory for each air bag deployment event must be locked to prevent any future overwriting of these data.'' We further clarified the meaning of ''locked'' in the preamble by stating that we consider it to be ''to protect EDR data from changes or deletion.'' We note that there are many strategies which may be utilized to ''lock'' data to prevent overwriting in addition to the mechanical lock Mr. Kowalick proposed. In fact, Mr. Rosenbluth highlights one example as the writing of data to Electrically Programmable Read Only Memory, which ''is not electrically changeable,'' to prevent EDR data from being erased or tampered with after a crash. We do not wish to restrict the method by which a vehicle manufacturer chooses to lock EDR data collected during a crash. Therefore, we are denying the petition to require mechanical locks for the OBD2 port.

*K. Other Technical Corrections*

The Alliance, the AIAM, the AORC and Bosch commented on several technical and editorial corrections to clarify the regulatory text as follows:

1. The AIAM commented that section 563.9(b) should be clarified to more clearly state that only air bag deployment event data should be locked after capture. The AIAM believes the intent of the agency was to require data from only air bag deployment events to be locked, rather than events that involve other types of deployable restraint systems. It commented that the regulatory language could be misinterpreted and recommended that § 563.9(b) be revised.

The AORC commented that § 563.9(b) appears to be inconsistent with the definition of an event. It interpreted this clause to mean that a deployment of a restraint other than an air bag may be treated as a trigger at the option of the manufacturer.

[16] A full analysis of the correlation tests will be provided in the docket for this notice.

[17] After the end of the period to submit petitions for reconsideration of the January 2008 final rule, two private individuals, Mr. William Rosenbluth (Docket No. NHTSA–2008–0004–0012) and Dr. W. David Thompson (Docket No. NHTSA–2008–0004–0013), submitted comments in support of Mr. Kowalick's petition. We have opted to address their comments herein.

*Agency Response:* We concur with the AORC interpretation of § 563.9(b) that the deployment of a restraint other than an air bag may be treated as an EDR trigger at the option of the manufacturer. We agree that § 563.9(b) could be misinterpreted to mean that in an event that involves both an air bag and another type of deployable restraint, the captured data would not need to be locked. Similarly, we concur with the AIAM that § 563.9(b) could be misinterpreted to require the EDR to lock data from crashes in which an air bag was not deployed, but other deployable restraint systems were activated. We intended for EDRs to record and lock data from frontal, side, and side curtain/tube air bag deployment events, but data from events that do not deploy a frontal, side, or side curtain/tube air bag could be captured and recorded at the option of the manufacturer subject to the conditions in § 563.9(b). For this reason, we have revised § 563.9(b) as shown below. We note that the inclusion of ''trigger threshold'' has been removed since exceeding the trigger threshold is by definition an event. Similarly, all other ''events'' not captured in § 563.9(a), must be captured, subject to the conditions in § 563.9(b).

(b) In an event that does not meet the criteria in § 563.9(a), capture and record the current event data, up to two events, subject to the following conditions:

(1) If an EDR non-volatile memory buffer void of previous-event data is available, the current event data is recorded in the buffer.

(2) If an EDR non-volatile memory buffer void of previous-event data is not available, the manufacturer may choose to either overwrite any previous event data that does not deploy an air bag with the current event data, or to not record the current event data.

(3) EDR buffers containing previous frontal, side, or side curtain/tube air bag deployment-event data must not be overwritten by the current event data.

2. In the definitions set forth in § 563.5(b), the Alliance recommended that the definition for occupant size classification be clarified from a driver as not being ''of small stature'' to ''larger than a 5th percentile female (as defined in 49 CFR part 572, subpart O),'' and a ''child'' as that defined in 49 CFR part 572, subpart N (6 year old child). It proposed the following definition:

*Occupant size classification* means, for the right front passenger, the classification of the occupant *as a child and not an adult, as defined in 49 CFR part 572, subpart N,* and for the driver, the classification of the driver as being *as large or larger than a 5th percentile female (as defined in 49 CFR part 572, subpart O).*

The Alliance also noted that the occupant classification data elements differ between Tables II and III. It recommended that the agency standardize the occupant classification data elements in Tables II and III to make Part 563 more objective.

*Agency Response:* We agree with adding more clarity to the *Occupant size classification* definition to reflect the occupant size categories used in testing the suppression of air bags in FMVSS No. 208. We amended the definition as: ''*Occupant size classification* means, for the right front passenger, the classification of the occupant as a child (as defined in 49 CFR part 572, subpart N or smaller) or not as an adult (as defined in 49 CFR part 572, subpart O), and for the driver, the classification of the driver as being a 5th percentile female (as defined in 49 CFR part 572, subpart O) or larger.'' We also concur that the differences in occupant classification data elements in Tables II and III were typographical errors and have made these editorial corrections in the regulatory text.

3. The Alliance recommended that the word ''status'' be inserted after ''foremost'' in the right front passenger seat track position data element in Table II.

*Agency Response:* We concur with this change. The word ''status'' is used in the companion data element in Table II for the driver and was originally part of the 2006 final rule. This was inadvertently dropped in the 2008 final rule. We have made this editorial correction to Table II.

4. The Alliance recommended that the requirement in Table III for the service brake status and ABS activity be revised to read: ''On or Off.''

*Agency Response:* We concur. These are listed presently as ''On and Off.'' However, ''On or Off'' is the correct way to list these options. We have made the editorial corrections to Table III and to the definition of ''Service brake, on and off'' in § 563.5.

5. The Alliance recommended that the requirement in Table III for stability control be revised to read: ''On, Off, or Engaged.''

*Agency Response:* We concur. This is presently listed as ''On, Off, Engaged.'' However, we intended for these three states to be offered as options. Therefore, we have made the requested editorial correction to Table III and Table II.

6. The AIAM recommended that the agency clarify the data element in Table I for ''Multi-event, number of event.'' It stated it is unclear if the status is used to indicate that there were 1 or 2 events, or if the status is used to indicate which event is being stored, (*e.g.,* event 1 of 2 or event 2 of 2). It interpreted this to mean that two events should be stored only in the case of a multi-event crash situation.

*Agency Response:* We agree that the data element in Table I needs clarification. We intended for the ''multi-event'' data element in Table I to indicate which event is being stored. In § 563.5(b), we defined a multi-event crash as ''the occurrence of 2 events, the first and last of which begin not more than 5 seconds apart.'' We note that in the case of a single event, the multi-event data element would then report a ''1.'' In the case of a multiple event, during the first event, the EDR would not yet know that the second event is going to occur. Therefore, the data from the first event would still report a ''1'' for the multi-event data element. Any data captured from the subsequent event would then report a ''2'' for the multi-event data element and the time from event 1 to 2. To clarify this, we have amended the multi-event data element in Table I to be ''Multi-event, number of event'' by removing the ''(1, 2).'' We have also revised this nomenclature in Table III.

7. The AORC requested that the agency clarify that upon locking of data from an event, the ''lock'' may be applied to either the data from the individual event or the entire EDR at the option of the manufacturer.

*Agency Response:* The January 2008 final rule revised § 563.9(a) to require that ''the memory for each air bag deployment event must be locked to prevent any future overwriting of these data.'' We further clarified the meaning of ''locked'' in the preamble (73 FR 2172) by stating that we consider it to be ''to protect EDR data from changes or deletion.'' We agree that either strategy suggested by the AORC may be employed to lock the EDR data provided that the minimum conditions within § 563.9 have been met.

8. The AORC requested that the agency clarify that acceleration and angular rate data recorded in accordance with Table II represents single sample (raw) data rather than time-averaged data.

*Agency Response:* Our understanding of the acceleration data reported by current EDRs is that the data is time-averaged for deployment decisions. However, as previously discussed, we have amended the requirements for the acceleration data elements to be at the option of the vehicle manufacturer. We note that part 563 does not regulate ''angular rate'' data. Rather, it specifies limits for ''vehicle roll angle'' data. We believe that this data element is time-averaged data.

9. The AORC commented that in newer active steering systems the steering wheel angle and the tire position may not correlate. Additionally, Bosch commented that the Table III accuracy and resolution requirements for the steering input data element are inconsistent with other data elements. It recommended that the agency revise the range definition for this data element to ±100 percent.

*Agency Response:* In response to the petitioners, we have revised the minimum range requirement for the ''Steering input'' data element from −250 degrees CW to 250 degrees CCW to a value of ±100 percent in Table III. We agree with Bosch that this change would be more consistent with the accuracy and resolution requirements being expressed as percentages. We also believe this change will better address state of the art active steering systems noted by the AORC.

10. Bosch commented that current EDR designs often utilize two different types of lateral acceleration sensors: a high-g sensor (± 50 g) to detect side impact events, and a low-g sensor (±5 g) to detect rollover events. It interpreted that the final rule is mainly concerned with side impact events, and recommend that the agency revise the lateral acceleration data element range to ±50 g.

*Agency Response:* We agree that current EDR designs may utilize two different types of lateral acceleration sensors for side impact and rollover events. However, for the reasons discussed previously, we have amended the minimum range requirements to be at the option of the manufacturer.

11. *Other editorial corrections:* We have revised the data element descriptions (first column) in Table III to remove references to the data range since Table III already references the range for each of the data elements.

## IV. Rulemaking Analyses and Notices

This rule makes several technical changes to the regulatory text of 49 CFR part 563, and does not increase the regulatory burden of manufacturers. The agency has discussed the relevant requirements of the Vehicle Safety Act, Executive Order 12866, the Department of Transportation's regulatory policies and procedures, the Regulatory Flexibility Act, Executive Order 13132 (Federalism), Executive Order 12988 (Civil Justice Reform), Executive Order 13045 (Protection of Children from Health and Safety Risks), the Paperwork Reduction Act, the National Technology Transfer and Advancement Act, Unfunded Mandates Reform Act, and the National Environmental Policy Act in the August 2006 final rule cited above. Those discussions are not affected by these technical changes.

### *Privacy Act*

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## V. Regulatory Text

### List of Subjects in 49 CFR Part 563

Motor vehicle safety, Motor vehicles, Reporting and recordkeeping requirements.

In consideration of the foregoing, part 563 is amended as follows:

## PART 563—EVENT DATA RECORDERS

■ 1. The authority citation for Part 563 continues to read as follows:

**Authority:** 49 U.S.C. 322, 30101, 30111, 30115, 30117, 30166, 30168; delegation of authority at 49 CFR 1.50.

■ 2. Amend paragraph (b) of § 563.5 by revising the definitions of ''end of event time,'' ''event,'' ''occupant size classification,'' and ''time zero,'' removing the definition of ''service brake, on and off'', and adding a definition in alphabetical order for ''service brake, on or off'' to read as follows:

### § 563.5 Definitions.

* * * * *

(b) * * *

*End of event time* means the moment at which the resultant cumulative delta–V within a 20 ms time period becomes 0.8 km/h (0.5 mph) or less, or the moment at which the crash detection algorithm of the air bag control unit resets.

* * * * *

*Event* means a crash or other physical occurrence that causes the trigger threshold to be met or exceeded, or any non-reversible deployable restraint to be deployed, whichever occurs first.

* * * * *

*Occupant size classification* means, for the right front passenger, the classification of the occupant as a child (as defined in 49 CFR part 572, subpart N or smaller) or not as an adult (as defined in 49 CFR part 572, subpart O), and for the driver, the classification of the driver as being a 5th percentile female (as defined in 49 CFR Part 572, subpart O) or larger.

* * * * *

*Service brake, on or off* means the status of the device that is installed in or connected to the brake pedal system to detect whether the pedal was pressed. The device can include the brake pedal switch or other driver-operated service brake control.

* * * * *

*Time zero* means whichever of the following occurs first:

(1) For systems with ''wake-up'' air bag control systems, the time at which the occupant restraint control algorithm is activated; or

(2) For continuously running algorithms,

(i) The first point in the interval where a longitudinal cumulative delta-V of over 0.8 km/h (0.5 mph) is reached within a 20 ms time period; or

(ii) For vehicles that record ''delta-V, lateral,'' the first point in the interval where a lateral cumulative delta-V of over 0.8 km/h (0.5 mph) is reached within a 5 ms time period; or

(3) Deployment of a non-reversible deployable restraint.

* * * * *

■ 3. In § 563.7, revise Table I in paragraph (a) and Table II in paragraph (b) to read as follows:

### § 563.7 Data elements.

(a) * * *

TABLE I—DATA ELEMENTS REQUIRED FOR ALL VEHICLES EQUIPPED WITH AN EDR

| Data element | Recording interval/time [1] (relative to time zero) | Data sample rate (samples per second) |
|---|---|---|
| Delta-V, longitudinal | 0 to 250 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | 100 |

TABLE I—DATA ELEMENTS REQUIRED FOR ALL VEHICLES EQUIPPED WITH AN EDR—Continued

| Data element | Recording interval/time[1] (relative to time zero) | Data sample rate (samples per second) |
|---|---|---|
| Maximum delta-V, longitudinal | 0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | N/A |
| Time, maximum delta-V | 0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | N/A |
| Speed, vehicle indicated | −5.0 to 0 sec | 2 |
| Engine throttle, % full (or accelerator pedal, % full) | −5.0 to 0 sec | 2 |
| Service brake, on/off | −5.0 to 0 sec | 2 |
| Ignition cycle, crash | −1.0 sec | N/A |
| Ignition cycle, download | At time of download[3] | N/A |
| Safety belt status, driver | −1.0 sec | N/A |
| Frontal air bag warning lamp, on/off[2] | −1.0 sec | N/A |
| Frontal air bag deployment, time to deploy, in the case of a single stage air bag, or time to first stage deployment, in the case of a multi-stage air bag, driver. | Event | N/A |
| Frontal air bag deployment, time to deploy, in the case of a single stage air bag, or time to first stage deployment, in the case of a multi-stage air bag, right front passenger. | Event | N/A |
| Multi-event, number of event | Event | N/A |
| Time from event 1 to 2 | As needed | N/A |
| Complete file recorded (yes, no) | Following other data | N/A |

[1] Pre-crash data and crash data are asynchronous. The sample time accuracy requirement for pre-crash time is −0.1 to 1.0 sec (*e.g.,* T = −1 would need to occur between −1.1 and 0 seconds.)

[2] The frontal air bag warning lamp is the readiness indicator specified in S4.5.2 of FMVSS No. 208, and may also illuminate to indicate a malfunction in another part of the deployable restraint system.

[3] The ignition cycle at the time of download is not required to be recorded at the time of the crash, but shall be reported during the download process.

(b) * * *

TABLE II—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS

| Data element name | Condition for requirement | Recording interval/time[1] (relative to time zero) | Data sample rate (per second) |
|---|---|---|---|
| Lateral acceleration | If recorded[2] | N/A | N/A |
| Longitudinal acceleration | If recorded | N/A | N/A |
| Normal acceleration | If recorded | N/A | N/A |
| Delta-V, lateral | If recorded | 0–250 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | 100 |
| Maximum delta-V, lateral | If recorded | 0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | N/A |
| Time maximum delta-V, lateral | If recorded | 0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | N/A |
| Time for maximum delta-V, resultant | If recorded | 0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter. | N/A |
| Engine rpm | If recorded | −5.0 to 0 sec | 2 |
| Vehicle roll angle | If recorded | −1.0 up to 5.0 sec[3] | 10 |
| ABS activity (engaged, non-engaged) | If recorded | −5.0 to 0 sec | 2 |
| Stability control (on, off, or engaged) | If recorded | −5.0 to 0 sec | 2 |
| Steering input | If recorded | −5.0 to 0 sec | 2 |
| Safety belt status, right front passenger (buckled, not buckled). | If recorded | −1.0 sec | N/A |
| Frontal air bag suppression switch status, right front passenger (on, off, or auto). | If recorded | −1.0 sec | N/A |
| Frontal air bag deployment, time to nth stage, driver[4]. | If equipped with a driver's frontal air bag with a multi-stage inflator. | Event | N/A |
| Frontal air bag deployment, time to nth stage, right front passenger[4]. | If equipped with a right front passenger's frontal air bag with a multi-stage inflator. | Event | N/A |
| Frontal air bag deployment, nth stage disposal, driver, Y/N (whether the nth stage deployment was for occupant restraint or propellant disposal purposes). | If recorded | Event | N/A |

TABLE II—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS—Continued

| Data element name | Condition for requirement | Recording interval/time [1] (relative to time zero) | Data sample rate (per second) |
|---|---|---|---|
| Frontal air bag deployment, nth stage disposal, right front passenger, Y/N (whether the nth stage deployment was for occupant restraint or propellant disposal purposes). | If recorded | Event | N/A |
| Side air bag deployment, time to deploy, driver. | If recorded | Event | N/A |
| Side air bag deployment, time to deploy, right front passenger. | If recorded | Event | N/A |
| Side curtain/tube air bag deployment, time to deploy, driver side. | If recorded | Event | N/A |
| Side curtain/tube air bag deployment, time to deploy, right side. | If recorded | Event | N/A |
| Pretensioner deployment, time to fire, driver. | If recorded | Event | N/A |
| Pretensioner deployment, time to fire, right front passenger. | If recorded | Event | N/A |
| Seat track position switch, foremost, status, driver. | If recorded | −1.0 sec | N/A |
| Seat track position switch, foremost, status, right front passenger. | If recorded | −1.0 sec | N/A |
| Occupant size classification, driver | If recorded | −1.0 sec | N/A |
| Occupant size classification, right front passenger. | If recorded | −1.0 sec | N/A |
| Occupant position classification, driver | If recorded | −1.0 sec | N/A |
| Occupant position classification, right front passenger. | If recorded | −1.0 sec | N/A |

[1] Pre-crash data and crash data are asynchronous. The sample time accuracy requirement for pre-crash time is −0.1 to 1.0 sec (*e.g.* T = −1 would need to occur between −1.1 and 0 seconds.)
[2] "If recorded" means if the data is recorded in non-volatile memory for the purpose of subsequent downloading.
[3] "vehicle roll angle" may be recorded in any time duration; −1.0 sec to 5.0 sec is suggested.
[4] List this element n − 1 times, once for each stage of a multi-stage air bag system.

■ 4. In § 563.8, revise Table III in paragraph (a) to read as follows:

**§ 563.8 Data format**

(a) * * *

TABLE III—REPORTED DATA ELEMENT FORMAT

| Data element | Minimum range | Accuracy [1] | Resolution |
|---|---|---|---|
| Lateral acceleration | At option of manufacturer | At option of manufacturer | At option of manufacturer. |
| Longitudinal acceleration | At option of manufacturer | At option of manufacturer | At option of manufacturer. |
| Normal Acceleration | At option of manufacturer | At option of manufacturer | At option of manufacturer. |
| Longitudinal delta-V | −100 km/h to + 100 km/h | +/−10% | 1 km/h. |
| Lateral delta-V | −100 km/h to +100 km/h | +/−10% | 1 km/h. |
| Maximum delta-V, longitudinal | −100 km/h to +100 km/h | +/−10% | 1 km/h. |
| Maximum delta-V, lateral | −100 km/h to +100 km/h | +/−10% | 1 km/h. |
| Time, maximum delta-V, longitudinal. | 0–300 ms, or 0–End of Event Time plus 30 ms, whichever is shorter. | +/−3 ms | 2.5 ms. |
| Time, maximum delta-V, lateral | 0–300 ms, or 0—End of Event Time plus 30 ms, whichever is shorter. | +/−3 ms | 2.5 ms. |
| Time, maximum delta-V, resultant | 0–300 ms, or 0—End of Event Time plus 30 ms, whichever is shorter. | +/−3 ms | 2.5 ms. |
| Vehicle Roll Angle | −1080 deg to +1080 deg | +/−10% | 10 deg. |
| Speed, vehicle indicated | 0 km/h to 200 km/h | +/−1 km/h | 1 km/h. |
| Engine throttle, percent full (accelerator pedal percent full). | 0 to 100% | +/−5% | 1%. |
| Engine rpm | 0 to 10,000 rpm | +/−100 rpm | 100 rpm. |
| Service brake | On or Off | N/A | On or Off. |
| ABS activity | On or Off | N/A | On or Off. |
| Stability control | On, Off, or Engaged | N/A | On, Off, or Engaged. |
| Steering input | +/−100% | +/−5% | 1%. |
| Ignition cycle, crash | 0 to 60,000 | +/−1 cycle | 1 cycle. |
| Ignition cycle, download | 0 to 60,000 | +/−1 cycle | 1 cycle. |
| Safety belt status, driver | On or Off | N/A | On or Off. |

TABLE III—REPORTED DATA ELEMENT FORMAT—Continued

| Data element | Minimum range | Accuracy [1] | Resolution |
|---|---|---|---|
| Safety belt status, right front passenger. | On or Off | N/A | On or Off. |
| Frontal air bag warning lamp | On or Off | N/A | On or Off. |
| Frontal air bag suppression switch status, right front passenger. | On, Off, or Auto | N/A | On, Off, or Auto. |
| Frontal air bag deployment, time to deploy/first stage, driver. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Frontal air bag deployment, time to deploy/first stage, right front passenger. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Frontal air bag deployment, time to nth stage, driver. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Frontal air bag deployment, time to nth stage, right front passenger. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Frontal air bag deployment, nth stage disposal, driver. | Yes or No | N/A | Yes or No. |
| Frontal air bag deployment, nth stage disposal, right front passenger. | Yes or No | N/A | Yes or No. |
| Side air bag deployment, time to deploy, driver. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Side air bag deployment, time to deploy, right front passenger. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Side curtain/tube air bag deployment, time to deploy, driver side. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Side curtain/tube air bag deployment, time to deploy, right side. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Pretensioner deployment, time to fire, driver. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Pretensioner deployment, time to fire, right front passenger. | 0 to 250 ms | +/−2 ms | 1 ms. |
| Seat track position switch, foremost, status, driver. | Yes or No | N/A | Yes or No. |
| Seat track position switch, foremost, status, right front passenger. | Yes or No | N/A | Yes or No. |
| Occupant size classification, driver | 5th percentile female or larger | N/A | Yes or No. |
| Occupant size classification, right front passenger. | Child | N/A | Yes or No. |
| Occupant position classification, driver. | Out of position | N/A | Yes or No. |
| Occupant position classification, right front passenger. | Out of position | N/A | Yes or No. |
| Multi-event, number of event | 1 or 2 | N/A | 1 or 2. |
| Time from event 1 to 2 | 0 to 5.0 sec | 0.1 sec | 0.1 sec. |
| Complete file recorded | Yes or No | N/A | Yes or No. |

[1] Accuracy requirement only applies within the range of the physical sensor. If measurements captured by a sensor exceed the design range of the sensor, the reported element must indicate when the measurement first exceeded the design range of the sensor.

* * * * *

■ 5. Revise § 563.9 to read as follows:

**§ 563.9 Data capture.**

The EDR must capture and record the data elements for events in accordance with the following conditions and circumstances:

(a) In a frontal air bag deployment crash, capture and record the current deployment data. In a side or side curtain/tube air bag deployment crash, where lateral delta-V is recorded by the EDR, capture and record the current deployment data. The memory for the air bag deployment event must be locked to prevent any future overwriting of the data.

(b) In an event that does not meet the criteria in § 563.9(a), capture and record the current event data, up to two events, subject to the following conditions:

(1) If an EDR non-volatile memory buffer void of previous-event data is available, the current event data is recorded in the buffer.

(2) If an EDR non-volatile memory buffer void of previous-event data is not available, the manufacturer may choose to either overwrite any previous event data that does not deploy an air bag with the current event data, or to not record the current event data.

(3) EDR buffers containing previous frontal, side, or side curtain/tube air bag deployment-event data must not be overwritten by the current event data.

Issued on: July 25, 2011.

**David L. Strickland,**

*Administrator.*

[FR Doc. 2011–19214 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–59–P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket ID FWS–R6–ES–2011–0062; 92220–1113–0000; ABC Code: C6]**

**RIN 1018–AX93**

## Endangered and Threatened Wildlife and Plants; Reinstatement of Listing Protections for the Preble's Meadow Jumping Mouse

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are issuing this final rule to comply with a court order that vacates our most recent rule and reinstates the regulatory protections under the Endangered Species Act of 1973, as amended (Act), for the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (Preble's) in Wyoming. The United States District Court for the District of Colorado, by order dated July 7, 2011, vacated and remanded the 2008 Final Rule to Amend the Listing for the Preble's Meadow Jumping Mouse To Specify Over What Portion of Its Range the Subspecies is Threatened (2008 Amended Listing Decision) and reinstated the 1998 Final Rule Listing the Preble's Meadow Jumping Mouse as Threatened Throughout Its Range, effective August 6, 2011. This rule reinstates the listing of Preble's in Wyoming. It also reinstates the special rule that exempts activities related to rodent control, ongoing agricultural activities, landscape maintenance, existing uses of water, noxious weed control, and ongoing ditch maintenance activities from the take provisions of the Act throughout the entire range of the Preble's.

**DATES:** This action is effective August 6, 2011.

**ADDRESSES:** This final rule and the U.S. District Court decision is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2011–0062.

**FOR FURTHER INFORMATION CONTACT:** Susan Linner, Field Supervisor, U.S. Fish and Wildlife Service, Colorado Ecological Services Office, 134 Union Boulevard, Suite 670, Lakewood, CO 80225; *telephone:* 303–236–4773; *facsimile:* 303–236–4005. Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at (800) 877–8337 for TTY.

**SUPPLEMENTARY INFORMATION:**

### Background

On July 10, 2008, we published a final rule amending the listing determination for the Preble's to remove protections for the mouse in Wyoming (73 FR 39790). In that rule, we determined that the Preble's was not threatened throughout all of its range, but the portion of its range located in Colorado represented a significant portion of the range where the Preble's should retain its threatened status. The 2008 Amended Listing Decision relied on a March 2007 Memorandum Opinion from the Department of the Interior's Office of the Solicitor (Opinion M–37013) and applied Opinion M–37013's interpretation of the Act's term "significant portion of the range" (SPR) to determine that a difference in status was warranted between the Wyoming and Colorado portions of the range.

On June 23, 2009, a petition for review of the 2008 amended listing decision was filed in the United States District Court for the District of Colorado. Petitioners challenged, among other things, our interpretation of SPR as applied to the Preble's decision. In the time since that lawsuit was filed, two courts vacated final listing decisions that relied on the same statutory interpretation contained in Opinion M–37013 and applied in the Preble's 2008 Amended Listing Decision. On May 4, 2011, after careful review of the statutory interpretation contained in Opinion M–37013 and those two court decisions, the Solicitor of the Department of the Interior issued a memorandum ("M–37024") withdrawing Opinion M–37013, and the Service announced its intent to propose in the near future, for notice and comment, a joint policy with the National Marine Fisheries Service ("NMFS") regarding the interpretation and implementation of the Act's statutory phrase "in danger of extinction throughout all or a significant portion of its range" ("SPR Language"). This announcement is available at: *http://www.fws.gov/home/feature/2011/pdf/Wolf_Actions_FAQs.pdf*.

The Service determined it necessary to reconsider the Preble's status in light of recent court decisions and the subsequent withdrawal of Opinion M–37013. Accordingly, the Service filed a motion for voluntary remand and vacatur of the Preble's 2008 Amended Listing Decision, and requested that the special rule promulgated pursuant to Section 4(d) of the Act and published in the **Federal Register** in 2001 (66 FR 28125, May 22, 2001), amended in 2002 (67 FR 61531, October 1, 2002), and extended indefinitely in 2004 (69 FR 29101, May 20, 2004), be reinstated throughout the species' range. On July 7, 2011, the United States District Court for the District of Colorado granted this motion and ordered the 2008 Amended Listing Decision vacated as of August 6, 2011 (*Center for Native Ecosystems, et al.* v. *Salazar, et al.*, 09–cv–01463–AP–JLK, 2011 U.S. Dist. LEXIS 72664 (D. Colo. July 7, 2011).

This court ruling reinstates the 1998 Final Rule listing the Preble's as threatened throughout its range (63 FR 26517), effective August 6, 2011. Accordingly, Federal protections that were in place prior to our 2008 Amended Listing Decision are reinstated for the Preble's in Wyoming. Further, the special rule promulgated pursuant to section 4(d) of the Act and published in the **Federal Register** in 2001, amended in 2002, and extended indefinitely in 2004, is reinstated throughout the species' range (50 CFR 17.40(l)). The Service must complete its status review of the Preble's and publish a 12-month finding in the **Federal Register** for two petitions submitted by the State of Wyoming and Coloradans for Water Conservation and Development to delist the Preble's by the sooner of either 12 months after its formulation of the new joint policy with NMFS interpreting "significant portion of its range" language or June 1, 2013.

We published a statement on our Web site to notify the public of the ruling and its impact shortly after the order was released. We intend to notify the public again when this notice is published to ensure awareness of the ruling.

### Administrative Procedure

This rulemaking is necessary to comply with the July 7, 2011, court order. Therefore, under these circumstances, the Director has determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and unnecessary. The Director has further determined, pursuant to 5 U.S.C. 553(d)(3), that the agency has good cause to make this rule effective August 6, 2011.

### Effects of the Rule

As of August 6, 2011, the Preble's is again listed as threatened in Wyoming (50 CFR 17.11(h)) and the section 4(d) rule is reinstated throughout the species' range (50 CFR 17.40(l)). Please see the above-cited **Federal Register** publications for more detailed information regarding the Preble's listing and the special rule.

This rule will not affect the status of the Preble's under State laws or suspend any other legal protections provided by State law.

**Lists of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

Accordingly, in order to comply with the court orders discussed above, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below.

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11 by revising the entry in the table at paragraph (h) for ''Mouse, Preble's meadow jumping'' to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| MAMMALS | | | | | | | |
| * | * | * | * | * | * | * | * |
| Mouse, Preble's meadow jumping. | *Zapus hudsonius preblei.* | U.S.A. (CO, WY) | Entire ................. | T | 636 | 17.95(a) | 17.40(l) |
| * | * | * | * | * | * | * | * |

■ 3. In § 17.40, revise paragraphs (l)(2)(vi)(E) and (l)(4) to read as follows:

**§ 17.40 Special rules—mammals.**

* * * * *

(l) * * *

(2) * * *

(vi) * * *

(E) Any future revisions to the authorities listed in paragraphs (l)(2)(vi)(A) through (D) of this section that apply to the herbicides proposed for use within the species' range.

* * * * *

(4) *Where does this rule apply?* The take exemptions provided by this rule are applicable within the entire range of the Preble's meadow jumping mouse.

* * * * *

Dated: July 27, 2011.

**James J. Slack,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–19895 Filed 8–4–11; 8:45 am]

BILLING CODE 4310–55–P

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 101029427–0609–02]**

**RIN 0648–XA555**

## Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2011 Winter II Quota

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

**ACTION:** Temporary rule; inseason adjustment.

**SUMMARY:** NMFS adjusts the 2011 Winter II commercial scup quota. This action complies with Framework Adjustment 3 (Framework 3) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which established a process to allow the rollover of unused commercial scup quota from the Winter I period to the Winter II period.

**DATES:** Effective August 5, 2011 through December 31, 2011.

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

**SUPPLEMENTARY INFORMATION:** NMFS published a final rule in the **Federal Register** on November 3, 2003 (68 FR 62250), implementing a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period (January 1 through April 30) to be added to the quota for the Winter II period (November 1 through December 31), and to allow adjustment of the commercial possession limit for the Winter II period commensurate with the amount of quota rolled over from the Winter I period.

For 2011, the initial Winter II quota is 3,245,500 lb (1,472 mt), and the best available landings information indicates that 3,366,913 lb (1,527 mt) remain of the Winter I quota of 9,184,725 lb (4,166 mt). Consistent with the intent of Framework 3, the full amount of unused 2011 Winter I quota is transferred to Winter II, resulting in a revised 2011 Winter II quota of 6,612,413 lb (2,999 mt). Because the amount transferred is greater than 2,000,000 lb (907 mt), the possession limit per trip will increase to 8,000 lb (3,629 kg) during the Winter II quota period, consistent with the final rule Winter I to Winter II possession limit increase table (table 3) published in the 2011 final scup specifications (75 FR 81498, December 28, 2010).

**Classification**

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

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on this in-season adjustment because it is impracticable and contrary to the public interest. The landings data upon which this action is based are not available on a real-time basis and were compiled only a short time before the determination was made that this action is warranted. If implementation of this in-season action is delayed to solicit prior public comment, the objective of the fishery management plan to achieve the optimum yield from the fishery could be compromised; deteriorating weather conditions during the later part of the fishery year will reduce fishing effort and could result in the annual quota from being fully harvested. This would conflict with the agency's legal obligation under the Magnuson-Stevens Fishery Conservation and Management

Act to achieve the optimum yield from a fishery on a continuing basis, resulting in a negative economic impact on vessels permitted to fish in this fishery.

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

Dated: August 2, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–19929 Filed 8–4–11; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 110218149–1182–01]**

**RIN 0648–BA86**

## Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fishery; Emergency Rule Extension, Revision of 2011 Butterfish Specifications

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

**ACTION:** Temporary final rule; emergency action extension and request for comments.

**SUMMARY:** NMFS extends the emergency revision to the butterfish allowable biological catch (ABC) implemented on March 15, 2011, which is scheduled to expire on September 12, 2011. Specifically, this temporary rule maintains the increase in the butterfish ABC from 1,500 mt to 1,811 mt, and applies the increase to the butterfish mortality cap in the *Loligo* (*Doryteuthis*) squid fishery, based on the most recent and best available scientific information. The increase is extended for an additional 186 days to maintain the increased butterfish ABC through the end of the 2011 fishing year (*i.e.,* through December 31, 2011), or until superseded by 2012 MSB specifications.

**DATES:** The effective date of the interim rule published March 15, 2011 (76 FR 13887), is extended through March 16, 2012, unless superseded by another action. NMFS will accept comments through September 6, 2011.

**ADDRESSES:** The supplemental EA is available by request from: Patricia Kurkul, Regional Administrator, National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930–2276, or via the Internet at *http://www.nero.noaa.gov*.

You may submit comments, identified by RIN 0648–BA86, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking portal *http://www.regulations.gov;*
- *Fax:* (978) 281–9135, *Attn:* Aja Szumylo;
- Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on Extension of the Emergency Rule to Revise the Butterfish Specifications.''

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

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

**FOR FURTHER INFORMATION CONTACT:** Aja Szumylo, Fishery Policy Analyst, (978) 281–9195; *fax:* (978) 281–9135.

**SUPPLEMENTARY INFORMATION:**

### Background

This temporary final rule extends the emergency measures implemented on March 15, 2011 (76 FR 13887), as authorized by section 305(c) of the Magnuson-Stevens Act, to increase the butterfish ABC from 1,500 mt to 1,811 mt. The March 15, 2011, emergency rule included detailed information on purpose and need to revise the butterfish ABC that was initially set in the final 2011 specifications for the MSB Fishery Management Plan (FMP) (76 FR 8306; February 14, 2011). There was one anonymous comment submitted on the emergency rule. NMFS will again accept public comment on both the appropriateness of the emergency action to date, and its extension.

The emergency specifications extended through this final rule maintain the 2011 butterfish ABC at 1,811 mt, with the increase applied to the butterfish mortality cap on the *Loligo* fishery. Other specifications for butterfish, specifically initial optimum yield (IOY), domestic annual harvest (DAH), domestic annual processing (DAP), total allowable level of foreign fishing (TALFF), and research set-aside (RSA), are unchanged from those set in the final 2011 specifications. Specifications for Atlantic mackerel, *Loligo* squid, and *Illex* squid also remain unchanged.

Amendment 10 to the MSB FMP specified that the butterfish mortality cap is to be set equal to 75 percent of the butterfish ABC, with the remaining 25 percent of the butterfish ABC allocated to account for butterfish catch in other fisheries, but noted that this apportionment may be revised as necessary to accommodate the *Loligo* squid fishery. The additional 311–mt ABC allotment extended through this action is entirely allocated to the mortality cap. Under the 2011 specifications, the butterfish mortality cap was 1,125 mt (75 percent of 1,500 mt); this extension maintains the increase in the 2011 butterfish mortality cap at 1,436 mt that was implemented in the emergency action.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. As noted in the March 15, 2011, emergency rule, NMFS determined that it was necessary to modify the butterfish specifications, consistent with new scientific advice, in a timely manner in order allow the *Loligo* squid fleet to optimize *Loligo* squid harvest with reduced concern that the fishery would be closed due to the butterfish mortality cap.

### Comments

*Comment:* One anonymous individual opposed the increase in the butterfish ABC and stated that this level of taking is not sustainable.

*Response*: As discussed in the background section of the March 2011 emergency rule, the increased butterfish

ABC NMFS implemented in the emergency action is consistent with the best scientific information available. The analysis presented in the supplemental EA concludes that increasing the butterfish ABC to 1,811 mt is not expected to have any adverse impact on the butterfish stock when compared to the original 1,500-mt butterfish ABC.

**Classification**

NMFS has determined that this rule is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under section 553(b)(B) of the Administrative Procedure Act (APA) that it is impracticable and contrary to the public interest to provide for prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment contrary to the public interest. This action provides the benefit of allowing the *Loligo* fleet to optimize its harvest, with less concern that the fishery could be closed due to the butterfish mortality cap. The initial emergency action did not allow for prior public comment because the scientific review process and determination could not have been completed any earlier, due to the inherent time constraints associated with the process and the fact that the information on which this action is based became available after 2011 specifications were finalized.

For the reason above, the Assistant Administrator for Fisheries finds good cause under section 553(d) of the APA to waive the 30-day delay in effectiveness.

This emergency rule has been determined to be not significant for purposes of E.O. 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

The EA prepared for the initial emergency rule analyzed the impacts of the emergency specifications for the duration of a year (Supplemental Environmental Assessment for 2011 Atlantic Mackerel, Squid, and Butterfish Specifications; February 2011). Therefore, the impacts of this emergency action extension have been analyzed, and are within the scope of the Finding of No Significant Impact.

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

Dated: August 2, 2011.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011–19924 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–22–P

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**RIN 0648–XA209**

## Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands King and Tanner Crabs

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

**ACTION:** Notice of agency decision.

**SUMMARY:** NMFS announces approval of Amendments 38 and 39 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). Amendment 38 establishes a mechanism in the FMP to specify annual catch limits and accountability measures for each crab stock. This action is necessary to account for uncertainty in the overfishing limit and prevent overfishing. Amendment 39 modifies the snow crab rebuilding plan to define the stock as rebuilt the first year the stock biomass is above the level necessary to produce maximum sustainable yield. Amendments 38 and 39 are intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws.

**DATES:** The amendment was approved on August 2, 2011.

**ADDRESSES:** Electronic copies of Amendments 38 and 39 and the Environmental Assessment prepared for this action may be obtained from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Gretchen Harrington, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery management council submit any fishery management plan or fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment.

NMFS published the notice of availability for Amendments 38 and 39 to the FMP on May 4, 2011 (76 FR 25295), with a comment period that ended on July 5, 2011. NMFS received one comment letter. NMFS summarized this letter into two separate comments, and responds to them under Response to Comments, below.

NMFS determined that Amendments 38 and 39 to the FMP are consistent with the Magnuson-Stevens Act and other applicable laws and approved Amendments 38 and 39 on August 2, 2011. The May 4, 2011, notice of availability (76 FR 25295) contains additional information on this action. No changes to Federal regulations are necessary to implement these FMP amendments.

The crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* The FMP establishes a cooperative management regime that defers many aspects of crab fisheries management to the State of Alaska (State) with Federal oversight. State crab fishery management action must be consistent with the FMP, Magnuson-Stevens Act, and other applicable Federal laws.

**Annual Catch Limits and Acceptable Biological Catch**

In October 2010, the Council unanimously recommended Amendments 38 and 39 to the FMP. Amendment 38 establishes a mechanism in the FMP for the Council to specify annual catch limits (ACLs) and accountability measures. Amendment 39 modifies the snow crab rebuilding plan to establish that the stock will be rebuilt when the snow crab biomass is estimated to reach the level necessary to produce maximum sustainable yield.

Amendment 38 satisfies requirements of the Magnuson-Stevens Act, as amended in 2007, while maintaining the FMP's cooperative management regime that relies on State expertise in collecting and analyzing scientific data on crab and in establishing the total allowable catches (TACs). Amendment 38 establishes acceptable biological catch (ABC) control rules in the FMP and sets an ACL for each stock equal to the stock's ABC. Annually, the ABC control rule will be used to set the maximum ABC for each crab stock below the overfishing level (OFL) set for that stock. This mechanism ensures that, at the maximum ABC, the probability of overfishing is less than 50 percent.

Amendment 38 establishes accountability measures to comply with the Magnuson-Stevens Act requirement that FMPs include accountability measures to prevent catch from exceeding ACLs and to correct overages of the ACL if they do occur.

Amendment 38 also amends the FMP to establish an optimum yield (OY) range of 0 to less that the OFL catch. This OY range enables the State to determine the appropriate TAC levels below the OFL to prevent overfishing or address other biological concerns that may affect the reproductive potential of a stock but that are not reflected in the OFL itself. The State establishes TACs at levels that maximize harvests, and associated economic and social benefits, when biological and ecological conditions warrant doing so.

Amendment 39 modifies the existing snow crab rebuilding plan to redefine when the snow crab stock will be considered ''rebuilt.'' Under Amendment 39, snow crab will be considered rebuilt when the estimated biomass reaches the level necessary to produce maximum sustainable yield, rather than when estimated biomass reaches such a level for 2 consecutive years, as previously defined. The Scientific and Statistical Committee recommended that a 1-year threshold is appropriate for snow crab based on its confidence in the biomass estimates provided by the approved stock assessment model.

An Environmental Assessment was prepared for Amendments 38 and 39 that describes the management background, the purpose and need for action, the management alternatives, and the environmental, social, and economic impacts of the alternatives (see **ADDRESSES**).

**Response to Comments**

*Comment 1:* The commenter supports approval of Amendment 38 but expresses concern over the fact that the burden of implementing accountability measures falls primarily on the State. NMFS should accept some of the responsibility for assisting the State in implementing accountability measures.

*Response:* NMFS agrees that it has the responsibility to implement accountability measures. The accountability measures under Amendment 38 conform to the cooperative management structure of the FMP. Appropriate accountability measures are implemented by the Council, NMFS, and the State according to the respective roles and responsibilities under the FMP. Existing State and Federal accountability measures prevent TACs from being exceeded in crab fisheries and will continue to be used to prevent catch from exceeding ACLs. Federal accountability measures will be implemented during the ABC-setting process as the Council's Crab Plan Team and the Scientific and Statistical Committee determine the appropriate downward adjustments to the ACL in the fishing year after an ACL has been exceeded. Additionally, given that the State sets the TAC under the FMP, Amendment 38 also includes accountability measures for the State to exercise in the annual TAC-setting process. Under the FMP, the State has some discretion to determine the most appropriate method to account for any catch above the ACL in setting the TAC for the subsequent fishing season.

*Comment 2:* The commenter does not support Amendment 39. The commenter states that it would be premature to declare the snow crab stock as rebuilt the first year the stock biomass is above the level necessary to produce maximum sustainable yield. The commenter suggests postponing the reclassification of the snow crab stock as rebuilt until the stock has proven a 2-year trend above the estimated biomass. The commenter states that maintaining the 2-year rebuilding requirement would ensure that the biomass has reached the appropriate level before opening it up to the new challenges it will face under the new classification system.

*Response:* NMFS and the Council adopted the 2-year threshold previously used to define the snow crab stock as rebuilt as a precautionary measure to address the high degree of uncertainty in snow crab biomass estimates at the time the rebuilding plan was approved in 2000. Since then, a stock assessment model has been approved for use in estimating the snow crab biomass and setting the biological reference points.

The decision to modify the definition of rebuilt from 2 consecutive annual biomass estimates at or above the level necessary to support maximum sustainable yield to 1 such biomass estimate was based on the confidence of the Crab Plan Team and Scientific and Statistical Committee in the stock assessment model's ability to accurately estimate snow crab biomass. With the improved accuracy of biomass estimates provided by the approved stock assessment model, the 2-year threshold is no longer necessary.

The comment does not identify the new challenges that snow crab will face under the new classification system. Under Amendment 38, once the snow crab stock is rebuilt, the Scientific and Statistical Committee will set the OFL and ABC according to the best available scientific information and the methods established in the FMP. In addition, the State will set the TAC according to the harvest strategy. These measures will prevent overfishing and help to ensure that the snow crab stock biomass remains at or near the level necessary to produce maximum sustainable yield.

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

Dated: August 2, 2011.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011–19945 Filed 8–4–11; 8:45 am]

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# Proposed Rules

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 213, 302, 315, 330, 334, 362, 531, 536, 550, 575, and 890

**RIN 3206–AM34**

### Excepted Service, Career and Career-Conditional Employment; and Pathways Programs

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing regulations to implement the Pathways Programs established by E.O. 13562, signed December 27, 2010, to provide clear paths to Federal internships and potential careers in Government for students and recent graduates. As directed by the President, the Pathways Programs consist of the Internship Program, the Recent Graduates Program and the Presidential Management Fellows Program. The President determined that these programs should be excepted from the competitive service and placed in the newly created Schedule D of the excepted service.

OPM's proposed implementing regulations would provide for more transparency in Federal internship opportunities, limit the programs so they are used as a supplement to competitive examining and not a substitute for it, apply veterans' preference, and provide for OPM oversight. Agencies would only be permitted to use the Pathways Programs as part of an overall workforce planning strategy and pursuant to an agreement with OPM. The regulations would require agencies to make an investment in the program participants' development through training, mentorship, and other means. The regulations would further require agencies to conduct meaningful assessments of participant performance as part of an agency's determination as to whether the program participants should be converted to permanent positions in the competitive service.

**DATES:** Comments must be received on or before October 4, 2011.

**ADDRESSES:** You may submit comments, which are identified by RIN 3206–AM34, by any of the following methods:

- *Federal eRuling Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *employ@opm.gov.* Include ''RIN 3206–AM34'', Excepted Service, Career and Career-Conditional Employment; and Pathways Programs'' in the subject line of the message.
- *Fax:* (202) 606–4430.
- *Mail:* Angela Bailey, Associate Director for Employee Services, U.S. Office of Personnel Management, Room 6566, 1900 E Street, NW., Washington, DC 20415-9700.

**FOR FURTHER INFORMATION CONTACT:** Gale Perryman, 202–606–1143, *Fax:* 202–606–4430, by TTY: 202–418–2532, or *e-mail: gale.perryman@opm.gov.*

**SUPPLEMENTARY INFORMATION:** The President is authorized by statute to provide for ''necessary exceptions of positions from the competitive service'' whenever warranted by ''conditions of good administration.'' 5 U.S.C. 3302. The President has also delegated to OPM the authority to except positions from the competitive service. 5 CFR 6.1(a). It has been a long-standing practice under these authorities for the President, and for OPM exercising its delegated authority, to permit positions that would otherwise be in the competitive service to be filled through excepted service appointments where conditions of good administration warrant exceptions from competitive examining procedures (*e.g.,* people with disabilities and students). One of the purposes for which exceptions have been made in the past is to fulfill the merit system principles, which provide, in part, that ''[r]ecruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society * * *.'' In keeping with that objective, President Obama issued Executive Order 13562, which established the concept of the Pathways Programs, ''find[ing] that conditions of good administration (specifically, the need to promote employment opportunities for students and recent graduates in the Federal workforce) make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.'' Exec. Order No. 13562, 75 FR 82,585 (Dec. 27. 2010). The Pathways Programs consist of three discrete excepted service internship programs for students and recent graduates: the Internship Program; the Recent Graduates Program; and the Presidential Management Fellows Program.

The Internship Program is for current students. It will consolidate provisions of the Student Educational Employment Program (SEEP) into a new student internship program designed to provide high school, vocational and technical, undergraduate, and graduate students opportunities to be exposed to the work of Government through Federal internships. This program is designed to attract the interest of students enrolled in a wide variety of educational institutions, with paid opportunities to work in agencies and explore Federal careers while still in school. Agencies may convert Interns who successfully complete program and academic requirements to any competitive service position for which the Intern is qualified, but they are not required to do so. It is expected that, even if an agency does not convert an Intern, service in the Internship Program will increase the likelihood that the Intern will consider applying for a Federal position at some point in the future, based upon the exposure to employment in the Pathways Program.

The Recent Graduates Program is a new program that will provide opportunities for individuals who have recently graduated (or obtained certificates) from qualifying educational institutions or programs. To be eligible, applicants must apply within 2 years of educational program completion (except that veterans who are precluded from applying within 2 years due to a military service obligation will have up to 6 years from the date they completed their educational program to participate in the Recent Graduates Program (*i.e.,* A veteran's 2-year eligibility is postponed until completion of military service obligation. Thus, a veteran will have up to a 6-year period to exercise his or her 2-year eligibility). Successful applicants will be placed in a 2-year career development program. Agencies may convert Recent Graduates Program participants who successfully complete the program to competitive service jobs, but they are not required to do so. Once again, it is expected that, even if an agency does not convert an employee participating in the Recent Graduates Program to a position in the competitive service at the expiration of the Recent Graduates Program, service in the Pathways Program will make it more likely that the Recent Graduate will want to pursue Federal service later in his or her career.

For more than three decades the Presidential Management Fellows (PMF) Program has been the Federal Government's premier leadership development program for advanced degree candidates. Executive Order 13562 expands the eligibility window for applicants, making it more ''student friendly'' by aligning it with academic calendars and including those who have received a qualifying advanced degree within the preceding 2 years. Like Recent Graduates, PMFs work in a 2-year developmental program and, upon successful completion of the program, may be converted to competitive service jobs. Indeed, the Recent Grads program, in some respects, is patterned after the PMF Program.

Each of these programs share 5 core principles that advance merit system principles and the policies established by the President in the Executive order:

1. *Transparency.* The Pathways Programs provide for more transparency in Federal internship or other developmental opportunities. Members of the public interested in these opportunities with the Federal Government will now be able to learn about them through USAJOBS.gov. That Web site is the portal to all Federal jobs in the competitive service, and it will now also be used to provide information to the public about agency internship needs and the process for applying for agency internships as these opportunities become available.

2. *Limited Scope.* The Pathways Programs are limited in nature, intended to provide agencies a supplemental authority to use as part of an overall workforce planning strategy. Accordingly, agencies must report the positions for which they intend to use the Pathways Programs to OPM on an annual basis. OPM will review the information provided by the agencies and, if appropriate, establish a cap on the number of individuals who may be converted from the Pathways Programs to positions in the competitive service. This safeguard will permit OPM to ensure that agencies use these programs in a limited way as part of an overall strategic plan rather than using them to avoid competitive examining altogether.

3. *Fairness to Veterans.* The Pathways Programs will be fair to veterans because they will honor veterans' preference and provide additional flexibility to veterans in recognition of their military service. Thus, when agencies are making selections for internship positions in any of the three Pathways programs, they must apply veterans' preference in accordance with Part 302 when selecting from among qualified applicants. Moreover, the eligibility rule for the Recent Graduates Program is more flexible for veterans than it is for non-veterans. Whereas the general rule is that, to be eligible for the Recent Graduates Program, an individual must have completed his or her educational program within the preceding 2 years, veterans who were precluded from applying within that period due to a military service obligation have up to 6 years from the date they completed their educational program to participate in the Recent Graduates Program.

4. *OPM Oversight.* The Pathways Programs will also be subject to OPM oversight. Agencies will be required to enter a memorandum of understanding (MOU) with OPM before using any of the Pathways Programs. The MOU will set forth the agency's obligations to the President and the Executive Branch in using the programs, and OPM will use the MOUs as an oversight tool. In addition, as mentioned above, agencies will be required to report to OPM annually on their usage of the Pathways Programs and will be subject to a cap on conversions of Pathways participants to non-Pathways positions in the competitive service if necessary.

5. *Agency Investment.* Agencies that use the Pathways Programs will have to be committed to investing in the participants. The Pathways Programs are intended to be more than simple excepted service hiring authorities; they are intended to fulfill a need for developmental programs that will inspire interest in more permanent Federal service. The purpose of the programs is to foster a positive experience for participants that will help prepare them for successful careers in Government—either immediately or at some future date. Agencies are encouraged to create cohorts of Pathways participants, and provide them with common training and developmental experiences. In order to continue participating in the programs, they will be required as well to conduct meaningful assessments of the participants for purposes of determining whether they should be converted to the competitive service.

By crafting the Pathways Programs around these core principles, we respond to the President's direction to address the special challenges the Federal Government faces in competing with private industry for the best candidates for Federal service, while safeguarding veterans' preference and ensuring that the normal competitive examining process is preserved to the greatest extent practicable.

## Background

### *1. Steps OPM Took To Assess Student and Recent Graduate Hiring*

OPM has conducted a thorough review of the Federal Government's ability to recruit and hire students and recent graduates. This review began in August of 2009, when OPM convened an interagency team consisting of Federal employees from six organizations—State, Education, Housing and Urban Development (HUD), Internal Revenue Service (IRS), OPM, and the Central Intelligence Agency (CIA). These employees worked for 90 days to examine the current Federal recruiting and hiring process as it relates to students and recent graduates.

On October 7, 2009, OPM hosted a ''Roundtable Discussion on Federal Recruitment and Hiring at Colleges and Universities'' (hereafter ''OPM Roundtable''). The OPM Roundtable was attended by representatives from nine different academic and good government organizations. It explored whether there are barriers to hiring students and recent graduates into Federal jobs.

On June 25, 2010, OPM convened a public hearing to consider issues connected to hiring students and recent graduates. OPM issued a **Federal Register** notice inviting the public to submit comments on three issues: (1) Whether normal, competitive hiring is an effective avenue for bringing recent college graduates into the Federal workforce and, if so, why that is the case; (2) if not, whether this presents a problem for the Federal Government that is sufficiently significant to warrant action or changes to policy; and (3) if action or changes in policy are warranted, what changes should be effected and who should effect them. Members of the public who submitted written comments were also offered an opportunity to speak at the hearing. During the hearing, OPM heard testimony from three panels of experts: agency Chief Human Capital Officers, representatives from Federal employee unions and veterans' service organizations, and representatives from good government and academic groups. Following the public hearing, OPM posted the hearing transcript and issued a **Federal Register** notice inviting the public to make any additional comments.

OPM also gathered and reviewed relevant literature on topics such as entry-level hiring, recruiting and hiring students and recent graduates, and the Federal Career Intern Program (FCIP).

Finally, OPM's qualifications and assessment experts provided information regarding the process for overhauling the currently predominant training- and experience-based approach to qualifications and assessments. The ubiquity of that approach has been identified as one of the barriers to recruiting and hiring students and recent graduates, because it places a premium on prior work experience rather than potential for success on the job.

This review informed the President's decision to issue E.O. 13562 and has also informed OPM in drafting these implementing regulations. The materials that OPM considered as part of its review are available for public review and comment at *http://www.opm.gov/open.*

*2. Conclusions From OPM's Review*

OPM has concluded that there are barriers to hiring students and recent graduates that can best be addressed through the implementation of effective excepted service internship programs. Even though studies ''show strong match between what the Federal Government offers and what [students] seek in an employer, * * * relatively few students * * * report considering the government as a potential employer * * *.'' *Id.* at 53 (testimony of Marilyn Mackes, National Association of Colleges and Employers (NACE)). This observation is borne out by empirical data and expert testimony. The MSPB reported in 2005 that only 10% of new hires in GS–5, 7, and 9 jobs in the competitive service (typical entry-level grades) had less than one year of full-time work experience, which was less than half the number with that experience level hired into the excepted service. MSPB, *Attracting the Next Generation,* at 19. Conversely, 37% of the new hires in these entry-level grades had 11 or more years of experience, including 20% with over 20 years of experience. *Id.* Many of the participants in our public hearing acknowledged this reality. *See* Tr. at 4 (testimony of Marilee Fitzgerald, Chief Human Capital Officer, Department of Defense); *id.* at 26 (testimony of William Dougan, President, National Federation of Federal Employees) (''it is difficult for many recent graduates or expected graduates to compete for government jobs through the competitive hiring system [because they] * * * do not have the experience necessary to compete * * *''); *id.* at 34 (testimony of Brian Hawthorne, Student Veterans of America) (''Recent college graduates are at a fundamental disadvantage in this economy * * *. [P]eople with more experience are seeking jobs which they are overqualified for, which fundamentally puts us out of the running.''); *id.* at 50 (testimony of Laurel McFarland, Executive Director, NASPAA) (''[m]any undergrads and grads lack work experience * * * [p]articularly the professional work experience that documents the skills and abilities required in the current competitive system. If you want to skip the next generation of Federal workers and leaders, keep doing what you are doing and hire only those with significant work experience.'').

Internship programs are essential to addressing these issues. By exposing students and recent graduates to jobs in the Federal civil service at the beginning of their careers, we will engage them at the outset of their work lives, before their career paths are fully established, inform them about the wide variety of interesting opportunities available in the Federal Government, and break through commonly held stereotypes about ''government work.'' We will also be better equipped to recruit and appoint more expeditiously, thus negating what is otherwise a significant disadvantage in competing with the private sector for high-potential candidates emerging from educational institutions. Through participating in effective internship programs, talented individuals who may not otherwise have considered a career in the Federal civil service will become more open to the idea of pursuing Federal service, whether early in their careers, when considering a mid-career change, or when they become experts in their fields. In addition, current and former interns who enjoy their internship experiences will become our best recruiting sources. Having a larger supply of talented people who are interested in working for the Federal Government is a benefit to the country and the taxpayers, especially when ''competition for high-quality talent among American employment sectors is heating up.'' Merit Systems Protection Board, *Attracting the Next Generation: A Look at Federal Entry-Level New Hires* (Jan. 2008), at 2. Exposing students and recent graduates to Federal jobs through internships and similar programs is an effective way to accomplish this goal.

Internships also have the benefit of affording agencies ''a low-risk means to assess potential employees on the job.'' Partnership for Public Service, *Leaving Talent on the Table: The Need To Capitalize on High Performing Student Interns* (April 2009), at 4. Indeed, under the Pathways Programs, interns will be given an extended ''on-the-job tryout,'' which is a relatively high indicator of future success on the job, significantly higher than considering experience or educational level alone. *See* Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper* (Sept. 1, 2006) at 19. Moreover, creating internship programs in the excepted service, as the President has done, allows for greater flexibility in evaluating inexperienced workers, as their internships last for 2 years, rather than the 1-year period applicable to the competitive service. To a large extent, recent graduates are hired based on their potential, rather than on their accomplishments. Without a proven record of success in a job related to their field, the period of evaluation takes on added significance. Similarly, we need to make allowance for the fact that new workers will require additional training and developmental opportunities. It may take them longer to become high performers. Accordingly, providing for a 2-year program serves multiple interests. It allows managers more time for more meaningful evaluation of inexperienced workers, while giving inexperienced workers a longer opportunity to grow into their jobs, develop their skills, and prove what they have to offer.

*3. The President's Findings*

OPM detailed a summary of this review process in a report to the President. Subsequently, the President concluded that conditions of good administration make necessary an exception to the competitive hiring rules for certain internship positions in the Federal civil service. In reaching this conclusion, the President made the following findings:

The Federal Government benefits from a diverse workforce that includes students and recent graduates, who infuse the workplace with their enthusiasm, talents, and unique perspectives. The existing competitive hiring process for the Federal civil service, however, is structured in a manner that, even at the entry level, favors job applicants who have significant previous work experience. This structure, along with the complexity of the rules governing admission to the career civil service, creates a barrier to recruiting and hiring students and recent graduates. It places the Federal Government at a competitive disadvantage compared to private-sector employers when it comes to hiring qualified applicants for entry-level positions.

To compete effectively for students and recent graduates, the Federal Government must improve its recruiting efforts; offer clear paths to Federal internships for students from high school through post-graduate school; offer clear paths to civil service careers for recent graduates; and provide meaningful training, mentoring, and career-development opportunities. Further, exposing students and recent graduates to Federal jobs through internships and similar programs attracts them to careers in the Federal Government and enables agency employers to evaluate them on the job to determine whether they are likely to have successful careers in Government.

Exec. Order No. 13562, 75 FR 82,585 (Dec. 27. 2010), Sec. 1.

These regulations implement the President's decision to create three distinct internship programs—the Pathways Programs—in Schedule D of the excepted service.

Summary of Changes

As directed by the President, positions filled under these programs would be in the excepted service under Schedule D in 5 CFR part 213, a new schedule created by Section 7 of Executive Order 13562. Schedule D would contain those positions for which competitive service requirements make it impracticable for agencies to recruit students attending qualifying academic institutions or individuals who have recently completed qualifying educational programs. Section 7(a)(i) of Executive Order 13562 also delegated additional authority to OPM to except certain positions from the competitive service.

Pursuant to the Executive order, OPM is also proposing to add a new regulation at the beginning of 5 CFR part 213, subpart A. The new section 213.102 would provide further guidance on excepting positions from the competitive service pursuant to applicable Executive orders. It would also clarify that positions may be excepted from the competitive service pursuant to 5 U.S.C. 3302 and 5 CFR 6.1 on either an indefinite or a temporary basis. Indefinite exceptions are appropriate when the nature of the position itself precludes it from being in the competitive service (such as attorney positions, for which examining is prohibited). Temporary exceptions are appropriate to allow for valid targeted recruiting and hiring of a particular class of persons, with the opportunity for the persons selected for those positions to convert to the competitive service at a later date.

This clarification reflects the President's (and several of his predecessors') interpretation of 5 U.S.C. 3302(1) and will permit OPM, exercising discretion delegated to it by the President, to continue its practice of allowing agencies to fill positions that would normally be in the competitive service through excepted service appointments in order to allow them to recruit and hire from among classes of individuals that are disadvantaged by competitive examining. For example, people with disabilities are hired into positions that are normally in the competitive service but are temporarily placed in the excepted service to allow for agencies to use targeted recruitment and hiring strategies in order to hire qualified people with disabilities. Individuals hired under this process convert into the competitive service after 2 years. For over 30 years, student interns and Presidential Management Fellows (formerly Presidential Management Interns) have been hired this same way—using excepted service appointments for jobs that were simultaneously being filled through competitive appointments by non-student interns and Fellows. The proposed new regulation would make more explicit that long-standing interpretation.

Next, OPM is proposing to remove the provisions in 5 CFR 213.3202(a) and (b), the Student Educational Employment Program (SEEP). We are proposing to remove these paragraphs because many of the provisions of the SEEP would be incorporated, with modifications, into the new Internship Program regulations in 5 CFR part 362. Section 8(b) of E.O. 13562 supersedes and revokes E.O. 12015, which authorized the establishment of career work-study programs, effective the date on which OPM issues final regulations for the Pathways Programs.

OPM is also proposing to remove paragraph (o) of 5 CFR 213.3202, the Federal Career Intern Program (FCIP). Section 8(a) of E.O. 13562 superseded and revoked E.O. 13162, which established the FCIP, effective March 1, 2011.

The proposed rule would redesignate part 362 as Pathways Programs. Part 362 currently contains provisions relating to the Presidential Management Fellows Program, but we are proposing to replace it with provisions governing all three of the Pathways Programs. Part 362 would now consist of four subparts: subpart A, General Provisions, which would contain rules pertaining to all three Pathways Programs; subpart B, Internship Program; subpart C, Recent Graduates Program; and subpart D, the Presidential Management Fellows Program. Though we are addressing each program within part 362, the programs are distinct, targeting different classes of people and governed by different rules and procedures. Accordingly, each should be considered independently of the others.

The proposed rule would also make conforming changes to the appropriate sections relating to noncompetitive conversions, creditable service for career tenure, pay, and benefits administration in 5 CFR parts 213, 302, 315, 330, 334, 531, 536, 537, 550, 575, and 890.

## General Provisions Common to all Pathways Programs

*Program Administration*

Subpart A of part 362, General Provisions, contains the overarching requirements applicable to all Pathways Programs. In some instances, we have consolidated and incorporated provisions of the current Student Educational Employment and Presidential Management Fellows Programs (SEEP, and PMFP, respectively) into the proposed Pathways Programs regulations. This subpart also contains new provisions necessary to implement E.O. 13562. The new subpart clarifies certain definitions and provisions relating to agencies' authority, requirements agencies must meet, how positions are filled, conversion to the competitive service, and program accountability and oversight. A description of these provisions follows.

*General Provisions*

Section 362.101 of the proposed regulations establishes the basic framework and purpose of the Pathways Programs. This section also directs agencies to provide for equal employment opportunities in the Pathways Programs.

*Definitions*

Section 362.102 contains the definitions necessary for the administration of this part. OPM is revising the definition of ''qualifying educational institution'' to expressly include home-school curricula that are recognized by the State or local government in which the curricula are administered (in the case of secondary home-school programs), or by a body recognized by the United States Department of Education (in the case of post-secondary, or vocational or technical home-school programs). This change makes clear that students using certain home-school curricula may apply for consideration under the Pathways Programs.

*Authority*

Section 362.103 of the proposed regulations authorizes agencies to make time-limited appointments to positions placed, temporarily, in the excepted service, pursuant to the Pathways Programs, subject to certain prerequisites. The section establishes a requirement for the agency head or his or her designee to enter into a Pathways Memorandum of Understanding (Pathways MOU) with OPM prior to making appointments under any Pathways authority. This section also requires agencies to execute a Pathways agreement with each individual appointed under the Pathways Programs.

*Agency Requirements*

Section 362.104 of the proposed regulations establishes the requirements and criteria that must be addressed in the MOU with OPM, including that it should identify a Pathways Program officer for the agency and describe the process for accepting and assessing applications. Requirements for the MOU are essentially the same for all three Pathways Programs. An agency will have to describe in writing how it intends to use each Pathways Program and the requirements the agency will establish for each Pathways Program.

We propose removing the existing three-way agreement between the school, student and agency under the Student Career Experience Program (SCEP) because we believe the requirement to include the educational institution is an unnecessary burden on both the student and the agency. In its place, we propose to establish a requirement that a given agency sign a Pathways Agreement with each participant in its Pathways Programs. These written agreements must identify requirements such as work assignments, evaluation procedures, and any procedures for noncompetitive conversion upon successful completion of the program. OPM believes these agreements will make the Programs more effective for the Government by assisting both management and the Program participant in identifying and attaining program goals, as well as providing Program participants with a better understanding of expectations and requirements for successful completion of each Pathways Program. Agencies are not, however, precluded from entering into 3-way agreements with educational institutions that sponsor programs for formal student work/academic relationships.

In an effort to help students and recent graduates understand and compare available Federal career opportunities, E.O. 13562 requires the use of standard naming conventions for Pathways Programs across all agencies. Therefore, OPM proposes that an agency can adopt its own Pathways Program name provided the agency name includes the Pathways Program name identified in these regulations; for example, OPM Recent Graduates Program. Any agency-specific name for a Pathways Program must be identified in the agency policy.

*Filling Positions*

Section 362.105 of the proposed regulations requires agencies' workforce planning to address the need to have an adequate number of positions available to which successful Pathways Program participants can be converted. It also provides that agencies must fill Pathways Programs positions under Schedule D of the excepted service (5 CFR part 213). In addition, this section explains the general eligibility criteria individuals must meet in order to be appointed to a Pathways Program. These criteria include, but are not limited to, requirements relating to all Federal appointments such as qualifications and suitability.

This section further explains that Pathways appointments are for 2 years and may be extended by the agency for up to 120 days. The new Executive Order does not provide OPM the flexibility to extend Pathways Programs appointments for an additional year.

*Conversion to the Competitive Service*

Section 362.106 of the proposed regulations permits agencies to noncompetitively convert Pathways Program participants to term, or permanent appointments in the competitive service. It also makes clear that an agency that initially converts a Pathways Program participant to a term appointment may subsequently convert the individual noncompetitively to a permanent competitive service appointment.

This section also provides that an agency may convert a Pathways Program participant to a position in the same agency or to a position in another Federal agency. It clarifies that the provisions of the career transition assistance programs in subparts B, F and G of 5 CFR part 330 do not apply to conversions. Proposed section 362.106 would clarify that any time spent by a Pathways Program participant counts towards career tenure if the individual is converted to a permanent position in the competitive service. However, participation in a Pathways Program does not provide any right to further employment.

*Program Accountability and Oversight*

The Executive Order authorizes the Director of OPM to ''establish, if appropriate, a Government-wide cap on the number of noncompetitive conversions to the competitive service of Interns, Recent Graduates, or PMFs (or a Government-wide combined conversion cap applicable to all three categories together).'' [*See* Sec. 7(b)(iii).] The proposed section 362.107 would establish that OPM would determine whether to establish any caps based on information it receives from the agencies about their use of the Pathways Programs. In the event the Director determined that a cap would be appropriate, OPM would publish it in the **Federal Register,** including how it would affect individual agencies participating in the Pathways Programs.

Proposed section 362.107 also specifies certain information agencies must include in their Human Capital Management planning documents relating to hiring in their Pathways Programs. OPM is requiring this information in order to gauge the effectiveness and usage of the Pathways Programs, and to determine whether to impose limitations on the number of appointments and/or conversions agencies may make each year.

OPM proposes, in section 362.108, adding a provision that would allow the Director to approve written requests for waivers of the regulatory requirements of the Pathways Programs under limited circumstances. This mirrors the provision currently appearing at 5 CFR 362.205.

OPM acknowledges, in proposed section 362.109, our requirements to issue written guidance for the orderly transition of current SEEP and PMF employees.

**Internship Program**

The Executive order establishing the Pathways Program framework provides for it to include an Internship Program, which replaces the existing Student Career Experience Program (SCEP). E.O. 13562 also supersedes and revokes E.O. 12015 (which authorized noncompetitive conversion to the competitive service for SCEPs), effective on the date the Pathways regulations become final. The Student Educational Employment Program (SEEP) at 5 CFR 213.3202 provides the existing framework for the SCEP.

*Background on the SEEP*

On December 16, 1994, OPM issued final regulations implementing the Student Educational Employment Program (SEEP). The SEEP consolidated 13 different student employment programs into one program with a standardized set of rules. The SEEP had two components, the Student Temporary Employment Program (STEP) and the Student Career Experience Program (SCEP). The SEEP was designed so that agencies could develop innovative work-study or temporary programs to attract students.

The SCEP component was designed to provide career-related work experience directly related to the student's educational program or curriculum. Agencies appoint students under SCEP to a job related to the student's academic field of study. After successful completion of academic and SEEP/SCEP program requirements, agencies can appoint SCEPs, without competition, to term, career, or career-conditional positions related to their academic field of study. The SCEP gives students valuable work experience in a field related to their academic course of study and allows them to experience firsthand the rewards of public service; at the same time, it gives agencies the opportunity to observe students' job performance in the work environment and evaluate them as potential employees.

The STEP component was created to provide jobs to students, on a temporary basis, which may or may not be related to their career goals or academic field of study. STEP was intended to provide agencies and students with maximum flexibility in meeting both their needs on a short-term basis. Though STEPs can convert into the SCEP, there is no provision that allows agencies to noncompetitively convert STEPs to term, career, or career-conditional appointments.

While OPM has refined the SEEP over the years, the original intent has remained constant: to provide students with an integrated program of academic study and related work experience while building a candidate pool of promising, high-potential graduates for entry-level positions in the Federal civil service. The most recent changes to the program were published in April 2006. These changes provided agencies with additional flexibility in crediting certain non-Federal work towards program requirements.

*Abolishment of the SEEP*

Executive Order 13562 provides a new framework for Government internship programs and authorizes the noncompetitive conversion of interns to term or permanent competitive service appointments. The new Internship Program under Pathways eliminates the need for the existing SEEP. Therefore, OPM is implementing E.O. 13562 by ending SCEP and has determined to eliminate STEP as well, as it would now be largely redundant of elements of the new program. For the most part, OPM proposes to incorporate many of the current provisions of the SEEP into the new Internship Program.

*Program Summary*

Whereas the SEEP had two components, STEP and the SCEP, the Internship Program will exist as one program or appointing authority. Students hired into this program will be known as ''Interns.''

Nature of Work Assigned to Interns

Interns are intended to provide agencies a ready pipeline of talent from which to fill positions, as part of a balanced workforce strategy. Accordingly, agencies are generally required to provide Interns with meaningful developmental work. This benefits the Government both from a succession planning perspective and in recruiting for future job opportunities. Experience shows that Interns who have favorable impressions of their time working for an agency are the agency's most successful recruiters among their peers.

The Internship Program is flexible enough, however, to accommodate the need of some agencies to hire Interns to complete temporary projects, to perform labor intensive tasks not requiring subject-matter expertise, or to work in traditional ''summer jobs, '' (*e.g.,* routine clerical work). Accordingly, agencies are excused from the requirement that they provide meaningful developmental work for the Interns they hire to perform these types of tasks. Agencies are urged, however, to use this exception judiciously, as the clear intent of the Pathways E.O. is for agencies to use the Internship Program as a means for developing a pipeline of talent. Moreover, agencies should still follow best practices to make the experience of all Interns a favorable one that will leave them with a positive impression of Federal service.

Agency Authority

Proposed section 362.201 describes the intent and purpose of the Internship Program.

Definitions

Section 362.202 contains a modified definition of *student,* which eliminates redundant references to academic institutions and degrees and certifications that will be addressed in the definition of *qualifying educational institution* in proposed section 362.102. OPM proposes to retain the requirement that an individual must be accepted for enrollment or enrolled in a degree program on at least a half-time basis.

Announcement

Section 362.203(a) of the proposed regulations would require that agencies provide information to OPM about their Internship opportunities. This information would include the title, series, grade and location, as well as a link to the agency's Web site where individuals can find information about how to apply for specific Internship opportunities. OPM would note that it will make available to the public a summary of these Internship opportunities in a manner the Director will determine, including how to find agency-specific Internship opportunities. At this time, OPM intends to make this information available to the public through advertisements on USAJOBS.gov as these opportunities arise. It would be within each agency's discretion to determine the process for soliciting and accepting applications for specific Internship opportunities, consistent with applicable legal and policy requirements, including the President's hiring reform initiative (*see* May 11, 2010, Presidential Memorandum, at *http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process*) and the requirement to collect applicant flow data.

Qualifications and Appointment

Agencies could continue to evaluate Interns using either agency-developed qualification standards or the OPM qualifications for the position and grade level of the position to which the Intern is appointed as specified in section 362.203(c).

Proposed section 362.203(d) would require agencies to make Internship appointments under Schedule D of the excepted service and maintain the provisions that agencies may appoint eligible individuals to any position for which the individual is qualified.

Under the terms of the proposed regulation, the duties of the position for which the individual is hired do not have to be directly related to the Intern's academic career goals or particular field of study. We are proposing this change to provide both students and agencies with greater flexibility in terms of the type of Federal employment that may be offered to eligible students.

OPM is proposing to remove the provision in the current SCEP rules, which states that any OPM test requirements are waived when an agency is using OPM Governmentwide qualification requirements. OPM is removing this language because the Governmentwide qualification requirements no longer require tests. Therefore, no waiver mechanism is required.

OPM is proposing to allow agencies to appoint Interns on a temporary basis for up to 1 year or for an initial period expected to last more than 1 year, similar to appointments made under the STEP and SCEP programs, respectively. A temporary appointment may be extended by the agency.

Promotions

Section 362.203(e) authorizes agencies to promote Interns in a manner similar to how they promoted students serving on STEP and SCEP appointments. An agency should document the promotion of an Intern serving on a temporary appointment as a conversion to another Schedule D excepted service appointment, but using the original not-to-exceed date.

Classification

OPM proposes to retain, in section 362.203(f), the requirement that Interns be classified to the -99 series for occupational groups appropriate for the General Schedule or appropriate pay plan and to the -01 series for occupational groups appropriate for the Federal Wage System.

Schedules

OPM is proposing to retain, in section 362.205(g), the same criteria for student schedules as currently exist under the SEEP.

Breaks in Program

OPM is proposing to retain, in section 362.205(h), the same criteria for breaks in program that currently exist under the SEEP. We seek comments on the proposed changes from all interested parties, but especially from agencies, on whether breaks in program criteria are still needed in light of the modification of the definition of ''student.''

Conversions to the Competitive Service

OPM proposes to retain, in section 362.204, most of the requirements for noncompetitive conversion as they currently exist under SCEP. Under the proposed rules agencies will continue to have 120 days to noncompetitively convert Interns to term or permanent positions in the competitive service. Agencies may subsequently convert Interns from term appointments to permanent competitive service appointments.

In order to be eligible for conversion, an intern must meet the OPM qualification standard for the position to which he or she will be converted, complete a course of academic study from a qualifying educational institution, complete a minimum of 640 hours of work experience while in the Internship Program, and receive a favorable recommendation by an official of the agency.

Interns may be converted to positions within the agency in which they have been serving as Interns, or to positions in other Federal agencies.

Agencies may credit time spent under one or more previous Federal appointments towards the 640 hours of required work experience.

OPM proposes to allow agencies to credit towards the 640-hour requirement work experience that is not in a field or functional area related to the Intern's target position or career field. This is a departure from the SCEP rules, which require that work creditable towards the 640 hours required for conversion be related to the student's academic goals and target position. OPM is proposing this change to allow both students and agencies more flexibility to convert Interns who successfully complete the program to positions that are not directly related to their field or functional area of study.

Otherwise, OPM proposes to retain the SCEP provisions pertaining to creditable service (for purposes of the 640-hour requirement). Creditable service for these purposes includes:

- Work performed by individuals who are not Federal employees, pursuant to a formal work-study program comparable to the Pathways Internship agreements;
- Work performed by individuals who are not Federal employees, pursuant to a written contract between the agency and the organization officially established to provide internship experiences to students;
- Volunteer service under 5 CFR part 308; and
- Active duty military service.

A credit of 320 hours means the Intern still must work a minimum of 640 hours to be eligible for noncompetitive conversion, but that 320 hours of certain non-Federal work experience may be applied towards the 640-hour requirement.

OPM also proposes to allow agencies to waive up to 320 hours of the 640-hour minimum service requirement for any Intern who performs work directly related to his or her academic field of study or career goals, and who demonstrates outstanding academic achievement and exceptional job performance. Agencies may apply this waiver in the same manner as they applied it under the SCEP. For clarity, in this context (as opposed to the credit context discussed above) a waiver means the Intern only needs to work a minimum of 320 hours to be eligible for noncompetitive conversion (provided that other program requirements are met).

Section 362.205 clarifies an Intern's coverage under part 351 of this chapter for the purposes of RIF. In addition, it identifies the appropriate tenure group for Interns based on the appointment type.

**Recent Graduates Program**

Executive Order 13562 recognizes the benefits of a diverse Federal workforce that includes recent graduates from academic institutions and technical programs. The E.O. also acknowledges that the normal rules for competitive hiring impose significant burdens and put the Government at a disadvantage, vis-a-vis the private sector, in competing for the best candidates emerging from educational institutions. In addition, agencies' current competitive hiring practices, at the entry levels, tend to favor job applicants who have significant previous work experience. This puts recent graduates at a competitive disadvantage—no matter the degree or technical training they possess—when applying to, and competing for, Federal job opportunities. In recognition of this disadvantage and of the value to the Government in being competitive with other sectors in recruiting and hiring recent graduates, the E.O. established a Recent Graduates Program under the Pathways Programs framework. To implement the Executive order, OPM proposes adding a new subpart C to 5 CFR part 362.

This new program will target individuals who have recently graduated from a qualifying educational institution or program. Qualifying educational institutions and programs include community colleges, colleges and universities, trade schools, and career and technical education programs. Advanced degree holders also are eligible to participate in the Recent Graduates Program. Though people holding advanced degrees tend to be highly educated in specialized fields, that education often does not translate well under the training and experience based approach to evaluating applicants for competitive service jobs that most agencies now use. Accordingly, people with advanced degrees and little experience fare poorly under these assessment approaches, as do their colleagues with 2-year and 4-year degrees.

To be eligible for an appointment to the Recent Graduates Program, an applicant must apply within 2 years of the date on which he or she completed the academic degree or technical program requirements. The proposed regulations extend the eligibility period for veterans who were precluded from applying within the 2-year window because of a military service obligation. This extended eligibility period cannot end more than 6 years after the date on which the individual completed his or her academic degree or technical program requirements. In other words, a veteran's 2-year eligibility is postponed until completion of military service obligation. Thus, a veteran will have up to a 6-year period to exercise his or her 2-year eligibility veterans will have up to a 6 year window to exercise their 2-year eligibility.

Individuals selected for the Recent Graduates Program will generally be appointed to positions up to the General Schedule (GS)–9 level (or equivalent) and placed in a 2-year career development program. OPM is proposing, however, to allow agencies to hire individuals for science, technology, engineering, or mathematics occupations at the GS–11 level (or equivalent) if they possess a Ph.D. or equivalent doctoral degree directly related to the science, technology, engineering, or mathematics position the agency is seeking to fill. In addition, OPM is proposing to allow agencies to fill certain scientific and professional research positions at the GS–11 or 12 level (or equivalent), if the individuals possess the requisite qualifying education. After successfully completing the program, participants may be considered for noncompetitive conversion to a career job in the competitive service. A description of proposed new subpart C follows.

*Program Summary*

Program Administration

Proposed section 362.301 makes clear the purpose of the Recent Graduates Program, which is to provide developmental experiences to eligible recent graduates, with the potential to lead to careers in the Federal Government. Individuals appointed under this authority will be referred to as Recent Graduates. This section introduces agency requirements particular to the Recent Graduates Program. These requirements address providing orientation, assignment of a mentor within 90 days of appointment, IDP development within 45 days of appointment, and providing Recent Graduates with a minimum of 40 hours of formal, interactive training per year. This will provide greater flexibility in meeting the training requirements, which we believe will prove beneficial to the Government as a whole, as well as the Recent Graduate and the agency. This change will allow conference attendance, on-line training and other non-conventional training formats to be credited toward meeting required training. It is important to note that on-line training and other non-conventional training methods would not include recurring training requirements such as yearly security training.

Eligibility

Proposed section 362.302 establishes eligibility for 2 years from the date on which the individual completed the academic degree or program requirements. The proposed regulations postpones the 2-year time limit for certain veterans.

Filling Positions

Section 362.303 of the proposed regulations covers announcements, appointments, qualifications, and promotions within the Recent Graduates Program.

Paragraph (a) of that section makes clear that an agency must provide information to OPM about opportunities available under the Recent Graduates Program. This information must list the types of positions the agency may fill under this program and the location of the position. OPM will make this information available to the public in a manner to be determined by the Director. As with the Internship Program, OPM is currently planning to make this information available to the public through advertisements available through USAJOBS.gov as these opportunities arise. It will be within each agency's discretion to determine the process for soliciting and accepting applications for specific Recent Graduates opportunities, consistent with applicable legal and policy requirements, including the President's hiring reform initiative (*see* May 11,2010, Presidential Memorandum, at *http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process*) and the requirement to collect applicant flow data.

Paragraph (b) of section 362.303 establishes that, subject to the requirements of subpart C of part 362 an agency may appoint a Recent Graduate to any position up to and including the General Schedule (GS)–09 level (or equivalent under other pay and classification systems such as the Federal Wage System). It also provides that an agency must appoint Recent Graduates to positions with progressively more responsible duties that provide career advancement opportunities. OPM has generally capped initial appointments under this authority at the GS–09 level because the Recent Graduates Program is intended to be a program for people seeking entry-level jobs who lack experience to compete with more experienced job seekers under the competitive examining process. However, OPM proposes to allow agencies to hire individuals at the GS–11 level for science, technology, engineering, or mathematics occupations if the individual possesses a Ph.D. or equivalent doctoral degree directly related to the science, technology, engineering, or mathematics position the agency is seeking to fill. In addition, OPM is proposing to allow agencies to fill certain scientific and professional research positions at the GS–11 or 12 level (or equivalent), if the individuals possess the requisite qualifying education.

Paragraph (c) of proposed section 362.303 provides that an agency may extend the 2-year program period for up to an additional 120 days when necessary due to rare or unusual circumstances or situations. This paragraph also requires an agency to identify the criteria for approving extensions in their Pathways Programs plans, and to record any extensions in writing and provide them to OPM.

Paragraph (d) of section 362.303 specifies that an agency must evaluate Recent Graduate candidates using OPM qualification standards for the occupation and grade level of the position being filled.

Paragraph (e) provides that an agency may promote any Recent Graduate who meets OPM qualification requirements in accordance with the agency's Pathways MOU. This section also makes clear that promotions are made at the agency's discretion and these provisions do not confer an entitlement to a promotion.

Paragraph (f) makes it clear that the first 2 years of a Recent Graduate's appointment is a trial period and creditable in the same manner as prescribed in 5 CFR 315.802.

Movement Between Agencies

Section 362.304 provides that an individual may accept a new Recent Graduates appointment with another agency. This section explains the criteria under which a Graduate may move from one agency to another under this authority and remain in the program.

Proposed paragraph (c) explains that the new employing agency must appoint the Graduate without a break in service.

Paragraph (d) of this section provides that the time served by a Graduate under the previous Program with the first agency is creditable towards the 2-year requirement for noncompetitive conversion eligibility to the competitive service. It also provides that the Graduate does not begin a new 2-year period in the Program when he or she meets the conditions of subpart C of part 362. Finally, this section, in paragraph (e), requires the new or gaining agency to identify requirements for program completion and eligibility for noncompetitive conversion in the agency's Pathways Programs plan.

Reduction in Force and Termination

The proposed section 362.305, in paragraph (a), makes clear that Graduates are in excepted service Tenure Group II for reduction in force (RIF) purposes. It also provides that the expiration of a Recent Graduate appointment is not subject to RIF procedures under 5 CFR part 351.

Paragraph (b) of that section makes clear that a Recent Graduate's appointment expires at the end of the 2-year program period, plus any approved agency extension, unless the agency has selected the participant for noncompetitive conversion to the competitive service.

Conversion to the Competitive Service

Paragraph (a) of section 362.306 provides that an agency may noncompetitively convert a Recent Graduate to a term or permanent competitive service appointment in the agency in which the Graduate had been working or to another Federal agency. Though conversion to term appointments is discouraged, OPM proposes providing for conversion to a term appointment for Recent Graduates in order to maximize employment opportunities for Recent Graduates who successfully complete the Program when an agency cannot otherwise convert them to permanent competitive service appointments.

Section 362.306(b) specifies the conditions a Recent Graduate must meet to be eligible for noncompetitive conversion to the competitive service. These include citizenship requirements, all other applicable Recent Graduates Program requirements, qualification requirements for the position to which the Graduate will be converted, and maintenance of acceptable performance under the agency's approved performance appraisal system.

Section 362.306(c) specifies how to set the effective date of the conversion of a Recent Graduate to the competitive service.

**Presidential Management Fellows (PMF) Program**

The Presidential Management Intern (PMI) Program was established by Executive order in 1977 to attract highly-qualified persons with graduate degrees from a variety of academic disciplines who demonstrated an interest in, and commitment to, leadership in the Federal service. PMI candidates were nominated by their graduate schools, and, after a rigorous assessment process conducted by OPM, the best qualified finalists were identified as eligible for excepted appointments by Federal agencies. Following successful completion of a 2-year internship that included formal training and rotational assignments, PMIs could be appointed without further competition to positions in the competitive service.

In 2005 OPM revised the PMI Program to implement the provisions of Executive Order 13318, which included renaming the program as the Presidential Management Fellows Program to better reflect its high standards, rigor, and prestige. In addition, the PMF Program had two components: Presidential Management Fellows and Senior Presidential Management Fellows. Executive Order 13318 charged the Director of OPM with developing, managing, and evaluating the Program.

On December 27, 2010, the President signed Executive Order 13562, which, as noted earlier in this Supplementary Information, contains additional changes to the PMF Program. The E.O. places the PMF Program under the Pathways Programs framework to clarify its relationship to the other Pathways Programs. To implement the Executive order, OPM is placing the provisions relating to the PMF Program in a new subpart D of 5 CFR part 362. For the most part, the PMF Program will remain the same, with minor changes that are necessary to implement the Executive order.

*Program Summary*

Senior Fellows

OPM proposes to eliminate the Senior Fellows component of the PMF Program. E.O. 13562 does not provide for a Senior Fellows Program under the Pathways Programs framework, an aspect of the 2005 Executive order that was never actually implemented.

Definitions

In section 362.401, OPM proposes to modify the definition of *Presidential Management Fellow* to accommodate new requirements identified under the E.O., such as the new Schedule D appointing authority and the elimination of the school nomination process.

The definition of *qualifying college or university* has been replaced with a definition of *qualifying educational institution.* However, to provide a consistent treatment of educational institutions and consistent requirements across the three Pathways Programs, we are proposing to place the definition in section 362.102.

Proposed section 362.401 no longer includes a definition of *Senior Presidential Management Fellow* because E.O. 13562 did not include the Senior Fellows Program under the Pathways Programs framework.

Program Administration

Section 362.402 of the proposed regulations includes provisions currently in 5 CFR 362.201.

This section provides the Director with the discretion to determine the number of Fellows agencies may appoint during any given year. Current PMF rules require the OPM Director to make this determination on or about October 1. OPM is proposing to change this rule because E.O. 13562 no longer requires the OPM Director to make the determination by this specific date. The Director will also establish the qualifications requirements for evaluating individuals for entrance into the PMF Program. Agencies will continue to appoint Fellow finalists selected by OPM.

OPM also proposes new requirements in section 362.402(d) for agencies that hire PMFs for locations in the field.

Announcement, Eligibility, and Selection

OPM proposes to move most of the provisions currently in 5 CFR 362.202 to section 362.403, which will be renamed ''Announcement, Eligibility, and Selection.'' We are proposing to remove from the section heading the reference to nomination, because the Executive order governing the program no longer requires an individual to be nominated by faculty of his or her graduate school in order to apply to become a Fellow, and OPM believes it would be preferable to evaluate candidates solely on the basis of centrally-administered assessment tools.

Under the proposed rule an individual will be able to apply for positions under the PMF Program for up to 2 years after completing his or her degree or certificate requirements at a qualifying educational institution. This proposed section also makes clear there is no limit to the number of times an applicant can apply, provided it is within the 2-year time limit identified in E.O. 13562, though an individual who is a PMF finalist for a previous year will lose that status if he or she applies to the Program again. OPM will select and publish a list of Fellows finalists.

Appointment and Extensions

Section 362.404 of the proposed regulations provides that PMF appointments may be at the GS–09, 11, or 12 level (or equivalent) and are limited to 2 years. An agency may extend a PMF appointment (without OPM approval) for up to an additional 120 days under rare and unusual circumstances. Extensions must be recorded in writing and provided to OPM. Under current PMF rules, OPM, upon a request from an agency, may extend a PMF appointment for up to an additional year. The new Executive order does not provide OPM the flexibility to extend appointments under any Pathways Program. Therefore, this proposed section eliminates OPM's authority to extend a PMF for up to an additional year. This proposed section also makes clear that the first 2 years of a Fellow's appointment is a trial period.

This proposed section does not address citizenship requirements. That language has been moved to proposed subpart A, General Provisions.

Development, Evaluation, Promotion, and Certification

Proposed section 362.405(a) establishes a requirement for agencies to approve an Individual Development Plan (IDP) for each of their Fellows.

Proposed paragraph (b) provides for certain required developmental activities. Proposed paragraph (b)(1) requires OPM to provide an orientation program and information on available training opportunities to each class or cohort of Fellows.

Proposed paragraph (b)(2) removes the requirement for formal classroom training and replaces it with ''interactive'' training. As discussed in the Recent Graduates section, this will provide greater flexibility in meeting the training requirements, which we believe will prove beneficial to both the PMF and the agency.

Proposed paragraph (b)(3) adds a new requirement that agencies will be responsible for assigning a mentor for each Fellow within 90 days of appointment. The mentor may not be part of the PMF's supervisory chain of command. Additionally, mentors must be members of the Senior Executive Service (SES) or equivalent, unless the PMF works in a location where an insufficient number of SES members are available for mentoring duties. In that event, mentors should be from the highest grade level from which a sufficient number of employees are available for mentoring duties. OPM is proposing the mentor requirement to emphasize the importance of the PMF Program and its role in leadership development. Mentors can provide Fellows with advice and counseling on a myriad of career decisions, such as training and developmental assignments. We believe the new mentor requirement will enhance and enrich not only the PMF Program, but each individual Fellow's development.

Proposed paragraph (b)(4) requires agencies to provide for a minimum of one developmental assignment of 4 to 6 months' duration. Alternatively, a Fellow may choose participation in an agency-wide, Presidential or Administration initiative that will provide experience comparable to the developmental assignment. In addition, this paragraph allows agencies to provide other short-term rotational assignments.

Proposed paragraph (b)(6) requires agencies to make Fellows available to assist OPM in the process of assessing candidates for future PMF classes. Any interactive training provided to a Fellow in connection with this responsibility would count toward the annual 80-hour requirement.

Performance and progress evaluation criteria in the current PMF Program are maintained in paragraph (c) of proposed section 362.405.

Proposed paragraph (d) makes it clear that Fellows may be promoted up to the GS–13 level or equivalent, provided they meet the OPM qualification standard for the grade level of the position.

Paragraph (e) of proposed section 362.405 retains the existing requirements for certification of an agency's Executive Review Board upon a Fellow's completion of the Program.

Waiver

The existing waiver provision for the PMF Program has been moved to subpart A of part 362.

Movement Between Agencies

We are proposing to eliminate references to Senior Fellows from section 362.406 (currently 5 CFR 362.206) because E.O. 13562 no longer provides for a Senior PMF Program.

Withdrawal and Readmission

OPM proposes to retain, in new section 362.407, the provisions currently in 5 CFR 362.207, allowing Fellows to withdraw and reapply to the program. We have made necessary conforming edits to those provisions, such as removing references to Senior Fellows.

Resignation, Termination, Reduction in Force, and Appeal Rights

OPM proposes to clarify the circumstances under which a Fellow may be terminated in new section 362.408, and to include necessary conforming edits, such as the removal of references to Senior Fellows.

Placement Upon Completion of the Program

The current provisions of section 362.209 will be retained in new section 362.409, with necessary conforming edits, such as the removal of reference to Senior Fellows, and the following additional changes:

Under E.O. 13562, an agency may convert any Pathways participant to a term or permanent competitive service appointment. As explained earlier, service in a Pathways Program confers no right to further employment. Agencies will no longer be required to convert Fellows to the competitive service.

The requirement for OPM to issue transition guidance has been moved to subpart A of proposed part 362.

## Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 12866.

## Paperwork Reduction Act

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

## Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Parts 213, 302, 315, 330, 334, 362, 531, 536, 537, 550, 575, and 890**

Administrative practices and procedures, Colleges and universities, Employment, Government employees, Military personnel, Students, Veterans.

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

Accordingly, the Office of Personnel Management proposes to amend title 5, Code of Federal Regulations, as follows:

* * * * *

## PART 213—EXCEPTED SERVICE

1. Revise the authority citation for part 213 to read as follows:

**Authority:** 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; E.O. 13562. Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; 38 U.S.C. 4301 *et seq.;* and Pub. L. 105–339, 112 Stat. 3182–83.

## Subpart A—General Provisions

2. Revise § 213.102 to read as follows:

### § 213.102 Identification of positions in Schedule A, B, C, or D.

(a) As provided in 5 U.S.C. 3302, the President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—

(1) Necessary exceptions of positions from the competitive service; and

(2) Necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of title 5, U.S. Code.

(b) The President delegated authority to the Office of Personnel Management (OPM) in Civil Service Rule VI to except positions from the competitive service when OPM determines that:

(1) Appointments thereto through competitive examination are not practicable; or

(2) Recruitment from among students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs can better be achieved by devising additional means for recruiting and assessing candidates that diverge from the processes generally applicable to the competitive service.

(3)(i) Upon determining that any position or group of positions, as defined in 5 CFR 302.101(c), should be excepted indefinitely or temporarily from the competitive service, the Office of Personnel Management will authorize placement of the position or group of positions into Schedule A, B, C, or D, as applicable. Unless otherwise specified in a particular appointing authority, an agency may make Schedule A, B, C, or D appointments on either a permanent or nonpermanent basis, with any appropriate work schedule (*i.e.,* full-time, part-time, seasonal, on-call, or intermittent).

(ii) When OPM establishes eligibility requirements (*e.g.,* residence, family income) for appointment under particular Schedule A, B, or D exceptions, an individual's eligibility for appointment must be determined before appointment and without regard to any conditions that will result from the appointment.

(c) For purposes of making any such determinations, *positions* includes:

(1) Those that are intended to be removed indefinitely from the competitive service because the nature of the position itself precludes it from being in the competitive service (*e.g.,* because it is impracticable to examine for the knowledge, skills, and abilities required for the job); and

(2) Those that are intended to be removed temporarily from the competitive service to allow for targeted recruiting and hiring from among a particular class of persons, as defined by the Office of Personnel Management, with the opportunity for the persons selected for those positions to convert to the competitive service at a later date.

3. In § 213.103, revise the heading and paragraph (a) to read as follows:

### § 213.103 Publication of excepted appointing authorities in Schedules A, B, C, and D.

(a) Schedule A, B, C, and D appointing authorities available for use by all agencies will be published as regulations in the **Federal Register** and the Code of Federal Regulations.

* * * * *

4. In § 213.104, revise the section heading, paragraph (a) introductory text, and paragraphs (a)(1), (b)(1), (b)(2), and (b)(3)(ii) to read as follows:

### § 213.104 Special provisions for temporary, time-limited, intermittent, or seasonal appointments in Schedule A, B, C, or D.

(a) When OPM specifies that appointments under a particular Schedule A, B, C, or D authority must be temporary, intermittent, or seasonal, or when agencies elect to make temporary, intermittent, or seasonal appointments in Schedule A, B, C, or D, those terms have the following meaning:

(1) *Temporary appointments,* unless otherwise specified in a particular Schedule A, B, C, or D exception, are made for a specified period not to exceed 1 year and are subject to the time limits in paragraph (b) of this section. Time-limited appointments made for more than 1 year are not considered to be temporary appointments, and are not subject to these time limits.

* * * * *

(b) * * *

(1) *Service limits.* Agencies may make temporary appointments for a period not to exceed 1 year, unless the applicable Schedule A, B, C, or D authority specifies a shorter period. Except as provided in paragraph (b)(3) of this section, agencies may extend temporary appointments for no more than 1 additional year (24 months of total service). Appointment to a successor position (*i.e.,* a position that replaces and absorbs the original position) is considered to be an extension of the original appointment. Appointment to a position involving the same basic duties, in the same major subdivision of the agency, and in the same local commuting area is also considered to be an extension of the original appointment.

(2) *Restrictions on refilling positions under temporary appointments.* Except as provided in paragraph (b)(3) of this section, an agency may not fill any position (or its successor) by a temporary appointment in Schedule A, B, C, or D if that position had previously been filled by temporary appointment(s) in either the competitive or excepted service for an aggregate of 2 years, or 24 months, within the preceding 3-year period. This limitation does not apply to programs established to provide for systematic exchange between a Federal agency and non-Federal organizations.

(3) * * *

(ii) Positions are filled under an authority established for the purpose of enabling the appointees to continue or enhance their education, or to meet academic or professional qualification requirements. These include the authorities set out in § 213.3102(r) and (s) and § 213.3402(a), (b), and (c), and authorities granted to individual agencies for use in connection with internship, fellowship, residency, or student programs.

* * * * *

## Subpart C—Excepted Schedules

**Schedule A**

### § 213.3102 [Amended]

5. In § 213.3102, remove and reserve paragraphs (ii) and (jj).

**Schedule B**

**§ 213.3202 [Amended]**

6. In § 213.3202, remove and reserve paragraphs (a), (b), and (o).

7. At the end of subpart C add Schedule D (undesignated heading) and §§ 213.3401 and 213.3402 to read as follows:

**Schedule D**

**§ 213.3401 Positions other than those of a confidential or policy determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs.**

As authorized by OPM, agencies may make appointments under this section to positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment and selection of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs. These positions, which may be filled in the excepted service to enable more effective recruitment from all segments of society by using means of recruiting and assessing candidates that diverge from the rules generally applicable to the competitive service, constitute Schedule D Pathways Programs. Appointments under this authority are subject to the basic qualification standards established by the Office of Personnel Management for the occupation and grade level unless otherwise stated.

**§ 213.3402 Entire executive civil service; Pathways Programs.**

(a) *Internship Program.* Positions in the Internship Program. Agencies may make initial appointments of Interns under this authority at any grade level, depending on the candidates' qualifications. Appointments must be made in accordance with the provisions of subpart B of part 362 of this chapter.

(b) *Recent Graduates Program.* Positions in the Recent Graduates Program. Appointments under this authority may not exceed 2 years except as provided in subpart C of part 362 of this chapter. Agencies may make initial appointments of Recent Graduates at any grade level, not to exceed GS–09 (or equivalent level under another pay and classification system, including the Federal Wage System (FWS)), depending on the candidates' qualifications, and the position's requirements except that:

(1) Initial appointments to positions for science, technology, engineering, or mathematics (STEM) occupations may be made at the GS–11 level, if the candidate possesses a PhD or equivalent doctoral degree directly related to the STEM position the agency is seeking to fill.

(2) Initial appointments to scientific and professional research positions at the GS–11 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a master's degree or equivalent graduate degree directly related to the position the agency is seeking to fill.

(3) Initial appointments to scientific and professional research positions at the GS–12 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a PhD or equivalent doctoral degree directly related to the position the agency is seeking to fill.

Appointments must be made in accordance with the provisions of subpart C of part 362 of this chapter.

(c) *Presidential Management Fellows Program.* Positions in the Presidential Management Fellows Program. Appointments under this authority may not exceed 2 years except as provided in subpart D of part 362 of this chapter. Agencies may make initial appointments of Fellows at either the GS–09, GS–11, or GS–12 level (or equivalent under another pay and classification system such as the FWS), depending on the candidates' qualifications. Appointments must be made in accordance with the provisions of subpart D of part 362 of this chapter.

## PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

8. The authority citation for part 302 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*

**§ 302.101 [Amended].**

9. In § 302.101, remove paragraph (c)(8) and redesignate paragraphs (c)(9) through (11) as paragraphs (c)(8) through (10), respectively.

## PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

10. The authority citation for part 315 is revised to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13562. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p. 111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

### Subpart B—The Career-Conditional Employment System

11. In § 315.201, revise paragraphs (b)(1)(ix), (b)(1)(xiii), (b)(1)(xvii), (b)(1)(xviii), and (b)(1)(xix) and add paragraphs (b)(1)(xx), (xxi), and (xxii) to read as follows:

**§ 315.201 Service requirement for career tenure.**

* * * * *

(b) * * *

(1) * * *

(ix) The date of nontemporary excepted appointment under § 213.3202(b) of this chapter (the former Student Career Experience Program) as in effect immediately before the effective date of the regulations removing that paragraph, provided the student's appointment was converted to career or career-conditional appointment under Executive Order 12015, with or without an intervening term appointment, and without a break in service of one day.

* * * * *

(xiii) The date of appointment as a participant in the Presidential Management Fellows Program under the provisions of Executive Order 13318, provided the employee's appointment was converted without a break in service to career or career-conditional appointment under § 315.708 as in effect immediately before the effective date of the regulations that removed and reserved that section;

* * * * *

(xvii) The starting date of active service as an administrative enrollee in the United States Merchant Marine Academy;

(xviii) The date on which an employee became eligible for benefits under Public Law 83–121, unless an earlier date can be chosen because of prior nontemporary service;

(xix) Appointment as a career intern under Schedule B, § 213.3202(o) of this chapter, provided the employee's appointment was converted to career or career-conditional appointment under

§ 315.712 as in effect immediately before the effective date of the regulations that removed and reserved that section;

(xx) The date of appointment as a Pathways participant in the Internship Program under Schedule D, § 213.3402(a) of this chapter, provided the employee's appointment is converted to career or career-conditional appointment under § 315.713(a);

(xxi) The date of appointment as a Pathways participant in the Recent Graduates Program under Schedule D, § 213.3402(b) of this chapter, provided the employee's appointment is converted to career or career-conditional appointment under § 315.713(b); and

(xxii) The date of appointment as a Pathways participant in the Presidential Management Fellows Program under Schedule D, § 213.3402(c) of this chapter, provided the employee's appointment is converted to career or career-conditional appointment under § 315.713(c).

* * * * *

## Subpart G—Conversion to Career or Career-Conditional Employment From Other Types of Employment

### § 315.708 [Removed and Reserved]

12a. In subpart G, remove and reserve § 315.708.

### § 315.712 [Removed and Reserved]

12b. In subpart G, remove and reserve § 315.712.

12c. In subpart G, add § 315.713 to read as follows:

### § 315.713 Conversion based on service in a Pathways Program.

(a) *Agency authority.* An agency may convert to a term, career or career-conditional position in the competitive service, without further competition, the following Pathways participants:

(1) Interns who satisfactorily complete the Internship Program and meet all eligibility requirements for conversion as outlined in subpart B of part 362 of this chapter;

(2) Recent Graduates who satisfactorily complete the Recent Graduates Program and meet all eligibility requirements for conversion as outlined in subpart C of part 362 of this chapter; and

(3) Presidential Management Fellows who satisfactorily complete the Fellows Program and meet all eligibility requirements for conversion as outlined in subpart D of part 362 of this chapter.

(b) *Tenure on conversion.* An employee whose appointment is converted under this section becomes:

(1) A career-conditional employee except as provided in paragraph (b)(2) of this section;

(2) A career employee when he or she has completed the service requirement for career tenure or is excepted from it by § 315.201(c).

(c) *Acquisition of competitive status.* (1) A Recent Graduate or Presidential Management Fellow converted to a full-time career or career-conditional position in the competitive service under this section does not serve a probationary period and acquires competitive status immediately upon conversion.

(2) An Intern acquires competitive status upon completion of a probationary period following conversion.

## PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

13. The authority citation for part 330 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 19 FR 7521, 3 CFR, 1954–58, Comp., p. 218. Section 330.102 also issued under 5 U.S.C. 3327. Subpart B also issued under 5 U.S.C. 3315 and 8151. Section 330.401 also issued under 5 U.S.C. 3310. Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b). Subpart K also issued under sec. 11203 of Pub. L. 105–33 (111 Stat. 738) and Pub. L. 105–274 (112 Stat. 2424). Subpart L also issued under sec. 1232 of Pub. L. 96–70, 93 Stat. 452.

14. In § 330.211, revise paragraph (f)(3) to read as follows:

### § 330.211 Exceptions to RPL placement priority.

* * * * *

(f) * * *

(3) An excepted service appointment under part 213 of this chapter;

* * * * *

15. In § 330.609, revise paragraph (e)(3) to read as follows:

### § 330.609 Exceptions to CTAP selection priority.

* * * * *

(e) * * *

(3) Make an excepted service appointment under part 213 of this chapter;

* * * * *

16. In § 330.707, revise paragraph (h)(3) to read as follows:

### § 330.707 Exceptions to ICTAP selection priority.

* * * * *

(h) * * *

(3) An excepted service appointment under part 213 of this chapter;

* * * * *

## PART 334—TEMPORARY ASSIGNMENTS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT (IPA)

17. The authority citation for part 334 continues to read as follows:

**Authority:** 5 U.S.C. 3376; E.O. 11589, 3 CFR 557 (1971–1975).

18. In § 334.102 revise the definition of *employee* to read as follows:

### § 334.102 Definitions.

* * * * *

*Employee,* for purposes of participation in this program, means an individual serving in a Federal agency under a career or career-conditional appointment, including a career appointee in the Senior Executive Service, an individual under an appointment of equivalent tenure in an excepted service position, or an individual employed for at least 90 days in a career position with a State, local, or Indian Tribal government, institution of higher education, or other eligible organization;

* * * * *

19. Revise part 362 to read as follows:

## PART 362—PATHWAYS PROGRAMS

### Subpart A—General Provisions



### Subpart B—Internship Program



### Subpart C—Recent Graduates Program



### Subpart D—Presidential Management Fellows Program

**Authority:** E.O. 13562.

## Subpart A—General Provisions

### § 362.101 Program administration.

(a) The Pathways Programs authorized under Executive Order 13562 consist of the following three programs:

(1) The Internship Program;

(2) The Recent Graduates Program; and

(3) The Presidential Management Fellows (PMF) Program.

(b) An agency may rename the Programs specified above provided that the agency specific name includes the Pathways Program name identified in (a), *e.g.,* OPM Internship Program.

(c) Agencies must provide for equal employment opportunity in the Pathways Programs without regard to race, ethnicity, color, religion, sex (including pregnancy and gender identity), national origin, age, disability, sexual orientation, genetic information, or any other non-merit-based factor.

### § 362.102 Definitions.

For the purposes of this part:

*Agency* means an Executive agency as defined in 5 U.S.C. 105, except that an Executive department may treat each of its bureaus or components (first major subdivision that is separately organized and clearly distinguished from other bureaus or components in work function and operation) as a separate agency or as part of one agency.

*Director* means the Director of OPM or his or her designee.

*OPM* means the Office of Personnel Management.

*Pathways Program participant* means any individual appointed under a Pathways Program.

*Qualifying educational institution* means—

(1) A high school whose curriculum has been approved by a State or local governing body, or a home-school curriculum that has been approved by such a body or a State; and

(2) Any of the following educational institutions or curricula that have been accredited by an accrediting body recognized by the Secretary of the U.S. Department of Education:

(i) A technical or vocational school;

(ii) A 2-year or 4-year college or university;

(iii) A graduate or professional school (*e.g.,* law school, medical school); or

(iv) A home-school curriculum.

### § 362.103 Authority.

An agency may make an appointment under this part to a position defined in 5 CFR 213.3402, provided the head of the agency or his or her designee executes a memorandum of understanding with OPM and a Pathways Agreement with each appointee in accordance with § 362.104.

### § 362.104 Agency requirements.

(a) In accordance with this part, the head of an agency, or his or her designee, must execute:

(1) A memorandum of understanding (Pathways MOU) with OPM for the administration and use of Pathways Programs, to be re-executed every 2 years. The Pathways MOU must:

(i) Describe how the agency will:

(A) Accept applications for positions;

(B) Assess candidates for positions;

(C) Rate and arrange qualified applicants;

(D) Ensure adherence to veterans' preference requirements in accordance with the provisions of Part 302 of this chapter; and

(ii) Include information about any agency-specific program labels that will be used, subject to the Federal naming conventions identified in § 362.101 (*e.g.,* OPM Internship Program);

(iii) State the delegations of authority for the agency's use of the Pathways Programs (*e.g.,* department-wide vs. bureaus or components);

(iv) Identify the agency's Pathways Programs Officer (PPO), who:

(A) Must be in a position at the agency's headquarters level, or at the headquarters level of a departmental component, in a position at or higher than grade 12 of the General Schedule (GS) (or the equivalent under the Federal Wage System (FWS) or another pay and classification system);

(B) Is responsible for administering the agency's Pathways Programs, including coordinating the recruitment and on-boarding process for Pathways Programs participants, and coordinating the agency's Pathways Programs plan with agency stakeholders and other hiring plans (*e.g.,* merit promotion plans, plans for hiring people with disabilities);

(C) Serves as a liaison with OPM by providing updates to OPM on the agency's implementation of its Pathways Programs, clarifying technical or programmatic issues with OPM, sharing agency best practices with OPM, and performing other similar duties; and

(D) Reports to OPM on the agency's implementation of its Pathways Programs and individuals hired under these programs, in conjunction with the agency's Pathways MOU;

(v) Prescribe criteria and procedures for agency-approved extensions, not to exceed 120 days, of the 2-year appointments authorized under the Pathways Programs;

(vi) Specify the roles and responsibilities of supervisors and other key officials in Pathways Programs, such as, to the extent applicable, human resources staff, budget and finance staff, career counselors, and mentors;

(vii) Describe how the agency will design, implement, and document formal training and/or development of employees selected under the provisions of these Programs, the type and duration of assignments, and necessary exceptions for short term temporary work, such as summer jobs;

(viii) Describe the on-boarding process, designed for each Pathways Program;

(ix) Include a commitment from the agency to:

(A) Provide in its annual Human Capital Management Reports under part 250 of this chapter (or through alternative means, as authorized by OPM) the information required by OPM on the agency's usage of the Pathways Programs;

(B) Adhere to any caps on conversion of Pathways Program participants imposed by the Director; and

(C) Provide information to OPM about opportunities for individuals interested in participating in the Pathways Programs, as required by this part;

(x) Identify the agency's PMF coordinator responsible for administering the agency PMF Program and serving as a liaison with OPM; and

(xi) Include any implementing policy or guidance that the agency determines, in its discretion, would facilitate successful implementation and administration for each Pathways Program.

(2) [Reserved].

(b) An agency must also execute a Pathways Agreement with each Pathways Program participant.

(c) The Pathways Agreement is a written agreement between the agency and each Pathways Program participant that clearly identifies expectations, including but not limited to:

(1) General description of duties;

(2) Evaluation procedures that will be used for the participant;

(3) Requirements for continuation and successful completion of the program;

(4) Work schedules;

(5) Minimum eligibility requirements for noncompetitive conversion to term or permanent competitive service employment according to the requirements of the applicable Pathways Program; and

(6) The length of the appointment and termination date.

**§ 362.105 Filling positions.**

(a) *Workforce planning.* Agencies should include measures in their workforce planning to ensure that an adequate number of permanent spots will be available to convert Pathways Program participants who successfully complete their programs.

(b) *Announcements.* Agencies must announce the availability of Pathways Programs job opportunities as provided in each of the three Pathways Programs.

(c) *Appointments.* (1) Agencies must fill positions under the Pathways Programs using the excepted service appointing authority provided by 5 CFR 213.3402(a), (b), or (c), as applicable.

(2) Agencies must follow the procedures of part 302 of this chapter when filling a position under a Pathways Program.

(3) Appointments are subject to all the requirements and conditions governing term, career, or career-conditional employment, including investigation to establish an appointee's qualifications and suitability.

(d) *Eligibility.* (1) Except as set forth in this section, eligibility requirements for appointment under a Pathways Program are specified in each Pathways Program.

(e) *Citizenship.* (1) An agency may appoint a non-citizen provided that:

(i) The Pathways Program participant is lawfully admitted to the United States as a permanent resident or is otherwise authorized to be employed; and

(ii) The agency is authorized to pay aliens under the annual Appropriations Act ban and any agency specific enabling and appropriation statutes.

(2) A Pathways Program participant must be a United States citizen to be eligible for noncompetitive conversion to the competitive service.

(f) *Employment of relatives.* In accordance with part 310 of this chapter, a Pathways Program participant may work in the same agency with a relative when there is no direct reporting relationship and the relative is not in a position to influence or control the participant's appointment, employment, promotion or advancement within the agency.

(g) *Length of appointments.* Except as provided in subpart B, Internship Program, appointments under this authority are for 2 years plus any agency approved extension of up to 120 days.

(h) *Terminations.* An agency may terminate a Pathways Participant for reasons related to misconduct, poor performance, or suitability. The appointment of a Pathways participant who is not converted to a career or career-conditional appointment automatically expires at the end of the program period, or upon expiration of an agency-approved extension, if applicable. Agencies must terminate Interns and Recent Graduates who are not converted at the end of the program period. Termination rules for Presidential Management Fellows are set forth in § 362.408 of this part.

**§ 362.106 Conversion to the competitive service.**

(a) Subject to any limits on conversion imposed by the Director, an agency may noncompetitively convert an eligible Pathways Program participant to a term or permanent competitive service position.

(b) A Pathways Program participant who is noncompetitively converted to a competitive service term appointment may be subsequently converted noncompetitively to a permanent competitive service position.

(c) Noncompetitive conversion may be to a position within the same agency or any other agency within the Federal Government.

(d) The provisions of the career transition assistance programs in subparts B, F, and G of part 330 of this chapter do not apply to conversions made under this part.

(e) Time spent serving as a Pathways Program participant counts towards career tenure when the individual is noncompetitively converted to a permanent position in the competitive service upon completion of the Program.

(f) A Pathways appointment expires of its own terms. Though Pathways Program participants are eligible for noncompetitive conversion to the competitive service upon successful completion of their Program and any other applicable conversion requirements, service in a Pathways Program confers no right to further employment in either the competitive or excepted service. An agency wishing to convert a Pathways Program participant must therefore execute the required actions to do so.

**§ 362.107 Program accountability and oversight.**

(a) The Director may limit the number of noncompetitive conversions to the competitive service of Interns, Recent Graduates, and PMFs under subparts B, C, and D, respectively, of this part. Any such limit may apply to any of the Pathways Programs individually, or to all three Pathways Programs collectively. If the Director establishes a Governmentwide limit on conversions for any or all of the Pathways Programs, he or she may implement the limits by establishing agency-specific limits, to be reflected in each affected agency's Pathways MOU.

(1) In determining whether establishment of any Governmentwide limits on conversions is appropriate, the Director will consider whatever factors and information the Director deems relevant.

(2) In implementing any Governmentwide limitations through agency-specific limits, the Director will consider:

(i) The agency's compliance with its Pathways MOU;

(ii) The agency's overall approach to entry-level hiring, including:

(A) Whether the agency is engaging in sound workforce planning to ensure that an adequate number of permanent spots will be available to convert Pathways Program participants who successfully complete its programs; and

(B) The agency's record in using the Pathways Programs as a supplement to competitive examining, rather than as a substitute for it;

(iii) The agency's record of publicizing its positions in the Pathways Programs and recruiting and selecting from a broad array of sources; and

(iv) Any other information the Director deems relevant.

(3) In the event the Director determines that any limits would be appropriate, OPM will publish the limits, including how they apply to individual agencies participating in the Pathways Programs, as a notice in the **Federal Register**.

(b) Agencies must provide in their Human Capital Management planning documents or another form prescribed by OPM, workforce planning strategies that include:

(1) Information on the entry-level occupations targeted for filling positions under this part in the coming year;

(2) The percentage of overall hiring expected in the coming year under the Internship, Recent Graduates, and Presidential Management Fellows Programs established under subparts B, C, and D, respectively, of this part; and

(3) For the previous year:

(i) The number of individuals initially appointed under each Pathways Program;

(ii) The percentage of the agency's overall hires made from each Pathways Program;

(iii) The number of Pathways Program participants, per program, converted to the competitive service; and

(iv) The number of Pathways Program participants, per program, who were separated.

**§ 362.108 Waiver.**

Under limited circumstances, the Director may approve a written request by an agency for a waiver of any of the regulatory requirements set forth in this part.

**§ 362.109 Transition.**

OPM will provide written guidance for the orderly transition of employees currently appointed as students under E.O. 13562, or as Fellows under E.O. 13318, to the Pathways Program under E.O. 13562 and may revise that guidance as necessary.

## Subpart B—Internship Program

**§ 362.201 Agency authority.**

The Internship Program provides students in high schools, colleges, trade schools and other qualifying educational institutions, as defined in § 362.102 of this part, the opportunity to explore Federal careers as paid employees while completing their education. Students appointed under this authority are referred to as Interns.

**§ 362.202 Definitions.**

In this subpart:

*Student* means an individual who has been accepted for enrollment or who is enrolled and seeking a degree (diploma, certificate, *etc.*) in a qualifying educational institution as defined in § 362.102, on a full or half-time basis (as defined by the institution in which the student is enrolled), including students in the Harry S. Truman Foundation Scholarship Program under Public Law 93–842. Students need not be in actual physical attendance, so long as all other requirements are met. An individual who needs to complete less than the equivalent of half an academic/vocational or technical course-load in the class enrollment period immediately prior to graduating is still considered a student for purposes of this program.

**§ 362.203 Filling positions.**

(a) *Announcement.* (1) An agency must provide OPM, information concerning opportunities to participate in the agency's Internship Program. The information must include:

(i) Position title, series and grade;

(ii) Geographic location of the position;

(iii) How to apply—a public source (*e.g.,* a link to the agency's Web site with information on how to apply) for interested individuals to seek further information about how to apply for Internship opportunities; and

(iv) Any other information OPM considers appropriate.

(2) OPM will publish information on Internship opportunities in such form as the Director may determine.

(b) *Eligibility.* Except as provided in paragraph (h) of this section, individuals must meet the definition of *student* in § 362.202 of this part throughout the duration of their Internship appointment.

(c) *Qualification*s. Individuals may be evaluated against either agency-developed standards or the OPM qualification standard for the position being filled.

(d) *Appointment.* (1) An agency may make appointments to the Internship Program, pursuant to its Pathways MOU, using the Schedule D excepted service appointing authority provided in 5 CFR 213.3402(a).

(2) Appointments may be made to any position, at any General Schedule grade (or equivalent level under another pay and classification system, including the FWS), for which the individual is qualified. The duties of the position to which the individual is appointed do not have to be related to the Intern's academic or career goals.

(3) An agency may appoint an Intern on either a temporary basis or for an initial period expected to last more than 1 year.

(i) Temporary appointments are made for a period not to exceed 1 year. The agency may extend the temporary appointment as provided in 213 of this chapter.

(ii) Appointments for an initial period expected to last more than 1 year are not required to have an end date. However, agencies are required to specify an end date for the appointment in the Pathways Agreement with the Intern.

(e) *Promotion.* An agency may promote an Intern.

(f) *Classification.* (1) An Intern whose position is under the General Schedule or appropriate pay plan must be classified as a student trainee, to the –99 series of the appropriate occupational group.

(2) An Intern whose position is under the Federal Wage System must be classified as a student trainee, to the –01 series of the appropriate occupational group.

(g) *Schedules.* An Intern may work a full-time or part-time schedule. An agency is responsible for establishing a work schedule for an Intern in accordance with 5 CFR 610.121. An Intern's work schedule should not interfere with his or her academic schedule. Agencies and students should agree on a formally-arranged schedule of school and work so that:

(1) Work responsibilities do not interfere with academic performance;

(2) Completion of the educational program (awarding of diploma/certificate/degree) and the Internship Program is accomplished in a reasonable and appropriate timeframe;

(3) The agency is informed and prepared for the student's periods of employment; and

(4) Requirements for noncompetitive conversion to term or permanent position in the competitive service are understood by all parties.

(h) *Breaks in program.* A break in program is defined as a period of time when an Intern is working but is unable to go to school, or is neither attending classes nor working at the agency. An agency may use its discretion in either approving or denying a break in program.

**§ 362.204 Conversion to the competitive service.**

(a)(1) An Intern who is a U.S. citizen may be noncompetitively converted from the Internship Program under this subpart to a term or permanent position in the competitive service when the Intern has:

(i) Completed at least 640 hours of work experience acquired through the Internship Program while otherwise enrolled as a full-time or part-time, degree-seeking student;

(ii) Completed a course of academic study within the 120-day period preceding the appointment at a qualifying educational institution conferring a diploma, certificate, or degree;

(iii) Received a favorable recommendation regarding such an appointment by an official of the agency or agencies in which the Internship was served;

(iv) Met the qualification standards for the position to which the Intern will be converted; and

(v) Met all agency-specific requirements, if any, as specified in the agency's Pathways Agreement with the Intern.

(2) Up to 320 hours acquired through a comparable non-Federal internship program meeting the criteria set forth in paragraph (b) and (c) of this section may be credited toward the 640-hour minimum required under paragraph (a)(1)(i) of this section.

(b) To be creditable under paragraph (a) of this section, work experience must be acquired under an Internship Program appointment under this subpart, another previous Federal appointment (*e.g.,* fellowships and similar programs in accordance with 5 CFR 213.3102(r)), or while the student:

(1) Worked in, but not for, a Federal agency, pursuant to a formal internship

agreement, comparable to the Internship Program under this subpart, between the agency and an accredited academic institution, including as a student volunteer as defined by part 308 of this chapter;

(2) Worked in, but not for, a Federal agency, pursuant to a written contract with a third-party internship provider officially established to provide internship experiences to students which is comparable to the Internship Program under this subpart; or

(3) Served as an active duty member of the armed forces of the United States (including the National Guard and Reserves), as defined in 5 U.S.C. 2101, and has been discharged or released from active duty in the armed forces under honorable conditions.

(c) An agency may waive up to one-half (*i.e.,* 320 hours) of the 640-hour minimum service requirement in paragraph (a)(1) of this section if a student enrolled in an accredited college or university completes 320 hours of career-related work experience under an Internship Program appointment, and has demonstrated high potential as evidenced by outstanding academic achievement and exceptional job performance.

(1) Outstanding academic achievement must be demonstrated by an overall grade point average of 3.5 or better, on a 4.0 scale; standing in the top 10 percent of the student's graduating class; and/or induction into a nationally-recognized scholastic honor society. Notwithstanding these differences, agencies may still refer to ''superior academic achievement'' in OPM's Qualifications Standards for General Schedule Positions available on the OPM Web site at *http://www.opm.gov* to obtain specific guidance on grade point average, class standing, and nationally recognized honor societies.

(2) Exceptional job performance must be demonstrated by a formal evaluation conducted by the student's internship supervisor(s), in a manner consistent with the applicable performance appraisal program established under an approved performance appraisal system and resulting in a rating of record (or summary rating) higher than Fully Successful or equivalent.

(d) In no event may an agency grant a credit or waiver (or a combination of a credit and waiver) totaling more than 320 hours of the 640-hour minimum service requirement in paragraph (a)(1) of this section.

(e) Student volunteer service under part 308 of this chapter and Fellows appointed under 5 CFR 213.3102(r) may be evaluated, considered, and credited under this section when that experience is determined by the agency to be comparable in scope to experience gained in the Internship Program.

### § 362.205 Reduction in force (RIF) and terminations.

Interns are covered by part 351 of this chapter for purposes of RIF.

(a) An Intern serving under an appointment for an initial period expected to last more than 1 year is in excepted service Tenure Group II for purposes of § 351.502 and is accorded the same retention rights as other excepted service employees.

(b) *Terminations.* As a condition of employment, a Recent Graduate appointment expires at the end of the 2-year program period, plus any agency-approved extension, unless the participant is selected for noncompetitive conversion under § 362.204.

(c) An Intern serving under a temporary appointment is in excepted service Tenure Group III for purposes of § 351.502, provided he or she has completed at least 1 year of current continuous service. If not, the Intern is in Tenure Group 0 for purposes of § 351.502.

## Subpart C—Recent Graduates Program

### § 362.301 Program administration.

The Recent Graduates Program provides a 2-year developmental experience designed to lead to a civil service career in the Federal Government. Individuals appointed under this authority are referred to as Recent Graduates. Agencies wishing to participate in the Recent Graduates Program must:

(a) Ensure, within 90 days of appointment, that each Recent Graduate is assigned a mentor from the appropriate level that is outside his or her chain of command;

(b) Ensure, within 45 days of appointment, that each Recent Graduate has an Individual Development Plan (IDP) that is approved by his or her supervisor; and

(c) Provide at least 40 hours of formal interactive training per year that advances the goals and competencies outlined in each Recent Graduate's IDP. Mandatory annual training, such as information security and ethics training, does not count towards the 40-hour requirement.

### § 362.302 Eligibility.

(a) A Recent Graduate is an individual who, within the previous 2 years, completed a qualifying associates, bachelors, masters, professional, doctorate, vocational or technical degree or certificate from a qualifying educational institution as defined in § 362.102 of this part.

(b)(1) Except as provided in paragraph (b)(2) of this section, an application for a position in the Recent Graduates Program may be considered only if it is received not later than 2 years from the date all requirements for a degree or certificate from a qualifying educational institution as defined in § 362.102 of this part are met.

(2) A veteran who, due to a military service obligation, was precluded from applying in to the Recent Graduates Program during the 2-year eligibility period after obtaining a degree or certificate will begin his or her 2-year window of elibigibility upon on his or her release or discharge from active duty. The individual's eligibility period may not extend beyond 6 years from the date on which the Graduate received his or her degree or certificate.

### § 362.303 Filling positions.

(a) *Announcement.* (1) An agency must provide OPM, information concerning opportunities to participate in the agency's Recent Graduates Program. The information must include:

(i) Position title, series and grade;

(ii) Geographic location of the position, and:

(iii) How to apply. A public source (*e.g.,* a link to the agency's Web site with information on how to apply for interested individuals to seek further information about how to apply; and

(iv) Any other information OPM considers appropriate.

(2) OPM will publish information on Internship opportunities in such form as the Director may determine.

(b) *Appointments.* (1) An agency may make 2-year appointments to the Recent Graduates Program, pursuant to a Pathways MOU executed with the OPM, under Schedule D of the excepted service in accordance with part 302 of this chapter.

(2) An agency must appoint a Recent Graduate using the excepted service appointing authority provided by 5 CFR 213.3402(b).

(3)(i) An agency may make an initial appointment of a Recent Graduate to any position identified to be filled under this authority for which the Recent Graduate qualifies up to the GS–09 level (or equivalent under another pay and classification system, such as the Federal Wage System), except as provided in paragraph (b)(3)(ii) through (iv) of this section.

(ii) Initial appointments to positions for science, technology, engineering, or mathematics (STEM) occupations may be made at the GS–11 level, if the candidate possesses a Ph.D. or equivalent doctoral degree directly related to the STEM position the agency is seeking to fill.

(iii) Initial appointments to scientific and professional research positions at the GS–11 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a master's degree or equivalent graduate degree directly related to the position the agency is seeking to fill.

(iv) Initial appointments to scientific and professional research positions at the GS–12 level for which the classification and qualification criteria for research positions apply, if the candidate possesses a Ph.D or equivalent doctoral degree directly related to the position the agency is seeking to fill.

(v) Positions must have progressively more responsible duties that provide career advancement opportunities (*i.e.,* there must be the opportunity for career ladder advancement).

(c) *Extensions.* An agency may extend the 2-year program period for up to an additional 120 days to cover rare or unusual circumstances or situations. The agency's Pathways MOU must identify criteria for approving extensions. Any such extensions must be recorded in writing and reported to OPM.

(d) *Qualifications.* An agency must evaluate candidates using OPM qualification standards for the occupation and grade level of the position being filled.

(e) *Promotions.* An agency may promote any Recent Graduate who meets the OPM qualification requirements for the position in accordance with the agency's Pathways MOU. This provision does not confer entitlement to promotion.

(f) *Trial period.* The first 2 years of a Recent Graduate's service is a trial period. Prior Federal civilian service is credited toward the completion of the required trial period in the same manner as prescribed in 5 CFR 315.802.

**§ 362.304 Movement between agencies.**

(a) A Recent Graduate may apply for and accept a new Recent Graduates appointment with another agency covered by this part, as long as the agency meets all the requirements for participating in the Recent Graduates Program.

(b) To move to the new agency, the Recent Graduate must separate from the current employing agency.

(c) The new employing agency must appoint the Recent Graduate without a break in service.

(d) Time served under the previous agency's Recent Graduates Program is credited toward the 2-year requirement for noncompetitive conversion eligibility to the competitive service. Because there is no break in service, the Recent Graduate does not begin a new period in the Program upon moving to the new agency.

(e) The new or gaining agency's plan must identify requirements for Program completion and eligibility for noncompetitive conversion.

**§ 362.305 Reduction in force and termination.**

(a) *Reduction in force.* Recent Graduates are in excepted service Tenure Group II for purposes of 5 CFR 351.502. Expiration of the Recent Graduates appointment is not otherwise subject to part 351 of this chapter.

(b) *Terminations.* (1) Except as provided in paragraph (b)(2) of this section, as a condition of employment, a Recent Graduate appointment expires at the end of the 2-year program period, plus any agency-approved extension, unless the participant is selected for noncompetitive conversion under § 362.306

(2) A Recent Graduate who held a career-conditional or career appointment in an agency immediately before entering the Program, and fails to complete the Program for reasons that are not related to misconduct, poor performance, or suitability, may, at the employing agency's discretion, be placed in a permanent competitive service position, as appropriate, in that agency.

**§ 362.306 Conversion to the competitive service.**

(a) An agency may noncompetitively convert a Recent Graduate to a term or permanent appointment in the competitive service under 5 CFR 315.713(b).

(b) A Recent Graduate who is a U.S. citizen may be noncompetitively converted from the Recent Graduates Program under this subpart to a term or permanent position in the competitive service when the Recent Graduate has:

(1) Successfully completed all the requirements of the Recent Graduates Program;

(2) Demonstrated successful job performance consistent with the applicable performance appraisal program established under the agency's approved performance appraisal system that results in a rating of record (or summary rating) of at least Fully Successful or equivalent and a recommendation for conversion by the first-level supervisor; and

(3) Met the OPM qualification standard for the competitive service position to which the Recent Graduate will be converted.

(c) When converting a Recent Graduate, an agency must make the noncompetitive conversion effective on the date the 2-year service requirement is met, or at the end of an agency-approved extension, if applicable.

## Subpart D—Presidential Management Fellows Program

**§ 362.401 Definitions.**

For purposes of this subpart:

*Agency PMF Coordinator* is an individual, at the appropriate agency component level, who coordinates the placement, development, and other program-related activities of PMFs appointed in his or her agency. The agency Pathways Program Officer may also serve as the PMF Coordinator.

*Executive Resources Board (ERB)* has the same meaning as specified in 5 CFR 317.501(a); in those agencies that are not required to have an ERB pursuant to that section, it means the senior agency official or officials who have been given responsibility for executive resources management and oversight by the agency head.

*Presidential Management Fellow (PMF)* or *Fellow* is an individual appointed, at the GS–9, GS–11, or GS–12 level (or equivalent under a non-GS pay and classification system such as the Federal Wage System), in the excepted service under 5 CFR 213.3402(c).

*Qualifications Review Board (QRB)* has the same meaning as specified in 5 CFR 317.502(a).

**§ 362.402 Program administration.**

(a) The Director may determine the number of Fellows that may be appointed during any given year. This determination will be based on input from the Chief Human Capital Officers Council, as well as input from agencies not represented on the Council.

(b) Thereafter, subject to the provisions and requirements of this chapter, an agency may appoint individuals selected by the Director as Fellows finalists according to its short-, medium-, and long-term senior leadership and related (senior policy, professional, technical, and equivalent) recruitment, development, and succession requirements, as set forth in 5 U.S.C. 1103(c)(2)(C).

(c) The Director will establish the qualification requirements for evaluating applicants for the Presidential Management Fellows (PMF) Program;

(d) An agency that hires Fellows in field locations outside the Washington, DC, Metropolitan Area must:

(1) Discuss with each Fellow, in advance of making the appointment, whether he or she wants to do a developmental rotation to agency headquarters and, if so, make a commitment to allow and fund such a rotation, to the maximum extent practicable, in accordance with § 362.405(b) of this part; and

(2) Coordinate with its Federal Executive Board (FEB) in promoting interaction with other Fellows in that region. In addition, an agency hiring Fellows in field locations must permit them to attend FEB-sanctioned activities in that region.

**§ 362.403 Announcement, eligibility, and selection.**

(a) OPM will announce the opportunity to apply for the PMF Program and conduct a competition for the selection of finalists as set forth in this section.

(b) Individuals who completed an advanced degree from a qualifing educational institution within the 2 years, preceding the Program announcement described in paragraph (a) of this section, or who are scheduled to complete an advanced degree prior to the date that PMF finalists are announced, are eligible to apply for the Program. An individual may apply for the PMF Program more than once as long as he or she meets the eligibility criteria. However, if an individual becomes a finalist and subsequently applies for the Program during the next open announcement, the individual will forfeit his or her status as a finalist.

(c) OPM will select Fellow finalists based on an OPM evaluation of each candidate's experience and accomplishments based on his or her application and the results of a rigorous structured assessment process.

(d) OPM will publish a list of Fellows finalists. OPM will send all participating agencies the list of Fellows finalists for appointment consideration.

**§ 362.404 Appointment and extension.**

(a) *Appointment.* (1) An agency must appoint a Fellow using the Schedule D excepted service appointing authority provided in 5 CFR 213.3402(c).

(2) An agency may appoint a Fellow for an initial period of 2 years. The first 2 years of a Fellow's appointment is a trial period.

(3) An agency may appoint a Fellow at any time during the 12-month period beginning on the date OPM publishes the list of Fellows finalists.

(4) An agency may extend a Fellow's appointment for up to 120 days to cover rare or unusual circumstances or situations. The agency's Pathways MOU must identify the criteria for approving extensions. Any such extensions must be recorded in writing and reported to OPM.

(b) *Grade.* An agency may appoint a Fellow at the GS–09, GS–11, or GS–12 level or equivalent depending on his or her qualifications.

**§ 362.405 Development, evaluation, promotion, and certification.**

(a) *Individual Development Plans.* The appointing agency must approve an Individual Development Plan (IDP) for each of its Fellows that sets forth the specific developmental activities that are mutually agreed upon by each Fellow and his or her supervisor. The IDP must be developed in consultation with the Agency PMF Coordinator and/or the mentor assigned to the Fellow under paragraph (b)(3) of this section.

(b) *Required developmental activities.* (1) OPM will provide an orientation program for each class or cohort of Fellows and will provide information on available training opportunities known to it.

(2) The appointing agency must provide each Fellow a minimum of 80 hours of interactive training per year that addresses the competencies outlined in the IDP.

(3) Within the first 90 days of a Fellow's appointment, the appointing agency must assign the Fellow a mentor, who is outside the Fellow's chain of command and who is a member of the SES (or equivalent), or other senior-level manager, as appropriate.

(4) The appointing agency must provide each Fellow with at least one rotational or developmental assignment with full-time management and/or technical responsibilities consistent with the Fellow's IDP. With respect to this requirement:

(i) Each Fellow must receive at least one developmental assignment of 4 to 6 months in duration, with management and/or technical responsibilities consistent with the Fellow's IDP. However, as an alternative, a Fellow may choose to participate in an agency-wide initiative or other Presidential or Administration initiative that will provide the Fellow with the experience he or she would have gained through the 4-to-6-month developmental assignment.

(ii) The developmental assignment may be within the Fellow's organization, in another component of the agency, or in another Federal agency.

(5) In addition, the Fellow may receive other short-term rotational assignments of 1 to 6 months in duration, at the appointing agency's discretion.

(6) Upon the request of OPM, the appointing agency must make Fellows available to assist in the assessment process for subsequent PMF classes. This may require travel on the part of the Fellow to be paid for by the appointing agency. Any interactive training provided to a Fellow in connection with assisting OPM in the assessment process may be counted toward the minimum 80-hour training requirement in paragraph (b)(2) of this section.

(c) *Performance and progress evaluation.* (1) Each Fellow must be placed on a performance plan, as prescribed by part 430 of this chapter or other applicable law or regulation, establishing performance elements and standards that are directly related to acquiring and demonstrating the various leadership, technical, and/or general competencies expected of the Fellow as well as the elements and standards established for the duties assigned.

(2) Each Fellow must receive an annual performance evaluation in accordance with the agency's performance management program. The rating is to include an evaluation of the Fellow's success in completing developmental activities designed to prepare the Fellow to meet the developmental and performance expectations described in his or her performance plan. In addition to the formal evaluation, the agency is expected to provide regular feedback concerning the Fellow's performance.

(3) If a Fellow does not meet expectations set forth in the performance plan with regard to his or her developmental progress or assignments, the agency may take appropriate action.

(d) *Promotion.* (1) An agency may promote a Fellow according to the agency's Program plan, provided the Fellow meets the OPM qualification standard for the grade level of the position. A Fellow may be promoted up to the GS–13 level (or the equivalent under another pay and classification system, such as the Federal Wage System).

(e) *Certification of completion.* (1) Upon a Fellow's completion of the Program, the appointing agency's ERB must evaluate each Fellow and determine whether it can certify in writing that he or she has met all of the requirements of the Program, including the performance and developmental expectations set forth in the individual's performance plan and IDP.

(2) The ERB may consult the Fellow's mentor in reaching its determination.

(3) In the event the Director has approved a waiver of one or more Program requirements in a particular case pursuant to § 362.108 of this part, the ERB must certify that such a waiver has been granted and that any remaining requirements were met.

(4) The ERB must notify the Fellow of its decision regarding certification of successful completion.

(5) ERB certifications must be forwarded to OPM.

(6)(i) If the ERB decides not to certify a Fellow, the Fellow may request reconsideration of that determination by the Director. Such reconsideration must be requested in writing, with appropriate documentation and justification, within 15 calendar days of the date of the agency's decision. The Director's decision on reconsideration is not subject to appeal.

(ii) The Fellow may continue in the Program pending the outcome of his or her request for reconsideration. The agency must continue to provide appropriate developmental activities during this period.

**§ 362.406 Movement between agencies.**

(a) At any time during his or her appointment in the Program, a Fellow may move to another agency covered by this part, as long as the agency meets all the requirements for participating in the PMF Program. To move from one agency to another during the Program, the Fellow must separate from the current agency. The new employing agency must appoint the participant without a break in service.

(b) The Fellow does not begin a new period in the Program upon appointment by the new employing agency. Because there is no break in service, time served under the previous Program appointment will apply towards the completion of the Program with the new employing agency.

(c) The new appointing agency must notify OPM when a Fellow moves to that agency from another agency.

**§ 362.407 Withdrawal and readmission.**

(a) *Withdrawal.* (1) A Fellow may withdraw from the Program at any time. Such withdrawal will be treated as a resignation from the Federal service; however, any obligations established upon admission and appointment (for example, as a result of accepting a recruitment incentive under part 575, subpart A, of this chapter) still apply. If the move occurs within the first 6 months of the Fellow's appointment, the original appointing agency may request reimbursement of one-quarter of the placement fee.

(2) A Fellow who held a permanent appointment in the competitive service in an agency immediately before entering the Program, and who withdraws from the Program for reasons that are not related to misconduct, poor performance, or suitability, may, at the employing agency's discretion, be placed in a permanent competitive service position, as appropriate, in that agency. The employing agency's determination in this regard is not subject to appeal.

(3) An agency must notify OPM when a Fellow withdraws from the Program.

(b) *Readmission.* (1) If a Fellow withdraws from the Program for reasons that are related to misconduct, poor performance, or suitability, as determined by the agency, he or she will not be readmitted to the Program at any time.

(2) If a Fellow withdraws from the Program for reasons that are not related to misconduct, poor performance, or suitability, he or she may petition the employing agency for readmission and reappointment to the Program. Such a petition must be in writing and include appropriate justification. The agency may approve or deny the request for readmission. An agency must submit written notification of approved readmission requests to OPM. The individual's status in the Program upon readmission and reappointment must be addressed as part of the agency's submission. The Director may overrule the agency's decision to readmit and reappoint, and the Director's decision is not subject to appeal.

**§ 362.408 Resignation, termination, and reduction in force.**

(a) *Resignation.* A Fellow who resigns at any time prior to completion of the Program does not have reinstatement eligibility for competitive service positions based on his or her appointment as a Fellow.

(b) *Termination.* (1) An agency may terminate a Fellow for reasons related to misconduct, poor performance, or suitability.

(2) As a condition of employment, a Fellow's appointment expires at the end of the 2-year program period, plus any agency-approved extension, unless the participant is selected for noncompetitive conversion. If an agency does not convert a Fellow at the end of the Program, as provided in § 362.409 of this part, or extend the individual's initial appointment under § 362.403, the appointment expires when certification for Program completion is denied or when the Director denies the agency's request for an extension.

(3) The agency must provide written notification to OPM when a Fellow is terminated for any reason.

(c) *Reduction in force.* Fellows are in the excepted service Tenure Group II for purposes of § 351.502 of this chapter.

**§ 362.409 Conversion to the competitive service.**

(a) A Fellow must complete the Program within the time limits prescribed in § 362.403 of this part, including any agency-approved extension. At the conclusion of that period, the Fellow may be converted, as provided in paragraph (b) of this section.

(b) As provided in part 315.713(c) of this chapter, an agency may convert, without a break in service, an ERB-certified Fellow to a term or permanent appointment in the competitive service.

## PART 531—PAY UNDER THE GENERAL SCHEDULE

20. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335 and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304 and 5305; E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682; and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

## Subpart B—Determining Rate of Basic Pay

21. In § 531.212—

a. Revise paragraph (a)(3)(v) to read as follows:

**§ 531.212 Superior qualifications and special needs pay-setting authority.**

(a) * * *

(3) * * *

(v) Employment under an Internship Program appointment under 5 CFR 213.3402(a).

* * * * *

## PART 536—GRADE AND PAY RETENTION

22. The authority citation for part 536 continues to read as follows:

**Authority:** 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.301(b) also issued under 5 U.S.C. 5334(b); § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004

(Pub. L. 108–411), 118 Stat. 2305; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

### Subpart A—General Provisions

23. In § 536.103, revise the definition of *management action* to read as follows:

**§ 536.103 Definitions.**

* * * * *

*Management action* means an action (not for personal cause) by an agency official not initiated or requested by an employee which may adversely affect the employee's grade or rate of basic pay. However, an employee's placement in or transfer to a position under a formal employee development program established by an agency for recruitment and employee advancement purposes (*e.g.,* Recent Graduates Program) is considered a management action even though the employee initiates or requests such placement or transfer.

* * * * *

### Subpart C—Pay Retention

24. In § 536.301, revise paragraph (a)(5) to read as follows:

**§ 536.301 Mandatory pay retention.**

(a) * * *

(5) A management action that places an employee in a formal employee development program generally utilized Governmentwide (*e.g.*, Recent Graduates Program); or

* * * * *

## PART 537—REPAYMENT OF STUDENT LOANS

25. The authority citation for part 537 continues to read as follows:

**Authority:** 5 U.S.C. 5379(g).

26. In § 537.102, revise paragraphs (6) and (7) in the definition of *time-limited appointment* to read as follows:

**§ 537.102 Definitions.**

* * * * *

*Time-limited appointment* * * *

(6) A Presidential Management Fellows Program appointment under 5 CFR 213.3402(c);

(7) A Recent Graduates Program appointment under 5 CFR 213.3402(b); and

* * * * *

## PART 550—PAY ADMINISTRATION (GENERAL)

### Subpart B—Advances in Pay

27. Revise the authority citation for subpart B of part 550 to read as follows:

**Authority:** 5 U.S.C. 5524a, 5545a(h)(2)(B); E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316.

28. In § 550.202, revise paragraph (c) introductory text of the definition of *newly appointed* to read as follows:

**§ 550.202 Definitions.**

* * * * *

*Newly appointed* * * *

(c) A permanent appointment in the competitive service following termination of employment an Internship Program (as described in 5 CFR part 362, subpart B, provided such employee—

* * * * *

### Subpart G—Severance Pay

29. The authority citation for subpart G of part 550 continues to read as follows:

**Authority:** 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964–1965 Comp., p. 357.

30. In § 550.703, revise paragraph (f)(5) in the definition of *nonqualifying appointment* to read as follows:

**§ 550.703 Definitions.**

* * * * *

*Nonqualifying appointment* * * *

(f) * * *

(5) A Presidential Management Fellows Program appointment under 5 CFR 213.3402(c).

* * * * *

### Subpart M—Firefighter Pay

31. The authority citation for subpart M of part 550 continues to read as follows:

**Authority:** 5 U.S.C. 5545b, 5548, and 5553.

32. In § 550.1302, revise paragraph (2)(iii) of the definition of *firefighter* to read as follows:

**§ 550.1302 Definitions.**

* * * * *

*Firefighter* * * *

(2) * * *

(iii) Covered by the General Schedule and classified in the GS–0099, General Student Trainee Series (as required by 5 CFR 362.203(e)), if the position otherwise would be classified in the GS–0081 series.

* * * * *

## PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

33. The authority citation for part 575 continues to read as follows:

**Authority:** 5 U.S.C. 1104(a)(2) and 5307; subparts A and B also issued under 5 U.S.C. 5753 and sec. 101, Public Law 108–411, 118 Stat. 2305; subpart C also issued under 5 U.S.C. 5754 and sec. 101, Public Law 108–411, 118 Stat. 2305; subpart D also issued under 5 U.S.C. 5755; subpart E also issued under 5 U.S.C. 5757 and sec. 207 of Public Law 107–273, 116 Stat. 1780.

### Subpart A—Recruitment Incentives

34. In § 575.102, revise paragraph (3)(vi) in the definition of *newly appointed* to read as follows:

**§ 575.102 Definitions.**

* * * * *

*Newly appointed* * * *

(3) * * *

(vi) Employment under an Internship Program appointment under 5 CFR 213.3402(a).

* * * * *

## PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

35. The authority citation for part 890 continues to read as follows:

**Authority:** 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–3, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061.

36. In § 890.102, revise paragraph (c)(2) to read as follows:

**§ 890.102 Coverage.**

* * * * *

(c) * * *

(2) An employee who is expected to work less than 6 months in each year, except for an employee who receives an appointment of at least 1 year's duration as an Intern under 5 CFR 213.3402(a) and who is expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the Internship Program.

* * * * *

[FR Doc. 2011–19623 Filed 8–4–11; 8:45 am]

BILLING CODE 6325–39–P

## OFFICE OF PERSONNEL MANAGEMENT

## 5 CFR PART 250

**RIN 3206–AL98**

## Personnel Management in Agencies

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing proposed regulations that would provide regulatory definitions related to the strategic management of human capital, clarify requirements regarding the systems and metrics for managing human resources in the Federal Government, and streamline/clarify the procedures agencies are required to follow.

**DATES:** Comments must be received on or before October 4, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number ''3206–AL98,'' using any of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

*Mail:* Joseph Kennedy, Deputy Associate Director, Agency and Veterans Support, U.S. Office of Personnel Management, Room 7460, 1900 E Street, NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Patsy Stevens by telephone at (202) 606–1574; by fax at (202) 606–1574; or by e-mail at *Patsy.Stevens@opm.gov.*

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to revise 5 CFR part 250, subpart B, Strategic Human Capital Management, and make a technical correction to subpart C, Employee Surveys. Subpart B implements the requirements of the Chief Human Capital Officers Act (CHCO Act), codified at 5 U.S.C. 1103(c). Section 1103 requires OPM to ''design a set of systems, including appropriate metrics, for assessing the management of human capital by Federal agencies'' and to define those systems in regulation. Subpart B of part 250 of title 5, Code of Federal Regulations, contains those regulations. Subpart B also provides a mechanism for Chief Human Capital Officers (CHCOs) to carry out their required functions under 5 U.S.C. 1402(a). Subpart C addresses the requirements for employee surveys.

The current regulations implement 5 U.S.C. 1103(c) by adopting the systems currently comprising the Human Capital Assessment and Accountability Framework (HCAAF) to constitute the systems required by 5 U.S.C. 1103(c)(1) and to provide the definitions required by 5 U.S.C. 1103(c)(2). The HCAAF is a framework that integrates five human capital systems—Strategic Alignment, Leadership and Knowledge Management, Results Oriented Performance Culture, Talent Management, and Accountability. These systems define good practices for effective and efficient human capital management and support the steps involved in the planning and goal setting, implementation, and evaluation of human capital initiatives in the Federal Government.

OPM believes that incorporating the full text of the HCAAF to satisfy these requirements has proven to undermine the original concept of the HCAAF with respect to flexibility and adaptability. The original HCAAF document was integrated several years ago into a Web-based Resource Center that was being updated based on feedback, analysis, and emerging agency practices and results. Once the entire text of the HCAAF was brought into regulation, it became more difficult to keep current. OPM has concluded that it would be more effective to discharge its obligations under 5 U.S.C. 1103(c)(2) by providing definitions in the regulations that establish broad, overarching concepts, and treating the material in the HCAAF as guidance that is subject to change as Federal human capital management evolves.

In addition, OPM is clarifying requirements imposed by two separate legal authorities. In the past, there was some confusion regarding whether agencies must establish separate accountability systems in order to satisfy the statutory requirements of 5 U.S.C. 1103(c)(2)(F) and any requirement OPM previously imposed under Civil Service Rule X (5 CFR 10.2). The proposed regulations would make clear that the requirements of these two legal authorities are satisfied by the establishment of the Human Capital Accountability System (HCAS) set forth in section 250.207 of the proposed regulation. Section 250.205(e) would codify in regulation OPM's longstanding practice in this area of these two legal authorities.

Finally, the proposed regulation would eliminate the requirement currently stated in section 250.203 to maintain a human capital plan. However, even though the requirement for a human capital plan will be eliminated, agencies are expected to continue to engage in strategic human capital planning. OPM will monitor agency outcomes in human capital management, and agencies should continue to implement good business practices that support effective and efficient human capital management. The purpose of these proposed changes is to focus the regulations on the specific requirements that are the most significant for establishing and maintaining efficient and effective human capital management while providing agencies more flexibility in determining how they will accomplish their human capital planning activities.

The proposed regulations, therefore, will—

- Define applicable systems and include standards as required by 5 U.S.C. 1103(c)(2) to constitute a set of overarching concepts in regulation, to be supplemented with details in guidance.
- Enable agencies to have a greater alignment of human capital policies and programs with mission objectives, by simplifying the system definitions to broad, overarching concepts. The current definitions incorporate the entire text of the HCAAF, which is quite lengthy and includes much material better suited as guidance. Because of its length, the HCAAF had to be printed in an Appendix, which was published as part of the final rule in the **Federal Register** (73 FR 23013, April 28, 2008), but was not codified in title 5. Our experience in recent years has shown agencies can achieve better alignment if they focus their human capital activities on those initiatives that offer the most organizational benefits, thus allowing them to allocate budgetary and human resources more effectively. We hope the simplified system definitions will facilitate more effective alignment of human capital programs with agency mission objectives.
- Ensure consistency by clearly defining key human capital management terms, including the Human Capital Management Report (HCMR).
- Outline OPM's requirements for the annual agency HCMR agencies currently submit, in alignment with the requirements placed on agencies' CHCOs in 31 U.S.C. 1115(a)(3) and (f) and 1116(d)(5).
- For purposes of the required elements of their Human Capital Accountability System and their HCMR, differentiate between agencies that are required by the CHCO Act to have a CHCO (hereafter referred to as ''CHCO agencies'') and agencies that are not required to have a CHCO (hereafter referred to as ''non-CHCO agencies'') in how they are expected to comply with subpart B. This does not suggest that

two separate systems are being implemented, rather that we have a system that is flexible enough to accommodate the human capital requirements for large agencies (or CHCO agencies) with small subcomponents, and smaller agencies (non-CHCO agencies).

- Streamline the requirements of subpart B of part 250 for agencies, by removing the regulatory requirement for a human capital plan and eliminating redundancy in provisions relating to agency accountability systems.

The technical correction to subpart C clarifies that the definitions contained in the subpart apply only to that subpart.

**Executive Order 13563 and Executive Order 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

**Regulatory Flexibility Act**

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Part 250**

Authority delegations (Government agencies), Government employees.

U.S. Office of Personnel Management.

**John Berry,**

*Director.*

Accordingly, OPM is proposing to amend 5 CFR part 250 as follows:

## PART 250—HUMAN CAPITAL MANAGEMENT IN AGENCIES

1. Revise the authority citation for part 250 to read as follows:

**Authority:** 5 U.S.C. 1101 note, 1103(a)(5), 1103(c), 1104, 1302, 1401, 1401 note, 1402, 3301, 3302; E.O. 10577, 12 FR 1259, 3 CFR, 1954–1958 Comp., p. 218; E.O. 13197, 66 FR 7853, 3 CFR 748 (2002).

2. Revise the heading of Part 250 to read as set forth above:

3. Revise subpart B to read as follows:

### Subpart B—Strategic Human Capital Management



### Subpart B—Strategic Human Capital Management

#### § 250.201 Coverage and purpose.

Pursuant to 5 U.S.C. 1103(c), this subpart defines a set of systems, including standards and metrics, for assessing the management of human capital by Federal agencies. These regulations apply to all Executive agencies as defined in 5 U.S.C. 105 and support the performance planning and reporting that is required by sections 1115(a)(3) and (f) and 1116(d)(5) of title 31, United States Code.

#### § 250.202 Definitions.

*Chief Human Capital Officer (CHCO)* means the person appointed or designated by the agency head as required by 5 U.S.C. 1401, who is accountable for the strategic alignment of the agency's workforce to its mission and is responsible for maintaining and effectively directing the agency's human capital management policies and programs.

*CHCO agency* means an agency required by 5 U.S.C. 1401 to appoint a CHCO.

*Human Capital Management Report (HCMR)* means the report compiling an agency's required metrics and its self-assessment of its progress in meeting the established goals, objectives and milestones in the agency's human capital programs and initiatives. Agencies may also use the HCMR to report on designated Governmentwide goals and objectives. The report helps CHCOs meet the requirements of 31 U.S.C. 1115(a)(3) and (f) and 1116(d)(5).

*Non-CHCO agency* means an agency not required by 5 U.S.C. 1401 to appoint a CHCO, although it may have one.

#### § 250.203 Agency responsibilities.

(a) An agency is responsible for planning, developing, implementing, maintaining and evaluating its strategic human capital management programs and policies and its human resources practices to ensure that they support meeting mission objectives and are efficient, effective, and compliant with merit system principles, laws, and regulations.

(b) An agency must comply with OPM instructions when assessing and reporting on its human capital management efforts.

#### § 250.204 Human Capital Management.

An agency must use the systems, standards and metrics contained in §§ 250.205 and 250.206 of this part in planning, evaluating and improving the efficiency and effectiveness of agency human capital management with respect to—

(a) Aligning with executive branch policies and priorities, as well as with individual agency missions, goals, and program objectives, and ensuring its human capital management strategies support its strategic plans and performance budgets prepared under OMB Circular A–11;

(b) Supporting human capital programs with comprehensive workforce planning and analysis;

(c) Recruiting, hiring and retaining a highly competent workforce, especially in the agency's mission-critical occupations;

(d) Ensuring leadership continuity through the implementation of recruitment, development, and succession plans;

(e) Sustaining an agency culture that values, elicits, identifies, and rewards high performance;

(f) Developing and implementing a knowledge-management strategy, supported by appropriate investment in training and technology; and

(g) Holding the agency head, executives, managers and human resources officers accountable for efficient and effective human capital management, in accordance with merit system principles.

#### § 250.205 Systems and standards.

The five human capital management systems and standards are—

(a) *Strategic Alignment.* A system led by senior management—typically the CHCO—to promote the alignment of human capital management strategies with agency mission, goals, and objectives through analysis, planning, investment, measurement, and management of human resources programs. The core standards for the Strategic Alignment system require an agency to have—

(1) Human capital management strategies and practices that effectively promote accomplishment of its mission; and

(2) Measurable, observable agency performance results.

(b) *Leadership and Knowledge Management.* A system that ensures continuity of leadership by identifying and addressing potential gaps in effective leadership and implements and maintains programs that capture organizational knowledge and promote learning. The core standards for the Leadership and Knowledge Management system require that agency leaders and managers—

(1) Manage people effectively, ensure continuity of leadership, sustain a learning environment that drives continuous improvement in performance;

(2) Provide a means to share critical knowledge across the organization; and

(3) Support knowledge management by appropriate investment in training and technology.

(c) *Results-Oriented Performance Culture.* A system that fosters a high-performing organizational culture that offers challenging work and is supported by effective performance management systems and awards programs. The core standards for the Results-Oriented Performance Culture system require an agency to have—

(1) A diverse, results-oriented, high-performing workforce; and

(2) A performance management system that effectively differentiates between high and low levels of performance and links individual/team/unit performance to organizational goals and desired results effectively.

(d) *Talent Management.* A system that addresses competency gaps, particularly in mission-critical occupations, by implementing and maintaining programs to attract, acquire, develop, promote, and retain quality talent. The core standards for the Talent Management system require an agency to—

(1) Close skills, knowledge, and competency gaps/deficiencies in mission-critical occupations; and

(2) Make meaningful progress toward closing skills, knowledge, and competency gaps/deficiencies in all occupations used in the agency.

(e) *Accountability.* A system an agency is required to establish under § 250.207 of this part that contributes to agency performance and mission accomplishment by measuring, monitoring and evaluating the results of its human capital management policies, programs, and activities; by analyzing compliance with merit system principles; and by identifying and monitoring necessary improvements. The core standards for the Accountability system require an agency to—

(1) Guide its human capital management decisions by a data-driven, results-oriented planning and accountability system;

(2) Inform the development of its human capital goals and objectives by the results of the agency's accountability system, in conjunction with the agency's strategic planning and performance budgets; and

(3) Effectively apply its accountability system to promote effective human capital management in accordance with the merit system principles and in compliance with Federal laws, rules, and regulations.

(f) OPM may augment the core standards set forth in this section with additional standards that the Director of OPM will publish in such form as the Director determines appropriate.

### § 250.206 System metrics.

(a) The required metrics that an agency must address focus on the three systems that implement the human resources life cycle (Leadership and Knowledge Management, Results-Oriented Performance Culture, and Talent Management) and include—

(1) Organization metrics;

(2) Employee perspective metrics; and

(3) Merit system compliance metrics.

(b) OPM will provide instructions on the specific metrics an agency must include in its Human Capital Management Report described in § 250.208.

(c) OPM may provide additional suggested metrics in guidance on human capital management activities that an agency may use in its reports.

### § 250.207 Human Capital Accountability System.

(a) Each agency must establish and maintain a Human Capital Accountability System (HCAS), consistent with § 250.205(e), that—

(1) Is formal and documented; and

(2) Is approved by OPM.

(b) For a CHCO agency, the HCAS also must provide for an independent audit process, subject to full OPM participation and evaluation, to review periodically the agency's human resources transactions to ensure legal and regulatory compliance.

(c) An agency must—

(1) Take corrective action to eliminate deficiencies identified in the independent audit and to improve its human capital management programs and its human resources processes and practices; and

(2) Report the analysis, HCAS results, and corrective actions taken to its leadership and OPM.

### § 250.208 Human Capital Management Report.

(a) An agency must submit a Human Capital Management Report (HCMR) to OPM that—

(1) Assesses human capital performance in relationship to the agency's mission;

(2) Addresses agency human capital programs and initiatives, including the required metrics specified in OPM instructions; and

(3) Informs the development of human capital management goals and objectives to support the agency's strategic planning and annual performance budget formulation processes, as well as the treatment of human resources results during the annual performance and accountability reporting process.

(b) A CHCO agency must submit an HCMR annually.

(c) A non-CHCO agency must submit an HCMR in accordance with the timeframe established by OPM.

4. Revise the introductory text to § 250.301 to read as follows:

### § 250.301 Definitions.

In this subpart—

* * * * *

[FR Doc. 2011–19844 Filed 8–4–11; 8:45 am]

BILLING CODE 6325–39–P

## DEPARTMENT OF ENERGY

### 10 CFR Parts 430 and 431

### [Docket Number EERE–2011–BT–NOA–0038]

## Energy Conservation Program: Treatment of "Smart" Appliances in Energy Conservation Standards and Test Procedures

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

**ACTION:** Request for information (RFI).

**SUMMARY:** The U.S. Department of Energy (DOE) seeks information and comments related to the analytical treatment of ''smart'' appliances in the development of DOE's energy conservation standards, as well as in test procedures used to demonstrate compliance with DOE's standards and qualification as an ENERGY STAR product.

**DATES:** Written comments and information are requested on or before September 6, 2011.

**ADDRESSES:** Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2011–BT–NOA–0038, by any of the following methods:

- *E-mail: to SmartApplianceRFI-2011-NOA-0038@ee.doe.gov.* Include EERE–2011–BT–NOA–0038 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Energy Conservations Standards: Treatment of Smart Appliances, EERE–2011–BT–NOA–0038, 1000

Independence Avenue, SW., Washington, DC 20585–0121. Phone: (202) 586–2945. Please submit one signed paper original.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking.

*Docket:* For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information may be sent to:

Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: 202–586–6590. E-mail: *Ashley.Armstrong@ee.doe.gov.*

In the office of the General Counsel, contact Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Ave., SW., Room 6A–179, Washington, DC 20585. Telephone: 202–586–7796; E-mail: *Elizabeth.Kohl@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:** In support of its Energy Conservation Standards Rulemakings, DOE conducts in-depth technical and economic analyses based on publicly reviewed methodologies. The results of these analyses determine whether new or amended standards are appropriate, and if so, which standard levels should be adopted. DOE continually seeks data and public input to improve the methodologies used to conduct these important analyses.

The impact of ''smart'' appliances in the marketplace affects other programs as well. On January 6, 2011, several interested parties of consumer products, including manufacturers and energy efficiency advocates, submitted a joint petition to the ENERGY STAR program regarding smart grid enabled appliances. These stakeholders requested the Environmental Protection Agency (EPA) consider a five percent credit to the ENERGY STAR performance level for smart grid enabled appliances that can provide demand response. In its response to stakeholders, EPA indicated it would continue to work closely with stakeholders to consider the opportunity and appropriate timing for ENERGY STAR product specifications to address smart grid functionality. EPA recently issued a framework document for residential refrigerators, which began discussing the possibilities of a 5-percent credit in the specification. DOE, as the lead agency for developing test procedures for the ENERGY STAR program, will be developing, to the extent necessary, test procedures for smart grid capable products. This RFI is intended to support DOE's efforts to develop such test procedures and solicit feedback on general issues regarding smart appliances within the Appliance Standards Program.

In this RFI, DOE seeks comment on whether and how to consider ''smart appliances'' in the development of energy conservation standards and test procedures for DOE's Appliance Standards Program and the ENERGY STAR Program. ''Smart'' features may enable a variety of services, including the ability of an appliance to change its normal operating behavior in response to a signal from a utility or another agent. Typical examples of operating changes include load shifting and load shedding in response to a price signal or a grid reliability event. Such capabilities could change the energy use profile of the appliance in active and/or standby mode and may require modifications to DOE's traditional test procedure and energy conservation standards analytical framework used during rulemakings.

In particular, DOE seeks comment and information on the specific topics below:

**Definitional Issues**

DOE recognizes that the term ''smart appliance'' may be defined differently by different parties and is often used to refer to any number of capabilities or bundle of capabilities. If DOE were to account for the ''smart'' features of appliances in some manner in its test procedures and energy conservation standards analyses, it may be necessary to define some of these capabilities. Of the potential capabilities under the ''smart'' umbrella, some are specific to demand response, some to energy efficiency, and some to consumer control or preferences. Many features do more than one of these things. Given the foregoing, DOE seeks input on the following definitional issues regarding ''smart'' appliances.

In your responses, to the extent possible, please specify whether your comments apply to all DOE covered products or to a specific product and whether they are meant for the ENERGY STAR Program, the Appliance Standards Program, or both.

• How should ''smart'' appliances be defined for the purposes of the Appliance Standards Program and ENERGY STAR test procedures? It may be useful to subdivide these ''smart'' capabilities into several defined categories. Is there a specific subset of features or capabilities that should be part of a ''smart appliance'' definition?

• Should the definition of a ''smart'' appliance vary based on the product type or should it be the same for all DOE covered products? Should it require certain minimum qualifications for all products (*e.g.,* the ability to shed or shift load) and then have additional qualifications on a product-by-product basis?

• Should the definition of ''smart'' appliances include requirements for communication capabilities? For example, should it specify the use of one of a set of required communication protocols? Should the definition require two-way communication capability? If so, what data should the appliance be capable of sending and receiving, and how frequently?

• Should ''smart'' appliances be required to have any specific technical capabilities (maintenance reminders, certain energy savings modes, programmable operations, *etc.*)?

• To what extent is it important that the definition of ''smart'' appliances be the same for DOE's regulatory Appliance Standards Program and the voluntary ENERGY STAR Program?

**Test Procedures**

DOE test procedures are fundamental to the Appliance Standards Program because they establish the protocols and metrics for measuring the energy use or efficiency of products subject to energy conservation standards. Incorporating the measurement and verification of ''smart'' capabilities into DOE test procedures may add complexity and uncertainty to those test procedures, and potentially increase burden on manufacturers required to test their products. DOE is therefore interested in stakeholder feedback concerning if and how test procedures should be amended to measure and verify the capabilities of ''smart'' appliances. Presumably, these capabilities would be specified in the definition of ''smart'' appliances.

• How, if at all, should DOE test procedures be amended to accommodate the particular energy-using characteristics of ''smart'' appliances?

• Should the portion of a given test procedure that verifies the ''smart'' capabilities of the appliance be an ''add-on'' to the existing test procedure's structure, which would essentially qualify or disqualify the appliance as ''smart?'' In the alternative, should the portion of a given test procedure that verifies the ''smart'' capabilities of the appliance be integrated into the existing test procedure and internalized in the outputted metric on a product-by-product basis?

- The ''smart'' capabilities of an appliance are considered as part of a ''network mode.'' IEC 62301 defines network mode(s) as: ''Any product modes where the energy using product is connected to a mains power source and at least one network function is activated (such as reactivation via network command or network integrity communication) but where the primary function is not active.'' Does this definition apply to all covered products and consumer equipment, or would other definitions apply more appropriately to certain products or equipment?
- EPCA authorizes DOE to set standards in active, standby, and off mode and to amend the EPCA definitions for these modes as appropriate for a given product. DOE requests comments on which of these three modes should be used to capture ''network'' mode energy use, or whether more than one of these modes should be used.
- How do you expect ''smart'' capabilities to change the energy use of an appliance in active and standby modes? What is the energy use impact of ''network mode'' and how should it be accounted for in test procedures?
- How should test procedures deal with various communication standards and protocols?

**Implications for Energy Conservation Standards Analyses**

DOE recognizes that ''smart'' appliances, however defined, could have implications on the economics and energy use of covered products analyzed during the energy conservation standards rulemakings.

- What costs and benefits of ''smart'' appliances can and should DOE account for within the appliance standards analytical framework? DOE seeks information and data that would help quantify such costs and benefits.
- DOE requests information and data on how, if at all, product and equipment energy usage profiles change when they are equipped with ''smart'' capabilities. DOE specifically seeks data related to covered products and equipment.
- DOE seeks estimates and underlying assumptions for market share penetration estimates of ''smart'' appliances, as well as other complementary technologies (such as smart meters) that may be necessary to the realization of ''smart appliance'' benefits.
- DOE seeks information and data from pilot programs or studies involving ''smart'' appliances. DOE also requests information of international voluntary and regulatory programs addressing ''smart'' appliances.

Issued in Washington, DC, on July 22, 2011.

**Kathleen Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

[FR Doc. 2011–19303 Filed 8–4–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0721; Directorate Identifier 2010–NM–217–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; ATR–GIE Avions de Transport Régional Model ATR42 and ATR72 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. 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:

> One ATR operator has experienced in-flight elevator travel limitations with unusual effort being necessary on pitch axis to control the aeroplane, while the ''pitch mistrim'' message appeared on the ADU [advisory display unit] display. The elevators seemed to be jammed.
>
> During the post-flight inspection, it was discovered that the LH [left-hand] elevator lower stop assembly was broken at the level of the angles, which may have prevented the elevator to respond normally to the flight control input.
>
> This condition, if not detected and corrected, could lead to reduced control of the aeroplane.
>
> * * * * *

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 September 19, 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 ATR–GIE Avions de Transport Régional, 1, Allée Pierre Nadot, 31712 Blagnac Cedex, France; telephone +33 (0) 5 62 21 62 21; fax +33 (0) 5 62 21 67 18; e-mail *continued.airworthiness@atr.fr;* Internet *http://www.aerochain.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0721; Directorate Identifier 2010–NM–217–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0138, dated July 1, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> One ATR operator has experienced in-flight elevator travel limitations with unusual effort being necessary on pitch axis to control the aeroplane, while the ''pitch mistrim'' message appeared on the ADU display. The elevators seemed to be jammed.
>
> During the post-flight inspection, it was discovered that the LH elevator lower stop assembly was broken at the level of the angles, which may have prevented the elevator to respond normally to the flight control input.
>
> This condition, if not detected and corrected, could lead to reduced control of the aeroplane.
>
> For the reasons described above, and as a precautionary measure, this [EASA] AD requires a one-time [general visual and detailed] inspection [for damaged angles] of the elevator hinge fittings and the reporting of all findings. Depending on the results, further action may be considered.

Corrective actions also include replacement of damaged angles with serviceable parts; and a detailed inspection of adjacent areas for damage, and repair if necessary. You may obtain further information by examining the MCAI in the AD docket.

## Relevant Service Information

Avions de Transport Régional has issued Service Bulletin ATR42–55–0014, dated May 11, 2010; and Service Bulletin ATR72–55–1006, dated May 11, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

## FAA's Determination and Requirements of This Proposed AD

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

## Differences Between This AD and the MCAI or Service Information

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

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

## Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 86 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $29,240, or $340 per product.

In addition, we estimate that any necessary follow-on actions would take about 60 work-hours and require parts costing up to $960, for a cost of up to $6,060 per product. We have no way of determining the number of products that may need these actions.

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); 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:

**ATR–GIE Avions de Transport Régional:** Docket No. FAA–2011–0721; Directorate Identifier 2010–NM–217–AD.

### Comments Due Date

(a) We must receive comments by September 19, 2011.

### Affected ADs

(b) None.

### Applicability

(c) This AD applies to ATR–GIE Avions de Transport Régional Model ATR42–200, –300,

–320, and –500 airplanes, all manufacturer serial numbers (MSN) up to MSN 643 inclusive; and Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes, all MSNs up to MSN 728 inclusive; certificated in any category.

**Subject**

(d) Air Transport Association (ATA) of America Code 55: Stabilizers.

**Reason**

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

One ATR operator has experienced in-flight elevator travel limitations with unusual effort being necessary on pitch axis to control the aeroplane, while the ''pitch mistrim'' message appeared on the ADU [advisory display unit] display. The elevators seemed to be jammed.

During the post-flight inspection, it was discovered that the LH [left-hand] elevator lower stop assembly was broken at the level of the angles, which may have prevented the elevator to respond normally to the flight control input.

This condition, if not detected and corrected, could lead to reduced control of the aeroplane.

* * * * *

**Compliance**

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

**Actions**

(g) Within 6 months after the effective date of this AD, perform a general visual inspection of the inboard hinge fitting area and a detailed inspection of lower stop angles of the inboard hinge fittings on both LH and right-hand (RH) elevators, in accordance with the Accomplishment Instructions of Avions de Transport Régional Service Bulletin ATR42–55–0014, dated May 11, 2010; or Avions de Transport Régional Service Bulletin ATR72–55–1006, dated May 11, 2010; as applicable.

(1) If any damaged angle is found during the inspection required by paragraph (g) of this AD, before further flight, replace the damaged angles with serviceable parts and accomplish a detailed inspection of the adjacent areas to detect any damage, in accordance with the Accomplishment Instructions of Avions de Transport Régional Service Bulletin ATR42–55–0014, dated May 11, 2010; or Avions de Transport Régional Service Bulletin ATR72–55–1006, dated May 11, 2010; as applicable.

(2) If any damage is detected in adjacent areas during the inspection required by paragraph (g)(1) of this AD, before further flight, repair the damage using a method approved by either the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA; or European Aviation Safety Agency (EASA) (or its delegated agent).

(h) Submit a report of the findings (damaged angles found on the LH and RH side elevator) of the inspection required by paragraph (g) of this AD to ATR Engineering, Service Bulletin Group, 1 Allee Pierre Nadot, 31712 Blagnac Cedex, France, at the applicable time specified in paragraph (h)(1) or (h)(2) of this AD. The report must include the MSN, accomplishment date, registration number, number of flights, flight hours, inspection results, and performed actions. In addition, return any damaged lower stop angles to ATR Engineering, Service Bulletin Group, 1 Allee Pierre Nadot, 31712 Blagnac Cedex, France.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

**FAA AD Differences**

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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 International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be e-mailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* 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.

(3) *Reporting Requirements:* A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

**Related Information**

(j) Refer to MCAI EASA Airworthiness Directive 2010–0138, dated July 1, 2010; Avions de Transport Régional Service Bulletin ATR42–55–0014, dated May 11, 2010; and Avions de Transport Régional Service Bulletin ATR72–55–1006, dated May 11, 2010; for related information.

Issued in Renton, Washington, on July 26, 2011.

**Ali Bahrami,**

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

[FR Doc. 2011–19902 Filed 8–4–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0722; Directorate Identifier 2010–NM–262–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede an existing airworthiness directive (AD) that applies to certain Model 737–100 and –200 series airplanes. The existing AD currently requires various inspections for cracks in the outboard chord of the frame at body station (BS) 727 and in the outboard chord of stringer (S) 18A, and repair or replacement of cracked parts. Since we issued that AD, there have been several reports of fatigue cracking in the frame outboard chord at BS 727 and in the radius of the auxiliary chord on airplanes that were not affected by the existing AD. This proposed AD would add airplanes to the applicability statement in the existing AD and add inspections for cracks in the BS 727 frame outboard chords and the radius of the auxiliary chord, for certain airplanes. This proposed AD would also remove the inspections of the outboard chord of S–18A required by the existing AD. We are proposing this AD to detect and correct fatigue cracking of the outboard and auxiliary chords, which

could result in reduced structural integrity of the outboard chord and consequent rapid decompression of the airplane.

**DATES:** We must receive comments on this proposed AD by September 19, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

## Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:**
Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone (425) 917–6450; fax (425) 917–6590; e-mail *alan.pohl@faa.gov.*

**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–2011–0722; Directorate Identifier 2010–NM–262–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

On June 5, 1995, we issued AD 95–12–17, amendment 39–9268 (60 FR 36981, July 19, 1995), for certain Model 737–100 and –200 series airplanes. That AD requires various inspections for cracks in the outboard chord of the frame at body station (BS) 727 and in the outboard chord of stringer (S) 18A, and repair or replacement of cracked parts. That AD resulted from reports of fatigue cracks in those outboard chords. We issued that AD to prevent such fatigue cracking, which could result in reduced structural integrity of the outboard chords, and subsequent rapid decompression of the airplane.

## Actions Since Existing AD Was Issued

Since we issued AD 95–12–17, we have received several reports of fatigue cracking in the frame outboard chord at BS 727 and in the radius of the auxiliary chord. The cracking in the chords occurred on airplanes that had accumulated between 20,000 and 52,000 total flight cycles, and between 27,000 and 74,000 total flight hours. The cracking in the auxiliary chord occurred on airplanes that had accumulated between 46,000 and 85,000 total flight cycles, and between 41,000 and 64,000 total flight hours. This cracking is caused by fatigue. The airplanes that are affected by AD 95–12–17 were produced with outboard chords at BS 727 made of 7075–T6 aluminum; subsequent airplanes were produced with outboard chords made of 7075–T73 aluminum.

In addition, we have determined that the inspections of the outboard chord of S–18A required by the existing AD are no longer necessary. The new inspections (described below) will decrease the probability of cracks in the frame at BS 727 where S–18A is attached.

## Relevant Service Information

We reviewed Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006. The existing AD refers to Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; and Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; for accomplishing the required actions. Revision 1 of this service bulletin was issued to include airplanes having 7075–T73 frame outboard chords. Revision 2 of this service bulletin expands the effectivity in Revision 1 of this service bulletin, and adds inspections for cracks of the 7075–T73 frame outboard chord and in the radius of the auxiliary chord, and repair or replacement if necessary.

## FAA's Determination

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

## Proposed AD Requirements

This proposed AD would retain certain requirements of AD 95–12–17. This proposed AD would add airplanes to the applicability statement in the existing AD. This proposed AD would also remove the inspections of the outboard chord of S–18A required by the existing AD, and add inspections for cracks in the BS 727 frame outboard chords and the radius of the auxiliary chord, for certain airplanes. 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 the Service Information.''

## Change to Existing AD

Since AD 95–12–17 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

| Requirement in AD 95–12–17 | Corresponding requirement in this proposed AD |
|---|---|
| paragraph (a) | paragraph (g) |
| paragraph (b) | paragraph (h) |
| paragraph (c) | paragraph (i) |
| paragraph (d) | paragraph (j) |
| paragraph (e) | removed |
| paragraph (f) | paragraph (k) |
| paragraph (g) | paragraph (l) |

**Difference Between the Proposed AD and the Service Information**

Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006, specifies contacting the manufacturer for instructions on how to repair a certain condition, but this AD requires repairing that condition in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Organization Designation Authorization whom we have authorized to make those findings.

**Costs of Compliance**

We estimate that this proposed AD affects 574 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators | Number of U.S. airplanes |
|---|---|---|---|---|---|
| Various inspections (retained actions from existing AD). | 4 work-hours × $85 per hour = $340 per inspection cycle. | $0 | $340 per inspection cycle | $100,640 per inspection cycle. | 296 |
| Ultrasonic inspection (new proposed action). | 13 work-hours × $85 per hour = $1,105 per inspection cycle. | 0 | 1,105 per inspection cycle. | 634,270 per inspection cycle. | 574 |
| Detailed and HFEC inspections (new proposed actions). | 13 work-hours × $85 per hour = $1,105 per inspection cycle. | 0 | 1,105 per inspection cycle. | 634,270 per inspection cycle. | 574 |

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspections. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Optional modification (retained action from existing AD). | 50 work-hours × $85 per hour = $4,250 | $3,680 | $7,930 |
| Repair of cracking of the outboard chord frame | 514 work-hours × $85 per hour = $42,690 | 13,586 | 57,276 |
| Time-limited repair cracking of the outboard chord frame. | 63 work-hours × $85 per hour = $5,355 | 2,732 | 8,087 |
| Repair of cracking of the outboard chord | 49 work-hours × $85 per hour = $4,165 | 4,255 | 8,420 |

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 95–12–17, Amendment 39–9268 (60 FR 36981, July 19, 1995), and adding the following new AD:

**The Boeing Company:** Docket No. FAA–2011–0722; Directorate Identifier 2010–NM–262–AD.

**Comments Due Date**

(a) The FAA must receive comments on this AD action by September 19, 2011.

**Affected ADs**

(b) This AD supersedes AD 95–12–17, Amendment 39–9268.

**Applicability**

(c) This AD applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

**Subject**

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53, Fuselage.

**Unsafe Condition**

(e) This AD was prompted by several reports of fatigue cracking in the frame outboard chord at body station (BS) 727, and cracks in the radius of the auxiliary chord on airplanes that were not affected by the existing AD. We are issuing this AD to detect and correct fatigue cracking of the outboard and auxiliary chords, which could result in reduced structural integrity of the outboard chord and consequent rapid decompression of the airplane.

**Compliance**

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

**Restatement of Certain Requirements of AD 95–12–17 With Revised Service Information: Repetitive Inspections and Repair or Replacement**

(g) For Model 737–100 and –200 series airplanes on which the BS 727 frame upper outboard chord has been replaced in accordance with Boeing Service Bulletin 737–53–1088: Prior to the accumulation of 30,000 total flight cycles since replacement of the upper outboard chord, or within 4,500 flight cycles after August 18, 1995 (the effective date of AD 95–12–17), whichever occurs later, perform close visual, pulse echo shear wave (PESW), and high frequency eddy current (HFEC) inspections to detect cracks in the outboard chord of the frame at BS 727, in accordance with Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; or Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; as applicable. As of the effective date of this AD use only Revision 2 of this service bulletin.

(h) For Model 737–100 and –200 series airplanes on which the BS 727 frame upper outboard chord has been replaced in accordance with Boeing Service Bulletin 737–53–1088: Repeat the inspections required by paragraph (g) of this AD at the time specified in paragraphs (h)(1), (h)(2), (h)(3), and (h)(4) of this AD, as applicable, until the optional terminating action described in paragraph (l) of this AD is accomplished.

(1) If, at the time of the most recent inspection required by paragraph (g) or (h) of this AD, the airplane has accumulated 27,000 or more total flight cycles, but fewer than 50,000 total flight cycles since the replacement of the outboard chord: Perform the next inspection within 15,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 15,000 flight cycles until the airplane has accumulated 50,000 or more total flight cycles since the replacement of the outboard chord. Do the inspections required by paragraph (h)(2) of this AD at the time specified.

(2) If, at the time of the most recent inspection required by paragraph (g) or (h) of this AD, the airplane has accumulated 50,000 or more total flight cycles, but fewer than 60,000 total flight cycles, since the replacement of the outboard chord: Perform the next inspection within 7,500 flight cycles. Repeat the inspection thereafter at intervals not to exceed 7,500 flight cycles until the airplane has accumulated 60,000 or more total flight cycles since the replacement of the outboard chord. Do the inspections required by paragraph (h)(3) of this AD at the time specified.

(3) If, at the time of the most recent inspection required by paragraph (g) or (h) of this AD, the airplane has accumulated 60,000 or more total flight cycles, but fewer than 70,000 total flight cycles, since the replacement of the outboard chord: Perform the next inspection within 5,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 5,000 flight cycles until the airplane has accumulated 70,000 or more total flight cycles since the replacement of the outboard chord. Do the inspections required by paragraph (h)(4) of this AD at the time specified.

(4) If, at the time of the most recent inspection required by paragraph (g) or (h) of this AD, the airplane has accumulated 70,000 or more total flight cycles since replacement of the outboard chord: Perform the next inspection within 3,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles.

(i) For Model 737–100 and –200 series airplanes on which the BS 727 frame outboard chord has not been replaced, or on which only the lower outboard chord has been replaced in accordance with Boeing Service Bulletin 737–53–1088: Perform close visual, PESW, and HFEC inspections to detect cracks in the outboard chord of the frame at BS 727, in accordance with Part I of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; or Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; as applicable. As of the effective date of this AD, use only Revision 2 of this service bulletin. Perform these inspections initially at the time specified in paragraph (i)(1), (i)(2), (i)(3), or (i)(4), as applicable. Repeat these inspections thereafter at the intervals specified in paragraph (j) of this AD.

(1) For airplanes that have accumulated 27,000 or more total flight cycles, but fewer than 50,000 total flight cycles, as of August 18, 1995: Inspect prior within 4,500 flight cycles after August 18, 1995.

(2) For airplanes that have accumulated 50,000 or more total flight cycles, but fewer than 60,000 total flight cycles, as of August 18, 1995: Inspect prior to the accumulation of 2,500 flight cycles after August 18, 1995.

(3) For airplanes that have accumulated 60,000 or more total flight cycles, but fewer than 70,000 total flight cycles as of August 18, 1995: Inspect prior to the accumulation of 1,500 flight cycles after August 18, 1995.

(4) For airplanes that have accumulated 70,000 or more total flight cycles as of August 18, 1995: Inspect prior to the accumulation of 500 flight cycles or within 90 days after August 18, 1995, whichever occurs first.

(j) Repeat the inspections required by paragraph (i) of this AD at the time specified in paragraphs (j)(1), (j)(2), (j)(3), and (j)(4) of this AD, as applicable, until the optional terminating action described in paragraph (l) of this AD is accomplished:

(1) If, at the time of the most recent inspection required by paragraph (i) or (j) of this AD, the airplane has accumulated 27,000 or more total flight cycles, but fewer than 50,000 total flight cycles: Perform the next inspection within 15,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 15,000 flight cycles until the airplane has accumulated 50,000 or more total flight cycles. Do the inspections required by paragraph (j)(2) of this AD at the time specified.

(2) If, at the time of the most recent inspection required by paragraph (i) or (j) of this AD, the airplane had accumulated 50,000 or more total flight cycles, but fewer than 60,000 total flight cycles: Perform the next inspection within 7,500 flight cycles. Repeat the inspection thereafter at intervals not to exceed 7,500 flight cycles until the airplane has accumulated 60,000 or more total flight cycles. Do the inspections required by paragraph (j)(3) of this AD at the time specified.

(3) If, at the time of the most recent inspection required by paragraph (i) or (j) of this AD, the airplane had accumulated 60,000 or more total flight cycles, but fewer than 70,000 total flight cycles: Perform the next inspection within 5,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 5,000 flight cycles until the airplane has accumulated 70,000 or more total flight cycles. Do the inspections required by paragraph (j)(4) of this AD at the time specified.

(4) If, at the time of the most recent inspection required by paragraph (i) or (j) of this AD, the airplane had accumulated 70,000 or more total flight cycles: Perform the next inspection within 3,000 flight cycles. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles.

(k) If any crack is found in the outboard chord of the frame at BS 727 during any inspection required by paragraphs (g) through (j) of this AD, accomplish paragraph (k)(1) or (k)(2) of this AD, as applicable, in accordance with Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; or Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; as applicable. As of the effective date of this AD, use only Revision 2 of this service bulletin.

(1) For any crack that extends from the forward edge of the chord or from the forward fastener hole, but that does not

extend past the second fastener hole, accomplish either paragraph (l)(1)(i) or (l)(1)(ii) of this AD. Thereafter, perform initial and repetitive inspections in accordance with paragraphs (g) and (h) of this AD.

(i) Prior to further flight, install the time limited repair. Within 4,500 flight cycles or within 18 months after accomplishing the time-limited repair, whichever occurs first, replace the outboard chord. Or

(ii) Prior to further flight, replace the outboard chord.

**Note 1:** Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; and Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; refer to Boeing Service Bulletin 737–53–1088 as an additional source of guidance for procedures to replace the chord.

(2) For any crack that extends from the forward edge of the chord, or from the forward fastener hole, and that extends past the second fastener hole, prior to further flight, replace the outboard chord in accordance with Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; or Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; as applicable. As of the effective date of this AD, use only Revision 2 of this service bulletin. Thereafter, perform initial and repetitive inspections in accordance with paragraphs (g) and (h) of this AD.

**New Requirements of This AD: Repetitive Inspections/Repair or Replace if Necessary**

(l) For airplanes identified in table 5 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006: Before the accumulation of 27,000 total flight cycles, or within 5,000 flight cycles after the effective date of this AD, whichever occurs later, do internal detailed and HFEC inspections to detect cracks in the auxiliary chord radius of the frame at BS 727, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006. Repeat the inspections thereafter at intervals not to exceed 15,000 flight cycles until the optional terminating action described in paragraph (r) of this AD is accomplished. If any crack is found, before further flight, repair in accordance with the requirements in paragraph (p) of this AD.

(m) For airplanes identified in table 2 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006: Do the applicable inspections required by paragraph (m)(1) or (m)(2) of this AD at the time specified, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006. Except as required by paragraph (p) of this AD, if any crack is found during any inspection required by paragraph (m)(1) or (m)(2) of this AD, before further flight, repair in accordance with Part 3 or Part 4 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006, as applicable. Repeat the inspections until the optional terminating action described in paragraph (r) of this AD is accomplished.

(1) For airplanes on which the inspections specified in Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; or Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; have not been performed as of the effective date of this AD: Do the inspections required by paragraphs (m)(1)(i) and (m)(1)(ii) of this AD at the time specified.

(i) Before the accumulation of 27,000 total flight cycles, or within 5,000 flight cycles after the effective date of this AD, whichever occurs later: Do ultrasonic and surface HFEC inspections to detect cracks in the forward flange of the outboard chord of the frame at BS 727. Repeat the inspections thereafter at intervals not to exceed 5,000 flight cycles.

(ii) Before the accumulation of 27,000 total flight cycles, or within 10,000 flight cycles after the effective date of this AD, whichever occurs later: Do an open hole eddy current inspection to detect cracks in the forward flange of the outboard chord of the frame at BS 727. Repeat the inspection thereafter at intervals not to exceed 15,000 flight cycles.

(2) For airplanes on which the inspections specified in Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; or Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; have been performed as of the effective date of this AD: Repeat the applicable inspection specified in paragraphs (m)(1)(i) and (m)(1)(ii) of this AD thereafter at intervals not to exceed 5,000 flight cycles for the ultrasonic and surface HFEC inspections, and at intervals not to exceed 15,000 flight cycles for the open hole eddy current inspection.

(n) For airplanes identified in table 3 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006: Do the applicable inspections required by paragraph (n)(1) or (n)(2) of this AD at the time specified, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006. Except as required by paragraph (p) of this AD, if any crack is found during any inspection required by paragraphs (n)(1) or (n)(2) of this AD, before further flight, repair in accordance with Part 3 or Part 4 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006, as applicable. Repeat the inspections until the optional terminating action described in paragraph (r) of this AD is accomplished.

(1) For airplanes on which the inspections specified in Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; or Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; have not been done as of the effective date of this AD: Do the inspections required by paragraphs (n)(1)(i) and (n)(1)(ii) of this AD at the time specified.

(i) Before the accumulation of 27,000 total flight cycles, or within 5,000 flight cycles after the effective date of this AD, whichever occurs later: Do ultrasonic, low frequency eddy current, and edge HFEC inspections to detect cracks in the forward flange of the outboard chord of the frame at BS 727. Repeat the inspections thereafter at intervals not to exceed 5,000 flight cycles.

(ii) Before the accumulation of 27,000 total flight cycles, or within 10,000 flight cycles after the effective date of this AD, whichever occurs later: Do an open hole eddy current inspection to detect cracks in the forward flange of the outboard chord of the frame at BS 727. Repeat the inspections thereafter at intervals not to exceed 15,000 flight cycles.

(2) For airplanes on which the inspections specified in Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; or Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; have been done as of the effective date of this AD: Repeat the applicable inspection specified in paragraphs (n)(1)(i) and (n)(1)(ii) of this AD thereafter at intervals not to exceed 5,000 flight cycles for the ultrasonic, low frequency eddy current, and edge HFEC inspections, and at intervals not to exceed 15,000 flight cycles for the open hole eddy current inspection.

**Note 2:** The detailed and eddy current inspections of the outboard chord of S–18A specified in Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006, are not required by this AD.

(o) For airplanes identified in table 4 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006: Before the accumulation of 50,000 or more total flight cycles, but fewer than or equal to 60,000 total flight cycles, after accomplishing the modification of the outboard chord of the frame at BS 727 at S–18A: Do a one-time follow-on open hole eddy current inspection to detect cracks in the modified chord in accordance with Part 8 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006.

(p) If any crack is found during any inspection required by paragraphs (l) through (o) of this AD, and the repairs specified in Part 3 and Part 4 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006, can not be installed using the procedures identified in this service bulletin: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (s) of this AD.

(q) For any airplane on which a time-limited repair is installed on the outboard chord of the frame at body station BS 727 in accordance with Boeing Alert Service Bulletin 737–53A1166, dated June 30, 1994; or Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995: Within 4,500 flight cycles after installation of the repair, or within 6 months after the effective date of this AD, whichever occurs later, replace the repair in accordance with Part 9 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006.

**Optional Terminating Action**

(r) Accomplishment of the applicable action specified in paragraph (r)(1) or (r)(2) of this AD, in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert

Service Bulletin 737–53A1166, dated June 30, 1994; Boeing Service Bulletin 737–53A1166, Revision 1, dated May 25, 1995; or Part 6 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006; constitutes terminating action for the inspections required by this AD.

(1) Installation of the preventative modification.

(2) Replacement of the cracked chord and installation of the preventative modification.

**Alternative Methods of Compliance (AMOCs)**

(s)(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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 95–12–17 are approved as AMOCs for the corresponding provisions of this AD.

(5) For airplanes identified in tables 2, 3, and 5 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006: The Manager, Seattle ACO, approves the inspection methods, thresholds, and repetitive intervals therein as an AMOC for the inspections of Structurally Significant Items (SSIs) F–29A and F–29B required by paragraphs (g) and (h) of AD 2008–08–23, Amendment 39–15477 (Boeing 737–100/200/200C Supplemental Structural Inspection Document (SSID) D6–37089, Revision E, dated May 1, 2007), and paragraphs (g) and (h) of AD 2008–09–13, Amendment 39–15494 (Boeing 737–400/500/600 SSID D6–82669, dated May 1, 2007). This approval applies only to SSIs F–29A and F–29B of the applicable SSID and only for the portions of the BS 727 outer chord that have been inspected or that have been repaired or modified in accordance with Boeing Alert Service Bulletin 737–53A1166, Revision 2, dated May 25, 2006. All provisions of ADs 2008–08–23 and 2008–09–13 that are not specifically referenced in this paragraph remain fully applicable and must be done. If operators request this AMOC, they must revise their FAA-approved maintenance or inspection program to incorporate the alternative inspections in this paragraph.

**Related Information**

(t) For more information about this AD, contact Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: (425) 917–6450; fax: (425) 917–6590; e-mail: *alan.pohl@faa.gov.*

(u) 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 July 26, 2011.

**Ali Bahrami,**

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

[FR Doc. 2011–19904 Filed 8–4–11; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF COMMERCE

## Bureau of Industry and Security

## 15 CFR Chapter VII

**[Docket No. 110711380–1379–01]**

**RIN 0694–XA37**

# Retrospective Regulatory Review Under E.O. 13563

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Bureau of Industry and Security (BIS), Department of Commerce, is currently engaged in the Export Control Reform Initiative, which will fundamentally reform the U.S. export control system. Retrospective review of the regulations administered by BIS is an essential aspect of the Export Control Reform Initiative. In addition to this effort, and pursuant to President Obama's direction in Executive Order 13563, BIS is conducting a retrospective review of portions of the Export Administration Regulations, Chemical Weapons Convention Regulations, Additional Protocol Regulations, and National Defense Industrial Base Regulations to determine how they might be clarified or streamlined to be more effective or less burdensome. Through this notice of inquiry, BIS seeks public comments on how it should undertake its retrospective review of regulations.

**DATES:** Comments must be received by BIS no later than February 1, 2012.

**ADDRESSES:** Comments may be submitted to the Federal rulemaking portal (*http://www.regulations.gov*). The regulations.gov ID for this notice of inquiry is: BIS–2011–0027. In order to maximize the open exchange of ideas, BIS strongly encourages comment submission through regulations.gov. However, comments may also be submitted via e-mail to *publiccommments@bis.doc.gov* or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, Washington, DC 20230. Please refer to RIN 0694–XA37 in all comments and in the subject line of e-mail comments. All comments (including any personally identifying information) will be made available for public inspection and copying.

**FOR FURTHER INFORMATION CONTACT:** Hillary Hess, Director, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security at 202–482–2440 or *rpd2@bis.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

**Executive Order 13563**

On January 18, 2011, President Barack Obama issued Executive Order 13563, affirming general principles of regulation and directing government agencies to improve regulation and regulatory review. Among other things, the President stressed the need for the regulatory system to allow for public participation and an open exchange of ideas, as well as promote predictability and reduce uncertainty. The President also emphasized that regulations must be accessible, consistent, written in plain language, and easy to understand. As part of its ongoing effort to ensure that its regulations are clear, effective, and up-to-date, BIS is issuing this notice of inquiry soliciting public comments on its existing and proposed rules, with the exception of those rules related to the Export Control Reform Initiative, as described below. BIS requests that comments on rules related to export control reform be submitted in response to those specific rules and notices rather than to this broader notice of inquiry, which pertains to other aspects of the Export Administration Regulations and to the Chemical Weapons Convention Regulations, the Additional Protocol Regulations, and National Security Industrial Base Regulations.

**The Export Control Reform Initiative**

In August 2009, the President directed a broad-based interagency review of the U.S. export control system with the goal of strengthening national security and the competitiveness of key U.S. manufacturing and technology sectors by focusing on current threats and adapting to the changing economic and technological landscape. The review determined that the current export control system is overly complicated, contains too many redundancies, and, in trying to protect too much, diminishes our ability to focus our efforts on the most critical national security priorities. As a result, the Administration began the Export Control Reform Initiative, which will fundamentally reform the U.S. export control system. The Export Control Reform Initiative is designed to enhance U.S. national security and strengthen the United States' ability to counter threats such as the proliferation of weapons of mass destruction. The Administration determined that fundamental reform is needed in each of the export control system's four component areas: transformation to a single control list, a single licensing agency, a single information technology system, and a single primary enforcement coordination agency. The Administration is implementing the reform in three phases. The first two phases involve short- and medium-term adjustments to the current export control system, with a focus on establishing harmonized control lists and processes among the Departments of Commerce, State, and the Treasury, to the extent practicable, in order to build toward the third phase of the single control list, licensing agency, information technology system, and enforcement coordination agency. Under this approach, new criteria for determining what items need to be controlled and a common set of policies for determining when an export license is required will be implemented. The control list criteria will be based on transparent rules, which will reduce the uncertainty faced by our allies, U.S. industry, and its foreign partners, and will allow the government to erect higher walls around the most sensitive items in order to enhance national security.

On December 9, 2010, BIS issued a proposed rule (75 FR 76653) describing the proposed new License Exception Strategic Trade Authorization (STA) that will be an initial step in the Export Control Reform Initiative. License Exception STA will authorize, with conditions, the export, reexport and transfer (in-country) of specified items to destinations that pose relatively low risk of unauthorized uses. To safeguard against reexports to destinations that are not authorized under License Exception STA, it will impose notification and consignee statement requirements on these transactions. Also on December 9, BIS issued an Advance Notice of Proposed Rulemaking (75 FR 76664) soliciting public comments on how the descriptions of items on the Commerce Control List (CCL) could be clarified and made more ''positive'' in the sense of using objective parameters rather than subjective criteria to determine the items' classifications, which in turn determine license requirements. This notice also sought public comments on ''tiering'' items in a manner consistent with the control criteria the Administration has developed as part of the reform effort: The degree to which an item provides the United States with a critical, substantial, or significant military or intelligence advantage; and the availability of that item outside certain groups of countries. The Department of State's Directorate of Defense Trade Controls published requests for comment on revisions to the U.S. Munitions List on December 10, 2010 (75 FR 76930).

BIS received numerous comments on the proposed License Exception STA and the CCL notice, most of them detailed, thoughtful, and technically expert. BIS issued the final rule implementing License Exception STA on June 16, 2011 (76FR 35276) having benefited significantly from such public participation, and anticipates that the continuing effort to coordinate, simplify, and harmonize export controls across agencies will be similarly informed by public response to the notice.

A core proposal intended to bring about the initiative's national security objectives is to transfer jurisdiction over less significant defense articles, principally generic parts and components, that are controlled by the regulations administered by the State Department to the export control regulations administered by the Commerce Department, which are more capable of having controls tailored to the significance of the item and the degree of risk associated with its export to different groups of countries. This plan will advance the national security objectives of export control reform by allowing for greater interoperability with our NATO partners and other close allies and also will strengthen the industrial base by removing incentives for foreign companies to design out or avoid US-origin content. This plan will also significantly reduce the licensing and other collateral burdens on exporters and the government while at the same time harmonizing the system to allow for the eventual creation of a single list of controlled items administered by a single licensing agency. (See ''Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML),'' published on July 15, 2011 (76 FR 41958).)

In the coming months, the agencies involved in the Export Control Reform Initiative will continue the regulatory modifications necessary to harmonize export control lists and definitions, which will involve issuing a number of proposals. This effort will draw heavily on the resources of those agencies, but it will require the efforts of members of the public as well, who take time from their normal duties to review proposals and submit comments.

**Export Administration Regulations**

The Export Control Reform Initiative is BIS's top priority, and as noted above, BIS requests that submission of reform-related comments be directed toward each specific proposal as it is published rather than as part of a general response to this notice of inquiry. Many key aspects of the EAR—which items are subject to the EAR and when they require licenses to which destination—will be addressed substantively by the Export Control Reform Initiative. In this notice of inquiry, BIS seeks comments on aspects of the EAR that are not immediately affected by the reform initiative and that could be clarified or streamlined to be more effective or less burdensome.

Controls imposed by the EAR protect the national security and advance the foreign policy interests of the United States, creating a necessary licensing burden. This necessary licensing burden entails an equally necessary compliance burden. BIS seeks comments identifying any unnecessary compliance burden caused by rules that are unduly complex, outmoded, inconsistent, or overlapping, and comments identifying ways to make any aspect of the EAR more effectively protect the national security or advance the foreign policy interests of the United States.

**Chemical Weapons Convention Regulations**

The Chemical Weapons Convention Regulations (15 CFR parts 710 through 729) (CWCR) implement certain obligations of the United States under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, known as the CWC or Convention.

**Additional Protocol Regulations**

The Additional Protocol Regulations (15 CFR parts 781 through 786) (APR) implement certain obligations of the United States under the Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency Concerning the Application of Safeguards in the United States of America, known as the Additional Protocol. These obligations relate to nuclear fuel cycle-related activities.

**National Security Industrial Base Regulations**

The National Security Industrial Base Regulations (15 CFR 700 through 705) include the Defense Priorities and Allocations System, Reporting of Offsets Agreements in Sales of Weapon Systems or Defense-Related Items to Foreign Countries or Foreign Firms, and Effect of Imported Articles on the National Security. Because the rules regarding reporting of offsets agreements were recently revised (74 FR 68136), BIS is not soliciting comments on 15 CFR part 701 with this notice of inquiry. BIS also published a proposed rule regarding the Defense Priorities and Allocations System Regulations (75 FR 32122) and has yet to publish a final rule. BIS is not soliciting comments on 15 CFR part 700 with this notice of inquiry.

**Public Comments**

With respect to improving existing rules or eliminating outmoded ones, BIS would like to receive comments that are as specific and well-supported as possible. Helpful comments will include a description of a problem or concern, available data on cost or economic impact, and a proposed solution. BIS also welcomes comments on rules the public considers effective or well designed. BIS is also interested in information on foreign countries' implementation of export controls. In the interest of fostering open exchange, BIS encourages those interested in submitting comments to peruse those already posted on regulations.gov.

Dated: August 1, 2011.

**Kevin J. Wolf,**

*Assistant Secretary for Export Administration.*

[FR Doc. 2011–19947 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–33–P

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Parts 1, 23, and 39

RIN 3038–AD51

## Customer Clearing Documentation and Timing of Acceptance for Clearing; Correction

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking; Correction.

**SUMMARY:** This document corrects incorrect text published in the **Federal Register** of August 1, 2011, regarding Customer Clearing Documentation and Timing of Acceptance for Clearing.

**FOR FURTHER INFORMATION CONTACT:** John C. Lawton, Deputy Director and Chief Counsel, 202–418–5480, *jlawton@cftc.gov,* or Christopher A. Hower, Attorney-Advisor, 202–418–6703, *chower@cftc.gov,* Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2011–19365 appearing on page 45737 in the **Federal Register** issue of Monday, August 1, 2011, the following corrections are made:

**§ 1.72 [Corrected]**

On page 45737, in the left column, in § 1.72(e), the text ''Prevents compliance with the time frames set forth in § 1.73(a)(9)(ii), § 23.609(a)(9)(ii),'' is corrected to read, ''Prevents compliance with the time frames set forth in § 1.74(b), § 23.610(b),''.

**§ 23.608 [Corrected]**

On page 45737, in the middle column, in § 23.608(e), the text ''Prevents compliance with the time frames set forth in § 1.73(a)(9)(ii), § 23.609(a)(9)(ii),'' is corrected to read, ''Prevents compliance with the time frames set forth in § 1.74(b), § 23.610(b),''.

Dated: August 1, 2011.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2011–19874 Filed 8–4–11; 8:45 am]

BILLING CODE P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 167

[Docket No. USCG–2005–21650]

## Port Access Route Study: In the Waters of Montauk Channel and Block Island Sound

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of availability of Preliminary Study Recommendations with request for comments.

**SUMMARY:** The Coast Guard announces the availability of Preliminary Study Recommendations of a Port Access Route Study evaluating the continued applicability of and the need for modifications to the current vessel routing measures in the Waters of Montauk Channel and Block Island Sound. The goals of the study are to help reduce the risk of marine casualties and increase vessel traffic management efficiency in the study area. Preliminary recommendations indicate that marine transportation safety would be enhanced through modifications to the existing vessel routing systems. The Coast Guard solicits comments on the preliminary recommendations presented in this document so we can complete our Port Access Route Study.

**DATES:** Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before October 4, 2011 or reach the Docket management facility by that date.

**ADDRESSES:** You may submit comments identified by docket number USCG–2005–21650 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this study, call or e-mail Lieutenant Junior Grade Isaac Slavitt, Project Officer, First Coast Guard District, telephone 617–223–8385, e-mail *Isaac.M.Slavitt@uscg.mil;* or George Detweiler, Office of Navigation Systems, Coast Guard, telephone 202–267–0416, e-mail *George.H.Detweiler@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

We encourage you to participate in this study by submitting comments and related material on the Preliminary Study Recommendations of a Port Access Route Study: In the Waters of Montauk Channel and Block Island Sound. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

*Submitting comments:* If you submit a comment, please include the docket number for this notice (USCG–2005–21650), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Notices'' and insert ''USCG–2005–21650'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

*Viewing the comments and documents:* To view comments and documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* insert ''USCG–2005–21650'' in the ''Keyword'' box and click ''Search.'' If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

*Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

## Discussion

## I. Definitions

The following definitions (except ''Regulated Navigation Area'') are from the International Maritime Organization's (IMO's) publication ''Ships' Routeing'' Tenth Edition, 2010 and may help you review this notice:

*Area to be avoided* (*ATBA*) means a routing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or certain classes of ships.

*Precautionary area* means a routing measure comprising an area within defined limits where ships must navigate with particular caution and within which the direction of traffic flow may be recommended.

*Recommended route* means a route of undefined width, for the convenience of ships in transit, which is often marked by centerline buoys.

*Regulated Navigation Area* (*RNA*) is a water area within a defined boundary for which regulations for vessels navigating within the area have been established under 33 CFR part 165.

*Separation Zone* or *separation line* means a zone or line separating the traffic lanes in which ships are proceeding in opposite or nearly opposite directions; or from the adjacent sea area; or separating traffic lanes designated for particular classes of ships proceeding in the same direction.

*Traffic lane* means an area within defined width in which one-way traffic is established. Natural obstacles, including those forming separation zones, may constitute a boundary.

*Traffic Separation Scheme* (*TSS*) means a routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.

*Two-way route* means a route within defined limits inside which two-way traffic is established, aimed at providing safe passage of ships through waters where navigation is difficult or dangerous.

*Vessel routing system* means any system of one or more routes or routing measures aimed at reducing the risk of casualties; it includes traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas, and deep-water routes.

## II. Background and Purpose

A. *Requirement for This Port Access Route Study:* Under the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221–1232), the Coast Guard may designate necessary fairways and traffic separation schemes to provide safe access routes for vessels proceeding to and from U.S. ports. The designation of fairways and TSSs recognizes the paramount right of navigation over all other uses in the designated areas.

Subsequent to an oil spill in Buzzards Bay in April 2003, the Coast Guard sponsored a Ports and Waterways Safety Assessment. One of the recommendations of the Assessment was that the Coast Guard establish a recommended route to assist vessel traffic and provide safer transit routes for commercial vessels. In response the Coast Guard created a recommended route from Cleveland Ledge, Buzzards Bay, Massachusetts to The Race, Long Island Sound, New York. This recommended route was subsequently incorporated on nautical charts by the National Oceanic and Atmospheric Administration. The Coast Guard determined that a Port Access Route Study (PARS) was needed to review and analyze all existing vessel routing measures in the approaches to Block Island Sound, between Montauk Channel and The Race, and the area from the Point Judith Pilot Boarding area to The Race. The goals of the PARS were to help reduce the risk of marine casualties and increase vessel traffic management efficiency in the study area.

Preliminary recommendations of the PARS include modifications to vessel routing measures in Montauk Channel and The Race. These recommendations also include the establishment of a two-way route for Montauk Channel.

B. *Conduct of this PARS:* We announced the PARS in a notice published in the **Federal Register** on July 1, 2005 (70 FR 38061). We will complete the PARS after review of any comments received in response to this notice.

C. *Data used by the Coast Guard to conduct the PARS:* We reviewed various studies and data collected both in-house and by other waterway users on various traffic patterns in Block Island Sound. No comments were received during the Notice of Study request for comments and no public meetings were requested or held. Since no comments or recommendations were received the Coast Guard established a navigation working group. The make-up of the navigation working group included the New York and Connecticut Pilots, the Coast Guard, and various Block Island Sound maritime industry representatives. The navigation working group submitted preliminary recommendations which are addressed as described in paragraph III below.

D. *Publishing these preliminary recommendations:* Because of the lack of comments to the original notice and our strong desire to engage the public in the study process, we decided to ask for comments on the recommendations presented by the navigation working group. The primary rationale was to allow the public to help us refine these recommendations through constructive comments.

**III. Study Recommendations**

From the information examined and the input provided by the navigation working group, we identified three recommendations that could be realized. Comments are particularly solicited with respect to these recommendations. A navigation chart with the proposed recommendations plotted is included in the docket at *http://www.regulations.gov*.

*Recommendation 1:* Remove the existing Recommended Route from the Race to the western edge of the Narragansett Bay Traffic Separation Scheme (TSS).

*Recommendation 2:* A Recommended Two Way Route for the Approaches to Block Island Sound should be established between the following geographical positions:

| Latitude | Longitude |
|---|---|
| 41°00′51.30″ N | 071°42′09.05″ W |
| 41°10′10.04″ N | 071°42′09.05″ W |
| 41°10′20.42″ N | 071°41′21.91″ W |
| 41°00′51.30″ N | 071°41′21.91″ W |

A Recommended Two Way Route for northwest and southeast bound traffic should be established between the following geographic positions:

| Latitude | Longitude |
|---|---|
| 41°13′29.27″ N | 072°02′54.82″ W |
| 41°13′44.08″ N | 072°00′40.34″ W |
| 41°10′44.76″ N | 071°41′58.95″ W |
| 41°10′10.04″ N | 072°42′09.05″ W |

A Recommended Two Way Route for entrance into and exit from Long Island Sound should be established between the following geographic positions:

| Latitude | Longitude |
|---|---|
| 41°15′01.49″ N | 072°04′07.69″ W |
| 41°14′04.56″ N | 072°02′37.42″ W |
| 41°13′29.27″ N | 072°02′54.82″ W |
| 41°14′34.40″ N | 072°04′37.91″ W |

An east/west Recommended Two Way Route for coastwise traffic should be established between the following geographic positions:

| Latitude | Longitude |
|---|---|
| 41°14′04.56″ N | 072°02′37.42″ W |
| 41°17′21.88″ N | 071°37′48.80″ W |
| 41°16′42.03″ N | 071°38′17.44″ W |
| 41°13′44.08″ N | 072°00′40.34″ W |

A Recommended Two Way Route for northeast and southwest bound traffic should be established between the following geographic positions:

| Latitude | Longitude |
|---|---|
| 41°10′44.76″ N | 071°41′58.95″ W |
| 41°16′42.03″ N | 071°38′17.44″ W |
| 41°16′49.55″ N | 071°37′20.65″ W |
| 41°10′20.42″ N | 071°41′21.91″ W |

This northeast/southwest route would be marked with a note reading ''Recommended Vessel Tracks for deep draft vessels (including tugs and barges). While not mandatory, deep draft commercial vessels (including tugs and barges) are requested to follow designated routes at the master's discretion. Other vessels while not excluded from these routes, should exercise caution in and around these areas and monitor VHF channel 16 or 13 for information concerning deep draft vessels (including tugs and barges) transiting these routes''.

*Recommendation 3:* Move Montauk Point Lighted Whistle Buoy MP (LLNR 655) to the geographic position 41° 00.47′ N, 071°41.44′ W to mark the middle of the Two Way Route for the Approaches to Block Island Sound.

**IV. Future Actions**

Upon receipt of any comments concerning this notice of preliminary study results, we will analyze them and publish a notice of study results in the **Federal Register**. Any recommended changes to the Code of Federal Regulations will require that a notice of proposed rulemaking (NPRM) be published in the **Federal Register**. In addition, any changes to the vessel routing system, *i.e.,* TSS, ATBA, and precautionary areas, will be submitted to the International Maritime Organization for adoption and implementation.

Dated: July 12, 2011.

**Daniel A. Neptun,**

*Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.*

[FR Doc. 2011–19859 Filed 8–4–11; 8:45 am]

BILLING CODE 9110–04–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 46 CFR Part 2

**[Docket No. USCG–2007–27668]**

**RIN 1625–AB35**

## Approval of Classification Societies

**AGENCY:** Coast Guard, DHS.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Coast Guard is reopening the comment period before issuing a final rule regarding the Approval of Classification Societies (USCG–2007–27668). We previously published a notice of proposed rulemaking (NPRM) proposing application procedures and performance standards that classification societies must meet in order to obtain approval by the Coast Guard before conducting work in the United States. We published the proposed regulations to implement the requirements imposed by the Coast Guard and Maritime Transportation Act of 2004, but before the publication of the final rule, the Coast Guard Authorization Act of 2010 changed the applicability to require that all classification societies be approved by the Coast Guard prior to conducting any work on a vessel in the United States. The published NPRM proposed allowing full members of the International Association of Classification Societies (IACS) to be exempt from Coast Guard approval prior to working in the United States. Because

of the Coast Guard Authorization Act of 2010, we are reopening the comment period to allow for any additional or updated comments from the public before publishing the final rule.

**DATES:** Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before September 6, 2011 or reach the Docket Management Facility by that date.

**ADDRESSES:** You may submit comments identified by docket number USCG–2007–27668 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

*Viewing incorporation by reference material:* You may inspect the material proposed for incorporation by reference at Room 2100, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–267–6716. Copies of the material are available as indicated in the ''Incorporation by Reference'' section of this preamble.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail LT Alfred Giordano, Coast Guard; telephone 202–372–1362, e-mail *Alfred.J.Giordano@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

### *A. Submitting Comments*

If you submit a comment, please include the docket number for this rulemaking (USCG–2007–27668), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2007–27668'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

### *B. Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2007–27668'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

### *C. Privacy Act*

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

### *D. Public Meeting*

We do not now plan to hold a public meeting. But you may submit a request for one to the docket using one of the methods specified under **ADDRESSES.** In your request, explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register.**

## II. Background

We published a notice of policy and a request for comments that outlined the procedures by which classification societies could apply for approval with the Coast Guard. *See* 69 FR 63548 (November 2, 2004). This notice of policy was based on the August 9, 2004 enactment of Section 413 of the Coast Guard and Maritime Transportation Act of 2004 (the ''2004 Act'') (Pub. L. 108–293). The 2004 Act amended 46 U.S.C. 3316 by adding paragraph (c), which prohibits certain activities of classification societies on a vessel in the United States that are not approved by the Coast Guard. The 2004 Act mandated that, after December 31, 2004, a classification society, including an employee or agent of that society, may not review, examine, survey, or certify the construction, repair, or alteration of a vessel in the United States unless the classification society is either approved by the Coast Guard or is a full member of the International Association of Classification Societies (IACS).

After publication of the notice of policy, we received questions from the public that were addressed in a notice of proposed rulemaking (NPRM) published in the **Federal Register** on April 23, 2010. The NPRM, titled ''Approval of Classification Societies'' (75 FR 21212), outlined the procedures and criteria we would use to evaluate classification societies. The comment period closed on July 22, 2010, and we received no comments on the proposed rule. No public meeting was requested and none was held.

Before the publication of the final rule, on October 15, 2010, the enactment of section 622 of the Coast Guard Authorization Act of 2010 (the ''2010 Act'') (Pub. L. 111–281) amended 46 U.S.C. 3316(c). The 2010 Act changed the applicability to require that all classification societies, including IACS members, be approved by the Coast Guard prior to conducting any work on a vessel in the United States.

**III. Discussion**

In this notice, we are reopening the comment period for the NPRM to allow comments from all interested parties. The 2010 Act changed the applicability to require that all classification societies be approved by the Coast Guard prior to conducting any work on a vessel in the United States. Accordingly, in §§ 2.45–10(a), 2.45–15(a), and 2.45–30 of the proposed rule, we plan to delete all references to IACS members, in order to comply with our revised statutory authority. The 2010 Authorization Act requires IACS members to apply to the Coast Guard for approval under Title 46, United States Code, Section 3316(c), if they wish to continue performing work related to the certification of construction, repair, or alteration of vessels within the United States.

Dated: August 1, 2011.

**J.G. Lantz,**

*Director of Commercial Regulations and Standards, U.S. Coast Guard.*

[FR Doc. 2011–19862 Filed 8–4–11; 8:45 am]

BILLING CODE 9110–04–P

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 101119575–1397–01]**

**RIN 0648–BA46**

## Fisheries of the Northeastern United States; Monkfish; Framework Adjustment 7

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement measures in Framework Adjustment 7 (Framework 7) to the Monkfish Fishery Management Plan (Monkfish FMP). The New England Fishery Management Council and Mid-Atlantic Fishery Management Council (Councils) developed Framework 7 to adjust the annual catch target (ACT) for the Northern Fishery Management Area (NFMA) to be consistent with the most recent scientific advice regarding the acceptable biological catch (ABC) for monkfish. The New England Council's Scientific and Statistical Committee (SSC) has recommended a revision to the ABC based on information from a 2010 stock assessment (50th Northeast Regional Stock Assessment Review Committee (SARC 50)). Framework 7 would also specify a new day-at-sea (DAS) allocation and trip limits for the NFMA commensurate with the new ACT, and Framework 7 and would also adopt revised biomass reference points for the NFMA and Southern Fishery Management Area (SFMA), based on the recommendations of SARC 50 and the SSC.

**DATES:** Public comments must be received no later than 5 p.m., eastern standard time, on September 6, 2011.

**ADDRESSES:** An environmental assessment (EA) was prepared for Framework 7 that describes the proposed action and other considered alternatives, and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of Framework 7, including the EA and the Initial Regulatory Flexibility Analysis (IRFA), are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council (Council), 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.*

You may submit comments, identified by 0648–BA46, 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: Jason Berthiaume.
- *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on Monkfish Framework 7 Proposed Rule.''

*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, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Jason Berthiaume, Fisheries Management Specialist, (978) 281–9177; fax: (978) 281–9135.

**SUPPLEMENTARY INFORMATION:**

**Background**

The monkfish fishery is jointly managed by the Councils, with the New England Council having the administrative lead. The fishery extends from Maine to North Carolina, and is divided into two management units: The NFMA and the SFMA. Details on the background and need for Amendment 5 and this framework are contained in the amendment and the preambles for the proposed (76 FR 11737; March 3, 2011) and final rules (76 FR 30265; May 25, 2011) for Amendment 5, and are not repeated here.

Amendment 5, which was partially approved by NMFS on April 28, 2011, was intended to bring the Monkfish FMP into compliance with the requirements of the reauthorized Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Magnuson-Stevens Act requires that all fishery management plans contain annual catch limits (ACL) to prevent overfishing, and measures to ensure accountability. Among other measures, Amendment 5 implemented accountability measures (AMs) and ACLs, established biological and management reference points and control rules, and specified an ACT, DAS and trip limits for the SFMA.

However, NMFS disapproved Amendment 5's proposed ACT for the NFMA, and specification of DAS and trip limits to achieve that ACT. Amendment 5 proposed an ACT for the NFMA of 10,750 mt, an allocation of 40 DAS, and trip limits of 1,250 lb (567 kg) tail wt. per DAS for Category A and C vessels, and 800 lb (363 kg) tail wt. per DAS for Category B and D vessels based on the 2007 Data Poor Working Group (DPWG) Assessment, which were considered to be the best scientific information available at the time the Amendment 5 document was finalized by the Councils. Subsequent to the Councils taking final action on Amendment 5, the results of SARC 50 became available, which revealed new scientific information that, when included in the Councils' interim ABC approach, reduced the monkfish NFMA ABC. In response to the new assessment, the SSC revisited its previous ABC recommendation at a meeting in August 2010. The SSC, after much discussion concerning the uncertainty with the new assessment and alternate methods for calculating ABC to account for this uncertainty, agreed to maintain the existing interim ABC approach it previously recommended. Using this interim ABC approach, the SSC recalculated the recommended ABC in Amendment 5 to incorporate the results of SARC 50. Based on the recalculation of the ABCs, the SFMA's ACT and associated DAS and trip limit measures were found to still be consistent with the new ABC and ACL, and they were approved by NMFS in Amendment 5. The recalculated ABC for the NFMA, on the other hand, was reduced from 10,750 mt to 7,592 mt, creating an inconsistency with the Amendment 5 recommended ABC, ACT, and associated NFMA DAS and trip limit measures. Based on this inconsistency, NMFS disapproved Amendment 5's proposed specifications for the NFMA.

This disapproval left current measures in effect for the NFMA until they are superseded by a revised ACT and specification of DAS and trip limits as proposed in this action. Because it was too late for the Councils to revise Amendment 5's NFMA measures in a timely fashion for fishing year (FY) 2011, the Councils initiated Framework 7 in September 2010, to revise the ACT for the NFMA to be consistent with the most recent scientific advice. Leaving the current measures in place was considered as an acceptable interim measure because they are more conservative than measures being proposed by this framework. This framework reconfirms the SFMA ABC and associated specifications and management measures that were included in the approval and implementation of Amendment 5. This framework would also update the biomass reference points in the monkfish FMP to be consistent with the results of SARC 50.

**Proposed Measures**

*1. ACT*

Framework 7 would adjust the ACT for the NFMA to be consistent with the most recent scientific advice regarding the monkfish NFMA ABC. The SSC recommended a revision of the NFMA ABC, based on SARC 50, to 7,592 mt. The proposed ACT for the NFMA in this framework adjustment is slightly higher than the current total allowable landing (TAL) in place for the NFMA. Because NFMA landings have been well below the TAL for the past 2 years (29 percent of the TAL in 2008, and 33 percent of the TAL in 2009) it is not expected that monkfish landings will exceed this proposed ACT before Framework 7 is implemented. Any landings that occur between when Amendment 5 was implemented on May 25, 2011, and the time the Framework 7 final rule is effective would accrue against the ACT for the current FY and be used to trigger AMs, if necessary.

Three options (from 73 to 86.5 percent of the ABC) were considered by the Council for setting the NFMA ACT at a level below the revised ACL. The Councils' preferred alternative, and the alternative in this proposed rule, would set the ACT at 86.5 percent of the ABC, or 6,567 mt. Once implemented, this NFMA ACT would be midway between the current TAL and the ABC.

*2. Specification of DAS and Trip Limits*

The DAS allocations and trip limit options proposed in this action are calculated so as to achieve, but not go over the recommended ACT. The proposed trip limits for the NFMA for permit Categories A and C would be 1,250 lb (567 kg) and 600 lb (272 kg) for permit Categories B and D, with all categories having a DAS allocation of 40.

*3. Revision to Biological Reference Points*

This action would revise the biological reference points in the Monkfish FMP to be consistent with those recommended by the SSC and SARC 50. In the SARC 50 report, the Southern Demersal Working Group recommended an approach that would set biomass target reference points based on the long-term projected biomass (B) corresponding to the fishing mortality rate (F) at maximum sustainable yield, or its proxy, which for monkfish is $F_{max}$. This recommendation, along with the recommendation to set B threshold reference points at one-half of the target, would be more consistent with National Standard 1 Guidelines. This would establish a $B_{target}$ of 52,930 mt for the NFMA and 74,490 mt for the SFMA, and $B_{threshold}$ of 26,465 mt for the NFMA and 37,245 mt for the SFMA.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has made a preliminary determination that this proposed rule is consistent with the Monkfish FMP, Framework 7, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

Pursuant to Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

The New England Council prepared an EA for Framework 7 to the Monkfish FMP that discusses the impact on the environment as a result of this rule. A copy of the EA is available from the Council (see **ADDRESSES**).

An IRFA has been prepared for this rule, as required by section 603 of the Regulatory Flexibility Act (RFA), that consists of the draft IRFA in Framework 7, this preamble, and the following summary. The IRFA describes the economic impacts this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from the New England Council (see **ADDRESSES**).

For purposes of the IRFA, all of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration size standards for small fishing businesses ($4.0 million in annual gross sales). 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 purposes of analysis, each permitted vessel is treated as a single entity. Information on costs in the fishery is not readily available and individual vessel profitability cannot be determined directly; therefore, expected changes in gross revenues were used as a proxy for profitability.

This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

**Description and Estimate of Number of Small Entities to Which the Rule Would Apply**

The management measures proposed in Framework 7 have the potential to affect all Federally permitted monkfish vessels that are actively participating in the fishery. As of September 2009, there were 758 limited access monkfish permit holders and 2,156 open access permit holders. Of these, 573 limited access permit holders (76 percent) actively participated in the monkfish fishery during the 2008 FY, while only 504 open access permit holders (23 percent) actively participated in the fishery during this time period. Thus, this action is expected to impact at least 1,077 currently active monkfish permit holders.

The majority of the measures proposed in this action are specific to the NFMA, and, thus, would apply to vessels that fish primarily in the NFMA. Of the 546 vessels that participated in the fishery in FY 2009, 232 reported fishing in the NFMA. Of the 232, 115 reported fishing only in the NFMA and 171 in both the NFMA and SFMA. Accordingly, this action would mainly impact approximately 232 vessels that fish in the NFMA.

**Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives**

*1. ACT*

The purpose of establishing an ACT as a measure for triggering a proactive AM is to account for management uncertainty in the ability of management measures in the Monkfish FMP (mainly DAS and trip limits) to limit catch to the prescribed level. The ACT is set lower than the ACL to serve as buffer between the ACL and the ACT to account for management uncertainty, and is intended to prevent overfishing from occurring in the event management measures to limit catch are not entirely successful. Since the ACT incorporates discards, actions that reduce discards or management uncertainty would allow for the establishment of an ACT that is closer to the ACL, resulting in higher monkfish revenues and benefits to vessels, but only if the allocation is actually landed versus discarded or left uncaught.

The Councils considered three ACT alternatives which would set the ACT at 73 percent, 80 percent, and 86.5 percent of the monkfish NFMA ABC, or 5,550 mt, 6,074 mt, and 6,567 mt respectively. The proposed ACT is 6,567 mt, or 86.5 percent of the monkfish NFMA ABC, the highest of the three levels considered by the Councils. This level results in the potential for higher revenues than the other alternatives considered, while still maintaining a robust buffer between the ACT and ACL to account for management uncertainty. By setting the ACT at this level, it is likely, based on historical landings in the NFMA that vessels will harvest this amount, although in FY 2008 landings were only 71 percent of the proposed ACT.

The no action alternative would not establish the ABC, ACL, or ACT for the NFMA of the monkfish fishery, and, therefore, would be inconsistent with the Magnuson-Stevens Act and National Standard 1 Guideline requirements to do so. Although there is likely no direct economic effect of taking no action, it could have a negative economic impact if the long-term sustainability of the monkfish fishery were affected by not establishing these management measures.

Actual quantification of the economic impacts of the proposed ACT requires specification of management measures, in the form of DAS and trip limits, to achieve the proposed ACT levels, as described below.

*2. Specification of DAS and Trip Limits*

A modified trip limit model was utilized to assess the impact of the DAS and trip limit options, under each ACT option, on monkfish revenues. The model is different from models used for prior monkfish actions in that it accounts for potential impacts on monkfish trips (higher retention and additional trips) resulting from increases in DAS and trip limits. A detailed description of the model was provided in Amendment 5 to the Monkfish FMP. Specification options comparable to those associated with the preferred NFMA ACT option were analyzed in Amendment 5 using FY 2008 data. This analysis is used to predict impacts of the revised DAS and trip limits under the proposed ACT levels in this framework adjustment.

The trip limit model was used to assess the impacts on monkfish revenues of the proposed DAS and trip limit options included in the framework on vessels fishing in only the NFMA, only in the SFMA, and in both management areas. For all alternatives, permit Categories A and C trip limits remain at 1,250 lb (567 kg), while the permit Categories B and D trip limits range from 465 lb (211 kg) to 686 lb (311 kg), and DAS allocations for all limited access permit types range from 31 to 45 DAS. For vessels fishing only in the NFMA, the trip limit model predicts that, under the proposed DAS and trip limit options for the NFMA, per trip average vessel return would increase from 0.2 percent to 1.7 percent, whereas average crew payment would increase from 0.5 percent to 1.6 percent, depending on different DAS allocations and trip limit alternatives. The increase in total monkfish revenue ranges from 0.8 percent to 16.1 percent under the proposed alternatives. Compared to the status quo, the proposed DAS and trip limits would maintain the current A and C Category permit holders trip limits at 1,250 lb (567 kg) and would increase B and D Category permit holders trip limits to 600 lb (272 kg), as well as increase DAS to 40 for both permit Categories. These measures would lead to a 0.5-percent increase in per trip average vessel return, 0.5-percent increase in crew payment, and 10.0-percent increase in total monkfish revenue. The maximum benefit in terms of percentage increase in average vessel return and monkfish revenue is expected to result from option 3B, the Councils' proposed option 3C, which would increase trip limits for Category B and D permit holders while maintaining current trip limits for Category A and C permit holders and also increase the DAS allocation for both permit categories. Although option 3B could lead to a higher percent increase in average vessel return, the Councils preferred a higher trip limit rather than a higher DAS allocation, thus preferred option 3C.

Vessels fishing in both management areas would be simultaneously affected by DAS and trip limit alternatives proposed for the NFMA. Although vessels that fish in both the NFMA and the SFMA may be more likely to change fishing locations than those that fish solely in one area, the trip limit model assumes that these vessels will continue to fish in the same locations. The results of the trip limit model indicate that there is no single DAS and trip limit alternative combination for the NFMA that leads to a best outcome in terms of impact on average vessel return, average crew payment, and total monkfish revenue. The largest increase in monkfish revenue is realized under option 3B with an incidental limit of 300 lb (136 kg), a 1,250-lb (567-kg) trip limit for Category A and C vessels, a 470-lb (213-kg) trip limit for Category B and D vessels, and 45 DAS in the NFMA, in combination with the SFMA levels of a 50-lb (23-kg) incidental limit; 550-lb (249-kg) trip limit for A, C, and G vessels; 450-lb (204-kg) trip limit for B, D and H vessels; and 28 DAS in the SFMA. Under the proposed measures for NFMA, the monkfish revenue for the vessels fishing in both the NFMA and SFMA would increase by 17.4 percent.

*3. Biological Reference Point Alternatives*

The proposed action to change the biological reference points in the Monkfish FMP would have no immediate impact on vessels, since these changes do not directly change any management measures or modify vessel level aspects of the Monkfish FMP. However, the establishment of new reference points that are consistent with NS1 guidance would allow for better monitoring and management of the monkfish fishery, potentially resulting in positive effects on vessels in the future. The no action alternative would maintain the existing biological and management reference points in the Monkfish FMP. As a result, taking no action would result in no additional economic impacts beyond those identified in earlier actions affecting this fishery.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: August 2, 2011.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be 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 § 648.92, revise paragraph (b)(1)(i) to read as follows:

### § 648.92 Effort-control program for monkfish limited access vessels.

* * * * *

(b) * * *

(1) * * *

(i) *General provision.* Limited access monkfish permit holders shall be allocated 40 monkfish DAS each fishing year to be used in accordance with the restrictions of this paragraph (b), unless otherwise restricted by paragraph (b)(1)(ii) of this section or modified by § 648.96(b)(3), or unless the vessel is enrolled in the Offshore Fishery Program in the SFMA, as specified in paragraph (b)(1)(iv) of this section. The annual allocation of monkfish DAS shall be reduced by the amount calculated in paragraph (b)(1)(v) of this section for the research DAS set-aside. Limited access NE multispecies and limited access sea scallop permit holders who also possess a limited access monkfish permit must use a NE multispecies or sea scallop DAS concurrently with each monkfish DAS utilized, except as provided in paragraph (b)(2) of this section, unless otherwise specified under this subpart F.

* * * * *

3. In § 648.94, revise paragraph (b)(1)(ii) to read as follows:

### § 648.94 Monkfish possession and landing restrictions.

* * * * *

(b) * * *

(1) * * *

(ii) *Category B and D vessels.* Limited access monkfish Category B and D vessels that fish under a monkfish DAS exclusively in the NFMA may land up to 600 lb (272 kg) tail weight or 1,746 lb (792 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 2.91). For every 1 lb (0.45 kg) of tail only weight landed, the vessel may land up to 1.91 lb (0.87 kg) of monkfish heads only, as described in paragraph (a) of this section.

* * * * *

[FR Doc. 2011–19925 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register

Vol. 76, No. 151

Friday, August 5, 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

### Forest Service

### Southern Arizona Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Southern Arizona Resource Advisory Committee will meet in Tucson, Arizona. 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 for the committee to review, discuss, and recommend to the Designated Federal Official the grant proposals to be funded.

**DATES:** The meeting will be held August 30, 2011, 9:30 a.m.

**ADDRESSES:** The meeting will be held at the Tucson Interagency Fire Center, 2646 E. Commerce Center Place, Tucson, Arizona 85706. 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 the Coronado National Forest Supervisor's Office, 300 West Congress Street, Tucson, AZ, 85701. Please call ahead to 520–388–8458 to facilitate entry into the building to view comments.

**FOR FURTHER INFORMATION CONTACT:** Sarah Davis, Coronado National Forest Supervisor's Office, 520–388–8458, *sldavis@fs.fed.us,* or Jennifer Ruyle, RAC Coordinator, same location, 520–388–8351, *jruyle@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 CONTACT**.

**SUPPLEMENTARY INFORMATION:** The following business will be conducted: review, discussion, and recommendation to the Designated Federal Official of the grant proposals to be funded. 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 August 19, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Sarah Davis, Coronado National Forest, 300 W. Congress Street, Tucson, AZ 85701, or by e-mail to *sldavis@fs.fed.us,* or via facsimile to 520–388–8332. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Southern+Arizona?OpenDocument* within 21 days of the meeting.

Dated: July 29, 2011.

**Reta Laford,**

*Deputy Forest Supervisor.*

[FR Doc. 2011–19831 Filed 8–4–11; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Huron Manistee Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Huron Manistee Resource Advisory Committee will meet in Mio, MI. 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 Title II of the Act. The meeting is open to the public. The purpose of the meeting is to conduct committee business and to review proposed projects.

**DATES:** The meeting will be held Wednesday August 24, 2011 from 6:30 to 8:30 p.m.

**ADDRESSES:** The meeting will be held at the Mio Ranger Station, 107 McKinley Road, Mio, Michigan 48647. 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 the Mio Ranger Station. Please call ahead to (989) 826–3252 to facilitate entry into the building to view comments.

**FOR FURTHER INFORMATION CONTACT:** Steven Goldman, Designated Federal Official or Carrie Scott, Natural Resource Planner, Huron Manistee National Forests, Mio Ranger Station 107 McKinley Road, Mio, MI 48647; (989) 826–3252

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: (1) Introductions and review of previous meeting; (2) Presentation of Title II project proposals; (3) RAC discussion and Title II project recommendations and (4) Public comment. A complete agenda may be previewed at: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Huron+Manistee?OpenDocument* .

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 August 23, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Huron Manistee RAC, c/o Mio Ranger Station, 107 McKinley Road, Mio, Michigan 48647, or by e-mail to *cnscott@fs.fed.us* or via facsimile to (989) 826–6073. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Huron+Manistee?OpenDocument* within 21 days of the meeting.

Dated: August 1, 2011.

**Steven A. Goldman,**

*Designated Federal Official.*

[FR Doc. 2011–19870 Filed 8–4–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Sacred Sites; Executive Order 13007

**AGENCY:** Forest Service, USDA.

**ACTION:** Public notice; request for comment.

**SUMMARY:** A draft report concerning U.S. Department of Agriculture (USDA) and U.S. Forest Service Native American Sacred Sites policies and procedures is available for review and comment at *http://www.fs.fed.us/spf/tribalrelations/sacredsites.*

**DATES:** Comments must be received in writing on or before October 4, 2011 to be assured of consideration. Comments received after that date will be considered to the extent possible.

**ADDRESSES:** Public comments concerning this notice should be addressed to U.S. Forest Service, Office of Tribal Relations, Ericka Luna, 1400 Independence Ave., SW., Mailstop Code: 1160, Washington, DC 20250–1160. Comments also may be submitted via facsimile to Ericka Luna at 202–205–1773 or by e-mail to *sacredsitescomment@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Fred Clark, USDA, Forest Service, Washington Office, Office of Tribal Relations, 202–205–1514 or *fclark@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** This draft report to the Secretary of Agriculture, Thomas J. Vilsack evaluates the current condition of Native American Sacred Sites protection, pursuant to Executive Order 13007 and other policies and procedures, on National Forest System (NFS) lands throughout the United States. The Secretary requested information about the unintended consequences of land management decisions affecting Native American Sacred Sites and communities whose cultural survival is connected to these sites.

In response to Secretary Vilsack's request, USDA's Office of Tribal Relations and the Forest Service formed a team to talk to Tribes and other Native American communities about how the Agency can do a better job incorporating Sacred Sites issues into the Agency's mission to deliver forest goods and services for current and future generations on NFS lands. Over 50 meetings (listening sessions) were held across the Nation. The meetings were held in Indian Country, Alaska Native villages, telephonically and face-to-face, at inter-tribal venues, and at numerous other locations as requested by the Tribes. These listening sessions engaged not only tribal leadership but also culture keepers, traditional practitioners, and unaffiliated native descendants. The team conducting this review also surveyed Forest Service line officers and program managers to learn their thoughts and observations about the effectiveness of the Agency's efforts to manage land that includes Sacred Sites. The review included a synthesis of current laws, rules, regulations, and policies that affect the Agency's ability to protect Sacred Sites.

The draft report, and other associated information, is available at: *http://www.fs.fed.us/spf/tribalrelations/sacredsites.*

The draft report will be made available to federally recognized Tribes and to Alaska Native Claims Settlement Act (ANCSA) Corporations (as required by 25 U.S.C. 450(b)) for consultation consistent with Executive Order 13175. Federally recognized Tribes and ANCSA Corporations will be directly contacted by USDA or the Forest Service. We will incorporate what we hear during government-to-government consultation with Tribes and government-to-corporation consultation with ANCSA Corporations into the final report, which is anticipated to be submitted to the Secretary early in 2012. In addition, public comments will be summarized as part of the final report. Public comments should be submitted as listed under **ADDRESSES**. All comments received in response to this notice, including names and addresses when provided, will be a matter of public record.

As a result of this review, if the Secretary directs policy change or other agency action, the need for additional consultation or public comment and publication in the **Federal Register** will be determined by the scope and extent of the proposed changes.

**Authority:** Executive Orders 13007 and 13175.

Dated: August 1, 2011.

**Joel D. Holtrop,**

*Deputy Chief, National Forest System.*

[FR Doc. 2011–19849 Filed 8–4–11; 8:45 am]

**BILLING CODE 3410–11–P**

## COMMISSION ON CIVIL RIGHTS

### Agenda and Notice of Public Meeting of the Nevada Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a planning meeting the Nevada Advisory Committee (Committee) to the Commission will be held on Monday, August 22, 2011 at the Department of Employment, Training and Rehabilitation, 2800 East St. Louis Ave., Las Vegas, Nevada 89104. The meeting is scheduled to begin at 10 a.m. and adjourn at approximately 12 p.m. The purpose of the meeting is to discuss the Committee's report on the status of civil rights and discuss future activity.

Members of the public are entitled to submit written comments. The comments must be received in the Western Regional Office of the Commission by September 22, 2011. The address is Western Regional Office, U.S. Commission on Civil Rights, 300 N. Los Angeles Street, Suite 2010, Los Angeles, CA 90012. Persons wishing to e-mail their comments, or to present their comments verbally at the meeting, or who desire additional information should contact Angelica Trevino, Office Manager, Western Regional Office, at (213) 894–3437, (or for hearing impaired TDD 913–551–1414), or by e-mail to *atrevino@usccr.gov.* Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Western Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Western Regional Office at the above e-mail or street address. The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC on August 2, 2011.

**Peter Minarik,**

*Acting Chief, Regional Programs Coordination Unit.*

[FR Doc. 2011–19891 Filed 8–4–11; 8:45 am]

**BILLING CODE 6335–01–P**

## COMMISSION ON CIVIL RIGHTS

### Agenda and Notice of Public Meeting of the Tennessee Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a planning meeting of the Tennessee Advisory Committee (Committee) to the Commission will be held on Tuesday, August 30, 2011 at the Nashville Public Library, 615 Church Street, Nashville, Tennessee 37219. The meeting is scheduled to begin at 2 p.m. and adjourn at approximately 4 p.m. The purpose of the meeting is for Committee members to receive annual ethics training and for the Committee to plan future activities.

Members of the public are entitled to submit written comments. The comments must be received in the Southern Regional Office of the Commission by September 30, 2011. The address is Southern Regional Office, U.S. Commission on Civil Rights, 61 Forsyth Street, Suite 16T126, Atlanta, GA 30303. Persons wishing to e-mail their comments, or to present their comments verbally at the meeting, or who desire additional information should contact Peter Minarik, Regional Director, Southern Regional Office, at (404) 562–7000, (or for hearing impaired TDD 800–877–8339), or by e-mail *klee@usccr.gov.* Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Southern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Southern Regional Office at the above e-mail or street address. The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC on August 2, 2011.

**Peter Minarik,**

*Acting Chief, Regional Programs Coordination Unit.*

[FR Doc. 2011–19892 Filed 8–4–11; 8:45 am]

**BILLING CODE 6335–01–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* 2012 Economic Census—Commodity Flow Survey.

*OMB Control Number:* 0607–0932.

*Form Number(s):* CFS 1000 (2012), CFS 2000 (2012), CFS–1100, CFS–1200, CFS–1000–L1, CFS–1000–F, CFS–1000–LE, CFS–1000–L1a.

*Type of Request:* Reinstatement, with change, of an expired collection.

*Burden Hours:* 800,000.

*Number of Respondents:* 100,000.

*Average Hours per Response:* 2 hours.

*Needs and Uses:* The 2012 Commodity Flow Survey (CFS), a component of the 2012 Economic Census, is the only comprehensive source of multi-modal, system-wide data on the volume and pattern of goods movement in the United States. The CFS is conducted through a partnership between the U.S. Census Bureau and the Research and Innovative Technology Administration (RITA), Bureau of Transportation Statistics (BTS), Department of Transportation (DOT). The survey provides a crucial set of statistics on the value, weight, mode, and distance of commodities shipped by mining, manufacturing, wholesale, and selected retail and services establishments, as well as auxiliary establishments that support these industries. The U.S. Census Bureau will publish these shipment characteristics for the nation, census regions and divisions, states, and CFS defined geographic areas. As with the 2007 Commodity Flow Survey, this survey also identifies export and hazardous material shipments.

The DOT consistently views updated information on freight flows as critical to understanding the use, performance, and condition of the nation's transportation system, as well as transportation investments and the unintended consequences of transportation. Data on the movement of freight also are important for effective analyses of changes in regional and local economic development, safety issues, and environmental concerns. They also provide the private sector with valuable data needed for critical decision-making on a variety of issues including market trends, analysis, and segmentation. Each day, governments, businesses, and consumers make countless decisions about where to go, how to get there, what to ship and which transportation modes to use. Transportation constantly responds to external forces such as shifting markets, changing demographics, safety concerns, weather conditions, energy and environmental constraints, and national defense requirements. Good decisions require having the right information in the right form at the right time.

The CFS is the primary source of information about freight movement in the United States. Estimates of shipment characteristics are published for differing levels of aggregation. The CFS produces summary statistics only, and no confidential data are released. The survey covers shipments from establishments in the mining, manufacturing, wholesale, and selected retail industries, as well as auxiliary establishments that support these industries. Federal agencies, state and local transportation planners and policy makers, and private sector transportation managers, analysts, and researchers have strongly supported the conduct of the CFS.

The 2012 CFS will be a mail-out/mail-back or electronic reporting sample survey of approximately 100,000 business establishments in the mining, manufacturing, wholesale, and selected retail and services industries, as well as auxiliary establishments that support these industries. Respondents will be asked to provide a quarterly response for a one-year period.

*Affected Public:* Businesses or other for-profit.

*Frequency:* Every 5 years.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Sections 131, 193, and 224.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: August 2, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–19873 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–07–P

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* 2011 Government Units Survey.

*OMB Control Number:* 0607–0930.

*Form Number(s):* GUS–1.

*Type of Request:* Reinstatement, with change, of an expired collection.

*Burden Hours:* 57,375.

*Number of Respondents:* 76,500.

*Average Hours per Response:* 45 minutes.

*Needs and Uses:* The 2011 Government Units Survey will be used to update the universe list of public sector entities for the 2012 Census of Governments. Each of the estimated 76,500 non-school governments will be sent a form. Respondents will be asked to verify or correct the name and mailing address of the government, answer the questions on the form, and return the form.

The directory survey for the 2007 Census of Governments, form G–30, was mailed to special district governments only. The form collected only basic information on the governing board, authorizing legislation, the Web address, agency activity, and employment and payroll data. The employment and payroll data were used in lieu of a response to the March 2007 Census of Governments: Employment, for special district governments. The Government Units Survey (GUS) collects more data and will be mailed to municipalities, townships, counties, and special districts. The GUS–1 consists of nine broad content areas: background information, debt, license and permit fees, taxes, retirement/pension plan, government activity, public services, judicial or legal activities, and finance. The first eight content areas consist predominantly of yes/no questions and are designed to collect information on the general characteristics of the government. The finance section of the questionnaire requests four numerical values: payroll, expenditures, revenues, and debt.

The GUS will be used to produce the official count of local government units in the United States; to obtain descriptive information on the basic characteristics of governments; to identify and delete inactive units from the official list of public entities maintained by the Governments Division of the Census Bureau; to identify file duplicates and units that were dependent on other governments; and to update and verify the mailing addresses of governments. The basic characteristics collected with the GUS will allow us to reduce the burden on small governments by improving small area estimates and imputation methods from a smaller sample size.

*Affected Public:* State, local or Tribal governments.

*Frequency:* Every 5 years.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13, Section 161, of the United States Code.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: August 2, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–19883 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–07–P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[Order No. 1775]

### Voluntary Termination of Subzone Status; Chrysler Group, LLC, Newark, DE

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* on July 3, 1984, the Board issued a grant of authority to the State of Delaware (grantee of FTZ 99) authorizing the establishment of Foreign-Trade Subzone 99B at the Chrysler Group, LLC, facility in Newark, Delaware (Board Order 258, 49 FR 28587, 7–13–1984);

*Whereas,* the State of Delaware has advised that the facility has been closed and zone procedures are no longer needed at the facility and requested voluntary termination of Subzone 99B (FTZ Docket 38–2011); and,

*Whereas,* the request has been reviewed by the FTZ Staff and U.S. Customs and Border Protection officials, and approval has been recommended;

*Now therefore,* the Foreign-Trade Zones Board terminates the subzone status of Subzone 99B, effective this date.

Signed at Washington, DC this 26th day of July 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

Attest:

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2011–19919 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–583–837]

### Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from Taiwan. The

period of review (POR) is July 1, 2009, through June 30, 2010. This review covers respondents, Shinkong Synthetic Fibers Corporation (SSFC) and Shinkong Materials Technology Co. Ltd. (SMTC) (collectively, Shinkong), and Nan Ya Plastics Corporation, Ltd. (Nan Ya), producers and exporters of PET Film from Taiwan.

The Department preliminarily determines that Shinkong and Nan Ya made sales of PET Film below normal value (NV) during the POR. The preliminary results are listed below in the section titled ''Preliminary Results of Review.'' Interested parties are invited to comment on these preliminary results.

**DATES:** *Effective Date:* August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Gene Calvert or Emily Halle, 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) 428–3586, or (202) 482–0176, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On July 1, 2002, the Department published in the **Federal Register** the antidumping duty order on PET Film from Taiwan.[1] On July 1, 2010, the Department published a notice of opportunity to request an administrative review of this order.[2] In response, on July 30, 2010, the domestic interested parties DuPont Teijin Films, Mitsubishi Polyester Film of America, SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners) requested that the Department conduct an administrative review of Nan Ya's and Shinkong's sales of PET Film from Taiwan to the United States.

On August 31, 2010, the Department initiated an administrative review of Shinkong and Nan Ya (collectively, the respondents).[3] On September 27, 2010, the Department issued an antidumping duty questionnaire to the respondents. Nan Ya did not respond to the Department's questionnaire. Therefore, in accordance with section 776(a)(2)(A), (B) and (C) of the Tariff Act of 1930, as amended (the Act), for these preliminary results, the Department has applied facts otherwise available with an adverse inference when determining Nan Ya's rate.[4]

Between February 2, 2011, and June 9, 2011, the Department issued supplemental questionnaires to Shinkong requesting additional information. All of Shinkong's responses were submitted on a timely basis.

On March 10, 2011, the Department extended the time period for issuing the preliminary results of this administrative review.[5] We have not received comments from Petitioners for these preliminary results.

## Scope of the Order

The products covered by the order are all gauges of raw, pretreated, or primed polyethylene terephthalate film, whether extruded or coextruded. 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. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

## Scope Ruling

On December 22, 2010, the Department issued a final scope determination stating that amorphous polyethylene terephthalate film that is not biaxially-oriented is not covered by the scope of the order.[6]

## Period of Review

The POR for this administrative review is July 1, 2009, through June 30, 2010.

## Collapsing of SSFC and SMTC

The Department will treat two or more affiliated producers as a single entity where: (1) Those producers have production facilities for similar or identical product that would not require substantial retooling of either facility; and (2) there is a significant potential for manipulation of price or production pursuant to 19 CFR 351.401(f)(1) and (2). Consistent with the most recently completed administrative review, the Department preliminarily determines that SSFC and SMTC should be treated as a single entity (*i.e.,* Shinkong) for purposes of calculating an antidumping margin pursuant to 19 CFR 351.401(f).[7] SMTC was established in October 2004 and it is a wholly-owned subsidiary of SSFC. SSFC and SMTC produce similar or identical merchandise. Evidence on the record shows that SSFC and SMTC both have similar production facilities to produce the subject merchandise. Additionally, the level of common ownership between SSFC and SMTC creates the fact that operations are intertwined to provide a significant potential for manipulation of price or production. SMTC is as a wholly-owned subsidiary of SSFC and, during the POR, almost all of the subject merchandise under review produced by SMTC was sold to SSFC for re-sale in the home market, United States market, and third country markets.

## Comparisons to Normal Value for Shinkong

Shinkong did not have affiliated U.S. customers. Therefore, to determine whether sales of PET Film were made at less than NV, we compared Shinkong's export price (EP) sales made to unaffiliated customers to NV, as described below in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we compared the EP of individual transactions to monthly weighted-average NVs.

## Selection of Comparison Market

To determine whether there was a sufficient volume of sales of PET Film in the home market to serve as a viable basis for calculating NV, we compared the volume of Shinkong's home market sales of the foreign like product to the volume of its U.S. sales of the subject

[1] *See Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From Taiwan,* 67 FR 44174 (July 1, 2002), as corrected in 67 FR 46566 (July 15, 2002).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review,* 75 FR 38074, 38075 (July 1, 2010).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review,* 75 FR 53274, 53275 (August 31, 2010).

[4] *See* the section ''Use of Facts Otherwise Available and Adverse Facts Available,'' below.

[5] *See Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From Taiwan: Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review,* 76 FR 13128 (March 10, 2011).

[6] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, ''Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Scope Ruling on Amorphous Polyethylene Terephthalate Film,'' dated December 22, 2010. This public document is on file at the Department's Central Records Unit, Room 7046 of the main Commerce Building.

[7] *See* Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, ''Analysis for the Preliminary Results of the 2009–2010 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co. Ltd,'' dated August 1, 2011 (Shinkong Calculation Memorandum).

merchandise, in accordance with section 773(a)(1) of the Act. In accordance with section 773(a)(1)(B) of the Act, and 19 CFR 351.404(b), because Shinkong's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we have determined that the home market was viable for comparison purposes.

**Product Comparisons**

Pursuant to section 771(16) of the Act, we determined that products sold by the respondents, as described in the ''Scope of the Order'' section above, in Taiwan during the POR are foreign like products for purposes of determining appropriate product comparisons to U.S. sales. For product comparisons, we have relied on five criteria to match U.S. sales of subject merchandise to comparison-market sales (in order of importance): Grade, Specification, Thickness, Thickness Category, and Surface Treatment.[8] Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the most similar foreign like product on the basis of the characteristics listed above.

**Date of Sale**

The Department normally uses invoice date as date of sale, consistent with 19 CFR 351.401(i). Shinkong reported that, on occasion, changes to the terms of sale occurred before subject merchandise was shipped due to the customer's request or because of Shinkong's production capacity. According to Shinkong, during the POR, the terms of sale changed for some home market sales after the initial sales agreements were made and that, therefore, the terms of sale were finalized in the Government Uniform Invoice (GUI).[9] As such, we preliminarily determine that for sales in the home market, and for sales to the United States made through domestic trading companies, the GUI date, *i.e.,* the date on which the terms of home market sales are finalized,[10] is the most appropriate date to use as Shinkong's date of sale. For sales made directly to U.S. customers, Shinkong stated that it issues its commercial invoice after production of subject merchandise is completed, at which time the terms of sale have been finalized. Therefore, we preliminarily determine that, for sales made directly to the U.S. market, the commercial invoice date is the most appropriate date to use as Shinkong's date of sale in accordance with 19 CFR 351.401(i). Evidence on the record also demonstrates that, with respect to Shinkong's sales to the United States, for some sales, the shipment date occurred prior to the invoice date.[11] In such cases, we limit the sales date (*i.e.,* invoice date) to no later than shipment date.[12]

**Margin Calculation**

*Export Price*

In calculating the U.S. price (USP) for Shinkong, we used EP, as defined in section 772(a) of the Act, because sales to the first unaffiliated U.S. customer occurred before importation. We based EP on packed prices to customers in the United States. We made deductions from USP for the following movement expenses in accordance with section 772(c)(2)(A) of the Act: Domestic inland freight from plant to port of exportation, brokerage and handling incurred in the country of manufacture, marine insurance and international freight.

**Normal Value**

*A. Quarterly Cost of Production (COP)*

Based on a review of record evidence, Shinkong did not appear to experience significant changes in cost of manufacturing (COM) during this POR. Therefore, we followed our normal methodology of calculating an annual weighted-average cost in conducting the sales-below-cost test described below.

*B. COP Analysis*

Pursuant to 773(b)(2)(A)(ii) of the Act, because the Department had disregarded certain of Shinkong's sales in the most recently completed review of this order,[13] the Department had reasonable grounds to believe or suspect that Shinkong made home market sales at prices below COP in this review. As a result, the Department was directed under section 773(b) of the Act to determine whether Shinkong made home market sales during the POR at prices below COP.

*C. Calculation of COP*

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of Shinkong's cost of materials and fabrication for the foreign like product, plus amounts for general and administrative expenses (G&A), interest expenses and home market packing costs. These calculations include revisions by the Department to the COP information reported by Shinkong, consistent with Department practice, and previous reviews. Specifically, we adjusted the G&A ratios for SSFC and SMTC, applied the adjusted ratios to each company's COM, and then weight-averaged the two COP databases into one set of cost data.[14]

*D. COP Test*

On a product-specific basis, we compared the revised COP figures to home market prices net of applicable billing adjustments, discounts and rebates, movement charges, selling expenses, and packing to determine whether home market sales had been made at prices below COP. In calculating product-specific costs, we ignored the Grade product characteristic reported by Shinkong, as Grade differences are the result of inadvertent errors in production that lead to different qualities of PET Film and not variances in production costs.[15] In determining whether to disregard home market sales made at prices below COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether, within an extended period of time, such sales were made in substantial quantities, and whether such sales were made at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade.

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[8] *See* the Department's September 27, 2010 Antidumping Duty Questionnaire to Shinkong, at sections B and C.

[9] *See* Shinkong's November 1, 2010 questionnaire response at 17.

[10] *Id.*

[11] *See* Shinkong's May 23, 2011 supplemental questionnaire response at Exhibit 2.

[12] *See, e.g., Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244, 7251 (February 18, 2010), unchanged in *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 41808 (July 19, 2010).

[13] *See Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Preliminary Results of Antidumping Duty Administrative Review,* 69 FR 18531, 18534 (April 8, 2004).

[14] *See, e.g., Certain Steel Nails From the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value,* 73 FR 33985, 33988 (June 16, 2008) and accompanying Issues and Decision Memorandum at Comment 11, and *Silicomanganese From Brazil: Final Results of Antidumping Duty Administrative Review,* 69 FR 13813, 13814 (March 24, 2004) and accompanying Issues and Decision Memorandum at Comment 11. *See also* Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, ''Cost of Production and Constructed Value Adjustments for the Preliminary Results—Shinkong Synthetic Fibers Corporation (SSFC) and Shinkong Materials Technology Co. Ltd (SMTC) (collectively, Shinkong),'' dated August 1, 2011.

[15] *See* Shinkong's March 4, 2011 submission at Exhibit 8. When producing PET Film, Shinkong's expectation is that the finished product will contain no flaws (*i.e.,* Grade A). However, inadvertent production errors occur, giving way to the different Grades.

In accordance with section 773(b)(2)(C) of the Act, where less than 20 percent of a given product was sold at prices less than COP, we did not disregard any below-cost sales of that product, because the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a given product was sold at prices less than COP, we disregarded the below cost sales if: (1) They were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on our comparison of prices to weighted-average COP figures for the POR, they were made at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Based on this analysis, we found that Shinkong did have below cost sales that must be disregarded. We used the remaining home market sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

*E. Constructed Value*

After disregarding certain sales as below cost, as described above, there were home market sales of contemporaneous identical and similar products that remained, which allowed for price-to-price comparisons for all margin calculations. Therefore, the Department did not need to rely on constructed value for any calculations for these preliminary results.

*F. Price-to-Price Comparisons*

We calculated NV based on packed prices (*i.e.,* including costs for packing) to unaffiliated customers in the home market.[16] We used Shinkong's adjustments and deductions as reported. We made deductions, where appropriate, for foreign inland freight pursuant to section 773(a)(6)(B) of the Act. In addition, for comparisons involving similar merchandise, we made adjustments for cost differences attributable to the physical differences between the products compared, pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also made adjustments for differences in the circumstances of sale, in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, specifically for imputed credit expenses. Finally, we deducted home market packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

*G. Arm's-Length Test*

The Department may calculate NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the prices at which sales are made to parties not affiliated with the exporter or producer; *i.e.,* sales to home market affiliates must be at arm's-length.[17] Sales to affiliated customers for consumption in the home market that are determined not to be at arm's-length are excluded from our analysis. To test whether sales are made at arm's-length prices, the Department compares the prices of sales of comparable merchandise to affiliated and unaffiliated customers, net of all movement charges, direct selling expenses, and packing. Pursuant to 19 CFR 351.403(c), and in accordance with the Department's practice, when the prices charged to an affiliated party are, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise comparable to that sold to the affiliated party, we determine that the sales to the affiliated party are at arm's-length.[18]

In this proceeding, Shinkong reported sales of the foreign like product to affiliated customers who consumed the purchased material. Shinkong's sales to these affiliated home market customers did not pass the arm's-length test, and were therefore excluded from our analysis.[19]

*H. Level of Trade*

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable we base NV on sales made in the home market at the same level of trade (LOT) as the sales in the U.S. market. To determine whether NV sales are at a different LOT than U.S. sales, we examine selling functions along the chain of distribution between the respondents and the unaffiliated customer for EP sales, and between the respondents and the affiliated U.S. importer for constructed export price sales. If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make an LOT adjustment pursuant to section 773(a)(7)(A) of the Act.

In implementing these principles, we examined information provided by Shinkong regarding the selling functions involved in its home market and U.S. sales, including a description of these selling functions, listed in Exhibit 8 of Shinkong's November 1, 2010 submission. Shinkong claims one LOT in both the U.S. and home market, and that the same selling functions were conducted in the U.S. and home market, leading Shinkong to claim the same LOT for the U.S. and home market.[20] Based on our analysis, we preliminarily determine that Shinkong sold at one LOT in both its home market and the United States. We also preliminarily determine that both the home market and the U.S. LOTs are the same and that, therefore, an LOT adjustment is not warranted.

**Currency Conversions**

Pursuant to section 773A of the Act and 19 CFR 351.415, we made currency conversions for Shinkong's sales based on the daily exchange rates in effect on the dates of the relevant U.S. sales as certified by the Federal Reserve Bank of New York.

**Use of Facts Otherwise Available and Adverse Facts Available**

Section 776(a) of the Act provides that the Department shall apply ''facts otherwise available'' if: (1) Necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

As referenced above, Nan Ya did not respond to the Department's initial

[16] Shinkong sold a small amount of foreign like product to its affiliates in the home market for consumption during the POR. These sales have failed the arm's-length test and therefore have been excluded from the calculation of NV. *See* ''Arm's Length Test'' section, below.

[17] *See* 19 CFR 351.403(c).

[18] *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade,* 67 FR 69186, 69187 (November 15, 2002).

[19] *See* section 773(b)(1) of the Act; *see also* Shinkong Calculation Memorandum.

[20] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From Taiwan,* 66 FR 65889, 65891 (December 21, 2001).

questionnaire in this administrative review.[21] As a result, Nan Ya did not provide the requested information that is necessary for the Department to calculate an antidumping duty rate for the company in this administrative review. Therefore, in reaching these preliminary results, pursuant to section 776(a) of the Act, the Department has based Nan Ya's antidumping duty rate on facts otherwise available on the record. Further, because Nan Ya did not respond to the Department's questionnaire, the Department determines that Nan Ya withheld information requested by the Department in accordance with sections 776(a)(2)(A) and (B) of the Act, and significantly impeded this proceeding in accordance with section 776(a)(2)(C) of the Act. Thus, we find that Nan Ya failed to cooperate to the best of its ability to provide the Department with requested information. Therefore, pursuant to section 776(b) of the Act, the Department has determined that, when selecting from among the facts otherwise available, an adverse inference through selection of adverse facts available (AFA) is warranted with respect to Nan Ya.

**Selection of the AFA Rate**

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from four particular sources, including data related to cooperative interested parties placed on the record: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. The Department's practice is to select an AFA rate that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner,'' and that ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' [22] Specifically, the Department's practice in reviews, in selecting a rate as a total AFA rate, is to use the highest weighted-average margin on the record of the proceeding which, to the extent practicable, can be corroborated (assuming the rate is based on secondary information).[23] The Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) have each affirmed decisions to select the highest weighted-average margin from any prior segment of the proceeding as the AFA rate on numerous occasions.[24] The Department also has the discretion of using a transaction-specific margin of a company to establish total AFA rates where it finds it to be appropriate under section 776(b) of the Act.[25] In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior weighted-average margin or, as in this case, one of the highest prior transaction-specific margins, reflects ''a common sense inference that the highest prior margin is the most probative evidence of current margins * * *'' [26]

The Department must ''balance the statutory objectives of finding an accurate dumping margin and inducing compliance'' when selecting the appropriate AFA rate.[27] At a minimum, an AFA rate must reasonably reflect an accurate estimate of the actual rate, ''albeit with some built-in increase intended as a deterrent to non-compliance.'' [28] The estimated rate from the petition was 15.65 percent,[29] and the highest weighted-average margin calculated for any party in these proceedings is 18.30 percent, which was calculated for Nan Ya during the most recently completed administrative review.[30] As Nan Ya did not respond to the Department's antidumping questionnaire in this segment of the proceeding knowing that its current weighted-average margin is 18.30 percent, we find that this margin would not be satisfactory as AFA to compel Nan Ya to participate in the Department's antidumping proceedings. As a result, the Department finds that it is not appropriate to apply any of the weighted-average margins calculated during the history of this proceeding as AFA.

Instead, we have assigned to exports of subject merchandise produced and/or exported by Nan Ya the rate of 99.31 percent, which we preliminarily determine is the most appropriate transaction-specific rate that we calculated in the 2008–2009 administrative review of the order with respect to Nan Ya.[31] We find that this rate is sufficiently adverse to serve the purposes of facts available and is reasonably related to the respondent's contemporaneous commercial, customary selling practices, because this AFA rate is a transaction-specific rate determined for Nan Ya itself in the most recently completed administrative review of this proceeding.[32]

**Corroboration of Secondary Information**

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources

[21] *See* Memorandum to the File, ''Nan Ya Plastics Corporation, Ltd. Non-Participation in the Administrative Review for the Period July 1, 2009, through June 30, 2010,'' dated August 1, 2011.

[22] *See* the Statement of Administrative Action Accompanying the Uruguay Round Agreement Act, H.R. Rep. No. 316, 103d Cong., 2d Sess. 870 (SAA) at 870 and *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8911 (February 23, 1998); *see also Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review,* 70 FR 69937, 69939 (November 18, 2005).

[23] *Id.*

[24] *See, e.g., NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (affirming a 73.55 percent total AFA rate, the highest available dumping margin calculated for a different respondent in the investigation); *see also Kompass Food Trading International* v. *United States,* 24 CIT 678, 683–84 (2000) (affirming a 51.16 percent total AFA rate, the highest available dumping margin for a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (CIT 2005) (affirming a 223.01 percent total AFA rate, the highest available dumping margin for a different respondent in a previous administrative review).

[25] *See, e.g., iScholar, Inc.,* v. *United States,* 2011 Ct. Intl. Trade LEXIS 3, 9 (January 13, 2011) (affirming the application of a transaction-specific margin as AFA for a different respondent); *see also Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review,* 75 FR 7563, 7563 (February 22, 2010).

[26] *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (CAFC 1990).

[27] See *Timken Co.* v. *United States,* 354 F.3d 1334, 1345 (Fed. Cir. 2004).

[28] *See F.lli de Cecco di Filippo Fara S. Martino S.p.A.* v. *United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000).

[29] *See Notice of Initiation of Antidumping Duty Investigations: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India and Taiwan,* 66 FR 31888 (June 13, 2001).

[30] *See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Amended Final Results of Antidumping Duty Review,* 76 FR 18519,18520 (April 4, 2011).

[31] *See* Memorandum to The File, ''Transfer of Record Information from the Administrative Review for the Period July 1, 2008 through June 30, 2009,'' dated August 1, 2011; *see also* Memorandum to Mark Hoadley, Program Manager, Office 6, ''Assignment of the Adverse Facts Available Rate for Nan Ya Plastics Corporation, Ltd.,'' dated August 1, 2011 (Nan Ya AFA Memorandum).

[32] *See Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 39919 (August 10, 2009) and accompanying Issues and Decision Memorandum at 10–15 (in which the Department applied, as AFA, a transaction-specific margin calculated in a prior administrative review to the same respondent).

that are reasonably at its disposal. Secondary information is defined as information derived from the petition, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[33] To corroborate means that the Department will satisfy itself that the secondary information to be used has probative value.[34] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.[35]

The AFA rate of 99.31 percent selected for Nan Ya is based on information Nan Ya itself submitted in a previous segment of this proceeding, the 2008–2009 administrative review. Because: (1) The AFA rate of 99.31 percent is based solely on Nan Ya's questionnaire responses and accompanying data from the immediately preceding administrative review for the period 2008–2009; (2) this information was provided by Nan Ya; and (3) we used this information without objections to calculate margins for the previous review, we find that the rate is reliable and relevant for use in this administrative review and, therefore, it has probative value for use as AFA. As such, the Department finds this rate to be corroborated to the extent practicable, consistent with section 776(c) of the Act.

Additionally, in selecting this particular transaction-specific margin to use as the AFA rate for Nan Ya, the Department has analyzed the underlying transaction to ensure that it is not inappropriate. Specifically, the Department examined the individual transaction-specific margins for the entire 2008–2009 POR for sales to the United States by Nan Ya. Our review of the individual transaction-specific margins affirms that this rate is neither aberrational nor unusual in terms of transaction quantities or products. The details of the secondary information analyzed by the Department contain business proprietary information, and have been placed on the record in the Nan Ya AFA Memorandum.

[33] *See* SAA at 870.

[34] *See id.*

[35] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825 (March 13, 1997).

## Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average antidumping duty margins exist for the period July 1, 2009, through June 30, 2010.

| Producer/exporter | Weighted-average margin percent |
|---|---|
| Nan Ya Plastics Corporation, Ltd | 99.31 |
| Shinkong Synthetic Fibers Corporation | 6.98 |

## Assessment Rates

Pursuant to 19 CFR 351.212(b), 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 Shinkong and Nan Ya. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. For assessment purposes, where possible, we calculate 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.[36] However, where the respondents do not report the entered value for their sales, we calculate importer-specific (or customer-specific) per-unit duty assessment rates. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any assessment rate calculated in the final results of this review is above *de minimis.*

## Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of PET Film from Taiwan entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for companies under review will be the rate established in the final results of this review (except, if the rate is *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and, (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash deposit rate will be the all others rate for this proceeding, 2.40 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

[36] *See* 19 CFR 351.212(b).

## Disclosure and Public Comment

We intend to disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**.[37] If a hearing is requested, the Department will notify interested parties of the hearing schedule.

Interested parties are invited to comment on the preliminary results of this review. The Department typically requests that interested parties submit case briefs within 30 days of the date of publication of this notice. However, we plan to issue a post-preliminary supplemental questionnaire and, therefore, will be extending the case brief deadline. The Department will inform interested parties of the updated briefing schedule when it has been confirmed. Rebuttal briefs, which must be limited to issues raised in the case briefs, must be filed not later than five days after the time limit for filing case briefs.[38] Parties who submit case briefs or rebuttal briefs in this review are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Executive summaries should be limited to five pages total, including footnotes.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**.[39]

## Notification to Importers

This notice also serves as a preliminary reminder to importers of

[37] *See* 19 CFR 351.310.

[38] *See* 19 CFR 351.309(c) and (d) (for a further discussion of case briefs and rebuttal briefs, respectively).

[39] *See* section 751(a)(3)(A) of the Act.

their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 1, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011–19946 Filed 8–4–11; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–824]**

### Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from India. This review covers one respondent, Ester Industries Ltd. (Ester), a producer and exporter of PET Film from India. The Department preliminarily determines that Ester did not make sales of PET Film from India at below normal value (NV) during the July 1, 2009, through June 30, 2010, period of review. The preliminary results are listed below in the section titled ''Preliminary Results of Review.'' Interested parties are invited to comment on these preliminary results.

**DATES:** *Effective Date:* August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Elfi Blum, or Toni Page, 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) 482–0197 or (202) 482–1398, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On July 1, 2002, the Department published in the **Federal Register** the antidumping duty order on PET Film from India. *See Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India,* 67 FR 44175 (July 1, 2002) (*PET Film India Order*). On July 1, 2010, the Department published a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 38074 (July 1, 2010). In response, on July 27, 2010, and August 2, 2010, Ester and SRF Limited (SRF), respectively, requested that the Department conduct an administrative review of their sales of PET Film in the U.S. market. On July 29, 2010, Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastics (America) Inc. (collectively, the petitioners) requested an administrative review of Ester.

On August 31, 2010, the Department published a notice of initiation of an administrative review of the antidumping duty order on PET Film from India covering the period July 1, 2009, through June 30, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review,* 75 FR 53274, 53276 (August 31, 2010). The Department initiated the review with respect to Ester and SRF.

On September 15, 2010, the Department issued an antidumping duty questionnaire to the respondents. On October 1, 2010, SRF withdrew its request for an administrative review, and the Department rescinded the administrative review of SRF on July 7, 2011. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Rescission, in Part, of Antidumping Duty Administrative Review,* 76 FR 39855 (July 7, 2011).

Ester timely submitted section A of the questionnaire on October 5, 2010, and sections B through D on November 3, 2010. On February 3, 2011, and on February 11, 2011, the Department issued its first supplemental questionnaires to sections D, and A through C, respectively. Ester timely filed its response to section D on March 1, 2011, and to sections A through C on April 15, 2011. The Department issued its second supplemental questionnaire to section D on March 18, 2011, and Ester filed its timely response on April 15, 2011.

On April 1, 2011, the Department extended the time period for issuing the preliminary results of the administrative review. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 18155 (April 1, 2011).

The Department issued its second supplemental questionnaire to sections A through C on June 17, 2011, and Ester filed its response to this questionnaire on July 5, 2011.

**Scope of the Order**

The products covered by the antidumping duty order are all gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. 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 of more than 0.00001 inches thick. Imports of PET film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the antidumping duty order is dispositive.

**Period of Review**

The period of review (POR) is July 1, 2009, through June 30, 2010.

**Home Market Viability**

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.,* the aggregate volume of home market sales of the foreign like product is five percent or more of the aggregate volume of U.S. sales), we compared the volume of Ester's home market sales of the foreign like product to the volume of its U.S. sales of subject merchandise, in accordance with section 773(a)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act). Based on this comparison, we determined that Ester's home market was viable during the POR.

**Product Comparisons**

Pursuant to section 771(16)(A) of the Act, for purposes of determining appropriate product comparisons to the U.S. sales, the Department considers all products, as described in the ''Scope of the Order'' section of this notice above, that were sold in the comparison market in the ordinary course of trade. In accordance with sections 771(16)(B) and

(C) of the Act, where there are no sales of identical merchandise in the comparison market made in the ordinary course of trade, we compare U.S. sales to sales of the most similar foreign like product based on the characteristics listed in sections B and C of our antidumping questionnaire: grade, specifications, dimensions, thickness, and surface treatment. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the most similar foreign like product on the basis of the characteristics listed above.

**Normal Value Comparisons**

To determine whether sales of subject merchandise to the United States were made at less than fair value, we compared the export price (EP) to NV, as described in the *United States Price* and *Normal Value* sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transaction prices.

**Date of Sale**

The Department will normally use invoice date, as recorded in the exporter's or producer's records kept in the ordinary course of business, as the date of sale, but may use a date other than the invoice date if it better reflects the date on which the material terms of sale are established. *See* 19 CFR 351.401(i). For Ester, we preliminarily determine that no departure from our standard practice is warranted. Ester reported invoice date as date of sale for both the home market and the U.S. market, and the record does not indicate that material terms of sale are established at a later date or earlier in the sales process.

**Level of Trade**

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, the Department determines NV based on sales in the comparison market at the same level of trade as the EP or constructed export price (CEP) sales in the U.S. market. To determine whether NV sales are at a different level of trade (LOT) than U.S. sales, we examine selling functions along the chain of distribution between the respondent and the unaffiliated customer for EP sales. *See* 19 CFR 351.412(c)(2). If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, then we make an LOT adjustment pursuant to section 773(a)(7)(A) of the Act.

In implementing these principles, we examined all the information provided by Ester regarding the selling functions involved in its home market and U.S. sales. In the original questionnaire, the Department asked Ester to provide its selling functions for each of its levels of trade, and to state the degree that function was performed (*i.e.,* rarely, sometimes, frequently, always). Additionally, the Department provided a sample chart at the end of the Section A questionnaire to use as a guideline.

In its questionnaire responses, Ester reported three LOTs in the home market: (1) End Users; (2) Distributors/Traders;, and (3) Agents; and two LOTs in the U.S. market: (1) End Users; and (2) Distributors/Traders.[1] In addition, Ester provided a chart of its selling functions.[2] However, it did not provide a breakout of sales activities between the claimed LOT(s) in the home market and in the U.S. market it claimed in its responses. Instead, Ester reported home market sales in two categories: made against stock or produced after receipt of the order. Ester later clarified in its second supplemental response that it occasionally made sales from stock in the home market only.[3]

In its first supplemental response, Ester revised its chart to include the level of degree of the selling activities, but did not break out the selling functions between the various LOTs in the home market and U.S. market.[4] In the second supplemental questionnaire, the Department requested that Ester indicate the level of selling function which Ester provides for each type of customer; however, Ester responded that it ''provides the individual selling functions to all customers.'' [5]

Because Ester did not provide complete information, we are unable to perform an LOT analysis. Despite explicit instructions as to how to report its selling functions, Ester has not provided the data needed to properly analyze the levels of trade the company has reported, to determine whether an offset is warranted. We have no basis to perform such an analysis between the various types of sales in the home and U.S. markets. Therefore, we preliminarily determine that Ester made all home market sales at one LOT. Moreover, we preliminarily determine that all home market sales by Ester were made at the same LOT as their U.S. sales. Accordingly, an LOT adjustment is not warranted. For a detailed analysis, *see* the ''Level of Trade'' section in Memorandum to Thomas Gilgunn, Program Manager, from Elfi Blum, International Trade Analyst, Analysis Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Ester Industries Ltd. (Preliminary Analysis Memorandum), dated concurrently with this notice.

[1] Ester's First Supplemental Questionnaire Response of March 29, 2011 (First Supplemental Response), at 18 and 28.

[2] *See* Ester's Original Response, Section A, of October 5, 2010, at Exhibit 3(b).

[3] Ester's Second Supplemental Questionnaire Response of July 5, 2011 (Second Supplemental Response), at 3–4.

[4] Ester's First Supplemental Response, at 28 and Exhibit SQA–9.

[5] Second Supplemental Response, at 4.

**United States Price**

We used EP methodology for Ester's U.S. sales, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation, and CEP methodology was not otherwise warranted based on the evidence on the record. In accordance with sections 772(a) and (c) of the Act, we calculated EP using the Cost Insurance Freight price (up to named point of destination) Ester charged its unaffiliated customer. We made deductions from the starting price, where applicable, for movement expenses, including domestic inland freight and insurance, domestic brokerage and handling, and international freight and marine insurance, and U.S. inland freight.

Information about the specific adjustments and our analysis of the adjustments is business proprietary, and is detailed in the ''Adjustments'' section in the Preliminary Analysis Memorandum.

Further, section 772(c)(1)(B) of the Act states that EP should be increased by the amount of any import duties ''imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States. * * *'' Ester claimed a duty drawback adjustment under this provision for its export credits earned on the Government of India (GOI) Duty Entitlement Passbook Scheme (DEPS). In its responses to the Department, Ester stated that it reported all of Ester's DEPS credits earned on exports to all markets during the POR, and that the credits it reported also include metallized PET film, which is not subject to the *PET Film India*

*Order.*[6] In addition, Ester reported the DEPS credits earned on the free-on-board (FOB) value of its total exports during the POR, and the DEPS credits utilized on its imports during the POR.[7]

India's DEPS scheme enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. All exporters are eligible to earn DEPS credits on a post-export basis, provided that the GOI has established a standard input-output norm (SION) for the exported product. DEPS credits can be used for any subsequent imports, regardless of whether they are consumed in the production of an exported product. DEPS credits are valid for twelve months and are transferable after the foreign exchange is realized from the export sales on which the DEPS credits are earned. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 75672 (December 12, 2008), and accompanying Issues and Decision Memorandum, at ''Duty Entitlement Passbook Scheme (DEPS/DEPB).'' The Department has determined that the DEPS scheme for which Ester is claiming duty drawback to be countervailable because: (1) The GOI provides credits for the future payment of import duties; and (2) the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended to confirm which inputs, and in what amounts, are consumed in the production of the exported product. *See id.* and *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India,* 67 FR 34905 (May 16, 2002), and accompanying Issues and Decision Memorandum, at Comment 1.

In determining whether an adjustment should be made to EP for this duty credit, we look for a reasonable link between the duties imposed and those rebated or exempted. We do not require that the imported input be traced directly from importation through exportation. We do require, however, that the company meet our ''two-pronged'' test in order for this increase to be made to EP. The first element is that the import duty and its rebate or exemption be directly linked to, and dependent upon, one another; the second element is that the company must demonstrate that there were sufficient imports of the imported material to account for the duty drawback or exemption granted for the export of the manufactured product. *See, e.g., Saha Thai Steel Pipe Co., Ltd.* v. *United States,* 635 F.3d 1335, 1340 (Fed. Cir. 2011); and *Mittal Steel USA, Inc.* v. *United States,* 31 CIT 1395, 1412–1413 (2007).

Ester failed to establish that it met the first prong of the two-pronged test: That there is a necessary link between the import duties paid on any inputs imported and the duty credit given by the GOI. First, Ester did not demonstrate how it arrived at the appropriate amounts of duty credits it allocated and claimed from its duty credits earned on all exports of subject and non-subject merchandise during the POR. Second, the Department has determined that the GOI does not have a system in place that is reasonable and effective for the purposes intended to confirm which inputs, and in what amounts, are consumed in the production of the exported product. While there is a SION in place for the production of subject merchandise, the duty credit given is based on an assumed amount of import content, and fails to link the amount of duty credits to the amount of import duties actually paid on imported inputs. As shown in the response, Ester's DEPS credits for which it claims duty drawback were earned on a pre-determined percent of the FOB value of its exports during the POR. Furthermore, as stated in Ester's response, ''Ester is not required to import to avail the benefit of DEPS benefits. The DEPS credit is based on prefixed rates and the Company is entitled to the DEPS credit regardless of imports of inputs.'' [8] For the second prong, Ester did not demonstrate that it imported any inputs for the production of subject merchandise prior to, during, or after the POR. Thus, for these preliminary results, we determine that Ester has not demonstrated that it meets both prongs of the duty drawback test pursuant to section 772(c)(1)(B) of the Act. Accordingly, we have not made an adjustment to EP for duty drawback.

In accordance with section 772(c)(1)(C) of the Act, we will adjust Ester's U.S. price to account for countervailing duties attributable to subject merchandise in order to offset export subsidies in the concurrent countervailing duty administrative review of Ester.

**Cost of Production Analysis**

The Department disregarded Ester's sales below cost of production (COP) in the investigation. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Terephthalate Film, Sheet, and Strip From India*, 66 FR 65893 (December 21, 2001), at ''C. COP Analysis,'' unchanged in the *PET Film India Order*. We therefore have reasonable grounds to believe or suspect, pursuant to section 773(b)(2)(A)(ii) of the Act, that sales of the foreign like product under consideration for the determination of NV in this review may have been made at prices below COP. Thus, pursuant to section 773(b)(1) of the Act, we examined whether Ester's sales in the home market were made at prices below the COP during the POR.

The Department's normal practice is to calculate an annual weighted-average cost for the entire period of investigation or POR. *See, e.g., Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000) and accompanying Issues and Decision Memorandum at Comment 18. However, the Department recognizes that possible distortions may result if our normal annual-average cost methodology is used during a period of significant cost changes. The Department determines whether to deviate from our normal methodology of calculating an annual weighted-average cost by evaluating two primary factors: (1) Whether the change in the cost of manufacturing recognized by the respondent during the POR is deemed significant (*i.e.*, greater than 25 percent); and (2) whether the record evidence indicates that sales during the shorter averaging periods could be reasonably linked with the COP during the same shorter averaging periods. *See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398, 75399 (December 11, 2008) and *Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009). Based on the review of record evidence, Ester did not appear to experience significant changes in cost of manufacturing during the POR. Therefore, we followed our normal methodology of calculating an annual weighted-average cost for these preliminary results of review.

Based on our analysis of Ester's questionnaire responses, we made adjustments to Ester's reported COP for

[6] *See* Ester's Original Response of November 3, 2010, at 86 and Exhibit Z–6, and First Supplemental Response, at 32–33.

[7] *See* Second Supplemental Response, at Exhibits SQ2–ABC–8 and ABC–9.

[8] *See* Second Supplemental Response, at 35–38 and Exhibit SQ2–ABC–8.

selling, general and administrative expenses (SG&A) and for interest. For more detailed information, *see* Memorandum to Neal M. Halper, Director, Office of Accounting from Sheikh M. Hannan, Senior Accountant, Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strips from India, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Ester Industries Limited, dated August 1, 2011.

We compared sales of the foreign like product in the home market with model-specific COP figures for the POR. In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the costs of materials and fabrication employed in producing the foreign like product, plus SG&A and all costs and expenses incidental to placing the foreign like product in packed condition and ready for shipment. In our sales-below-cost analysis, we relied on home market sales and COP information provided by Ester in its questionnaire responses.

We compared the weighted-average COPs to home market sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether these sales had been made at prices below the COP. In determining whether to disregard home market sales made at prices below the COP, we examined whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which did not permit recovery of all costs within a reasonable period of time in the normal course of trade, in accordance with section 773(b)(1)(A) and (B) of the Act. On a product-specific basis, we compared the COP to home market prices, less any movement charges, discounts, and direct and indirect selling expenses.

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product were at prices less than COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in substantial quantities within an extended period of time. Where 20 percent or more of the respondent's sales of a given product were at prices less than COP, we disregarded the below-cost sales because they were made in substantial quantities within an extended period of time, in accordance with sections 773(b)(2)(B) and (C) of the Act. Based upon our comparison of prices to POR-average costs, we determined that the below-cost prices did not permit the recovery of costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act. Therefore, for purposes of this review, we disregarded the below-cost sales and used the remaining sales, as the basis for NV, in accordance with section 773(b)(1) of the Act.

## Normal Value

*Price-to-Price Comparison*

We based NV on the starting prices of Ester's sales to unaffiliated home market customers, pursuant to sections 773(a)(1)(A) and 773(a)(1)(B)(i) of the Act. Pursuant to section 773(a)(6)(B)(ii) of the Act, we made deductions from NV for movement expenses (*i.e.*, inland freight and inland insurance) where appropriate. In accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c), we made, where indicated, circumstance-of-sale adjustments for home market direct selling expenses, including imputed credit expenses. Ester did not report certain payment dates. In instances of missing pay dates or pay dates preceding the invoice date, we used the signature date of the preliminary results (August 1, 2011) as the payment date to calculate imputed credit expenses in the home market, in accordance with practice.[9] We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison-market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, because commissions were paid only in the home market, we made an upward adjustment to NV for the lesser of: (1) The amount of commission paid in the home market; or (2) the amount of the indirect selling expenses incurred in the home market on U.S. sales. *See* 19 CFR 351.410(e). In accordance with sections 773(a)(6)(A) and (B) of the Act, we also deducted home market packing costs and added U.S. packing costs. We also made adjustments for differences in costs attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act. *See* Preliminary Analysis Memorandum.

*Constructed Value-to-Price*

In accordance with section 773(a)(4) of the Act, we used constructed value (CV) as the basis for NV when there were no above-cost contemporaneous sales of identical or similar merchandise in the comparison market. We calculated CV in accordance with section 773(e) of the Act. We included the cost of materials and fabrication, SG&A, and profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the foreign country. For selling expenses, we used the weighted-average home market selling expenses.

[9] *Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review*, 70 FR 46482 (August 10, 2005) and accompanying Issues and Decision Memorandum at Comment 8.

## Currency Conversions

Pursuant to section 773A(a) of the Act and 19 CFR 351.415, we made currency conversions for Ester's sales based on the daily exchange rates in effect on the dates of the relevant U.S. sales as certified by the Federal Reserve Bank of New York.

## Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margin exists for the period July 1, 2009, through June 30, 2010.

| Manufacturer/Exporter | Weighted-average margin |
|---|---|
| Ester Industries Ltd ...... | 0.00% |

## 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 Ester. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. For assessment purposes, where the respondent reported the entered value for its 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 respondent did not report the entered value for its sales, we will calculate importer-specific (or customer-specific) per unit duty assessment rates. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any per unit duty assessment rate calculated in the final results of this review is above *de minimis (i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we intend to instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is zero or *de* *minimis* (*i.e.*, less than 0.50 percent). *See* 19 CFR 351.106(c)(1).

**Cash Deposit Requirements**

The following deposit requirements will be effective for all shipments of PET Film from the India entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for company under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis*, *i.e.*, less than 0.5 percent, no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and, (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash deposit rate will be the all others rate for this proceeding, 5.71 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

**Disclosure and Public Comment**

We will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. *See* 19 CFR 351.310. If a hearing is requested, the Department will notify interested parties of the hearing schedule.

Interested parties are invited to comment on the preliminary results of this review. Unless extended by the Department, interested parties must submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, must be filed not later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(c) and (d) (for a further discussion of case briefs and rebuttal briefs, respectively). Parties who submit case briefs or rebuttal briefs in this review are requested to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Executive summaries should be limited to five pages total, including footnotes.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, unless otherwise extended. *See* section 751(a)(3)(A) of the Act.

**Notification to Importers**

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 1, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011–19952 Filed 8–4–11; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–894]**

### Certain Tissue Paper Products From the People's Republic of China: Notice of Rescission of the 2009–2010 Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is rescinding the administrative review of the antidumping duty order on certain tissue paper products from the People's Republic of China (PRC) for the period of review (POR) of March 1, 2009, to February 28, 2010, with respect to Max Fortune (Vietnam) Paper Products Company Limited (MFVN) because MFVN had no sales of subject merchandise which entered the United States during the POR.

**DATES:** *Effective Date:* August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Brian Smith or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1766 or (202) 482–3773, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On April 6, 2011, the Department published the preliminary results of this administrative review. *See Certain Tissue Paper Products From the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 19049 (April 6, 2011) (*Preliminary Results*).

On May 20, 2011, MFVN and the petitioner [1] submitted case briefs. On May 27, 2011, the petitioner submitted its rebuttal brief. MFVN did not submit a rebuttal brief.

On May 31, 2011, MFVN withdrew its May 6, 2011, request for a hearing. No other party in this review requested a hearing.

On July 8 and 13, 2011, the Department held meetings with MFVN's and the petitioner's counsels, respectively, to discuss issues raised in their case briefs.[2]

**Rescission of Administrative Review**

In this administrative review, MFVN requested rescission of this review on the basis that it made no sales/shipments during the POR of tissue paper products produced from Chinese-origin jumbo rolls/sheets.[3] We determined in the *Preliminary Results,* as adverse facts available (AFA), that during the POR MFVN made shipments to the United States of tissue paper products produced using Chinese-origin jumbo rolls/sheets. Further, based on AFA, we preliminarily found that no substantial transformation is occurring as a result of further processing by MFVN in Vietnam and, thus, the country of origin for antidumping duty (AD) purposes of the tissue paper products produced by MFVN from Chinese-origin jumbo rolls/sheets is China. Consequently, we assigned MFVN a cash deposit rate of 112.64 percent.

Our *Preliminary Results* assumed that MFVN was the entity making the first sale for export to the United States of

[1] The petitioner is Seaman Paper Company of Massachusetts, Inc.

[2] *See* the Department's memoranda to the file entitled, ''Ex Parte Meeting with Counsel for Max Fortune (Vietnam) Paper Products Company, Limited,'' dated July 11, 2011, and ''Ex Parte Meeting with the Petitioner's Counsel,'' dated July 14, 2011.

[3] *See* Letter from MFVN, dated August 17, 2010.

the tissue paper products produced using Chinese-origin jumbo rolls/sheets. However, upon further review of the sales documentation on the record, we found that while MFVN physically ships the tissue paper it produces to the United States, MFVN's parent company in Hong Kong, Max Fortune Industrial Limited (MFHK), is the entity that sells it to the U.S. customer and, thus, is the ''exporter'' for AD purposes. The record evidence establishes that MFHK, among other things, negotiates the terms of the sale with and issues the commercial invoice to the U.S. customer for exports of tissue paper produced by MFVN.[4] This fact pattern is not inconsistent with the Department's AFA determination in the *Preliminary Results* that MFVN made shipments to the United States of tissue paper products produced from Chinese-origin jumbo rolls/sheets, but instead reflects the Department's determination upon further consideration of record evidence that MFVN is not the *exporter* of the subject merchandise.

In administrative reviews involving non-market-economy countries, the Department calculates cash deposit rates only for exporters, not producers. *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Administrative Review,* 72 FR 53527, 53530 (September 19, 2007) (rescinding review for company that was a producer, but not an exporter, of subject merchandise to the United States); unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission,* 73 FR 15479 (March 24, 2008). Accordingly, because MFVN was the producer, rather than the exporter, of the merchandise under review and, thus, had no sales of the subject merchandise to the United States during the POR, the Department is rescinding this administrative review with respect to MFVN.

In this case, the petitioner withdrew its request for review of the exporter MFHK, and we subsequently rescinded the review with respect to MFHK. *See Certain Tissue Paper Products From the People's Republic of China: Notice of Partial Rescission and Extension of Time Limit for Preliminary Results of 2009–2010 Administrative Review,* 75 FR 73040 (November 29, 2010). Therefore, given that MFHK is no longer subject to this review and there are no sales of subject merchandise by MFVN which entered the United States during the POR, we are rescinding this administrative review of MFVN in accordance with 19 CFR 351.213(d)(3).

[4] *See* Memorandum from to the File from Case Analysts entitled ''Verification of the Questionnaire Response of Max Fortune (Vietnam) Paper Products Co., Ltd. and Its Affiliates in the Anti-circumvention Inquiry and 2009–2010 Antidumping Duty Administrative Review of Certain Tissue Paper Products from the People's Republic of China,'' dated March 31, 2011, at exhibits 6A through 6F.

**Assessment**

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries, including those from the PRC-wide entity. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register**.

**Notification to Importers**

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping 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 the subsequent assessment of double antidumping duties.

**Notification Regarding Administrative Protective Orders**

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under 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 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.

This notice is published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: August 1, 2011.

**Christian Marsh,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2011–19923 Filed 8–4–11; 8:45 am]

BILLING CODE 3510–DS–P

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## DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–570–894]**

## Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**Final Determination**

We determine that certain tissue paper products (tissue paper) produced by Max Fortune (Vietnam) Paper Products Company, Limited (MFVN)[1] and exported to the United States are made from jumbo rolls and/or cut sheets of tissue paper produced in the People's Republic of China (PRC), and are circumventing the antidumping duty order on tissue paper from the PRC, as provided in section 781(b) of the Tariff Act of 1930, as amended (the Act).

**DATES:** Effective Date: August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Brian Smith or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–1766 or (202) 482–3773, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On April 6, 2011, the Department of Commerce (the Department) published in the **Federal Register** its affirmative preliminary determination that tissue paper produced by MFVN in Vietnam using Chinese-origin jumbo rolls and/or

[1] MFVN is a company located in Vietnam and is a wholly-owned subsidiary of Max Fortune Industrial Co., Ltd. (MFHK) located in Hong Kong. MFHK was the exporter of the tissue paper produced and shipped by MFVN to the United States during the analysis period of this inquiry. *See* Memorandum to the File from Case Analysts entitled ''Verification of the Questionnaire Response of Max Fortune (Vietnam) Paper Products Co., Ltd. and Its Affiliates in the Anti-circumvention Inquiry and 2009–2010 Antidumping Duty Administrative Review of Certain Tissue Paper Products from the People's Republic of China,'' dated March 31, 2011 (MFVN verification report), at exhibits 6A through 6F.

cut sheets and exported to the United States is circumventing the antidumping duty order on certain tissue paper products from the PRC (PRC Tissue Paper Order),[2] as provided in section 781(b) of the Act. *See Certain Tissue Paper Products From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order,* 76 FR 19043 (April 6, 2011) (*Preliminary Determination*).

On May 2, 2011, the International Trade Commission (ITC) notified the Department that consultations pursuant to section 781(e)(2) of the Act were not necessary.[3]

On May 20, 2011, MFVN submitted its case brief. The petitioner[4] did not submit a case brief. On May 27, 2011, the petitioner submitted its rebuttal brief.

On May 31, 2011, MFVN withdrew its May 6, 2011, request for a hearing. No other party in this review requested a hearing.

On July 8 and 13, 2011, the Department held meetings with counsels for MFVN and the petitioner to discuss the issues raised in MFVN's case brief.[5]

On July 14, 2011, Michaels Stores, Inc. (Michaels) filed an entry of appearance and subsequently requested, on July 15, 2011, a postponement of the final determination in order to submit information regarding its imports of tissue paper from Vietnam. On July 20, 2011, the Department informed Michaels that it was unable to grant its request because the deadlines for submitting new factual information and case/rebuttal briefs in this inquiry had passed.

On July 22, 2011, Michaels submitted another letter which the Department rejected on July 26, 2011, pursuant to 19 CFR 351.302(d), because it contained unsolicited, untimely new argument.

**Scope of the Antidumping Duty Order**

The tissue paper products subject to this order are cut-to-length sheets of tissue paper having a basis weight not exceeding 29 grams per square meter. Tissue paper products subject to this order may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die cut. The tissue paper subject to this order is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch. Subject tissue paper may be flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of tissue paper subject to this order may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.

The merchandise subject to this order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may be under one or more of several different subheadings, including: 4802.30; 4802.54; 4802.61; 4802.62; 4802.69; 4804.31.1000; 4804.31.2000; 4804.31.4020; 4804.31.4040; 4804.31.6000; 4804.39; 4805.91.1090; 4805.91.5000; 4805.91.7000; 4806.40; 4808.30; 4808.90; 4811.90; 4823.90; 4820.50.00; 4802.90.00; 4805.91.90; 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.[6]

Excluded from the scope of this order are the following tissue paper products: (1) Tissue paper products that are coated in wax, paraffin, or polymers, of a kind used in floral and food service applications; (2) tissue paper products that have been perforated, embossed, or die-cut to the shape of a toilet seat, *i.e.,* disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel or napkin stock, paper of a kind used for household or sanitary purposes, cellulose wadding, and webs of cellulose fibers (HTSUS 4803.00.20.00 and 4803.00.40.00).

**Scope of the Circumvention Inquiry**

The products covered by this inquiry are tissue paper products, as described above in the ''Scope of the Antidumping Duty Order'' section, which are produced in Vietnam by MFVN from Chinese-origin jumbo rolls and/or cut sheets of tissue paper, and exported to the United States.

**Statutory Provisions Regarding Circumvention**

Section 781(b) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting anti-circumvention inquiries under section 781(b)(1) of the Act, the Department analyzes the following criteria: (A) Merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

Section 781(b)(2) of the Act provides the criteria for determining whether the process of assembly or completion is minor or insignificant. These criteria are: (a) The level of investment in the foreign country; (b) the level of research and development in the foreign country; (c) the nature of the production process in the foreign country; (d) the extent of the production facilities in the foreign country; and (e) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316, at 893 (1994), provides some guidance with respect to these criteria. It explains that no single factor listed in section 781(b)(2) of the Act will be controlling. Accordingly, it is the Department's practice to evaluate each of the factors as they exist in the foreign country depending on the particular facts present in the

[2] *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 16223 (March 30, 2005) (*PRC Tissue Paper Order*).

[3] *See* Letter from James R. Holbein, Acting Secretary to the Commission, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated May 2, 2011.

[4] The petitioner is Seaman Paper Company of Massachusetts, Inc.

[5] *See* the Department's memoranda to the file entitled, ''*Ex Parte* Meeting with Counsel for Max Fortune (Vietnam) Paper Products Company, Limited,'' dated July 11, 2011, and ''*Ex Parte* Meeting with the Petitioner's Counsel,'' dated July 14, 2011.

[6] On January 30, 2007, at the direction of U.S. Customs and Border Protection (CBP), the Department added the following HTSUS classifications to the AD/CVD module for tissue paper: 4802.54.3100, 4802.54.6100, and 4823.90.6700. Also on July 14, 2011, at the direction of CBP, the Department added the following HTSUS classification to the AD/CVD module for tissue paper: 4811.90.9080. However, we note that the six-digit classifications for these numbers were already listed in the scope.

circumvention inquiry. Therefore, the importance of any one of the factors listed under section 781(b)(2) of the Act can vary from case to case depending on the particular circumstances unique to each circumvention inquiry.

Section 781(b)(3) of the Act further provides that, in determining whether to include merchandise assembled or completed in a foreign country in an antidumping duty order, the Department shall consider: (A) The pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise described in accordance with section 781(b)(1)(B) of the Act is affiliated with the person who uses the merchandise described in accordance with section 781(b)(1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States; and (C) whether imports into the foreign country of the merchandise described in accordance with section 781(b)(1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order.

**Summary of Analysis of Statutory Provisions**

We considered all of the comments submitted by the interested parties and find, pursuant to section 781(b) of the Act, that exports to the United States of tissue paper produced by MFVN using Chinese-origin jumbo rolls and/or cut sheets are circumventing the *PRC Tissue Paper Order.*

As we explained in the *Preliminary Determination,* based on the list of products MFVN provided in its questionnaire response, we find that the merchandise subject to this inquiry meets the written description of the products subject to the *PRC Tissue Paper Order* and is, therefore, of the same class or kind of merchandise as that subject to the PRC Tissue Paper Order, pursuant to section 781(b)(1)(A) of the Act. In addressing the other statutory criteria under sections 781(b)(1), (2), and (3) of the Act, we relied on facts available where the respondent failed to provide necessary, verifiable information.

In its questionnaire response, MFVN admitted that it was possible that it manufactured some tissue paper in Vietnam from PRC-origin jumbo rolls before and during 2007. MFVN also stated that its records before 2008 were incomplete and unreliable.[7] However, MFVN asserted that it could conclusively demonstrate that as of January 1, 2008, it did not convert any PRC-origin jumbo rolls and/or cut sheets of tissue paper in Vietnam into its own tissue paper products.[8] At verification, MFVN failed to provide the requested production and accounting records to show when it ceased using Chinese-origin jumbo rolls and/or cut sheets in its production of tissue paper products for export to the United States.[9] Accordingly, we conclude that MFVN impeded the conduct of this anti-circumvention inquiry by withholding the necessary verifiable information requested by the Department under section 776(a)(2) of the Act.

Furthermore, we conclude that MFVN failed to act to the best of its ability in providing this necessary information pursuant to section 776(b) of the Act. MFVN was expected to maintain the requested production and accounting records in the normal course of business and was required to maintain them under Vietnamese accounting law,[10] but did not do so.[11] Despite its claims, MFVN could not conclusively demonstrate that as of January 1, 2008, it did not convert any Chinese-origin jumbo rolls into tissue paper sold in the United States.[12] Moreover, although it claimed that it could accurately account for its inventory as of January 1, 2008,[13] the Department discovered at verification that MFVN withdrew Chinese-origin jumbo rolls from inventory in March 2010, but could not account for the ultimate destination or usage of those jumbo rolls in its books and records.[14] Therefore, the Department determined, as adverse facts available (AFA), that MFVN used Chinese-origin jumbo rolls and/or cut-sheets of tissue paper in its production of tissue paper for export to the United States from January 1, 2005, to December 31, 2007, and that MFVN continued to use such merchandise from inventory during that period to produce tissue paper for export on or after January 1, 2008. *See* Comments 1 and 3 of the Issues and Decision Memorandum (Decision Memo) accompanying this notice for further discussion of the application of AFA for purposes of the final determination in this inquiry.

In determining that MFVN used Chinese-origin jumbo rolls and/or cut-sheets of tissue paper in its production of tissue paper for export to the United States from January 1, 2005, to December 31, 2007, as AFA, we relied on information provided by the petitioner in its February 19, 2010, request for initiation of this anti-circumvention inquiry (February 19 submission), which showed that during the 2005–2007 period, MFVN imported a significant quantity of jumbo rolls from the PRC. MFVN did not provide any information on the record that contradicted the petitioner's information and, in fact, MFVN admitted in its questionnaire responses that ''it is possible that MFVN might have made {tissue paper} in Vietnam from jumbo rolls from the PRC during this time period.''[15] Further, Vietnamese Customs data provided to Department officials at verification covered entries during 2008 and afterward, and does not contradict the petitioner's pre-2008 data or MFVN's admission.[16] Moreover, MFVN did not provide pre-2008 Vietnamese Customs data at verification and there is no information on the record that contradicts the petitioner's pre-2008 data. Therefore, we consider this information to be corroborated to the extent practicable pursuant to section 776(c) of the Act.

Based on the above analysis, relying on AFA, we determine, pursuant to section 781(b)(1)(B) of the Act that MFVN completed tissue paper in Vietnam using jumbo rolls and/or cut sheets produced in the PRC. With respect to section 781(b)(1)(C) of the Act, we determine that the process of converting the jumbo rolls and/or cut sheets of tissue paper into finished tissue paper products in Vietnam is minor or insignificant, after taking into consideration all of the factors listed in section 781(b)(2) of the Act. *See* Comment 2 of the Decision Memo for further discussion. With respect to section 781(1)(D) of the Act, we determine that the value of the jumbo rolls and/or cut sheets of tissue paper MFVN used in its production is a significant portion of the value of the merchandise exported to the United States. *See* Comment 2 of the Decision Memo for further discussion.

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[7] *See* June 28, 2010, response to the Department's April 23, 2010, anti-circumvention questionnaire (June 28 Response) at pages 3 and 12.

[8] *See id.*

[9] *See* MFVN verification report at pages 2 and 40.

[10] For companies doing business in Vietnam, Vietnamese regulations require companies such as MFVN to retain such records for up to 10 years. *See* Memorandum to the File dated March 31, 2011 which contains the following document, ''Decree No. 129/2004/ND–CP of May 31, 2004 Detailing and Guiding the Implementation of a Number of Articles of the Accounting Law, Applicable to Business Activities,'' issued by the Government of the Socialist Republic of Vietnam on May 31, 2004.

[11] *See* MFVN verification report at page 2.

[12] *See id.* at pages 2 and 35–36.

[13] *See* June 28 Response at pages 4 and 12.

[14] *See* MFVN verification report at pages 2 and 40.

[15] *See* MFVN's June 28 Response at pages 4 and 12.

[16] *See* MFVN verification report at pages 3, 23–24, and 32–33.

We note that we relied on secondary information in addressing section 781(b)(1)(C) of the Act. Specifically, because MFVN did not provide the Department with sufficient information to reach a conclusion based solely on its own data under this provision, we relied, in part, on information contained in the petitioner's February 19 submission to conclude that the tissue paper completion process in Vietnam is minor or insignificant.[17] MFVN did not provide any information on the record of this inquiry to contradict this information, and there is no other information on the record that contradicts this information. Moreover, the results of a prior circumvention inquiry of the *PRC Tissue Paper Order* corroborates the Department's conclusion as AFA that the processing in Vietnam is minor or insignificant, as the same conclusion was reached by the Department in that prior inquiry which also involved allegations of Chinese-origin jumbo rolls being converted to cut-to-length tissue paper in Vietnam. *See Certain Tissue Paper Products from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination,* 73 FR 21580, 21582–21587 (April 22, 2008) (*Quijiang Prelim*) (unchanged in *Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 73 FR 57591 (October 3, 2008) (*Quijiang Final*)). Furthermore, the Department is unaware of any available independent sources it could use to corroborate this information. Accordingly, we consider the petitioner's information relied upon by the Department as AFA to reach a finding under section 781(b)(1)(C) of the Act corroborated to the extent practicable under section 776(c) of the Act. *See* Comment 3 of the Decision Memo for further discussion of the Department's corroboration of secondary information used as AFA as part of its analysis under section 781(b)(1)(C) of the Act.

Similarly, we relied on secondary information in addressing section 781(b)(1)(D) of the Act. Because MFVN did not provide the Department with sufficient information to determine whether the value of the jumbo rolls and/or cut sheets is a significant portion of the value of MFVN's finished tissue paper products exported to the United States, we relied on the data in the petitioner's February 19 submission[18] as AFA, to make this determination. MFVN did not provide any information on the record of this inquiry to contradict this information, and there is no other information on the record to contradict it. Additionally, as in the case of our determination with respect to the Vietnamese processing, pursuant to section 776(c) of the Act, we corroborated to the extent practicable the petitioner's data based on our findings in the above-referenced prior anti-circumvention inquiry of the PRC Tissue Paper Order. *See Quijiang Prelim,* 73 FR at 21582–21587 (unchanged in *Quijiang Final*). Furthermore, the Department is unaware of any available independent sources it could use to corroborate this information. Accordingly, we consider the petitioner's information relied upon by the Department as AFA to reach a finding under section 781(b)(1)(D) of the Act corroborated to the extent practicable under section 776(c) of the Act. *See* Comment 3 of the Decision Memo for further discussion.

As a result of the above analysis, we affirm our preliminary determination that action by the Department is warranted in this case to prevent evasion of the *PRC Tissue Paper Order,* pursuant to section 781(b)(1)(E) of the Act.

Furthermore, based on the additional factors we must consider under section 781(b)(3) of the Act, we find that MFVN's pattern of trade, affiliations, and level of importation of Chinese-origin tissue paper jumbo rolls/sheets support an affirmative finding of circumvention. *See* Comment 2 of the Decision Memo for the Department's complete final analysis of the criteria under section 781(b) of the Act.

Based on our overall analysis of the statutory provisions regarding circumvention via completion or assembly in a foreign country, we conclude, pursuant to section 781(b) of the Act, that exports to the United States of tissue paper products produced from Chinese-origin jumbo rolls and/or cut sheets which are further processed in Vietnam by MFVN are circumventing the *PRC Tissue Paper Order.*

All issues raised by the interested parties to which we have responded are listed in the Appendix to this notice and addressed in the Decision Memo, which is hereby adopted by this notice. Parties can find a complete discussion of the issues raised in this inquiry and the corresponding recommendation in this public memorandum, which is on file in the Central Records Unit (CRU) of the main Department of Commerce building. In addition, a complete version of the Decision Memo can be accessed directly on the Internet at *http://ia.ita.doc.gov/.* The paper copy and electronic copy of the Decision Memo are identical in content.

**Continuation of Suspension of Liquidation**

In accordance with sections 735(c) and 781(b) of the Act and 19 CFR 225(i)(3), we will direct CBP to suspend liquidation and require cash deposits of estimated duties, at the rate applicable to the exporter, on all unliquidated entries of tissue paper produced by MFVN that were entered, or withdrawn from warehouse, for consumption on or after March 29, 2010, the date of initiation of the circumvention inquiry.[19]

Should the Department conduct an administrative review in the future, and determine in the context of that review that MFVN has not produced for export tissue paper using Chinese-origin jumbo rolls and/or cut sheets, the Department will consider initiating a changed circumstances review pursuant to section 751(b) of the Act to determine if the continued suspension of all tissue paper produced by MFVN is warranted.

**Notice to Parties**

This notice serves as 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 APO in accordance with section 351.305 of the Department's regulations. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This final affirmative circumvention determination is published in accordance with section 781(b) of the Act and 19 CFR 351.225.

[17] *See* the petitioner's February 19 submission at pages 34–35 and Exhibit 16.

[18] *See* the petitioner's February 19 submission at pages 34–36.

[19] In the *Preliminary Determination,* at 76 FR 19048, we stated that we would direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the PRC-wide rate of 112.64 percent, on all unliquidated entries of tissue paper produced by MFVN "and/or exported by MFVN" that was entered, or withdrawn from warehouse, for consumption on or after March 29, 2010, the date of initiation of the circumvention inquiry. However, in this inquiry, the Department is concerned only with merchandise produced by MFVN, irrespective of the exporter. Therefore, we have clarified our instructions for purposes of this final determination. *See* Comment 5 of the Decision Memo for further discussion.

Dated: August 1, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

## Appendix I

### Discussion of the Issues

*Comment 1:* Whether the Application of Fact Available (FA)/Adverse Facts Available (AFA) Is Lawful.
*Comment 2:* Whether the Department's Circumvention Analysis Properly Addressed the Statutory Criteria.
*Comment 3:* Whether the Department's Use of FA/AFA Is Uncorroborated, Unreasonable and Punitive.
*Comment 4:* Whether the Remedy Imposed Is Lawful.
*Comment 5:* Whether the Assignment of the PRC-Wide Rate as AFA Is Appropriate.

[FR Doc. 2011–19921 Filed 8–4–11; 8:45 am]

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# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–588–850, A–588–851, A–485–805]**

## Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Japan; Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Japan and Romania: Final Results of the Expedited Second Five-Year Sunset Reviews of the Antidumping Duty Orders

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* August 5, 2011.

**SUMMARY:** On April 1, 2011, the Department of Commerce (''Department'') initiated the second sunset reviews of the antidumping duty orders on certain large diameter carbon and alloy seamless standard, line and pressure pipe (''large diameter pipe'') from Japan and certain small diameter carbon and alloy seamless standard, line and pressure pipe (''small diameter pipe'') from Japan and Romania. The Department has conducted expedited sunset reviews of these orders. As a result of these reviews, the Department finds that revocation of the antidumping duty orders would likely lead to a continuation or recurrence of dumping at the margins identified in the ''Final Results of Review'' section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Mary Kolberg, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–1785.

**SUPPLEMENTARY INFORMATION:**

### Background

On April 1, 2011, the Department published the notice of initiation of the second sunset reviews of the antidumping duty orders on large diameter pipe from Japan and small diameter pipe from Japan and Romania pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-Year (''Sunset'') Review,* 76 FR 18163 (April 1, 2011). The Department received a notice of intent to participate in each of these reviews from United States Steel Corporation (''Petitioner''), within the deadline specified in 19 CFR 351.218(d)(1)(i). Petitioner claimed interested party status for each of these reviews under section 771(9)(C) of the Act, as a manufacturer of the domestic-like product in the United States.

On May 2, 2011, the Department received a complete substantive response from Petitioner for each of the reviews within the deadline specified in 19 CFR 351.218(d)(3)(i). We received no substantive responses from any respondent interested parties. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted expedited sunset reviews of these antidumping duty orders.

### Scope of the Orders

*Large Diameter Pipe From Japan*

The products covered by this order are large diameter seamless carbon and alloy (other than stainless) steel standard, line, and pressure pipes produced, or equivalent, to the American Society for Testing and Materials (''ASTM'') A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, and the American Petroleum Institute (''API'') 5L specifications and meeting the physical parameters described below, regardless of application. The scope of this order also includes all other products used in standard, line, or pressure pipe applications and meeting the physical parameters described below, regardless of specification, with the exception of the exclusions discussed below. Specifically included within the scope of this order are seamless pipes greater than 4.5 inches (114.3 mm) up to and including 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (hot finished or cold-drawn), end finish (plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish.

The seamless pipes subject to this order are currently classifiable under the subheadings 7304.10.10.30, 7304.10.10.45, 7304.10.10.60, 7304.10.50.50, 7304.19.10.30, 7304.19.10.45, 7304.19.10.60, 7304.19.50.50, 7304.31.60.10, 7304.31.60.50, 7304.39.00.04, 7304.39.00.06, 7304.39.00.08, 7304.39.00.36, 7304.39.00.40, 7304.39.00.44, 7304.39.00.48, 7304.39.00.52, 7304.39.00.56, 7304.39.00.62, 7304.39.00.68, 7304.39.00.72, 7304.51.50.15, 7304.51.50.45, 7304.51.50.60, 7304.59.20.30, 7304.59.20.55, 7304.59.20.60, 7304.59.20.70, 7304.59.60.00, 7304.59.80.30, 7304.59.80.35, 7304.59.80.40, 7304.59.80.45, 7304.59.80.50, 7304.59.80.55, 7304.59.80.60, 7304.59.80.65, and 7304.59.80.70 of the Harmonized Tariff Schedule of the United States (''HTSUS'').

Specifications, Characteristics, and Uses: Large diameter seamless pipe is used primarily for line applications such as oil, gas, or water pipeline, or utility distribution systems. Seamless pressure pipes are intended for the conveyance of water, steam, petrochemicals, chemicals, oil products, natural gas and other liquids and gasses in industrial piping systems. They may carry these substances at elevated pressures and temperatures and may be subject to the application of external heat. Seamless carbon steel pressure pipe meeting the ASTM A–106 standard may be used in temperatures of up to 1,000 degrees Fahrenheit, at various American Society of Mechanical Engineers (''ASME'') code stress levels. Alloy pipes made to ASTM A–335 standard must be used if temperatures and stress levels exceed those allowed for ASTM A–106. Seamless pressure pipes sold in the United States are commonly produced to the ASTM A–106 standard. Seamless standard pipes are most commonly produced to the ASTM A–53 specification and generally are not intended for high temperature service.

They are intended for the low temperature and pressure conveyance of water, steam, natural gas, air and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipes (depending on type and code) may carry liquids at elevated temperatures but must not exceed relevant ASME code requirements. If exceptionally low temperature uses or conditions are anticipated, standard pipe may be manufactured to ASTM A–333 or ASTM A–334 specifications.

Seamless line pipes are intended for the conveyance of oil and natural gas or other fluids in pipe lines. Seamless line pipes are produced to the API 5L specification. Seamless water well pipe (ASTM A–589) and seamless galvanized pipe for fire protection uses (ASTM A–795) are used for the conveyance of water.

Seamless pipes are commonly produced and certified to meet ASTM A–106, ASTM A–53, API 5L–B, and API 5L–X42 specifications. To avoid maintaining separate production runs and separate inventories, manufacturers typically triple or quadruple certify the pipes by meeting the metallurgical requirements and performing the required tests pursuant to the respective specifications. Since distributors sell the vast majority of this product, they can thereby maintain a single inventory to service all customers.

The primary application of ASTM A–106 pressure pipes and triple or quadruple certified pipes in large diameters is for use as oil and gas distribution lines for commercial applications. A more minor application for large diameter seamless pipes is for use in pressure piping systems by refineries, petrochemical plants, and chemical plants, as well as in power generation plants and in some oil field uses (on shore and off shore) such as for separator lines, gathering lines and metering runs. These applications constitute the majority of the market for the subject seamless pipes. However, ASTM A–106 pipes may be used in some boiler applications.

The scope of this order includes all seamless pipe meeting the physical parameters described above and produced to one of the specifications listed above, regardless of application, with the exception of the exclusions discussed below, whether or not also certified to a non-covered specification. Standard, line, and pressure applications and the above-listed specifications are defining characteristics of the scope of this review. Therefore, seamless pipes meeting the physical description above, but not produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, and API 5L specifications shall be covered if used in a standard, line, or pressure application, with the exception of the specific exclusions discussed below.

For example, there are certain other ASTM specifications of pipe which, because of overlapping characteristics, could potentially be used in ASTM A–106 applications. These specifications generally include ASTM A–161, ASTM A–192, ASTM A–210, ASTM A–252, ASTM A–501, ASTM A–523, ASTM A–524, and ASTM A–618. When such pipes are used in a standard, line, or pressure pipe application, such products are covered by the scope of this order.

Specifically excluded from the scope of this order are: A. Boiler tubing and mechanical tubing, if such products are not produced to ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, and API 5L specifications and are not used in standard, line, or pressure pipe applications. B. Finished and unfinished oil country tubular goods (''OCTG''), if covered by the scope of another antidumping duty order from the same country. If not covered by such an OCTG order, finished and unfinished OCTG are included in this scope when used in standard, line or pressure applications. C. Products produced to the A–335 specification unless they are used in an application that would normally utilize ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, and API 5L specifications. D. Line and riser pipe for deepwater application, *i.e.,* line and riser pipe that is (1) Used in a deepwater application, which means for use in water depths of 1,500 feet or more; (2) intended for use in and is actually used for a specific deepwater project; (3) rated for a specified minimum yield strength of not less than 60,000 psi; and (4) not identified or certified through the use of a monogram, stencil, or otherwise marked with an API specification (*e.g.,* API 5L).

With regard to the excluded products listed above, the Department will not instruct U.S. Customs and Border Protection (''CBP'') to require end-use certification until such time as Petitioner or other interested parties provide to the Department a reasonable basis to believe or suspect that the products are being utilized in a covered application. If such information is provided, we will require end-use certification only for the product(s) (or specification(s)) for which evidence is provided that such products are being used in a covered application as described above. For example, if, based on evidence provided by Petitioner, the Department finds a reasonable basis to believe or suspect that seamless pipe produced to the A–335 specification is being used in an A–106 application, we will require end-use certifications for imports of that specification. Normally we will require only the importer of record to certify to the end use of the imported merchandise. If it later proves necessary for adequate implementation, we may also require producers who export such products to the United States to provide such certification on invoices accompanying shipments to the United States.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise subject to this scope is dispositive.

**Small Diameter Pipe From Japan and Romania**

The products covered by these orders include small diameter seamless carbon and alloy (other than stainless) steel standard, line, and pressure pipes and redraw hollows produced, or equivalent, to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–335, ASTM A–589, ASTM A–795, and the API 5L specifications and meeting the physical parameters described below, regardless of application. The scope of these orders also includes all products used in standard, line, or pressure pipe applications and meeting the physical parameters described below, regardless of specification. Specifically included within the scope of these orders are seamless pipes and redraw hollows, less than or equal to 4.5 inches (114.3 mm) in outside diameter, regardless of wall-thickness, manufacturing process (hot finished or cold-drawn), end finish (plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish.

The seamless pipes subject to these orders are currently classifiable under the subheadings 7304.10.10.20, 7304.10.50.20, 7304.19.10.20, 7304.19.50.20, 7304.31.30.00, 7304.31.60.50, 7304.39.00.16, 7304.39.00.20, 7304.39.00.24, 7304.39.00.28, 7304.39.00.32, 7304.51.50.05, 7304.51.50.60, 7304.59.60.00, 7304.59.80.10, 7304.59.80.15, 7304.59.80.20, and 7304.59.80.25 of the HTSUS.

Specifications, Characteristics, and Uses: Seamless pressure pipes are intended for the conveyance of water, steam, petrochemicals, chemicals, oil products, natural gas and other liquids and gasses in industrial piping systems. They may carry these substances at elevated pressures and temperatures and may be subject to the application of external heat. Seamless carbon steel pressure pipe meeting the ASTM A–106 standard may be used in temperatures of up to 1000 degrees Fahrenheit, at various ASME code stress levels. Alloy pipes made to ASTM A–335 standard must be used if temperatures and stress levels exceed those allowed for ASTM

A–106. Seamless pressure pipes sold in the United States are commonly produced to the ASTM A–106 standard.

Seamless standard pipes are most commonly produced to the ASTM A–53 specification and generally are not intended for high temperature service. They are intended for the low temperature and pressure conveyance of water, steam, natural gas, air and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipes (depending on type and code) may carry liquids at elevated temperatures but must not exceed relevant ASME code requirements. If exceptionally low temperature uses or conditions are anticipated, standard pipe may be manufactured to ASTM A–333 or ASTM A–334 specifications.

Seamless line pipes are intended for the conveyance of oil and natural gas or other fluids in pipe lines. Seamless line pipes are produced to the API 5L specification.

Seamless water well pipe (ASTM A–589) and seamless galvanized pipe for fire protection uses (ASTM A–795) are used for the conveyance of water.

Seamless pipes are commonly produced and certified to meet ASTM A–106, ASTM A–53, API 5L–B, and API 5L–X42 specifications. To avoid maintaining separate production runs and separate inventories, manufacturers typically triple or quadruple certify the pipes by meeting the metallurgical requirements and performing the required tests pursuant to the respective specifications. Since distributors sell the vast majority of this product, they can thereby maintain a single inventory to service all customers.

The primary application of ASTM A–106 pressure pipes and triple or quadruple certified pipes is in pressure piping systems by refineries, petrochemical plants, and chemical plants. Other applications are in power generation plants (electrical-fossil fuel or nuclear), and in some oil field uses (on shore and off shore) such as for separator lines, gathering lines and metering runs. A minor application of this product is for use as oil and gas distribution lines for commercial applications. These applications constitute the majority of the market for the subject seamless pipes. However, ASTM A–106 pipes may be used in some boiler applications.

Redraw hollows are any unfinished pipe or ''hollow profiles'' of carbon or alloy steel transformed by hot rolling or cold drawing/hydrostatic testing or other methods to enable the material to be sold under ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–335, ASTM A–589, ASTM A–795, and API 5L specifications.

The scope of these orders includes all seamless pipe meeting the physical parameters described above and produced to one of the specifications listed above, regardless of application, with the exception of the specific exclusions discussed below, and whether or not also certified to a non-covered specification. Standard, line, and pressure applications and the above-listed specifications are defining characteristics of the scope of the orders. Therefore, seamless pipes meeting the physical description above, but not produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–335, ASTM A–589, ASTM A–795, and API 5L specifications shall be covered if used in a standard, line, or pressure application, with the exception of the specific exclusions discussed below.

For example, there are certain other ASTM specifications of pipe which, because of overlapping characteristics, could potentially be used in ASTM A–106 applications. These specifications generally include ASTM A–161, ASTM A–192, ASTM A–210, ASTM A–252, ASTM A–501, ASTM A–523, ASTM A–524, and ASTM A–618. When such pipes are used in a standard, line, or pressure pipe application, such products are covered by the scope of these orders.

Specifically excluded from the scope of these orders are boiler tubing and mechanical tubing, if such products are not produced to ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–335, ASTM A–589, ASTM A–795, and API 5L specifications and are not used in standard, line, or pressure pipe applications. In addition, finished and unfinished OCTG are excluded from the scope of these orders, if covered by the scope of another antidumping duty order from the same country. If not covered by such an OCTG order, finished and unfinished OCTG are included in these scopes when used in standard, line or pressure applications.

With regard to the excluded products listed above, the Department will not instruct CBP to require end-use certification until such time as Petitioner or other interested parties provide to the Department a reasonable basis to believe or suspect that the products are being used in a covered application. If such information is provided, we will require end-use certification only for the product(s) (or specification(s)) for which evidence is provided that such products are being used in covered applications as described above. For example, if, based on evidence provided by Petitioner, the Department finds a reasonable basis to believe or suspect that seamless pipe produced to the A–161 specification is being used in a standard, line or pressure application, we will require end-use certifications for imports of that specification. Normally we will require only the importer of record to certify to the end use of the imported merchandise. If it later proves necessary for adequate implementation, we may also require producers who export such products to the United States to provide such certification on invoices accompanying shipments to the United States.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise under these orders is dispositive.

## Analysis of Comments Received

All issues raised in these reviews are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') 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, which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the orders were revoked. Parties can find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit in room 7046 of the main Commerce building.

In addition, a complete version of the Decision Memorandum 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.

## Final Results of Review

Pursuant to sections 752(c)(1) and (3) of the Act, we determine that revocation of the antidumping duty order on large diameter pipe from Japan and the antidumping orders on small diameter pipe from Japan and Romania would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

| Manufacturers/producers/ exporters | Margin (percent) |
|---|---|
| Large Diameter Pipe from Japan: | |
| Nippon Steel Corporation | 107.80 |
| Kawasaki Steel Corporation | 107.80 |
| Sumitomo Metal Industries, Ltd | 107.80 |
| All Others | 68.88 |
| Small Diameter Pipe from Japan: | |
| Nippon Steel Corporation | 106.07 |
| Kawasaki Steel Corporation | 106.07 |
| Sumitomo Metal Industries, Ltd | 106.07 |
| All Others | 70.43 |
| Small Diameter Pipe from Romania: | |
| Metal Business International S.R.L | 11.08 |
| S.C. Petrotub S.A | 11.08 |
| Sota Communication Company | 15.15 |
| S.C. Silcotub | 15.15 |
| All Others | 13.06 |

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: July 29, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–533–825]**

### Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Countervailing Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review under the countervailing duty (CVD) order on polyethylene terephthalate film, sheet and strip (PET Film) from India. This review covers one respondent, Ester Industries Ltd. (Ester), a producer and exporter of PET Film from India.

We preliminarily determine that Ester has benefitted from countervailable subsidies provided on the production and export of PET Film from India. *See* the ''Preliminary Results of Administrative Review'' section, below. If the final results remain the same as the preliminary results of this review, we intend to instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties. Interested parties are invited to comment on the preliminary results of this administrative review. *See* the ''Disclosure and Public Hearing'' section of this notice, below.

**DATES:** *Effective Date:* August 5, 2011.

**FOR FURTHER INFORMATION CONTACT:** Toni Page or Elfi Blum, 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) 482–1398 or (202) 482–0197, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On July 1, 2002, the Department published in the **Federal Register** the CVD order on PET Film from India. *See Notice of Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India,* 67 FR 44179 (July 1, 2002). On July 1, 2010, the Department published a notice of opportunity to request an administrative review of the countervailing duty order on PET Film from India covering the period January 1, 2009, through December 31, 2009 (POR). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 38074 (July 1, 2010). The Department received a request for review from the petitioners (Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc.) and two companies, Ester and SRF Limited. On August 31, 2010, the Department published a notice of initiation of administrative review with respect to Ester and SRF Limited. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review,* 75 FR 53274 (August 31, 2010). On October 1, 2010, SRF Limited withdrew its request for an administrative review. On July 7, 2011, the Department published a rescission, in part, with respect to SRF Limited. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Rescission, in Part, of Countervailing Duty Administrative Review,* 76 FR 39855 (July 7, 2011).

The Department issued the initial questionnaires to the Government of India (GOI), Ester, and SRF Limited on September 15, 2010. Ester submitted its questionnaire response on October 20, 2010, while the GOI submitted its questionnaire response on October 21, 2010. The Department issued its first supplemental questionnaires to the GOI and Ester on February 16, 2011. On March 11, 2011, Ester submitted its first supplemental questionnaire response. The GOI filed its first supplemental questionnaire response after the deadline established by the Department. Because the GOI missed the filing deadline and did not request a timely extension of the filing deadline, the Department rejected the GOI's late filing and no further supplemental questionnaires have been sent to the GOI. The Department issued a second supplemental questionnaire to Ester on June 16, 2011 and received the company's second supplemental questionnaire response on July 5, 2011.

On March 28, 2011, the Department extended the deadline for the preliminary results of the countervailing duty administrative review from April 2, 2011 to August 1, 2011. *See Polyethylene Terephthalate Film, Sheet, and Strip From India: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review,* 76 FR 18156 (April 1, 2011).

On July 20, 2011, petitioners filed pre-preliminary comments regarding Ester's data.

### Scope of the Order

The products covered by the countervailing duty order are all gauges of raw, pretreated, or primed Polyethylene Terephthalate Film, Sheet and Strip, whether extruded or coextruded. 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 of more than 0.00001 inches thick. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the countervailing duty order is dispositive.

### Period of Review

This countervailing duty administrative review covers the period

January 1, 2009, through December 31, 2009.

**Subsidies Valuation Information**

*Allocation Period*

Under 19 CFR 351.524(d)(2)(i), we will presume the allocation period for non-recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 2006 Class Life Asset Depreciation Range System, as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company-specific AUL or country-wide AUL for the industry under investigation is significant, pursuant to 19 CFR 351.524(d)(2)(i) and (ii). In the IRS Tables, PET Film falls under the category ''Manufactured Chemicals and Allied Products.'' For that category, the IRS tables specify a class life of 9.5 years, which is rounded to establish an AUL of 10 years.

In the investigation period of this case, Ester rebutted the presumption and the Department determined to apply a company-specific AUL of 18 years. *See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India,* 67 FR 34905 (May 16, 2002) (*PET Film Final Determination*), and accompanying Issues and Decision Memorandum, at ''Allocation Period.'' In the instant administrative review, Ester argues that the Department should adjust its 18 year company-specific AUL to 20 years for any non-recurring subsidies received after the period of investigation (POI). For the preliminary results of this countervailing duty administrative review, the Department determines that Ester has not provided the type of information required to establish that its AUL should be changed in accordance with the Department's regulations as set forth in 19 CFR 351.524(d)(2)(i) and (iii) and that its proposed AUL should not be used to determine the allocation period for non-recurring subsidies received after the POI . Therefore, the Department will continue to use the original company-specific AUL of 18 years that Ester demonstrated in the investigation to allocate all non-recurring subsidies.

**Benchmark Interest Rates and Discount Rates**

For programs requiring the application of a benchmark interest rate or discount rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company would pay on a comparable commercial loan that the company could obtain on the market. Also, 19 CFR 351.505(a)(3)(i) states that when selecting a comparable commercial loan that the recipient ''could actually obtain on the market'' the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR 351.505(a)(3)(ii).

Pursuant to 19 CFR 351.505(a)(2)(iv), if a program under review is a government provided, short-term loan program, the preference would be to use a company-specific annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken out, weighted by the principal amount of each loan. For this review, the Department required a rupee-denominated short-term loan benchmark rate to determine benefits received under the Pre-Shipment and Post-Shipment Export Financing program. For further information regarding this program, *see* the ''Pre-Shipment and Post-Shipment Export Financing'' section below.

In prior reviews of this case, the Department determined that Inland Bill Discounting (IBD) loans are more comparable to pre- and post-shipment export financing loans than other types of rupee-denominated short-term loans. *See, e.g., Notice of Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India,* 70 FR 46483, 46485 (August 10, 2005) (*PET Film Preliminary Results of 2003 Review*) unchanged in *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India,* 71 FR 7534 (February 13, 2006), and accompanying Issues and Decision Memorandum at ''Benchmarks for Loans and Discount Rate'' (*PET Film Final Results of 2003 Review*).

In the *Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India,* 66 FR 53389, 53390–91 (October 22, 2001), at ''Benchmarks for Loans and Discount Rate,'' unchanged in *PET Film Final Determination,* the Department determined that, in the absence of IBD loans, cash credit (CC) loans are the next most comparable type of short-term loans to pre-shipment and post-shipment export financing. Like pre-shipment export financing, CC loans are denominated in rupees and take the form of a line of credit which can be drawn down by the recipient. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Ester did not obtain IBD loans during the POR; however, it did take out CC short-term loans during the POR. Therefore, for these preliminary results, we used the weighted average interest rate (derived from the amount of interest paid by Ester on its rupee-denominated short-term CC loans) as the benchmark for Ester's pre- and post-shipment export financing.

Pursuant to 19 CFR 351.505(a)(2)(iii), in selecting a comparable loan if a program under review is a government provided, long-term loan program, the preference would be to use a loan the terms of which were established during, or immediately before, the year in which the terms of the government-provided loan were established. Pursuant to 19 CFR 351.505(a)(2)(ii) the Department will not consider a loan provided by a government-owned special purpose bank to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan. The Department has previously determined that the Industrial Development Bank of India (IDBI) is a government-owned special purpose bank. *See PET Film Final Results of 2003 Review,* and accompanying Issues and Decision Memorandum, at Comment 3. Further, the Department previously has determined that the Industrial Finance Corporation of India (IFCI) and the Export-Import Bank of India (EXIM) are government-owned special purpose banks. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review,* 73 FR 7708 (February 11, 2008), and accompanying Issues and Decision Memorandum at ''Benchmark Interest Rates and Discount Rates.'' As such, the Department does not use loans from the IDBI, IFCI, or EXIM, if reported by the respondents, as a basis for a commercial loan benchmark.

In this review, Ester had comparable commercial long-term rupee-denominated loans for some of the required years which the Department was able to use for long-term benchmarks. However, for the years which we did not have company-specific loan information, and where the relevant information was on the record, we relied on comparable long-term rupee-denominated benchmark interest rates from the immediately preceding year as directed by 19 CFR 351.505(a)(2)(iii). When there were no comparable long-term rupee-denominated loans from commercial banks during either the year under consideration or the preceding year, we used national average long-term interest rates, pursuant to 19 CFR 351.505(a)(3)(ii), from the International Monetary Fund's publication International Financial Statistics (*IMF Statistics*).

Ester received exemptions from import duties on the importation of capital equipment under the Export Promotion Capital Goods Scheme (EPCGS) program. As discussed in more detail below, Ester had not fulfilled its export obligation for certain EPCGS licenses. We treat EPCGS licenses with unfulfilled export obligations as interest-free contingent liability loans *See, e.g., PET Film Preliminary Results of 2003 Review,* 70 FR at 46488, unchanged in *PET Film Final Results of 2003 Review.* For the EPCGS licenses with unfulfilled export obligations, the Department used as long-term benchmarks, Ester's long-term loans from the required year or the preceding year as well as interest rates from *IMF Statistics,* as described above.

Finally, we determine grants to be non-recurring benefits in accordance with 19 CFR 351.524; thus, the Department must identify an appropriate discount rate for purposes of allocating these non-recurring benefits over time in accordance with 19 CFR 351.524(d)(3). The regulations provide several options in order of preference. The first among these is the cost of long-term fixed-rate loans of the firm in question for each year in which the government agreed to provide the non-recurring subsidies excluding any loans which have been determined to be countervailable and excluding loans from government banks. As the second option, the regulations direct us to use the average annual cost of long-term, fixed-rate loans in the country in question. Thus, for those years for which Ester did not report any long-term fixed-rate commercial loans, we used the yearly average long-term lending rate in India from the *IMF Statistics* as the discount rate.

**Denominator**

When selecting an appropriate denominator for use in calculating the *ad valorem* subsidy rate, the Department considers the basis for the respondent's receipt of benefits under each program at issue. As discussed in further detail below, we preliminarily determine that the benefits received by Ester under all of the programs found countervailable were contingent upon export performance. Therefore, for our calculations for EPCGS benefits, we will use total export sales inclusive of deemed exports as the denominator. Because DEPS and Pre-Shipment and Post-Shipment Export Financing require that the recipient demonstrate physical exports, we used total export sales net of deemed exports. *See* 19 CFR 351.525(b)(2); *see also Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Countervailing Duty New Shipper Review,* 76 FR 30910 (May 27, 2011), and accompanying Issues and Decision Memorandum at the ''Denominator'' section. In addition, the Department has previously found that exporters qualify for Post-Shipment Export Financing by presenting their export documents to the lending bank. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review,* 72 FR 6530 (Februrary 12, 2007) and accompanying Issues and Decision Memorandum at ''Pre-Shipment and Post-Shipment Export Financing.'' Therefore, we used Ester's total export sales of subject merchandise to the United States as the denominator for Post-Shipment Export Financing.

*A. Programs Preliminarily Determined To Be Countervailable*

1. Pre-Shipment and Post-Shipment Export Financing

The Reserve Bank of India (RBI), through commercial banks, provides short-term pre-shipment financing, or ''packing credits,'' to exporters. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre-shipment loans for working capital purposes (*i.e.,* purchasing raw materials, warehousing, packing, transportation, *etc.*) for merchandise destined for exportation. Companies may also establish pre-shipment credit lines upon which they draw as needed. Limits on credit lines are established by commercial banks and are based on a company's creditworthiness and past export performance. Credit lines may be denominated either in Indian rupees or in a foreign currency. Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI.

Post-shipment export financing consists of loans in the form of discounted trade bills or advances by commercial banks. Exporters qualify for this program by presenting their export documents to the lending bank. The credit covers the period from the date of shipment of the goods to the date of realization of the proceeds from the sale to the overseas customer. Under the Foreign Exchange Management Act of 1999, exporters are required to realize proceeds from their export sales within 180 days of shipment. Post-shipment financing is, therefore, a working capital program used to finance export receivables. In general, post-shipment loans are granted for a period of not more than 180 days, and may be obtained in Indian rupees and in foreign currencies. In the original investigation, the Department determined that the pre-shipment and post-shipment export financing programs conferred countervailable subsidies on the subject merchandise because: (1) The provision of the export financing constitutes a financial contribution pursuant to section 771(5)(D)(i) of the Tariff Act of 1930, as amended (the Act) as a direct transfer of funds in the form of loans; 2) the provision of the export financing confers benefits on the respondents under section 771(5)(E)(ii) of the Act to the extent that the interest rates provided under these programs are lower than comparable commercial loan interest rates; and (3) these programs are specific under section 771(5A)(B) of the Act because they are contingent upon export performance. *See PET Film Final Determination* at ''Pre-Shipment and Post-Shipment Export Financing.'' There is no new information or evidence of changed circumstances that would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

Ester reported receiving both pre- and post-shipment export financing during the POR. The benefit conferred by the pre-shipment and post-shipment loans is the difference between the amount of interest the company paid on the government loan and the amount of interest it would have paid on a comparable commercial loan (*i.e.,* the short-term benchmark). Because pre-shipment loans are tied to a company's total physical exports rather than physical exports of subject merchandise, we calculated the subsidy rate for these loans by dividing the total benefit by the value of Ester's total exports, net of deemed exports, during the POR. *See* 19

CFR 351.525(b)(2). Because post-shipment loans are tied to specific shipments of a particular product to a particular country, we divided the total benefit from post-shipment loans tied to exports of subject merchandise to the United States by the value of total exports of subject merchandise to the United States during the POR pursuant to 19 CFR 351.525(b)(4). On this basis, we preliminarily determine the countervailable subsidy from pre- and post-shipment export financing for Ester to be 7.72 percent *ad valorem.*

2. Export Promotion Capital Goods Scheme (EPCGS)

The EPCGS provides for a reduction or exemption of customs duties and excise taxes on imports of capital goods used in the production of exported products. Under this program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to four to five times the value of the capital goods within a period of eight years. Once a company has met its export obligation, the GOI will formally waive the duties on the imported goods. If a company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction, depending on the extent of the shortfall in foreign currency earnings, plus an interest penalty.

In the investigation, the Department determined that import duty reductions or exemptions provided under the EPCGS are countervailable export subsidies because the scheme: (1) Provides a financial contribution pursuant to section 771(5)(D) of the Act; (2) provides two different benefits under section 771(5)(E) of the Act; and (3) is specific pursuant to section 771(5A) (B) of the Act because the program is contingent upon export performance. *See, e.g., PET Film Final Determination* and accompanying Issues and Decision Memorandum at ''EPCGS.'' Because there is no new information or evidence of changed circumstances that would warrant reconsidering our determination that this program is countervailable, we continue to find that this program is countervailable for these preliminary results.

Since the unpaid duties are a liability contingent on subsequent events, under the EPCGS, the exempted import duties would have to be paid to the GOI if the accompanying export obligations are not met. It is the Department's practice to treat any balance on an unpaid liability that may be waived in the future, as a contingent-liability interest-free loan pursuant to 19 CFR 351.505(d)(1). *See PET Film Final Determination,* and accompanying Issues and Decision Memorandum, at ''EPCGS.'' These contingent-liability loans constitute the first benefit under the EPCGS. The second benefit arises when the GOI waives the duty on imports of capital equipment covered by those EPCGS licenses for which the export requirement has already been met. For those licenses, for which companies demonstrate that they have completed their export obligation, we treat the import duty savings as grants received in the year in which the GOI waived the contingent liability on the import duty exemption pursuant to 19 CFR 351.505(d)(2).

Import duty exemptions under this program are approved for the purchase of capital equipment. The preamble to our regulations states that, if a government provides an import duty exemption tied to major equipment purchases, ''it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring * * *'' *See Countervailing Duties; Final Rule,* 63 FR 65348, 65393 (November 25, 1998). In accordance with 19 CFR 351.524(c)(2)(iii) and past practice, we are treating these import duty exemptions on capital equipment as non-recurring benefits. *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review,* 75 FR 6634 (February 10, 2010) and accompanying Issues and Decision Memorandum at Comment 9.

Ester imported capital goods at reduced import duty rates under the EPCGS in the years prior to the POR. Information provided by Ester indicates that certain licenses were issued for the purchase of capital goods involved in the production of both subject and non-subject merchandise. *See* Ester's July 5, 2011 Second Supplemental Questionnaire Response at Exhibit 10. Based on the information and documentation submitted by Ester, we cannot determine which EPCGS licenses are tied to the production of a particular product within the meaning of 19 CFR 351.525(b)(5). As such, we find that all of Ester's EPCGS licenses benefit all of the company's exports.

Ester met the export requirements for certain EPCGS licenses prior to December 31, 2009, and the GOI has formally waived the relevant import duties. For most of its licenses, however, Ester has not yet met its export obligation as required under the program. Therefore, although Ester has received a deferral from paying import duties when the capital goods were imported, the final waiver on the obligation to pay the duties has not yet been granted for many of these imports.

To calculate the benefit received from the GOI's formal waiver of import duties on Ester's capital equipment imports where its export obligation was met prior to December 31, 2009, we considered the total amount of duties waived, *i.e.,* the calculated duties payable less the duties actually paid in the year, net of required application fees, in accordance with section 771(6) of the Act, to be the benefit and treated these amounts as grants pursuant to 19 CFR 351.504. Further, consistent with the approach followed in the investigation, we determine the year of receipt of the benefit to be the year in which the GOI formally waived Ester's outstanding import duties. *See PET Film Final Determination,* and accompanying Issues and Decision Memorandum, at Comment 5. Next, we performed the ''0.5 percent test,'' as prescribed under 19 CFR 351.524(b)(2), for the total value of duties waived, for each year in which the GOI granted Ester an import duty waiver. For any years in which the value of the waived import duties was less than 0.5 percent of Ester's total export sales, we expensed the value of the duty waived to the year of receipt. For years in which the value of the waivers exceeded 0.5 percent of Ester's total export sales in that year, we allocated the value of the waivers using Ester's company-specific allocation period of 18 years for non-recurring subsidies, in accordance with 19 CFR 351.524(d)(2). *See* ''Allocation Period'' section, above. For purposes of allocating the value of the waivers over time, we used the appropriate discount rate for the year in which the GOI officially waived the import duties. *See* ''Benchmark Interest Rates and Discount Rates'' section, above.

As noted above, import duty reductions or exemptions that Ester received on the imports of capital equipment for which it has not yet met export obligations may have to be repaid to the GOI if the obligations under the licenses are not met. Consistent with our practice and prior determinations, we are treating the unpaid import duty liability as an interest-free loan. *See* 19 CFR 351.505(d)(1), *PET Film Final Determination,* and accompanying Issues and Decision Memorandum, at ''EPCGS''; *see also Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From India,* 70 FR 13460 (March 21, 2005), and accompanying Issues and Decision Memorandum at ''Export Promotion Capital Goods Scheme (EPCGS).''

The amount of the unpaid duty liabilities to be treated as an interest-free loan is the amount of the import duty reduction or exemption for which the respondent applied but, as of the end of the POR, had not been officially waived by the GOI. Accordingly, we find the benefit to be the interest that Ester would have paid during the POR had it borrowed the full amount of the duty reduction or exemption at the time of importation. *See, e.g., PET Film Preliminary Results of 2003 Review,* 70 FR at 46488, unchanged in *PET Film Final Results of 2003 Review.*

As stated above under this section, the time period for fulfilling the export requirement expires eight years after importation of the capital good. As such, pursuant to 19 CFR 351.505(d)(1), the benchmark for measuring the benefit is a long-term interest rate because the event upon which repayment of the duties depends (*i.e.,* the date of expiration of the time period to fulfill the export commitment) occurs at a point in time that is more than one year after the date of importation of the capital goods (*i.e.,* under the EPCGS program, the time period for fulfilling the export commitment is more than one year after importation of the capital good). As the benchmark interest rate, we used the weighted-average interest rate from all of Ester's comparable commercial long-term, rupee-denominated loans for the year in which the capital good was imported. For the years where Ester did not have any comparable long-term commercial loans, we used the loans from the preceding year or the national average interest rates from the *IMF Statistics* pursuant to 19 CFR 351.505(a)(2)(iii) and (a)(3)(ii). *See* ''Benchmarks Interest Rates and Discount Rates'' section above for a discussion of the applicable benchmark. We then multiplied the total amount of unpaid duties under each license by the long-term benchmark interest rate for the year in which the capital good was imported and summed these amounts to determine the total benefit from these contingent liability loans.

The benefit received under the EPCGS is the sum of: (1) The benefit attributable to the POR from the formally waived duties for imports of capital equipment for which the respondents met export requirements by the end of the POR; and (2) interest due on the contingent-liability loans for imports of capital equipment that have not met export requirements. We then divided the total benefit received by Ester under the EPCGS program by Ester's total exports, inclusive of deemed exports, to determine a countervailable subsidy of 30.97 percent *ad valorem.*

3. Duty Entitlement Passbook Scheme (DEPS)

India's DEPS was enacted on April 1, 1997, as a successor to the Passbook Scheme (PBS). As with PBS, DEPS enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. All exporters are eligible to earn DEPS credits on a post-export basis, provided that the GOI has established a standard input-output norm for the exported product. DEPS credits can be applied to subsequent imports of any materials, regardless of whether they are consumed in the production of an exported product. DEPS credits are valid for twelve months and are transferable after the foreign exchange is realized on the export sales from which the DEPS credits are earned.

The Department has previously determined that DEPS is countervailable. *See, e.g., PET Film Final Determination,* and accompanying Issues and Decision Memorandum at ''DEPS.'' In the investigation, the Department determined that, under DEPS, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because the GOI provides credits for the future payment of import duties. Moreover, the GOI does not have in place and does not apply a system that is reasonable and effective to confirm which inputs, and in what amounts, are consumed in the production of the exported products. *Id.* Therefore, under section 771(5)(E) of the Act and 19 CFR 351.519(a)(4), the entire amount of import duty exemption earned during the POI constitutes a benefit. Finally, this program is only available to exporters and, therefore, it is specific under sections 771(5A)(B) of the Act. No new information or evidence of changed circumstances has been presented in this review to warrant reconsideration of this finding. Therefore, we continue to find that the DEPS is countervailable.

In accordance with past practice and pursuant to 19 CFR 351.519(b)(2), we find that benefits from the DEPS are conferred as of the date of exportation of the shipment for which the pertinent DEPS credits are earned. *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From India,* 64 FR 73131, 73134 and Comment 4 (December 29, 1999) (*Final Determination Carbon Steel Plate from India*). We calculated the benefit on an as-earned basis upon export because DEPS credits are provided as a percentage of the value of the exported merchandise on a shipment-by-shipment basis and, as such, it is at this point that recipients know the exact amount of the benefit (*e.g.,* the duty exemption).

Ester reported that it received post-export credits under the DEPS during the POR. Because DEPS credits are earned on a shipment-by-shipment basis, we normally calculate the subsidy rate by dividing the benefit earned on subject merchandise exported to the United States by total exports of subject merchandise to the United States during the POR. *See, e.g., Final Determination Carbon Steel Plate from India,* 64 FR at 73134. Ester reported that it earned DEPS credits on exports of both subject and non-subject merchandise. Although Ester reported that it was able to separate the DEPS credits earned on exports to the United States in the DEPS data it provided to the Department, our analysis indicates that Ester earned DEPS credits for shipments of subject and non-subject merchandise as well as for shipments to multiple countries on the same DEPS license. Therefore, since we are unable to tie the benefits received to subject merchandise in accordance with 19 CFR 525(b)(5), we have calculated the subsidy rate using the value of all DEPS export credits that Ester earned during the POR. We divided the total amount of the benefit by Ester's total export sales to all markets, net of deemed exports, during the POR.

On this basis, we preliminarily determine Ester's countervailable subsidy from DEPS to be 74.25 percent *ad valorem.*

*B. Programs Preliminarily Determined To Be Not Used*

We preliminarily determine that Ester did not apply for or receive benefits during the POR under the programs listed below:

GOI Programs

1. *Duty Free Replenishment Certificate (DFRC) (GOI).*
2. *Target Plus Scheme (GOI).*
3. *Capital Subsidy (GOI).*
4. *Exemption of Export Credit from Interest Taxes (GOI).*
5. *Loan Guarantees from the GOI.*

State Programs

6. *State Sales Tax Incentive Schemes.*
7. *Octroi Refund Scheme State of Maharashtra (SOM).*
8. *Waiving of Interest on Loans by SICOM Limited (SOM).*
9. *State of Uttar Pradesh (SUP) Capital Incentive Scheme.*
10. *Infrastructure Assistance Schemes (State of Gujarat).*

11. *Capital Incentive Scheme Uttaranchel.*
12. *Capital Incentive Schemes (SOM).*
13. *Electricity Duty Exemption Scheme (SOM).*
14. *Union Territories Sales Tax Exemption.*

**Preliminary Results of Administrative Review**

In accordance with section 751(a)(2)(B)(i) of the Act and 19 CFR 351.221(b)(4)(i), we have calculated an individual subsidy rate for Ester for the POR. We preliminarily determine the total countervailable subsidy to be 112.95 percent *ad valorem* for Ester.

**Assessment Rates/Cash Deposits**

If these preliminary results are adopted in our final results of this review, the Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after publication of the final results of this review.

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties at the rate of 112.95 percent *ad valorem* of the entered value on shipments of the subject merchandise produced and exported by Ester, and entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. We intend to instruct CBP to continue to collect cash deposits for non-reviewed companies at the applicable company-specific CVD rate for the most recent period or all-others rate established in the investigation. These deposit rates, when imposed, shall remain in effect until further notice.

**Disclosure and Public Hearing**

We will disclose the calculations used in our analysis to parties to this segment of the proceeding within ten days of the public announcement of these preliminary results of review. *See* 19 CFR 351.224(b). Interested parties who wish to request a hearing on arguments to be raised in case or rebuttal briefs, must submit a written request within 30 days of the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) to the extent practicable, a list of arguments to be raised.

Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless the time period is extended by the Department, case briefs are to be submitted within 30 days after the date of publication of this notice in the **Federal Register**. *See* 19 CFR 351.309(c). Rebuttal briefs, which must be limited to responding to arguments raised in case briefs, are to be submitted no later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit arguments in this proceeding are requested to submit with the argument: (1) A statement of the issues; (2) a brief summary of the argument; and (3) a table of authorities cited. Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments. Case and rebuttal briefs must be served on interested parties, in accordance with 19 CFR 351.303(f).

Unless extended, the Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of signature of this notice, pursuant to section 751(a)(3)(A) of the Act.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: August 1, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011–19949 Filed 8–4–11; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA607**

### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); South Atlantic Black Sea Bass (Centropristis striata) and Golden Tilefish (Lopholatilus chamaeleonticeps)

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

**ACTION:** Notice of a date change for SEDAR 25 Review Workshop for South Atlantic black sea bass and golden tilefish.

**SUMMARY:** The SEDAR 25 Review of the South Atlantic stock of black sea bass and golden tilefish will consist of one workshop, originally scheduled for September 20–22, 2011, will now be held October 11–13, 2011. This is the twenty-fifth SEDAR. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The SEDAR 25 Review Workshop will take place October 11–13, 2011. See **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** The SEDAR 25 Review Workshop will be held at the Crowne Plaza, 4831 Tanger Outlet Boulevard, North Charleston, SC 29418, telephone: (843) 740–7028.

**FOR FURTHER INFORMATION CONTACT:** Kari Fenske, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; (843) 571–4366; *kari.fenske@safmc.net.*

**SUPPLEMENTARY INFORMATION:** The original notice published in the **Federal Register** on July 28, 2011 (76 FR 45231). All other information previously-published remains unchanged.

The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Panelists for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. SEDAR participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and Federal agencies.

**SEDAR 25 Review Workshop Schedule**

*October 11–13, 2011; SEDAR 25 Review Workshop*

October 11, 2011: 9 a.m.–8 p.m.;
October 12, 2011: 8 a.m.–8 p.m.;
October 13, 2011: 8 a.m.–1 p.m.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Consensus Summary.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Dated: August 2, 2011.

**William D. Chappell,**

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

[FR Doc. 2011–19927 Filed 8–4–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA618**

### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Assessment Process Webinars for South Atlantic Black Sea Bass (Centropristis striata) and Golden Tilefish (Lopholatilus chamaeleonticeps)

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

**ACTION:** Notice of SEDAR 25 South Atlantic assessment webinars for black sea bass and golden tilefish.

**SUMMARY:** The SEDAR 25 assessments of the South Atlantic black sea bass and golden tilefish will consist of a series of workshops and webinars: this notice is for webinars associated with the Assessment portion of the SEDAR process. See **SUPPLEMENTARY INFORMATION.**

**DATES:** Two additional SEDAR 25 webinars will be held between on September 2 and September 13, 2011. Please see list below for exact dates and times. Webinars for July 12 through August 22, 2011 were announced in a previous notice. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from, or completed prior to the times established by this notice.

| Date | Day | Time (Eastern) |
|---|---|---|
| Sept. 2, 2011 .. | Tuesday .. | 9 a.m.–12 p.m. |
| Sept. 13, 2011 | Thursday | 1 p.m.–4 p.m. |

**ADDRESSES:** The meetings will be held via webinar. The webinar is open to the public. Those interested in participating should contact Kari Fenske at SEDAR (See Contact Information Below) to request an invitation providing webinar access information.

**FOR FURTHER INFORMATION CONTACT:** Kari Fenske, SEDAR Coordinator, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *kari.fenske@safmc.net.*

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop, (2) Assessment Process utilizing webinars and workshops (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Panelists for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and Federal agencies.

**SEDAR 25 Assessment Process Webinar Series**

Using datasets recommended from the Data Workshop, Panelists will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions. Panelists will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Dated: August 2, 2011.

**William D. Chappell,**

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

[FR Doc. 2011–19928 Filed 8–4–11; 8:45 am]

**BILLING CODE 3510–22–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Additions to the Procurement List.

**SUMMARY:** This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** *Effective Date:* 9/5/2011.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, *Telephone:* (703) 603–7740, *Fax:* (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:**

**Additions**

On 4/22/2011 (76 FR 22680); 5/6/2011 (76 FR 26279); 6/3/2011 (76 FR 32146); and 6/10/2011 (76 FR 34064–34065), the Committee for Purchase From People

Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

**Regulatory Flexibility Act Certification**

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

**End of Certification**

Accordingly, the following products and services are added to the Procurement List:

**Products**

*NSN:* 5340–00–NIB–0079—Notebook Computer Combination Lock.
*NSN:* 5340–00–NIB–0099—Desktop & Peripherals Locking Kit, Standard.
*NPA:* Alphapointe Association for the Blind, Kansas City, MO.
*Contracting Activity:* General Services Administration, Fort Worth, TX.
*COVERAGE:* A-List for the Total Government Requirement as aggregated by the General Services Administration.
*NSN:* 8105–00–117–9860—Envelope, Bubble Padded, 6″ x 10″.
*NSN:* 8105–00–117–9866—Envelope, Bubble Padded, 7¼″ x 12″.
*NSN:* 8105–00–117–9869—Envelope, Bubble Padded, 8½″ x 12″.
*NSN:* 8105–00–117–9872—Envelope, Bubble Padded, 9½″ x 14½″.
*NSN:* 8105–00–117–9879—Envelope, Bubble Padded, 10½″ x 16″.
*NSN:* 8105–00–117–9881—Envelope, Bubble Padded, 12½″ x 19″.
*NSN:* 8105–00–117–9886—Envelope, Bubble Padded, 14½″ x 20″.
*NSN:* 8105–00–290–0340—Envelope, Macerated Paper Padded, 6″ x 10″.
*NSN:* 8105–00–290–0343—Envelope, Macerated Paper Padded, 8½″ x 12″.
*NSN:* 8105–00–281–1168—Envelope, Macerated Paper Padded, 9½″ x 14½″.
*NSN:* 8105–00–281–1436—Envelope, Macerated Paper Padded, 10½″ x 16″.
*COVERAGE:* A-List for the Total Government Requirement as aggregated by the General Services Administration.
*NSN:* 8105–00–117–9870—Envelope, Bubble Padded, 8½″ x 14½″.
*NSN:* 8105–00–290–0342—Envelope, Macerated Paper Padded, 7¼″ x 12″.
*NSN:* 8105–00–281–1167—Envelope, Macerated Paper Padded, 12½″ x 19″.
*NSN:* 8105–00–281–1169—Envelope, Macerated Paper Padded, 14½″ x 20″.
*COVERAGE:* B-List for the Broad Government Requirement as aggregated by the General Services Administration.
*NPA:* Alphapointe Association for the Blind, Kansas City, MO.
*Contracting Activity:* General Services Administration, New York, NY.
*NSN:* M.R. 517—Pack, Party, Birthday, 8pc.
*NSN:* M.R. 518—Pack, Party, Birthday, Sports-Theme, 8pc.
*NPA:* Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC.
*Contracting Activity:* Defense Commissary Agency, Fort Lee, VA.
*COVERAGE:* C-List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.
*NSN:* M.R. 1056—Mop, Spray, Wet.
*NSN:* M.R. 1066—Pad, Cleaning, Refill, Mop, Spray.
*NPA:* Industries for the Blind, Inc., West Allis, WI.
*Contracting Activity:* Defense Commissary Agency, Fort Lee, VA.
*COVERAGE:* C-List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.

**USB Flash Drives, Level 3, Encrypted**

*NSN:* 7045–00–NIB–0354—2G.
*NSN:* 7045–00–NIB–0355—4G.
*NSN:* 7045–00–NIB–0356—8G.
*NSN:* 7045–00–NIB–0357—16G.
*NSN:* 7045–00–NIB–0358—32G.
*NSN:* 7045–00–NIB–0360—Anti-Virus, 2G.
*NSN:* 7045–00–NIB–0361—Anti-Virus, 4G.
*NSN:* 7045–00–NIB–0362—Anti-Virus, 8G.
*NSN:* 7045–00–NIB–0363—Anti-Virus, 16G.
*NSN:* 7045–00–NIB–0364—Anti-Virus, 32G.
*NPA:* North Central Sight Services, Inc., Williamsport, PA.
*Contracting Activity:* General Services Administration, New York NY.
*COVERAGE:* A-List for the Total Government Requirement as aggregated by the General Services Administration.
*NSN:* 8465–01–580–1666—Load Lifter Attachment Strap, MOLLE Components, OCP.
*NPA:* The Arkansas Lighthouse for the Blind, Little Rock, AR.
*Contracting Activity:* Department of the Army Research, Development, & Engineering Command, Natick, MA.
*COVERAGE:* C-List for 100% of the requirement of the Department of the Army, as aggregated by the Department of the Army Research, Development, & Engineering Command, Natick, MA.

**Services**

*Service Type/Location:* Facilities Maintenance Services, Department of Public Works, Fort Knox, KY.
*NPAs:* NISH, Vienna, VA (Prime Contractor), Lakeview Center, Inc., Pensacola, FL (Subcontractor).
*Contracting Activity:* Dept of the Army, W6QM FT Knox Contr Ctr, Fort Knox, KY.
*Service Type/Location:* Contract Center Services, Human Resources Command, 1600 Spearhead Division Avenue, Fort Knox, KY.
*NPAs:* InspiriTec, Inc., Philadelphia, PA (Prime Contractor), Employment Source, Inc., Fayetteville, NC (Subcontractor).
*Contracting Activity:* Dept of the Army, W6QM FT Knox Contr Ctr, Fort Knox, KY.

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2011–19885 Filed 8–4–11; 8:45 am]

BILLING CODE 6353–01–P

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

## Procurement List; Proposed Additions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed Additions to the Procurement List.

**SUMMARY:** The Committee is proposing to add services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities.

*Comments Must Be Received on or Before:* 9/5/2011.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

*For Further Information or To Submit Comments Contact:* Barry S. Lineback, *Telephone:* (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

**Additions**

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

**Regulatory Flexibility Act Certification**

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. If approved, the action will result in authorizing small entities provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

**End of Certification**

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

**Services**

*Service Type/Locations:* Grounds Maintenance, National Weather Service Weather Forecast Office, 587 Aero Drive, Buffalo, NY, National Weather Service Weather Forecast Office, Radar Data Acquisition, Site, 3 North Airport Drive, Cheektowaga, NY, National Weather Service Weather Forecast Office, Upper-Air Observatory, Amherst Villa Road, Cheektowaga, NY.

*NPA:* Suburban Adult Services, Inc., Elma, NY.

*Contracting Activity:* Dept of Commerce, National Oceanic and Atmospheric Administration, Norfolk, VA.

*Service Type/Location:* Transient Aircraft Services, Moody AFB, GA.

*NPA:* Training, Rehabilitation, & Development Institute, Inc., San Antonio, TX.

*Contracting Activity:* Dept of the Air Force, FA4830 23 Cons CC, Moody AFB, GA.

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2011–19884 Filed 8–4–11; 8:45 am]

BILLING CODE 6353–01–P

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

### Agency Information Collection Extension; Correction

**AGENCY:** Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

**ACTION:** Notice and Request for comments; Correction.

**SUMMARY:** The Department of Energy (DOE) published a document in the **Federal Register** of May 24, 2011, pursuant to the Paperwork Reduction Act of 1995), announcing its intention to extend for three years, an information collection request with the Office of Management and Budget (OMB). This document corrects an error in that notice.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Goldstein, Buy American Coordinator, Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy, 1000 Independence Avenue, SW., Mailstop EE–2K, Washington, DC 20585 or by e-mail at *BuyAmerican@ee.doe.gov.*

**Correction**

In the **Federal Register** of Tuesday, May 24, 2011, in FR Doc. 2011–12718, please make the following correction:

On page 30143, under the heading **SUPPLEMENTARY INFORMATION**, (1) should read *OMB No.:* 1910–5152.

Issued in Washington, DC, on July 8, 2011.

**Henry Kelly,**

*Acting Assistant Secretary EERE, U.S. Department of Energy.*

[FR Doc. 2011–19886 Filed 8–4–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

### Nationwide Categorical Waivers Under Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (Recovery Act)

**AGENCY:** Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

**ACTION:** Notice of Limited Waivers.

**SUMMARY:** The U.S. Department of Energy (DOE) is hereby granting a nationwide limited waiver of the Buy American requirements of section 1605 of the Recovery Act under the authority of Section 1605(b)(2), (iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality), with respect to Recovery Act projects funded by EERE for: (1) 2–10 horsepower, self contained, sensorless, variable speed pumps; (2) bi-directional bicycle counters; (3) 28W, 30W, and 60W 360 degree LED bulbs for retrofits of HPS streetlights; (4) bathroom ventilation fans with a built in occupancy sensors; (5) solar thermosiphon water heating systems certified by FSEC; (6) 40 Ton, factory-assembled, indirect-fired absorption chillers; (7) premium efficiency electric drive submersible pump motors (motors only, not pumps themselves); and (8) flush-to-handrail LED lighting systems.

**DATES:** *Effective Date:* July 8, 2011.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Goldstein, Energy Technology Program Specialist, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287–1553, Department of Energy, 1000 Independence Avenue SW., Mailstop EE–2K, Washington, DC 20585.

**SUPPLEMENTARY INFORMATION:** Under the authority of the Recovery Act, Public Law 111–5, section 1605(b)(2), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provision) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''nonavailability''). The authority of the Secretary of Energy to make all inapplicability determinations was re-delegated to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act, in Redelegation Order No. 00.00201E, dated April 25, 2011. Pursuant to this delegation the Assistant Secretary, EERE, has concluded that: (1) 2–10 horsepower, self contained, sensorless, variable speed pumps; (2) bi-directional bicycle counters; (3) 28W, 30W, and 60W 360 degree LED bulbs for retrofits of HPS streetlights; (4) bathroom ventilation fans with a built in occupancy sensors; (5) solar thermosiphon water heating systems certified by FSEC; (6) 40 Ton, factory-assembled, indirect-fired absorption chillers; (7) premium efficiency electric drive submersible pump motors (motors only, not pumps themselves); and (8) flush-to-handrail LED lighting systems.

EERE has developed a robust process to ascertain in a systematic and expedient manner whether or not there is domestic manufacturing capacity for the items submitted for a waiver of the Recovery Act Buy American provision. This process involves a close collaboration with the United States Department of Commerce National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP), in order to scour the domestic manufacturing landscape in search of producers before making any nonavailability determinations.

The MEP has 59 regional centers with substantial knowledge of, and connections to, the domestic manufacturing sector. MEP uses their regional centers to 'scout' for current or potential manufacturers of the product(s) submitted in a waiver request. In the course of this interagency collaboration, MEP has been able to find exact or partial matches for manufactured goods that EERE grantees had been unable to locate. As a result, in those cases, EERE was able to work with the grantees to procure American-made products rather than granting a waiver.

Upon receipt of completed waiver requests for the eight (8) products in the current waiver, EERE reviewed the information provided and submitted the relevant technical information to the MEP. The MEP then used their network of nationwide centers to scout for domestic manufacturers. The MEP reported that their scouting process did not locate any domestic manufacturers for these exact or equivalent items.

In addition to the MEP collaboration outlined above, the EERE Buy American Coordinator worked with other manufacturing stakeholders to scout for domestic manufacturing capacity or an equivalent product for each item contained in this waiver. EERE also conducted significant amounts of independent research to supplement MEP's scouting efforts, including utilizing the solar experts employed by the Department of Energy's National Renewable Energy Laboratory. EERE's research efforts confirmed the MEP findings that the goods included in this waiver are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The nonavailability determination is also informed by the inquiries and petitions to EERE from recipients of EERE Recovery Act funds, and from suppliers, distributors, retailers and trade associations—all stating that their individual efforts to locate domestic manufacturers for these items have been unsuccessful.

Specific technical information for the manufactured goods included in this non-availability determination is detailed below:

**(1) 2–10 Horsepower, Self Contained, Sensorless, Variable Speed Pumps**

This pump does not require costly pressure and flow transmitters to maintain a constant pressure in a city water system at flow rates from almost zero to about 60 gpm. The pump to be used in the requesting project is a low horsepower (5 hp), sensorless, constant pressure pump with an integrated variable speed motor controller. Extensive contacts with pump distributors and Web research did not result in the identification of an American producer of this type pump technology, nor was the National Energy Technology Laboratory (NETL) or MEP able to locate a pump of this type manufactured in the United States.

**(2) Bidirectional Bicycle Counters**

There are no products made in the United States that meet the basic criteria needed for the requesting project. The basic needs for a bicycle counter are: weatherproofing, battery operation, capability to detect and store time in a 24 hour period, store one year of data and store data on the counter after retrieval, provision of directional data, modem connectivity and download, no speed restrictions on capturing data. Traffic counters made in the USA are designed for automobile counting—not for bicycle counting. In addition to MEP DOE reached out to a number of bicycle advocacy organizations, trade groups and communities with extensive bike lane and trail systems. No U.S. products were identified as a result of this search.

**(3) 28W, 30W, and 60W 360 Degree LED Bulbs for Retrofits of HPS Streetlights**

These bulbs provide 360 degrees of illumination, and are used in the retrofit of 360 illuminating street, walkway, carriage and parking lot fixtures. This waiver does not include the retrofit of cobrahead streetlights, for which there are domestic manufacturers. This waiver is as a result of multiple waiver applications from separate grantees. Although several companies have demonstrated interest in manufacturing these bulbs, none are yet manufacturing domestically.

**(4) Bathroom Ventilation Fans With Built In Occupancy Sensors**

These fans provide continual low discharge exhaust ventilation, and upon occupancy or motion in the bathroom area, the discharge exhaust ventilation increases automatically, returning to continuous low exhaust when motion is no longer present, nor are there domestically-manufactured fans available that meet the specifications and requirements of the Rhode Island building code requirements for multi-family public housing and the requirements included in RI WAP ECM pages 12–13.

**(5) Solar Thermosiphon Water Heating Systems Certified by FSEC**

Under Florida Statutes 377.705, all solar thermal systems sold and installed within the state of Florida must have the certification of the Florida Solar Energy Center (FSEC). FSEC is the recognized testing, rating and certification agency in the U.S. for solar thermal and solar photovoltaic systems. At this time, no domestic manufacturers of solar thermosiphon systems have been certified through FSEC. The certification process is too lengthy for any U.S. manufacturer to become certified within the remainder of the Recovery Act spending period. This waiver for solar thermosiphon water heaters applies only to projects in the State of Florida, and is specifically for a demonstration project that will analyze the advantages and dis-advantages of both direct circulation and thermosiphon systems for this type of application in Florida going forward. This comparison will assist U.S. manufacturers in analyzing the market for both technologies in the state.

**(6) 40 Ton, Factory-Assembled, Indirect-Fired Absorption Chillers**

In addition to MEP, DOE worked with the ENERGY STAR program and reached out to a number of trade organizations, including ASHRAE. No U.S. products were identified as a result of these search efforts.

**(7) Premium Efficiency Electric Drive Submersible Pump Motors (15–30hp)**

EERE and MEP identified a number of U.S. manufacturers producing the pumps needed for the requesting project. However, the motors that operate the pumps are not available domestically. These pumps must be heavy duty wet wound of NEMA design, capable of continuous operation under water at the conditions specified in the project design and suitable for use on a three phase, 60 cycle electrical service.

**(8) Flush-to-Handrail Electric LED Lighting Systems**

Extensive effort was expended by the grantee, MEP and DOE to find a similar product manufactured in the U.S. In addition, alternative solutions to this type of system that would provide lighting of the area were considered. No domestic options were found. The handrail LED lighting system is unique to one manufacturer, and there is nothing comparable that is manufactured in the U.S. In light of the foregoing, and under the authority of section 1605(b)(2) of Public Law 111–5 and Redelegation Order 00–002–01D, with respect to Recovery Act projects funded by EERE, I hereby issue a ''determination of inapplicability'' (a waiver under the Recovery Act Buy American provision) for: (1) 2–10 horsepower, self contained, sensorless, variable speed pumps; (2) bi-directional bicycle counters; (3) 28W, 30W, and 60W 360 degree LED bulbs for retrofits of HPS streetlights; (4) bathroom ventilation fans with a built in occupancy sensors; (5) solar thermosiphon water heating systems certified by FSEC; (6) 40 Ton, factory-assembled, indirect-fired absorption chillers; (7) premium efficiency electric drive submersible pump motors (motors only, not pumps themselves); and (8) flush-to-handrail LED lighting systems.

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Acting Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies only to EERE projects carried out under the Recovery Act.

Having established a proper justification based on domestic nonavailability, EERE hereby provides notice that on July 08, 2011, eight nationwide categorical waivers of section 1605 of the Recovery Act were issued as detailed *supra.* This notice constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies to all EERE projects carried out under the Recovery Act.

**Authority:** Pub. L. 111–5, section 1605.

Issued in Washington, DC, on July 8, 2011.

**Henry Kelly,**

*Acting Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.*

[FR Doc. 2011–19882 Filed 8–4–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

### Nationwide Categorical Waivers Under Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (Recovery Act)

**AGENCY:** Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

**ACTION:** Notice of limited waivers.

**SUMMARY:** The U.S. Department of Energy (DOE) is hereby granting a nationwide limited waiver of the Buy American requirements of section 1605 of the Recovery Act under the authority of Section 1605(b)(2), (iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality), with respect to: five kilowatt (5kW) and fifty kilowatt (50kW) wind turbines for use on eligible EERE-Recovery Act funded projects.

**DATES:** *Effective Date:* July 8, 2011.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Goldstein, Energy Technology Program Specialist, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287–1553, Department of Energy, 1000 Independence Avenue, SW., Mailstop EE–2K, Washington, DC 20585.

**SUPPLEMENTARY INFORMATION:** Under the authority of the Recovery Act, Public Law 111–5, section 1605(b)(2), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provision) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''nonavailability''). On April 25, 2011, the authority of the Secretary of Energy to make all inapplicability determinations was re-delegated to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act. Pursuant to this delegation the Assistant Secretary, EERE, has concluded that: five kilowatt (5kW) and fifty kilowatt (50kW) wind turbines qualify for the ''nonavailability'' waiver determination when utilized in eligible EERE Recovery Act-funded projects where the wind resource and needs of the project require such size.

While there are US manufacturers of turbines appropriate for the needs of the great majority of EERE funded wind projects, there are currently no US manufacturers of five kilowatt (5kW) or fifty kilowatt (50kW) turbines.

The EERE Buy American Coordinator has worked with many manufacturing stakeholders to scout for domestic manufacturing capacity or an equivalent product for each item contained in this waiver. This included the Small Wind Manufacturing Council, the Distributed Wind Energy Association, and the American Wind Energy Association. EERE also conducted significant amounts of independent research, including utilizing the small wind experts employed by the Department of Energy's National Renewable Energy Laboratory. In addition, this nonavailability determination is informed by the many inquiries and petitions to EERE from recipients of EERE Recovery Act funds, and from suppliers, distributors, retailers and trade associations—all stating that their individual efforts to locate domestic manufacturers for five kilowatt (5kW) and fifty kilowatt (50kW) turbines have been unsuccessful.

For all Recovery Act Buy American waiver requests, EERE also employs a comprehensive process to ascertain in a systematic and expedient manner whether or not there is domestic manufacturing capacity for the items submitted for a waiver. This process involves a close collaboration with the United States Department of Commerce National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP), in order to scour the domestic manufacturing landscape in search of producers before making any nonavailability determinations.

The MEP has 59 regional centers with substantial knowledge of, and connections to, the domestic manufacturing sector. MEP uses their regional centers to 'scout' for current or potential manufacturers of the product(s) submitted in a waiver request. In the course of this interagency collaboration, MEP has been able to find exact or partial matches for manufactured goods that EERE grantees had been unable to locate. As a result, in those cases, EERE was able to work with the grantees to procure American-made products rather than granting a waiver.

Upon receipt of completed waiver requests for the two products in the current waiver, EERE reviewed the information provided and submitted the relevant technical information to the MEP. The MEP then used their network of nationwide centers to scout for domestic manufacturers. The MEP reported that their scouting process did not locate any domestic manufacturers for these exact or equivalent items.

The research efforts of MEP confirmed EERE's findings that the 5kW and 50kW turbines referenced in this waiver are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

In light of the foregoing, and under the authority of section 1605(b)(2) of Public Law 111–5 and Redelegation Order 00–002–01D, with respect to Recovery Act projects funded by EERE, I hereby issue a ''determination of inapplicability'' (a waiver under the Recovery Act Buy American provision) for: five kilowatt (5kW) and fifty kilowatt (50kW) wind turbines, when used on eligible EERE Recovery Act-funded projects.

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Acting Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies only to EERE projects carried out under the Recovery Act.

Having established a proper justification based on domestic nonavailability, EERE hereby provides notice that on July 8, 2011, two nationwide categorical waivers of section 1605 of the Recovery Act were issued as detailed *supra.* This notice constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies to all EERE projects carried out under the Recovery Act.

**Authority:** Pub. L. 111–5, section 1605.

Issued in Washington, DC, on July 8, 2011.

**Henry Kelly,**

*Acting Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.*

[FR Doc. 2011–19887 Filed 8–4–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. PR11–111–000; PR11–111–001]**

### Arcadia Gas Storage, LLC; Notice of Baseline Filing

Take notice that on May 19, 2011 and July 26, 2011, Arcadia Gas Storage, LLC submitted a revised baseline filing of their Statement of Operating Conditions for services provided under Section 311 of the Natural Gas Policy Act of 1978 (''NGPA'').

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Monday August 8, 2011.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19944 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER11–3494–001.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Southwest Power Pool, Inc. submits tariff filing per 35: Compliance Revisions to 2198 Kansas Power Pool NITSA to be effective 4/1/2011.
*Filed Date:* 08/01/2011.
*Accession Number:* 20110801–5132.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–3522–001.
*Applicants:* Public Service Company of New Mexico.
*Description:* Public Service Company of New Mexico submits tariff filing per 35.17(b): PNM Response to Request for Additional Information on LGIP Filing to be effective 9/30/2011.
*Filed Date:* 08/01/2011.
*Accession Number:* 20110801–5111.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4165–000.
*Applicants:* New England Power Pool Participants Committee.
*Description:* New England Power Pool Participants Committee submits tariff filing per 35.13(a)(2)(iii: Aug 2011 Membership Filing to be effective 8/1/2011.
*Filed Date:* 08/01/2011.
*Accession Number:* 20110801–5000.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4166–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: CCSF IA—34th Quarterly Filing of Facilities Agreements to be effective 6/30/2011.
*Filed Date:* 08/01/2011.
*Accession Number:* 20110801–5001.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4168–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(2)(iii:

Filing of Notice of Succession to Interconnection Agreement to be effective 10/1/2011.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5020.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4169–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(2)(iii: Filing of Notice of Succession to Transmission Interconnection Agreement to be effective 10/1/2011.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5021.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4170–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Submission of Notice of Cancellation.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5077.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4171–000.

*Applicants:* Newmont Nevada Energy Investment, LLC.

*Description:* Newmont Nevada Energy Investment, LLC submits tariff filing per 35.13(a)(2)(iii: Newmont Nevada Energy Investment LLC Revised Market-Based Rate Filing to be effective 9/30/2011.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5108.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4172–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1636R4 Kansas Electric Power Cooperative, Inc. NITSA NOA to be effective 8/1/2011.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5123.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* ER11–4173–000.

*Applicants:* Michigan Electric Transmission Company, Midwest Independent Transmission System Operator, Inc.

*Description:* Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(2)(iii: G479b Amended GIA to be effective 8/1/2011.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5124.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

Take notice that the Commission received the following land acquisition reports:

*Docket Numbers:* LA11–2–000.

*Applicants:* Portland General Electric Company.

*Description:* Quarterly Site Acquisition Report of Portland General Electric Company.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5278.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* LA11–2–000.

*Applicants:* Goshen Phase II LLC.

*Description:* Quarterly Land Acquisition Report of Goshen Phase II LLC.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5100.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

*Docket Numbers:* LA11–2–000.

*Applicants:* Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Avenal Park LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Cottonwood Energy LP, Devon Power LLC, Dunkirk Power LLC, El Segundo Energy Center LLC, El Segundo Power, LLC, El Segundo Power II LLC, GenConn Devon LLC, GenConn Energy LLC, GenConn Middletown LLC, Huntley Power LLC, Indian River Power LLC, Keystone Power LLC, Long Beach Generation LLC, Long Beach Peakers LLC, Louisiana Generating LLC, Middletown Power LLC, Montville Power LLC, NEO Freehold-Gen LLC, Norwalk Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG New Jersey Energy Sales LLC, NRG Power Marketing LLC, NRG Rockford LLC, NRG Rockford II LLC, NRG Solar Blythe LLC, NRG Sterlington Power LLC, Oswego Harbor Power LLC, Saguaro Power Company, A Limited Partnership, Sand Drag LLC, Somerset Power LLC, Sun City Project LLC, Vienna Power LLC, NRG Power Marketing, LLC, NRG Energy, Inc.

*Description:* NRG Power Marketing LLC, *et al.* Order 697–C Compliance Filing Regarding Site Control.

*Filed Date:* 08/01/2011.

*Accession Number:* 20110801–5110.

*Comment Date:* 5 p.m. Eastern Time on Monday, August 22, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19937 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC11–99–000.
*Applicants:* Vermont Wind, LLC.
*Description:* Application of Vermont Wind, LLC for Authorization under FPA Section 203.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5174.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* EC11–100–000.
*Applicants:* PEI Power II, LLC, PEI Power Corporation.
*Description:* Application of PEI Power Corporation and PEI Power II, LLC under Section 203 of the Federal Power Act.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5179.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER11–1994–002.
*Applicants:* Westar Energy, Inc.
*Description:* Westar Energy, Inc. submits tariff filing per 35: Compliance Filing, City of Herington, KS, Rate Schedule WTU–012011 to be effective 1/1/2011.
*Filed Date:* 07/28/2011.
*Accession Number:* 20110728–5158.
*Comment Date:* 5 p.m. Eastern Time on Thursday, August 18, 2011.

*Docket Numbers:* ER11–3460–002.
*Applicants:* Bayonne Energy Center, LLC.
*Description:* Bayonne Energy Center, LLC submits tariff filing per 35: MBR Tariff Compliance Filing under Dockets ER11–3460–000 and ER11–3460–001 to be effective 4/28/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5105.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–3463–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Pacific Gas and Electric Company submits tariff filing per 35.19a(b): Compliance Refund Report for CCSF 33rd Quarterly Filing to be effective N/A.
*Filed Date:* 07/25/2011.
*Accession Number:* 20110725–5084.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 15, 2011.

*Docket Numbers:* ER11–3748–001.
*Applicants:* CES Placerita, Incorporated.
*Description:* CES Placerita, Incorporated submits tariff filing per 35.17(b): Amendment to Market-Based Rate Tariff Under Docket ER11–3748 to be effective 3/24/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5140.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4140–000.
*Applicants:* New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
*Description:* New York Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: SGIA Between Niagara Mohawk and WM Renewable Energy to be effective 6/23/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5080.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4142–000.
*Applicants:* Nevada Power Company.
*Description:* Nevada Power Company submits tariff filing per 35.13(a)(2)(iii: Rate Schedule No. 122 Concurrence in So CA Edison Rate Schedule No. 488 to be effective 7/14/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5131.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4143–000.
*Applicants:* PJM Interconnection, LLC.
*Description:* PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Revisions to PJM Tariff Attachment DD Section 10B to be effective 9/17/2010.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5139.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4144–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.1: Filing of Joint Pole Use Agreement to be effective 9/29/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5150.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4145–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Equipment Removal Agreement to be effective 9/29/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5151.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4146–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5171.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4147–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5181.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4148–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1636R3 Kansas Electric Power Cooperative, Inc. NITSA NOA to be effective 6/1/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5186.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4149–000.
*Applicants:* ITC Midwest LLC.
*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Construction Agreement to be effective 9/29/2011.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5208.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4150–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: E&P Agreements under PG&E's Transmission Owner Tariff and Report to be effective 4/27/2010.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5209.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4151–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* California Independent System Operator Corporation submits

tariff filing per 35.13(a)(2)(iii: 2011–07–29 CAISO's NRS–RA Amendment Filing to be effective 1/1/2012.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5211.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4152–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5212.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4153–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5214.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4154–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Adjustment Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5216.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4155–000.

*Applicants:* Florida Power & Light Company.

*Description:* Florida Power & Light Company submits tariff filing per 35.13(a)(2)(iii: FPL and Seminole TSA 162 NTSA to be effective 8/22/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5219.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4156–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Relocation Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5227.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4157–000.

*Applicants:* Entergy Arkansas, Inc.

*Description:* Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: Amended SRW IOA to be effective 9/27/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5232.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4158–000.

*Applicants:* Entergy Arkansas, Inc.

*Description:* Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: Occidential Amended IOA to be effective 9/27/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5234.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4159–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5235.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4160–000.

*Applicants:* ITC Midwest LLC.

*Description:* ITC Midwest LLC submits tariff filing per 35.13(a)(1): Filing of Transmission Upgrade Agreement to be effective 9/29/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5238.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4161–000.

*Applicants:* California Independent System Operator Corporation.

*Description:* California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–07–29 Amendment to Modify Dynamic Transfer Provisions to be effective 11/1/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5244.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4162–000.

*Applicants:* Florida Power & Light Company.

*Description:* Florida Power & Light Company submits tariff filing per 35.13(a)(2)(iii: FPL and JEA RS 323 to be effective 9/27/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5250.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4163–000.

*Applicants:* New England Power Pool Participants Committee.

*Description:* New England Power Pool Participants Committee submits tariff filing per 35.13(a)(2)(iii: 124th Agreement to be effective 8/31/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5252.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* ER11–4164–000.

*Applicants:* Westar Energy, Inc.

*Description:* Westar Energy, Inc. submits tariff filing per 35.13(a)(2)(iii: Herington, KS, Revision to Article I to be effective 10/1/2011.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5253.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES11–40–000.

*Applicants:* Entergy Mississippi, Inc., Entergy Arkansas, Inc., Entergy Louisiana, LLC, Entergy New Orleans, Inc., Entergy Gulf States Louisiana, LLC, System Energy Resources, Inc., Entergy Texas, Inc.

*Description:* Application of Entergy Services, Inc., on Behalf of Entergy Arkansas, Inc., *et al.* for FPA Section 204 Authorization.

*Filed Date:* 07/28/2011.

*Accession Number:* 20110728–5199.

*Comment Date:* 5 p.m. Eastern Time on Thursday, August 18, 2011.

*Docket Numbers:* ES11–41–000.

*Applicants:* ITC Midwest LLC.

*Description:* Application of ITC Midwest LLC under Section 204 of the Federal Power Act and Part 34 of the Commission's Regulations.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5270.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

Take notice that the Commission received the following land acquisition reports:

*Docket Numbers:* LA11–2–000.

*Applicants:* ORNI 18 LLC.

*Description:* Quarterly Land Acquisition Report of ORNI 18 LLC.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5092.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* LA11–2–000.

*Applicants:* Niagara Generation LLC.

*Description:* Land Acquisition Report of Niagara Generation, LLC.

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5255.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

*Docket Numbers:* LA11–2–000.

*Applicants:* San Diego Gas & Electric Company, Cedar Creek II, LLC, El Dorado Energy, LLC, Fowler Ridge II Wind Farm, LLC, Mesquite Power, LLC, Sempra Energy Trading LLC, Sempra Generation, Termoelectrica U.S., LLC.

*Description:* Land Acquisition Report/Form of San Diego Gas & Electric Company, *et al.*

*Filed Date:* 07/29/2011.

*Accession Number:* 20110729–5272.

*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

Take notice that the Commission received the following public utility holding company filings:

*Docket Numbers:* PH11–18–000.
*Applicants:* Mitsubishi UFJ Financial Group, Inc.
*Description:* Application of Mitsubishi UFJ Financial Group, Inc.
*Filed Date:* 07/29/2011.
*Accession Number:* 20110729–5097.
*Comment Date:* 5 p.m. Eastern Time on Friday, August 19, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19936 Filed 8–4–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Effectiveness of Exempt Wholesale Generator Status

| | Docket Nos. |
|---|---|
| Bayonne Energy Center, LLC | EG11–80–000 |
| Long Island Solar Farm, LLC | EG11–81–000 |
| Evergreen Gen Lead, LLC | EG11–82–000 |
| Alta Wind IV Owner Lessor A | EG11–83–000 |
| Alta Wind IV Owner Lessor B | EG11–84–000 |
| Alta Wind IV Owner Lessor C | EG11–85–000 |
| Alta Wind IV Owner Lessor D | EG11–86–000 |
| Sherbino II Wind Farm LLC | EG11–87–000 |
| Tanner Street Generation, LLC | EG11–88–000 |
| Inversiones EólicasEolicas, S. de R. L. de C.V. | FC11–6–000 |

Take notice that during the month July 2011, the status of the above-captioned entities as Exempt Wholesale Generators or Foreign Utility Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19938 Filed 8–4–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[FERC Docket No. PF09–11–000]**

### TransCanada Alaska Company, LLC; Notice of Intent To Prepare an Environmental Impact Statement for the Planned Alaska Pipeline Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of the planned Alaska Pipeline Project (APP). The project under review is a new natural gas pipeline system that would transport natural gas produced on the Alaska North Slope (ANS) to the Alaska-Canada border for onward delivery to markets in North America. The APP is being advanced jointly by TransCanada Alaska Company, LLC and ExxonMobil Alaska Midstream Gas Investments, LLC (''project proponent''). This EIS will be used by the Commission in its decision-making process regarding issuance of a Certificate of Public Convenience and Necessity (Certificate) under the provisions of section 7(c) of the Natural Gas Act (NGA) and the Alaska Natural Gas Pipeline Act of 2004 (ANGPA).[1]

This notice explains the scoping process that the Commission will use to gather comments from the public and interested agencies on the planned project. Your input will help the Commission staff determine the issues that need to be evaluated in the EIS and help to focus the analysis on potentially significant environmental issues. Because of the magnitude of the proposal, the scoping period will remain open for an extended period, closing on February 27, 2012. This is not your only public input opportunity; please refer to the Environmental Review Process flow chart in Attachment 1.

[1] The project proponent is also considering an alternative proposal to build a natural gas pipeline to Valdez, Alaska for delivery into a liquefied natural gas (LNG) plant for liquefaction and export to global LNG markets. Because the Commission has received very little information on the LNG plant and the associated pipeline, the Valdez proposal is not sufficiently developed for the FERC to include in the environmental review at this time.

Comments may be submitted in writing or verbally. Further details on how to submit written comments are provided in the ''Public Participation'' section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend public scoping meetings to provide verbal and/or written comments on the project.

A schedule of the public scoping meeting dates, locations, and times will be issued in a separate notice at least one month prior to the date of the meetings. The meetings are tentatively scheduled to occur during January and February 2012.

This notice is being sent to the Commission's current environmental mailing list for this project. The environmental mailing list includes potentially affected landowners (crossed by or adjacent to the project route); landowners within 0.5 mile of compressor station sites; Federal, state, and local government agencies; elected officials; environmental and public interest groups; Alaska Native tribes; local libraries and newspapers; and other interested parties. State, local, and tribal government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a potentially affected landowner receiving this notice, you may be contacted by the project proponent about permission to conduct surveys, and the acquisition of an easement to construct, operate, and maintain the planned facilities. The project proponent would seek to negotiate a mutually acceptable easement agreement. If the project is approved by the Commission, that approval conveys with it the right of eminent domain for securing facility easements. Therefore, if easement negotiations fail to produce an agreement, the project proponent could initiate condemnation proceedings where compensation for the necessary easement would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is included for the potentially affected landowners identified along the proposed route and is available for viewing on the FERC Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

**Summary of the Planned Project**

The APP would involve construction and operation of a new pipeline system to transport up to 4.5 billion cubic feet of natural gas per day (Bcfd). Specifically, the planned project includes the following major components in Alaska:

- About 58 miles of 32-inch-diameter pipeline and associated aboveground facilities (the Point Thomson Pipeline) from the processing plant at the Point Thomson Field to a planned gas treatment plant (GTP) near Prudhoe Bay, Alaska;
- A new GTP near Prudhoe Bay capable of producing up to 4.5 Bcfd of pipeline-quality gas;
- About 745 miles of 48-inch-diameter pipeline and associated aboveground ancillary and auxiliary facilities (the Alaska Mainline) from the GTP to the Alaska-Yukon border. The Alaska Mainline would have a maximum allowable operating pressure of 2,500 pounds per square inch;
- Construction of at least five delivery points, eight compressor stations, two meter stations, various mainline block valves, and pig launching/receiving facilities; [2] and
- Associated infrastructure such as access roads, helipads, construction camps, pipe storage areas, contractor yards, borrow sites, and dock modifications and dredging at Prudhoe Bay.

The planned Alaska Mainline would start at the GTP and generally follow the existing Trans-Alaska Pipeline System crude oil pipeline (TAPS) and adjacent highways southeast to Delta Junction, Alaska. From Delta Junction, the mainline would diverge from TAPS and generally follow the Alaska Highway southeast to the Alaska-Yukon border. At the Alaska-Yukon border, the pipeline would interconnect to a new pipeline in Canada to deliver gas to North American markets through the Alberta Hub or other facilities with existing off-take capacity at or near the British Columbia/Alberta border. A map depicting the general location of project facilities is included as attachment 2.[3]

The project proponent anticipates filing a formal application with the FERC in October 2012, starting construction of the APP in the fourth quarter of 2014, and placing the pipeline system into service in the third quarter of 2020.

**Land Requirements for Construction**

The project proponent plans to use a nominal 145- to 200-foot-wide construction right-of-way for the majority of the pipeline routes. Additional temporary work areas would be required where the pipeline routes cross certain features (*e.g.,* waterbodies, wetlands, steep slopes, roads, and railroads); for staging areas, pipe yards, and contractors' yards; and for widening certain roads for project access.

On the basis of preliminary information, the project proponent estimates that construction of the APP would disturb about 19,900 acres of land. About 10,200 acres of this land would be retained after construction for a proposed 100-foot-wide permanent right-of-way and the aboveground facility sites (such as compressor stations). The remaining acreage would be restored and allowed to revert to former uses following construction.

**The EIS Process**

Under section 104 of the ANGPA, Congress designated the FERC as the lead Federal agency for preparation of an EIS that consolidates all involved Federal agency environmental reviews. The ANGPA directed that involved Federal agencies adopt this EIS to satisfy their individual National Environmental Policy Act (NEPA) responsibilities.

NEPA requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity under section 7 of the NGA. NEPA also requires us [4] to identify concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EIS on important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to be addressed in the EIS. All comments received during the scoping period will be considered during the preparation of the EIS. To ensure your comments are considered, please carefully follow the instructions in the

[2] A ''pig'' is a tool that is inserted into and moves through the pipeline, and is used for cleaning the inside surface of the pipeline, internal inspections, and other purposes.

[3] Attachment 1 (Environmental Review Process), attachment 2 (APP General Location Map) and attachment 3 (Mailing List/Environmental Document Request Form) are not being printed in the **Federal Register**. Copies are available on the Commission's Web site (*http://www.ferc.gov*) at the ''eLibrary'' link or from the Commission's Public Reference Room at 202–502–8371. For instructions on connecting to eLibrary, refer to the ''Availability of Additional Information'' section at the end of this notice. The General Project Map and Mailing List/Environmental Document Request Form were sent to all those receiving this notice in the mail.

[4] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

Public Participation section of this notice.

In the EIS, we will discuss impacts that could occur as a result of the construction and operation of the planned project under the following general headings:

- Geology and soils:
- Land use, recreation, and visual resources;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Socioeconomics and subsistence;
- Air quality and noise;
- Endangered and threatened species; and
- Public health and safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resources.

Although no formal application has been filed, we have already initiated our NEPA review under the FERC's pre-filing process.[5] The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. As part of our pre-filing review, we have already started to meet with the project proponent, jurisdictional agencies, Alaska Native tribes, local officials, and other interested stakeholders to discuss the project and identify issues/impacts and concerns. We also participated in 24 public open house meetings in Alaska hosted by the project proponent in March, April, May, and June 2011. Additionally, we have been meeting with interested state and Federal agencies to discuss their possible involvement in the scoping process and the preparation of the EIS.

Our independent analysis of the issues identified during the scoping process will be presented in the EIS. The draft EIS will be published and distributed for a 45-day public review and comment period. We will consider all timely comments and revise the document, as necessary, before issuing a final EIS.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EIS. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Thus far, the Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration, U.S. Geological Survey, U.S. Coast Guard, Eielson Air Force Base, and the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects have agreed to participate as cooperating agencies in the preparation of the EIS.

[5] The FERC granted the project proponent's request to begin the pre-filing process on May 1, 2009.

**Currently Identified Environmental Issues**

We have already identified a number of issues that we think deserve attention based on the public open houses, interagency meetings, and our review of the information provided by the project proponent. This preliminary list of issues may be changed based on your comments and our analysis.

- Permafrost, Soils, and Reclamation:

—Construction limitations and slope stabilization in steep terrain and permafrost.
—Potential for problematic reclamation due to poor soils and permafrost conditions.
—Material, design, and operations and maintenance procedures/specifications for permafrost and subsidence locations.
—Potential for introduction or spread of invasive and/or noxious species of vegetation during and after construction.

- Cultural Resources:

—Impacts on traditional Alaska Native culture, historic sites, and landscapes.

- Water Resources and Wetlands:

—Effects of construction and operation on waterbodies and wetlands.
—Effects of dredging and dumping dredged material into ocean waters.

- Fish, Wildlife, Vegetation, and Sensitive Species:

—Effects of project construction on fish and wildlife and their habitat, including federally listed threatened and endangered species, migratory birds, and big game species.
—Effects of water depletion from hydrostatic testing and ice road construction.

- Seismic Activity and Geohazards:

—Pipeline design in seismically active areas.
—Construction in geohazard areas.

- Land Use, Recreation, and Special Interest Areas:

—Impacts on wilderness characteristics.
—Impacts on existing conservation system units (*e.g.,* Tetlin National Wildlife Refuge).
—Private land crossings.
—Impacts on recreation (*e.g.,* fishing, hunting, boating, camping, hiking, skiing, mushing, and snowmachining).

- Socioeconomics:

—Effects of construction workforce demands on public services and temporary housing.
—Economic impacts on local communities.
—Environmental Justice.

- Subsistence and Public Health:

—Effects of construction and operation on fish, wildlife, marine mammal, and plant species used for subsistence.
—Impacts on access to subsistence resources.
—Health impacts on local communities.

- Air Quality and Noise

—Impacts on areas of air quality nonattainment.

- Reliability and Safety:

—Crossings of the TAPS.
—Corrosion protection.
—Potential hazards to the planned facilities from wildfires.
—Assessment of security associated with operation of the facilities.

- Cumulative Impacts:

—Effects of the APP when combined with other actions in the same region.
—Impacts from siting multiple utilities within the same corridor.
—Potential for the new corridors to attract future utility lines.

**Public Participation**

You can make a difference by providing us with your specific comments or concerns about the planned project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. *The more specific your comments, the more useful they will be.* To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC, on or before February 27, 2012.

For your convenience, there are three methods that you can use to submit written comments to the Commission. In all instances, please reference the project docket number (PF09–11–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

1. You may file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* An eComment is an easy method for interested persons to submit brief, text-only comments on a project.

2. You may file your comments electronically by using the eFiling feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing''; or

3. You may mail a paper copy of your comments to the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

**Environmental Mailing List**

We are developing an environmental mailing list that will be used to provide interested parties with information on the EIS process and opportunities for public participation, including distribution of the draft EIS for public review. The environmental mailing list includes Federal, state, and local government representatives and agencies; Alaska Native tribes and village corporations; elected officials; environmental and public interest groups; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. If you received this notice, you are currently on the environmental mailing list for the APP. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

Copies of the completed draft EIS will be sent to individuals on the environmental mailing list for public review and comment. If you would prefer to receive a paper copy instead of the CD version or would like to remove your name from the mailing list, please return the attached Environmental Document Request Form (attachment 3).

**Becoming an Intervenor**

Once the project proponent formally files its application with the Commission, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''eFiling'' link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until a formal application for the APP is filed with the Commission. You do not need intervener status to have your environmental comments considered.

**Additional Information**

Additional information is available from FERC's Office of External Affairs at (866) 208–FERC (3372) or on the FERC Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* PF09–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link on the FERC Web site also provides access to the text of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to the eSubscription link on the FERC Web site (*http://www.ferc.gov/docs-filing/esubscription.asp*).

Also, the project proponent has established a Web site for the APP at *http://www.thealaskapipelineproject.com.* The Web site includes a description of the project as well as project maps and links to related documents. Information can also be obtained by calling the project proponent directly at (877) 625–8679 (toll free) or (907) 564–3660.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19942 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR11–120–000]**

### DCP Intrastate Network, LLC; Notice of Filing

Take notice that on July 26, 2011, DCP Intrastate Network, LLC filed to provide notice of its cancellation of its Statement of Operating Conditions for Interstate Gas Transportation proposed to be effective February 1, 2011, as more fully described in the filing.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern time on Monday, August 8, 2011.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19935 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR11–121–000]**

### Rocky Mountain Natural Gas LLC; Notice of Filing

Take notice that on July 28, 2011, Rocky Mountain Natural Gas LLC filed a revised Statement of Operating Conditions to comply with an unpublished Delegated letter order issued on July 13, 2011, in Docket No. PR10–130–000.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, August 9, 2011.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19939 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR10–97–003; Docket No. PR10–101–003; Not Consolidated]**

### Enstor Grama Ridge Storage and Transportation, L.L.C.; Enstor Katy Storage and Transportation, L.P.; Notice of Filing

Take notice that on July 29, 2011, the applicants listed above submitted a revised baseline filing of their Statement of Operating Conditions to comply with unpublished Delegated letter orders issued on June 29, 2011.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19943 Filed 8–4–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13135–002]**

### City of Watervliet; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 1, 2011, the City of Watervliet filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Delta Hydroelectric Project to be located at Delta Dam on the Mohawk River in Oneida County, New York. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 1,016-foot-long, 76-foot-high Delta Dam, owned by the New York State Canal Corporation, (2) an existing impoundment having a surface area of 2,700 acres and a storage capacity of 63,200 acre-feet and normal water surface elevation of 550 feet mean sea level, (3) a proposed powerhouse containing two generating units with a total installed capacity of 5.0 megawatts, (4) a proposed 17,000-foot-long, 13.2-kilovolt underground generator lead, and (5) appurtenant facilities. The project would have an annual generation of 14.1 gigawatt hours.

*Applicant Contact:* Mark Gleason, General Manager, City of Watervliet, City Hall, Watervliet, NY 12189; phone: (518) 270–3800.

*FERC Contact:* Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13135–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19941 Filed 8–4–11; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RM98–1–000]**

### Records Governing Off-the Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866)208–3676, or for TTY, contact (202) 502–8659.

| Docket No. | File Date | Presenter or requester |
|---|---|---|
| 1. P–739–022 | 7–14–11 | Hon. H. Morgan Griffith. |
| 2. P–2149–152 | 7–14–11 | Hon. Doc Hastings. |
| 3. P–12737–002 | 7–20–11 | Dr. James D. Price.[1] |

[1] Record of e-mail exchanges with staff.

Dated: August 1, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–19940 Filed 8–4–11; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–8998–3]**

### Environmental Impacts Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/*

Weekly receipt of Environmental Impact Statements

Filed 07/25/2011 Through 07/29/2011

Pursuant to 40 CFR 1506.9

#### Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has included its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

*EIS No. 20110245, Draft EIS, BLM, NV,* Sloan Hills Competitive Mineral Material Sales Project, Proposing to

Mine Limestone and Dolomite Minerals, Clark County, NV, *Comment Period Ends:* 12/02/2011, *Contact:* Shonna Dooman 702–515–5174.

*EIS No. 20110246, Final EIS, DOE, TX,* Texas Clean Energy Project, Construction and Operation of a Coal-Based Electric Power Generation and Chemicals Production Plant, Odessa, Ector County, TX, *Wait Period Ends:* 09/06/2011, *Contact:* Mark L. McKoy 1–800–432–8330.

*EIS No. 20110247, Draft EIS, USFS, CA,* Algoma Vegetation Management Project, Proposing to Protect and Promote Conditions of Late-Successional Forest Ecosystem on 5, 6000 Acres within the 14,780 Acre Unit of the Algoma Late-Successional Reserve (LSR), Shasta-Trinity National Forest, Siskiyou County, CA, *Comment Period Ends:* 09/19/2011, *Contact:* Emelia Barnum 530–926–9600.

*EIS No. 20110248, Final EIS, USFS, SD,* Pactola Project Area, Proposes to Implement Multiple Resource Management Actions, Mystic Ranger District, Black Hills National Forest, Pennington County, SD, *Wait Period Ends:* 09/06/2011, *Contact:* Katie Van Alstyne 605–343–1567.

**Amended Notices**

*EIS No. 20110179, Draft EIS, USFS, CO,* Ski Resort Peak 6 Project, To Better Accommodate Existing Daily Visitation Levels, Dillon Ranger District, White River National Forest, Summit County, CO, *Comment Period Ends:* 08/26/2011, *Contact:* Jan Cutts 970–262–3451.

Revision to FR Notice 06/10/2011: Extending Comment from 07/25/2011 to 08/26/2011.

Dated: August 2, 2011.

**Cliff Rader,**

*Acting Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2011–19917 Filed 8–4–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2009–1017; FRL–8882–9]**

## Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

**DATES:** Comments must be received on or before September 6, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. *Attn:* Maia Tatinclaux.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2009–1017. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *regulations.gov* or e-mail. The *regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

**FOR FURTHER INFORMATION CONTACT:** Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–0123; *e-mail address: tatinclaux.maia@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 45 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Tables 1, 2, and 3 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| EPA Reg. No. | Product name | Active ingredients |
|---|---|---|
| 000239–02373 | Bug-Geta Snail & Slug Pellets | Metaldehyde. |
| 000279–03053 | Command 4EC Herbicide | Clomazone. |
| 000279–03071 | Command 4E Herbicide | Clomazone. |
| 000538–00199 | Scotts Turf Manager for St. Augustine Grass | Paclobutrazol. |
| 000538–00201 | Scotts Turf Manager II | Paclobutrazol. |
| 001270–00254 | Zep FS CIP Acid Sanitizer | Phosphoric Acid Dodecybenzenesulfonic acid. |
| 001448–00047 | Busan 52 | Carbamodithioic acid, methyl-, monopotassium salt. |
| 001448–00389 | D–33–5 | Potassium dimethyldithiocarbamate. |
| 001448–00390 | D–33–6 | Potassium dimethyldithiocarbamate. |
| 001448–00391 | D–33–7 | Potassium dimethyldithiocarbamate. |
| 001448–00392 | D–33–8 | Potassium dimethyldithiocarbamate. |
| 001448–00429 | Diald 25P | Glutaraldehyde. |
| 001448–00430 | Diald 15P | Glutaraldehyde. |
| 001448–00431 | Diald 45P | Glutaraldehyde. |
| 002596–00132 | Hartz Sumithrin Carpet Powder | MGK–264 Sumithrin. |
| 002724–00697 | Permanone H&G Insect Control | Permethrin. |
| 004822–00531 | Raid 1000 | Triethylene glycol. |
| 006959–00082 | Cessco Accudose Aerosol Insecticide | Pyrethrins Piperonyl butoxide. |
| 047000–00171 | SMCP Pyrethrum Dust 1% | Pyrethrins. |
| 061483–00086 | 10% Permectrin Pour-On Insecticide | Permethrin. |
| 069592–00002 | Laginex AS | Lagenidium giganteum, mycelium or oospores. |
| 069592–00003 | Technical Laginex | Lagenidium giganteum, mycelium or oospores. |
| 070506–00202 | Penncozeb EG Raincote | Mancozeb. |
| 080490–00002 | Promeris Spot on for Dogs | Amitraz 4-{(2Z)-2-({[4-(Trifluoromethoxy) Anilino]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone. |
| 080490–00003 | Promeris Spot on for Cats | 4-{(2Z)-2-({[4-(Trifluoromethoxy) Anilino]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone. |
| 080490–00004 | Promeris for Dogs—Flea Control | 4-{(2Z)-2-({[4-(Trifluoromethoxy) Anilino]Carbonyl}Hydrazono)-2-[3-(Trifluoromethyl) Phenyl]Ethyl}Benzonitrile Metaflumizone. |
| 081598–00010 | Glyphosate Acid Technical | Glyphosate. |
| 083100–00029 | Glyphosate 62% Manufacturing Concentrate | Glyphosate-isopropylammonium. |
| 087650–00001 | Fipronil Technical | Fipronil |
| CA920028 | Devrinol 50–DF Selective Herbicide | Napropamide. |
| CO100002 | Endigo | Thiamethoxan lambda-Cythalothrin. |
| ND900005 | Vitavax-200 Flowable Fungicide (Vitavax with Thiram) ... | Thiram Carboxin. |

TABLE 2—REGISTRATIONS CONTAINING METHYL BROMIDE OR CHLOROPICRIN WITH PENDING REQUESTS FOR CANCELLATION

| EPA Reg. No. | Product name | Active ingredients |
|---|---|---|
| 005785–00017 | Chlor-O–Pic | Chloropicrin. |
| 005785–00025 | Terr-O–Gas 33 Preplant Soil Fumigant | Chloropicrin Methyl bromide. |
| 008536–00012 | Methyl Bromide 99.5% | Methyl bromide. |
| CA900038 | Methyl Bromide 99.5% | Methyl bromide. |
| CA900045 | Methyl Bromide 99.5% | Methyl bromide. |
| CA910003 | Methyl Bromide 99.5% | Methyl bromide. |
| CA910020 | Methyl Bromide 99.5% | Methyl bromide. |
| CA970017 | Methyl Bromide 99.5% | Methyl bromide. |
| ID070004 | MBC Concentrate Soil Fumigant | Methyl bromide. |

TABLE 3—REGISTRATIONS CONTAINING CARBOFURAN WITH PENDING REQUESTS FOR CANCELLATION

| EPA Reg. No. | Product name | Active ingredients |
|---|---|---|
| 000279–02712 | Furadan 10 G Insecticide/Nematicide | Carbofuran. |
| 000279–02876 | Furadan 4F Insecticide/Nematicide | Carbofuran. |
| 000279–03023 | Furadan 15 G Insecticide/Nematicide | Carbofuran. |
| 000279–03310 | Furadan LFR Insecticide/Nematicide | Carbofuran. |

Table 4 of this unit includes the names and addresses of record for all registrants of the products in Tables 1, 2, and 3 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 4—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

| EPA Co. No. | Company name and address |
|---|---|
| 239 | The Scotts Company, P.O. Box 190, Marysville, OH 43040. |
| 279 | FMC Corp. Agricultural Products Group, ATTN: Michael C. Zucker, 1735 Market St., Rm 1978, Philadelphia, PA 19103. |
| 538 | The Scotts Company, 14111 Scottslawn Rd., Marysville, OH 43041. |
| 1270 | ZEP Inc., 1310 Seaboard Industrial Blvd. NW., Atlanta, GA 30318. |
| 1448 | Buckman Laboratories Inc., 1256 North McLean Blvd., Memphis, TN 38108. |
| 2596 | The Hartz Mountain Corp., 400 Plaza Dr., Secaucus, NJ 07094. |
| 2724 | Wellmark International, 1501 E. Woodfield Rd., Suite 200 West, Schaumburg, IL 60173. |
| . | |
| 4822 | S.C. Johnson & Son Inc., 1525 Howe St., Racine, WI 53403. |
| 5785 | Great Lakes Chem Corps, Agent: Chemtura Corporation, 1801 Highway 52 West, West Lafayette, IN 47906. |
| 6959 | Cessco Inc, 3609A River Rd., John's Island, SC 29455. |
| 8536 | Soil Chemicals Corporation , P.O. Box 782, Hollister, CA 95024. |
| 47000 | Chem-Tech, LTD., 4515 Fleur Dr. #303, Des Moines, IA 50321. |
| 61483 | KMG–Bernuth, Inc., 9555 W. Sam Houston Pkwy South, Suite 600 , Houston, TX 77099. |
| 69592 | Agraquest Inc, 1540 Drew Avenue, Davis, CA 95618–6320. |
| 70506 | United Phosphorus, Inc, 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. |
| 80490 | Fort Dodge Animal Health, 7000 Portage Rd., KZO 300–403 SW., Kalamazoo, MI 49001. |
| 81598 | Rotam Limited, AGENT: IPM Resources LLC, 4032 Crockers Lake Blvd., Suite 818, Sarasota, FL 43238. |
| 83100 | Rotam Agrochemical Company Ltd., AGENT: IPM Resources LLC, 4032 Crockers Lake Blvd., Suite 818, Sarasota, FL 43238. |
| 87650 | Fipronex Solutions, Inc., AGENT: Technology Sciences Group, Inc., 1150 18th St., NW., Suite 1000, Washington, DC 20036. |
| CA900038; CA900045; CA910003; CA910020; CA970017 | Soil Chemicals Corporation , P.O. Box 782, Hollister, CA 95024. |
| CA920028 | Easter Lily Research Foundation, P.O. Box 907, Brookings, OR 97415. |
| CO100002 | Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. |
| ID070004 | TriCal Inc., P.O. Box 1327, Hollister, CA 95024–1327. |
| ND900005 | Chemtura Corporation, 199 Benson Rd. (2–5), Middlebury, CT 06749. |

**III. What is the Agency's authority for taking this action?**

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be cancelled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 4 of Unit II. have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

**IV. Procedures for Withdrawal of Request**

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

**V. Provisions for Disposition of Existing Stocks**

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Upon cancellation of the products identified in Tables 1, 2, and 3 of Unit II., EPA will allow existing stocks provisions as follows:

*A. Registrations Listed in Table 1 of Unit II Except Nos. 080490–00002, 080490–00003, 080490–00004*

The Agency anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

*B. Registration Nos. 080490–00002, 080490–00003, 080490–00004*

The Agency anticipates allowing registrants to sell and distribute existing stocks of these products through September 30, 2011. Thereafter, registrants will be prohibited from selling or distributing these pesticide products, except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

*C. Registrations Listed in Table 2 of Unit II*

The effective date of cancellation of these products is the date of publication of the cancellation order in the **Federal Register**. The registrants will be allowed to sell and distribute existing stocks until December 31, 2011. Thereafter, registrants will be prohibited from selling or distributing these pesticide products, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant will be allowed to sell and distribute existing stocks through April 30, 2012. After this date, remaining existing stocks may be used until exhausted, provided that such use complies with the EPA-approved label and labeling of the product.

*D. Registrations Listed in Table 3 of Unit II*

The effective date of cancellation of these products is the date of publication of the cancellation order in the **Federal Register**. EPA does not intend to allow the continued sale and distribution of existing stocks of these products after the effective date of this cancellation for several reasons. First, there are currently no tolerances in effect for any of the food or feed crops associated with the domestic use of these products, and there have been none since the 2009 tolerance revocations took effect on December 31, 2009, (May 15, 2009, 74 FR 23046) (FRL–8413–3). In addition, the Agency believes that little, if any existing stock remains in the hands of retailers, based on the sole registrant's repeated representation that no carbofuran products have been released for shipment since January 2010, and that they have offered to buy back unused carbofuran products. Consequently, sale of existing stocks of carbofuran is prohibited as of the effective date of this cancellation. Users may only use those carbofuran products labeled for non-food use (ornamentals, spinach grown for seed, and pine seedlings) on those specific crops and in accordance with all geographical restrictions. Any food or feed crops with carbofuran residues after this date will be considered adulterated and subject to seizure.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: August 1, 2011.

**Patricia L. Moe,**

*Acting Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2011–19903 Filed 8–4–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Public Information Collection Being Submitted to OMB for Review and Approval, Comments Requested

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology;

and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written comments should be submitted on or before September 6, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, OMB, via fax 202–395–5167, or via e-mail *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via e-mail *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov*. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:** To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

*OMB Control Number:* 3060–1150.

*Title:* Structure and Practices of the Video Relay Service Program, Second Report and Order, CG Docket No. 10–51.

*Form No.:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business and other for-profit entities.

*Number of Respondents and Responses:* 11 respondents and 54 responses.

*Estimated Time per Response:* .5 hours to 50 hours.

*Frequency of Response:* Annual, on occasion, and one-time reporting requirements.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for these proposed information collections is found at section 225 of the Act, 47 U.S.C. 225. The law was enacted on July 26, 1990, as Title IV of the ADA, Pub. L. 101–336, 104 Stat. 327, 366–69.

*Total Annual Hourly Burden:* 900 hours.

*Total Annual Costs:* None.

*Nature and Extent of Confidentiality:* An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

*Privacy Act Impact Assessment:* No impacts.

*Needs and Uses:* On July 28, 2011, in document FCC 11–118, the Commission released a *Second Report and Order* adopting the final rules that amend the Commission's process for certifying Internet-based Telecommunications Relay Service (iTRS) providers as eligible for payment from the Interstate TRS Fund (Fund) for their provision of iTRS, as proposed in the Commission's April 2001 Further Notice of Proposed Rulemaking in the Video Relay Service (VRS) reform proceeding, CG Docket No. 10–51, published at 76 FR 24437, May 2, 2011. The Commission adopted the newly revised certification process to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers.

The *Second Report and Order* contains information collection requirements with respect to the following four requirements, all of which aims to ensure that providers are qualified to provide iTRS and that the services are provided in compliance with the Commission's rules with no or minimal service interruption.

(*A*) *Required Evidence for Submission for Eligibility Certification.* The *Second Report and Order* requires that potential iTRS providers must provide full and detailed information in its application for certification that show its ability to comply with the Commission's rules. The *Second Report and Order* requires that applicants must provide a detailed description of how the applicant will meet all non-waived mandatory minimum standards applicable to each form of TRS offered, including documentary and other evidence, and in the case of VRS, such documentary and other evidence shall demonstrate that the applicant leases, licenses or has acquired its own facilities and operates such facilities associated with TRS call centers and employees communications assistants, on a full or part-time basis, to staff such call centers at the date of the application. Such evidence shall include but not be limited to:

1. For VRS applicants operating five or fewer call centers within the United States, a copy of each deed or lease for each call center operated by the applicant within the United States;

2. For VRS applicants operating more than five call centers within the United States, a copy of each deed or lease for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States; and

3. For VRS applicants operating call centers outside of the United States, a copy of each deed or lease for each call center operated by the Applicant outside of the United States;

4. For all applicants, a list of individuals or entities that hold at least a 10 percent equity interest in the applicant, have the power to vote 10 percent or more of the securities of the applicant, or exercise de jure or de facto control over the applicant, a description of the applicant's organizational structure, and the names of its executives, officers, members of its board of directors, general partners (in the case of a partnership), and managing members (in the case of a limited liability company);

5. For all applicants, a list of the number of applicant's full-time and part-time employees involved in TRS operations, including and divided by the following positions: executives and officers; video phone installers (in the case of VRS), communications assistants, and persons involved in marketing and sponsorship activities;

6. Where applicable, a description of the call center infrastructure, and for all core call center functions (automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS fund, and registration) a statement whether such equipment is owned, leased or licensed (and from whom if leased or licensed) and proofs of purchase, leases or license agreements, including a complete copy of any lease or license agreement for automatic call distribution;

7. For all applicants, copies of employment agreements for all of the provider's executives and communications assistants need not be

submitted with the application, but must be retained by the applicant and submitted to the Commission upon request; and

8. For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including any associated written agreements;

(*B*) *Submission of Annual Report.* The *Second Report and Order* requires that providers submit annual reports that include updates to the information listed under Section *A* above or certify that there are no changes to the information listed under Section *A* above.

(*C*) *Requiring Providers to Seek Prior Authorization of Voluntary Interruption of Service.* The *Second Report and Order* requires that a VRS provider seeking to voluntarily interrupt service for a period of 30 minutes or more in duration must first obtain Commission authorization by submitting a written request to the Commission's Consumer and Governmental Affairs Bureau (CGB) at least 60 days prior to any planned service interruption, with detailed information of:

(*D*) *Reporting of Unforeseen Service Interruptions.* With respect to brief, unforeseen service interruptions or in the event of a VRS provider's voluntary service interruption of less than 30 minutes in duration, the *Second Report and Order* requires that the affected provider submit a written notification to CGB within two business days of the commencement of the service interruption, with an explanation of when and how the provider has restored service or the provider's plan to do so imminently. In the event the provider has not restored service at the time such report is filed, the provider must submit a second report within two business days of the restoration of service with an explanation of when and how the provider has restored service.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–19791 Filed 8–4–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written comments should be submitted on or before August 30, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, OMB, via fax 202–395–5167, or via e-mail *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via e-mail *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:** The Commission is requesting emergency OMB processing of the information collection requirements contained in this notice and has requested OMB approval by September 6, 2011.

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

*OMB Control Number:* 3060–XXXX.

*Title:* Structure and Practices of the Video Relay Service Program, Interim Rules, CG Docket No. 10–51.

*Form Number:* N/A.

*Type of Review:* New collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 31 respondents; 53 responses.

*Estimated Time per Response:* .017 (1 minute) to .50 hours (30 minutes).

*Frequency of Response:* Annual and one-time reporting requirements; and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefit. The statutory authority for the information collection requirements is found at Section 225 of the Communications Act, 47 U.S.C. 225. The law was enacted on July 26, 1990, as Title IV of the ADA, Pub. L. 101–336, 104 Stat. 327, 366–69.

*Total Annual Burden:* 7 hours.

*Total Annual Cost:* None.

*Nature and Extent of Confidentiality:* An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* On July 28, 2011 the Commission released *Second Report and Order and Order* FCC 11–118, adopting final and interim rules—containing information collection requirements—designed to help prevent fraud and abuse, and ensure quality service, in the provision of Internet-based forms of Telecommunications Relay Services (iTRS).

Specifically, the interim rules, described in A. and B. below, require that applicants and providers certify, under penalty of perjury, that their certification applications and annual compliance filings required under section 64.606 (a)(2) and 64.606(g) of the Commission's rules are truthful, accurate, and complete. The final rules, described in C. and D. below, are designed to enhance disclosures to iTRS consumers so that they are better aware of service terminations or temporary cessations.

Below are the information collection requirements contained in the *Second Report and Order and Order:*

**A. Applicant Certifying Under Penalty of Perjury for Certification Application**

The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an applicant for Internet-based TRS certification with first hand knowledge of the accuracy and completeness of the information provided, when submitting an application for certification for eligibility to receive compensation from the Interstate TRS Fund, must certify under penalty of perjury that all application information required under the Commission's rules and orders has been provided and that all statements of fact, as well as all documentation contained in the application submission, are true, accurate, and complete.

**B. Certified Provider Certifying Under Penalty of Perjury for Annual Compliance Filings**

The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an Internet-based TRS provider with first hand knowledge of the accuracy and completeness of the information provided, when submitting an annual compliance report under paragraph (g) of section 64.606 of the Commission's rules, must certify under penalty of perjury that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in the annual compliance report submission, are true, accurate, and complete. .

**C. Notification of Service Cessation**

The applicant for certification must give its customers at least 30 days notice that it will no longer provide service should the Commission determine that the applicant's certification application does not qualify for certification under paragraph (a)(2) of section 64.606 of the Commission's rules.

**D. Notification on Web Site**

The provider must provide notification of temporary service outages to consumers on an accessible website, and the provider must ensure that the information regarding service status is updated on its website in a timely manner.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–19794 Filed 8–4–11; 8:45 am]

**BILLING CODE 6712–01–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before October 4, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov.* To submit your PRA comments by e-mail send them to: *PRA@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Benish Shah, Office of Managing Director, (202) 418–7866.

*OMB Control No.:* 3060–0093.

*Title:* Application for Renewal of Radio Station License for Experimental Radio Service, FCC Form 405.

*Form No.:* FCC Form 405.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit and not-for-profit institutions.

*Number of Respondents and Responses:* 300 respondents and 300 responses.

*Estimated Time per Response:* 2.25 hours.

*Frequency of Response:* On occasion and every two year reporting requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection (IC) is contained in sections 4(i), 301, 302, 303(e), 303(f), and 303(r), of the Communications Act of 1934, as amended; 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f) and 303(r).

*Total Annual Burden:* 675 hours.

*Total Annual Cost:* $100,500.

*Privacy Act Impact Assessment:* This information collection affects individuals or households. The Commission has a System of Records, FCC/OET–1 ''Experimental Radio Station License Files'' which cover the personally identifiable information (PII) that individual applicants may include in their submissions for experimental radio authorizations. The system of records notice (SORN) was published in the **Federal Register** on April 5, 2006, *see* 71 FR 17234, 17241. The SORN may be viewed at *http://www.fcc.gov/omd/privacyact/records-systems.html.*

*Nature and Extent of Confidentiality:* Applicants may request that any information supplied be withheld from public inspection, *e.g.,* granted confidentiality, pursuant to 47 CFR Section 0.459 of the Commission's rules.

*Needs and Uses:* This collection will be submitted as an extension (no change in reporting and third party disclosure requirements), after this 60 day comment period in order to obtain the full 3-year clearance from the OMB. There are adjustment increases to the annual burden hours (+128 hours) and annual cost burden (+37,320).

FCC Form 405 is used by the Experimental Radio Service to apply for renewal of radio station licenses at the FCC. Section 307 of the Communications Act of 1934, as amended, limits the term of radio licenses to 5 years and requires that written applications be submitted for renewal. The regular license period for stations in the Experimental Radio Service is either 2 or 5 years.

The information submitted on FCC Form 405 is used by the Commission staff to evaluate the applicant/licensee's need for a license renewal. In performing this function, staff performs analysis of the renewal request as compared to the original license grant to ascertain if any changes are requested. If so, additional analysis is performed to determine if such changes met the requirements of the rules of the Experimental Radio Service for interference free operation. If needed, the collected information is used to coordinate such operation with other Commission bureaus or other Federal Agencies. All applications are also analyzed on their merits regarding whether they meet the general requirements for an Experimental license. These requirements are set out in 47 CFR part 5.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–19879 Filed 8–4–11; 8:45 am]

**BILLING CODE 6712–01–P**

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## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens and as required by the Paperwork Reduction Act of 1995, Public Law 104–13, the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

**DATES:** Persons wishing to comment on this information collection should submit comments by October 4, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Submit your PRA comments to Nicolas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov,* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission (FCC). To submit your comments by e-mail send them to: *PRA@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection(s), contact Judith B. Herman at 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

*OMB Control No.:* 3060–0695.

*Title:* Section 87.219, Automatic Operations.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 60 respondents; 60 responses.

*Estimated Time per Response:* .7 hours.

*Frequency of Response:* On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154, 303, and 307(e).

*Total Annual Burden:* 42 hours.

*Annual Cost Burden:* $6,468.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* There is no need for confidentiality.

*Needs and Uses:* The Commission is seeking Office of Management and Budget (OMB) approval for an extension of this information collection (no change in the reporting, recordkeeping and/or third party disclosure requirements). The Commission will submit this information collection after this 60 day comment period.

Section 87.219 requires that if airports have control towers or Federal Aviation Administration (FAA) flight service stations, and more than one licensee wants to have an automated aeronautical advisor station (Unicom), they must write an agreement outlining who will be responsible for the Unicom's operation; all licensees must sign the agreement and keep a copy of the agreement with each licensee's station authorization. If the control is to be shared among several operators, how that control will be divided or scheduled must be agreed upon by the licensees.

The information will be used by compliance personnel for enforcement purposes and by licensees to clarify responsibility in operating Unicom.

*OMB Control No.:* 3060–0740.

*Title:* Section 95.1015, Disclosure Policies.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 26 respondents; 26 responses.

*Estimated Time per Response:* 1 hour.

*Frequency of Response:* On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154, 303, and 307(e).

*Total Annual Burden:* 26 hours.

*Annual Cost Burden:* $1,300.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* There is no need for confidentiality.

*Needs and Uses:* The Commission is seeking Office of Management and Budget (OMB) approval for an extension of this information collection (no change in the reporting, recordkeeping and/or third party disclosure requirements). The Commission will submit this information collection after this 60 day comment period.

Prior to operating a Low Power Radio Service (LPRS) transmitter for Automated Marine Telecommunications System (AMTS) purposes, an AMTS licensee must notify, in writing, each television station that may be affected by such operations, as defined in 47

CFR 80.215(h). The notification provided with the station's license application is sufficient to satisfy this requirement if no new television stations would be affected. This information is used by Commission staff and affected stations television stations to be aware of the location of potential harmful interference from AMTS operations.

The reporting requirement in section 90.1015 necessary to ensure that television stations that may be affected by harmful interference from AMTS operations are notified.

*OMB Control No.:* 3060–0882.

*Title:* Section 95.833, Construction Requirements.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 10 respondents; 10 responses.

*Estimated Time per Response:* 1 hour.

*Frequency of Response:* Every decade (ten years) reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154 and 303.

*Total Annual Burden:* 10 hours.

*Annual Cost Burden:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* There is no need for confidentiality.

*Needs and Uses:* The Commission is seeking Office of Management and Budget (OMB) approval for an extension of this information collection (no change in the reporting, recordkeeping and/or third party disclosure requirements). The Commission will submit this information collection after this 60 day comment period.

The reporting requirement contained in 47 CFR 95.833 is necessary for 218–219 MHz service system licensees to file a report after ten years of license grant to demonstrate that they provide substantial service to its service areas.

The information is used by the Commission staff to access compliance with 218–219 MHz service construction requirements, and to provide adequate spectrum for the service. This will facilitate spectrum efficiency and competition by the 218–219 MHz service licensees in the wireless marketplace.

Without this information, the Commission would not be able to carry out its statutory responsibilities.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–19868 Filed 8–4–11; 8:45 am]

BILLING CODE 6712–01–P

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## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 6, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to the Federal Communications Commission's PRA mailbox (*e-mail address: PRA@fcc.gov*). Include in the e-mail the OMB control number of the collection as shown in the ''Supplementary Information'' section below, or if there is no OMB control number, include the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail, contact he person listed below to make alternate arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-b.herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0395.

*Title:* ARMIS USOA Report (ARMIS Report 43–02); ARMIS Service Quality Report (ARMIS Report 43–05); and ARMIS Infrastructure Report (ARMIS Report 43–07).

*Form No.:* ARMIS Reports 43–02, 43–05 and 43–07.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Individuals or households and state, local or tribal government.

*Number of Respondents:* 48 respondent; 63 responses.

*Estimated Time per Response:* 322.50793 hours (average).

*Frequency of Response:* On occasion and annual reporting requirements and recordkeeping requirements.

*Obligation to Respond:* Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. sections 160, 161, 209(b), and 220.

*Total Annual Burden:* 20,318 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* Ordinarily these reports do not involve questions of a sensitive nature are not involved in these ARMIS reports. The Commission contends that areas in which detailed information is required are fully subject to regulation and the issue of data being regarded as sensitive will arise in special circumstances only. In such circumstances, the respondent is instructed on the appropriate procedure to follow to safeguard sensitive or confidential data. The Commission has determined that certain data in FCC Reports 43–02 and 43–07 are proprietary, and we have accorded confidential treatment to the respondents upon request.

*Needs and Uses:* The Commission will submit this expiring information collection (IC) to the OMB during this comment period to obtain the three year clearance from them. The Commission is seeking OMB approval for an extension (no change in the reporting and/or recordkeeping requirements) of this information collection. The Commission is reporting a 850 hour increase adjustment in burden which is due to the addition of a respondent not included in prior ARMIS Report 43–05 review process.

The USOA Report provides the annual results of the carriers' activities for each account in the Uniform System of Accounts.

The Service Quality Report provides service quality information in the areas of interexchange access service, installation and repair intervals, local service installation and repair intervals, trunk blockage, and total switch downtime for price cap carriers.

The Infrastructure Report provides the switch deployment and capabilities data.

The information contained in the three reports provides the necessary detail to enable this Commission to fulfill its regulatory responsibilities. Automated reporting of these data greatly enhances the Commission's ability to process and analyze the extensive amounts of data it needs to administer its rules. ARMIS facilitates the timely and efficient analysis of revenue requirements, rates of return and price caps, and provides an improved basis for auditing and other oversight functions. It also enhances the Commission's ability to quantify the effects of policy proposals.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–19880 Filed 8–4–11; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Sunshine Act Meeting; Open Commission Meeting; Tuesday, August 9, 2011

Date: August 2, 2011.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Tuesday, August 9, 2011, which is scheduled to commence at 10:30 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC.

The meeting will include a presentation of the 2011 Excellence in Economics and Excellence in Engineering awards.

| Item Nos. | Bureau | Subject |
|---|---|---|
| 1 | Wireless Telecommunications Bureau. | *Title:* Amendment of Part 101 of the Commission's Rules To Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and To Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees (WT Docket No. 10–153), and Petition for Rulemaking filed by Fixed Wireless Communications Coalition To Amend Part 101 of the Commission's Rules to Authorize 60 and 80 MHz Channels in Certain Bands for Broadband Communications (RM–11602).<br>*Summary:* The Commission will consider as part of its Broadband Acceleration Initiative a Report and Order, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order addressing several proposals to remove regulatory barriers to the full and effective use of certain spectrum bands for wireless backhaul to promote broadband deployment. The item also addresses other ways to make additional spectrum available for wireless backhaul. |
| 2 | International | *Title:* Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1964, as Amended.<br>*Summary:* As part of the regulatory reform efforts, the Commission will consider a Notice of Proposed Rulemaking to reduce regulatory burdens and streamline the review process for foreign ownership of common carrier radio licensees (*e.g.,* wireless phone companies) and certain aeronautical radio licensees under section 310(b)(4) of the Communications Act, while ensuring the Commission continues to receive the information it needs to serve the public interest. This item does not address issues related to foreign ownership of broadcast licensees. |
| 3 | International | *Title:* Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, and Petitions for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act (WT Docket No. 07–208), and Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act (WT Docket No. 08–95).<br>*Summary:* As part of its efforts to provide greater clarity regarding foreign ownership review procedures, the Commission will consider an Order on Reconsideration addressing two section 310(b)(4) foreign ownership rulings granted to Verizon Wireless in two proceedings approving its acquisitions of Rural Cellular Corporation (RCC) and Alltel Corporation (Alltel). |

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC Live Web page at *http://www.fcc.gov/live.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *http://www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com.*

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–20006 Filed 8–3–11; 4:15 pm]

**BILLING CODE 6712–01–P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Notice

**AGENCY:** Federal Election Commission.

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 76 FR 45798 (August 1, 2011).

**DATE AND TIME:** Thursday, August 4, 2011, at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** Meeting open to the public.

**CHANGES IN THE MEETING:** The following item was withdrawn from the agenda:

Proposed Final Audit Report on John Edwards for President.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Commission Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the hearing date.

**PERSON TO CONTACT FOR INFORMATION:** Judith Ingram, Press Officer. Telephone: (202) 694–1220.

**Shawn Woodhead Werth,**

*Secretary and Clerk of the Commission.*

[FR Doc. 2011–20031 Filed 8–3–11; 4:15 pm]

**BILLING CODE 6715–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 19, 2011.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *James S. MacLeod, Hilton Head Island, South Carolina;* to acquire up to 31.36 percent of the voting shares of CoastalSouth Bancshares, Inc., Hilton Head Island, South Carolina, and thereby acquire shares of CoastalStates Bank, Hilton Head, South Carolina.

Board of Governors of the Federal Reserve System, August 2, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011–19894 Filed 8–4–11; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 1, 2011.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Adam Bank Group, Inc, Tampa, Florida,* to acquire 100 percent of Brazos Valley Bank, National Association, College Station, Texas.

Board of Governors of the Federal Reserve System, August 2, 2011.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2011–19893 Filed 8–4–11; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Findings of Research Misconduct

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

*Sheng Wang, PhD, Boston University School of Medicine Cancer Research Center:* Based on the Respondent's acceptance of ORI's research misconduct findings, ORI found that Dr. Sheng Wang, who has been an Assistant Professor, Department of Medicine, Boston University School of Medicine Cancer Research Center (BUSM), engaged in research misconduct in research supported by National Cancer Institute (NCI), National Institutes of Health (NIH), grants R01 CA102940 and R01 CA101992.

ORI found that the Respondent engaged in research misconduct by fabricating data that were included in two (2) published papers:

1. Zhang, B., Faller, D.V., Wang, S. ''HIC1 regulates tumor cell responses to endocrine therapies.'' *Mol. Endocrinol.* 23(12):2075–85, 2009; and

2. Zhang, B., Chambers, K.J., Leprince, D., Faller, D.V., Wang, S. ''Requirement for chromatin-remodeling complex in novel tumor suppressor HIC1-mediated transcriptional repression and growth control.'' *Oncogene* 28(5):651–61, 2009.

Specifically, ORI found that Respondent:

- Fabricated RT–PCR and ChIP experiments represented in Figures 1b, 2b, 3a,b, 4b,c, 6a,b, 7c in *Mol. Endocrinol.* 23(12):2075–85, 2009; RT–PCR and/or ChIP experiments were included in six (6) of seven (7) figures in this publication; and
- Fabricated RT–PCR and ChIP experiments represented in Figures 2a,b,

3a,b, 4a,c, 5a,b, 6b,c, 8a,b in *Oncogene* 28(5):651–61, 2009; RT–PCR and/or ChIP experiments were included in six (6) of eight (8) figures in this publication.

Respondent has entered into a Voluntary Exclusion Agreement (Agreement). Respondent and the U.S. Public Health Service (PHS) want to conclude this matter without further expenditure of time or other resources. Respondent accepts ORI's findings of research misconduct as set forth above but neither admits nor denies committing research misconduct. The Agreement does not constitute an admission of liability on Respondent's part. Respondent agrees not to appeal the jurisdiction of ORI or request a U.S. Department of Health and Human Services (HHS) administrative hearing to review the findings as set forth in the Agreement.

As a condition of the Agreement, Respondent agrees that the *Mol. Endocrinol.* 23(12):2075–85, 2009, and *Oncogene* 28(5):651–61, 2009, publications be retracted.

In entering into the Agreement, Dr. Wang has voluntarily agreed for a period of two (2) years, beginning on July 18, 2011:

(1) To exclude himself from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376 *et seq*) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations''); and

(2) To exclude himself from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

**FOR FURTHER INFORMATION CONTACT:** Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

**John Dahlberg,**

*Director, Division of Investigative Oversight, Office of Research Integrity.*

[FR Doc. 2011–19930 Filed 8–4–11; 8:45 am]

**BILLING CODE 4150–31–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Disease Control and Prevention

## Advisory Committee on Breast Cancer in Young Women (ACBCYW)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned committee:

**Times and Dates**

9 a.m.–5 p.m., September 21, 2011.
8 a.m.–4:30 p.m., September 22, 2011.
8 a.m.–2:30 p.m., September 23, 2011.

*Place:* CDC, Building 19, Auditorium B, Tom Harkin Global Communications Center, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

*Status:* Open to the public, limited only by the space available.

*Purpose:* The committee provides advice and guidance to the Secretary, HHS; the Assistant Secretary for Health; and the Director, CDC, regarding the formative research, development, implementation and evaluation of evidence-based activities designed to prevent breast cancer (particularly among those at heightened risk) and promote the early detection and support of young women who develop the disease. The advice provided by the Committee will assist in ensuring scientific quality, timeliness, utility, and dissemination of credible appropriate messages and resource materials.

*Matters to Be Discussed:* The agenda will include discussions on health communications tools and resources related to breast cancer in young women including appropriate venues to educate women at increased risk for developing breast cancer at younger ages; and approaches to increase awareness of clinicians/practitioners regarding topics such as breast health, symptoms, diagnosis, and treatment of breast cancer in young women.

Agenda items are subject to change as priorities dictate.

*Online Registration Required:* In order to expedite the security clearance process required for entry into a Federal building, all ACBCYW attendees must register for the meeting online at least 21 days in advance at *http://www.cdc.gov/cancer/breast/what_cdc_is_doing/meetings.htm.* Please complete all the required fields before submitting your registration and submit no later than August 29, 2011. Each meeting day, attendees must provide CDC staff and security with a driver's license/state issued identification, or passport.

*Contact Person for More Information:* Temeika L. Fairley, PhD, Designated Federal Officer, National Center for Chronic Disease Prevention and Health Promotion, CDC, 5770 Buford Highway, NE., Mailstop K52, Atlanta, Georgia 30341, *Telephone:* (770) 488–4518, *Fax:* (770) 488–4760.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention, and Agency for Toxic Substances and Disease Registry.

Dated: July 29, 2011.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2011–19869 Filed 8–4–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Disease Control and Prevention

## Advisory Board on Radiation and Worker Health (ABRWH or Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), and pursuant to the requirements of 42 CFR 83.15(a), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned committee:

Board Public Meeting Times and Dates (All times are Pacific Time):

8:15 a.m.–5 p.m., August 23, 2011.
8:15 a.m.–4:45 p.m., August 24, 2011.
8:15 a.m.–12:30 p.m., August 25, 2011.

Public Comment Times and Dates (All times are Pacific Time):

5 p.m.–6 p.m.*, August 23, 2011.
5 p.m.–6:30 p.m.*, August 24, 2011.

**Please note that the public comment periods may end before the times indicated, following the last call for comments. Members of the public who wish to provide public comments should plan to attend public comment sessions at the start times listed.*

*Place:* Courtyard by Marriott, 480 Columbia Point, Richland, Washington 99352, *Telephone:* (509) 942–9400, *Fax:* (509) 942–9401.

Audio Conference Call via FTS Conferencing. The USA toll-free, dial-in number is 1–866–659–0537 with a pass code of 9933701.

*Status:* Open to the public, limited only by the space available. The meeting space accommodates approximately 150 people.

*Background:* The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of

Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2011.

*Purpose:* This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

*Matters To Be Discussed:* The agenda for the Advisory Board meeting includes: NIOSH Program Update and 10-Year Program Review; Department of Labor (DOL) Program Update; Department of Energy (DOE) Program Update; Hanford Work Group Update; SEC petitions for: W.R. Grace (Curtis Bay, Maryland), Piqua Organic Moderated Reactor (1963–1966), Y–12 (1948–1957), Hangar 481 (Kirtland Air Force Base), Hooker Electrochemical, Feed Materials Production Center (Fernald, Ohio), Norton Company, Savannah River Site, Pantex Plant, Vitro Manufacturing (1959–1965), Ames Laboratory (1942–1970); SEC Petition Status Updates; Subcommittee and Work Group Reports; and Board Work Sessions.

The agenda is subject to change as priorities dictate.

In the event an individual cannot attend, written comments may be submitted in accordance with the redaction policy provided below. Any written comments received will be provided at the meeting and should be submitted to the contact person below well in advance of the meeting.

Policy on Redaction of Board Meeting Transcripts (Public Comment): (1) If a person making a comment gives his or her name, no attempt will be made to redact that name. (2) NIOSH will take reasonable steps to ensure that individuals making public comment are aware of the fact that their comments (including their name, if provided) will appear in a transcript of the meeting posted on a public website. Such reasonable steps include: (a) A statement read at the start of each public comment period stating that transcripts will be posted and names of speakers will not be redacted; (b) A printed copy of the statement mentioned in (a) Above will be displayed on the table where individuals sign up to make public comments; (c) A statement such as outlined in (a) Above will also appear with the agenda for a Board Meeting when it is posted on the NIOSH Web site; (d) A statement such as in (a) Above will appear in the **Federal Register** Notice that announces Board and Subcommittee meetings. (3) If an individual in making a statement reveals personal information (*e.g.,* medical information) about themselves that information will not usually be redacted. The NIOSH FOIA coordinator will, however, review such revelations in accordance with the Freedom of Information Act and the Federal Advisory Committee Act and if deemed appropriate, will redact such information. (4) All disclosures of information concerning third parties will be redacted. (5) If it comes to the attention of the DFO that an individual wishes to share information with the Board but objects to doing so in a public forum, the DFO will work with that individual, in accordance with the Federal Advisory Committee Act, to find a way that the Board can hear such comments.

*For Further Information Contact:* Theodore Katz, M.P.A., Executive Secretary, NIOSH, CDC, 1600 Clifton Road, MS E–20, Atlanta Georgia 30333, *Telephone:* (513) 533–6800, *Toll Free:* 1–800–CDC–INFO, *E-mail: dcas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 29, 2011.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2011–19863 Filed 8–4–11; 8:45 am]

BILLING CODE 4163–18–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier CMS–10392]**

### Agency Information Collection Activities: Proposed Collection; Comment Request; Correction

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a previously approved collection; *Title of Information Collection:* Consumer Operated and Oriented (CO–OP) Program; *Use:* The Consumer Operated and Oriented Plan (CO–OP) program is a new program, established by Section 1322 of the Affordable Care Act. This program provides for loans to establish at least one consumer-operated, qualified nonprofit health insurance issuer in each State. Issuers supported by the CO–OP program will offer at least one qualified health plan at the silver level of benefits and one at the gold level of benefits in the Affordable Insurance Exchanges (Exchanges). At least two-thirds of policies or contracts offered by a CO–OP will be open to individuals and small employers. Profits generated by the nonprofit CO–OPs will be used to lower premiums, improve benefits, improve the quality of health care delivered to their members, expand enrollment, or otherwise contribute to the stability of coverage offered by the CO–OP. By increasing competition in the health insurance market and operating with a strong consumer focus, the CO–OP program will provide consumers more choices, greater plan accountability, increased competition to lower prices, and better models of care, benefiting all consumers, not just CO–OP members.

The CO–OP program will provide nonprofits with loans to fund start-up costs and State reserve requirements, in the form of Start-up Loans and Solvency Loans. An applicant may apply for (1) Joint Start-up and Solvency Loans; or (2) only a Solvency Loan. Start-up Loans are intended to assist loan recipients with the many start-up costs associated with establishing a new health insurance issuer. Solvency Loans are intended to assist loan recipients with meeting the solvency requirements of States in which the applicant seeks to be licensed to issue qualified health plans.

The Funding Opportunity Announcement (FOA) was released on July 28, 2011. Applications will be due on October 17, 2011 and on a quarterly basis thereafter up to and including December 31, 2012. At that time, a new FOA will be released subject to the availability of funding. Loan awards will be announced within approximately 75 days after each completed application is received.

The purpose of this 60-day notice is to announce that CMS is seeking an extension of the information collection request (ICR) currently approved under 0938–1139. The Office of Management and Budget previously reviewed and approved the ICR under emergency processing according to 5 CFR 1320.13.

*Form Number:* CMS–10392 (OMB # 0938–1139); *Frequency:* Occasionally; *Affected Public:* Private sector, not-for-profit institutions; *Number of Respondents:* 238; *Total Annual Responses:* 1,139; *Total Annual Hours:* 39,178. (For policy questions regarding this collection contact Anne Bollinger at 301–492–4395. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at 410–786–1326.

In commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *October 4, 2011:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, *Attention:* Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: August 2, 2011.

**Michelle Shortt,**

*Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2011–19910 Filed 8–4–11; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10292]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* State Medicaid Health Information Technology (HIT) Plan, Planning-Advance Planning Document and Update, Implementation Advance Planning Document (IAPD) and Update, and Annual IAPD to implement section 4201 of the American Reinvestment and Recovery Act of 2009; *Use:* To assess the appropriateness of States' requests for Federal financial participation for expenditures under their Medicaid Electronic Health Record Incentive Program related to health information exchange, CMS staff will review the submitted information and documentation in order to make an approval determination for the APD. The CMS is issuing an updated IAPD template to reduce the burden on States by clearly indicating the information required for a successful submission; *Form Number:* CMS–10292 (OMB #: 0938–1088); *Frequency:* Yearly, once, occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 448. (For policy questions regarding this collection contact Richard Friedman at 410–786–4451. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *September 6, 2011:* OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974, *E-mail: OIRA_submission@omb.eop.gov.*

Dated: August 1, 2011.

**Martique Jones,**

*Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2011–19766 Filed 8–4–11; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10291]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* State Collection and Reporting of Dental Provider and Benefit Package Information on the Insure Kids Now! Web site and Hotline; *Use:* The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) sections 501(f)(1) and (2), requires that state-specific information on dental providers and benefits be posted on the Insure Kids Now (IKN) Web site and available on the hotline. States must update the information on the dental providers quarterly and the information on their benefit package annually. CMS is asking States to submit their dental benefits in a revised format that is designed to reduce the amount of time States have to spend in compiling the dental benefit information. Although in the past we allowed States to only check a box to indicate that the Medicaid dental benefits were in compliance with Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services, we are also modifying the form to ask States to include their Medicaid dental benefits in this form so those may also be posted on the Web site. In addition, we are asking States to specify if they have a dollar or code limit at which point prior authorization is required for any additional services and if they have cost sharing requirements for dental services; *Form Number:* CMS–10291 (OMB #: 0938–1065); *Frequency:* Yearly (dental benefits) and quarterly (dental providers); *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 255; *Total Annual Hours:* 190. (For policy questions regarding this collection contact Nancy Goetschius at 410–786–0707. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *October 4, 2011:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, *Attention:* Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: August 1, 2011.

**Martique Jones,**

*Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2011–19768 Filed 8–4–11; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Award of Replacement Grant for Preventive Health to Lutheran Social Services of North Dakota, Fargo, ND

**AGENCY:** Office of Refugee Resettlement, ACF, DHHS.

**ACTION:** Notice of award.

CFDA NUMBER: 93.576.

*Statutory Authority:* This program is authorized by Section 412(b)(5) of the Immigration and Nationality Act, as amended (8 U.S.C. 1522(b)(5)), which provides for medical screening and initial medical treatment for refugees.

*Amount of Award:* $66,000.

**SUMMARY:** In Fiscal Year 2006, in an effort to assist States and local health departments to ensure that newly arriving refugees have access to preventive health screenings, the Administration for Children and Families (ACF), Office of Refugee Resettlement (ORR), Division of Refugee Assistance (DRA) awarded, through competition, a Refugee Preventive Health grant to the North Dakota Department of Human Services for a project period of July 1, 2006 to June 30, 2011. The North Dakota Department of Human Services has relinquished the grant.

ORR announces the award of a single-source replacement grant to Lutheran Social Services of North Dakota of Fargo, ND, a non-profit organization engaged in the resettlement of refugees, to continue services under the Refugee Preventive Health grant. Services provided under the grant to Lutheran Social Services of North Dakota are within the scope and operation of the original award, and address the preventive health needs of refugees in their first year in the United States. The program includes initial health screening, treatment of immediate health needs, follow up on chronic illnesses, nursing case management, interpretation services and preventive health education. The project period for the award is July 1, 2010 to June 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** Pamela Green-Smith, Director, Division of Refugee Assistance, Office of Refugee Resettlement, 370 L'Enfant Promenade, SW., Washington, DC 20447. *Telephone:* 202–401–4531. *E-mail: Pamela.Greensmith@acf.hhs.gov.*

Dated: July 27, 2011.

**Mitiku Ashebir,**

*Acting Director, Division of Refugee Assistance, Office of Refugee Resettlement.*

[FR Doc. 2011–19847 Filed 8–4–11; 8:45 am]

**BILLING CODE 4120–27–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–D–0541]**

### Guidance for Small Business Entities on Current Good Manufacturing Practice for Positron Emission Tomography Drugs; Availability

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for small business entities entitled ''PET Drugs—Current Good Manufacturing Practice (CGMP); Small Entity Compliance Guide.'' FDA has prepared this guidance in accordance with the Small Business Regulatory Enforcement Fairness Act. It is intended to help small businesses better understand FDA's thinking on compliance with the positron emission tomography drugs (PET) CGMP regulations, including appropriate resources, procedures, and documentation for PET drug production facilities.

**DATES:** Submit either electronic or written comments on Agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of this guidance to the Division of Drug Information, Center for

Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. 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:** Frank Perrella, Center for Drug Evaluation and Research (HFD–320), Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–3265.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a guidance entitled ''PET Drugs—Current Good Manufacturing Practice (CGMP); Small Entity Compliance Guide.'' This guidance is intended to help small businesses better understand and comply with the regulations issued by FDA concerning CGMP for PET drugs. The guidance addresses resources, procedures, and documentation for all PET drug production facilities. In some cases, the guidance provides practical examples of methods or procedures that PET drug production facilities can use to comply with the CGMP requirements. FDA has prepared this guidance in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act.

This 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 compliance with CGMP for PET drugs. 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 statutes and regulations.

## II. 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.

## III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 211 have been approved under OMB control number 0910–0139, and the collections of information in 21 CFR part 212 have been approved under OMB control number 0910–0667.

## IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: August 1, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–19867 Filed 8–4–11; 8:45 am]

BILLING CODE 4160–01–P

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# DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Billing Code 4140–01–P]**

## National Institutes of Health; Proposed Collection; Comment Request; Simulations for Drug Related Science Education

**SUMMARY:** Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on June 26, 2008 (Vol. 73, No. 124, page 36337) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after November 15, 2008, unless it displays a currently valid OMB control number.

*Proposed Collection: Title:* Simulations for Drug Related Science Education. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* This is a request for a one-time clearance to evaluate an interactive multimedia module developed by *ArchieMD.* This evaluation seeks to determine whether the multimedia module *Archie MD: The Science of Drugs* (1) Increases students' knowledge in brain and heart biology and the effects drugs have on the body (2) Increases positive attitudes towards science education for high school students (3) Reinforce or instill negative attitudes towards substance abuse. In order to test the effectiveness of the interactive multimedia module, data will be collected in the form of pre and post test surveys from 10th and 11th grade high school students utilizing the developed module. The findings will provide valuable information regarding information pertaining to the use of interactive multimedia educational modules in high school science classrooms and their ability to increase knowledge and change attitudes and perceptions.

*Frequency of Response:* 3. *Affected Public:* High school students engaged with the *ArchieMD: The Science of Drugs* program. *Type of Respondent:* Participants will include high school students enrolled in the tenth and eleventh grade. *Estimated Total Annual Number of Respondents:* 360. *Estimated Number of Responses per Respondent:* 4. *Average Burden Hours per Response:* 25 minutes. *Estimated Total Annual Burden Hours Requested:* 450.00. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report. The estimated annualized burden is summarized below.

| Type of respondents | Number of respondents | Frequency of response | Average burden hours per response | Estimated total burden hours requested |
|---|---|---|---|---|
| Participants-High School Students | 360 | 3 | .417 | 450.00 |
| Total | 360 | 3 | .417 | 450.00 |

*Request for Comments:* Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

*Direct Comments to OMB:* Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Cathrine Sasek, Coordinator, Science Education Program, Office of Science Policy and Communications, National Institute on Drug Abuse, 6001 Executive Blvd, Room 5237, Bethesda, MD 20892, or call non-toll-free number (301) 443–6071; fax (301) 443–6277; or by e-mail to *csasek@nida.nih.gov.*

*Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: August 1, 2011.

**Mary Affeldt,**

*Executive Officer, (OM Director, NIDA).*

[FR Doc. 2011–19877 Filed 8–4–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Chronic Illness and Anxiety.

*Date:* August 23, 2011.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Monica Basco, PhD, Scientific Review Officer, RPHB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3220, MSC 7808, Bethesda, MD 20892, 301–496–7010, *bascoma@mail.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Biology and Diseases of the Posterior Eye.

*Date:* September 13, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Renaissance, Washington, DC Hotel, 999 Ninth Street, NW., Washington, DC 20001–4427.

*Contact Person:* Noni Byrnes, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5130, MSC 7840, Bethesda, MD 20892, (301)-435–1023, *byrnesn@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR–09–084: Developmental Biology Research.

*Date:* September 13–14, 2011.

*Time:* 1 p.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting).

*Contact Person:* John Burch, PhD, Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, 301–408–9519, *burchjb@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; MIT Laser Biomedical Research Center.

*Date:* September 14–16, 2011.

*Time:* 6 p.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

*Contact:* 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.*

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.

*Date:* September 15–16, 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:* Boris P Sokolov, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

*Name of Committee:* Oncology 1–Basic Translational Integrated Review Group; Cancer Etiology Study Section.

*Date:* September 16, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* InterContinental Chicago Hotel, 505 North Michigan Avenue, Chicago, IL 60611.

*Contact:* Elaine Sierra-Rivera, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

(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: August 1, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–19878 Filed 8–4–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Neurological Disorders and Stroke Special

Emphasis Panel; SUDEP Centers Without Walls Planning Grants.

*Date:* August 25, 2011.

*Time:* 8:30 a.m. to 1:30 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Doubletree Hotel Chicago O'Hare Airport-Rosemont, 5460 North River Road, Rosemont, IL 60018.

*Contact Person:* William C. Benzing, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, 301–496–0660, *benzingw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 29, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–19881 Filed 8–4–11; 8:45 am]

**BILLING CODE 4140–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Notice of Scientific Summit; The Science of Compassion—Future Directions in End-of-Life and Palliative Care

**SUMMARY:** Notice is hereby given that the National Institute of Nursing Research (NINR), National Institutes of Health (NIH), Department of Health and Human Services, will convene a scientific summit titled ''The Science of Compassion—Future Directions in End-of-Life and Palliative Care.'' The summit is cosponsored by the NIH Office of Rare Diseases Research, the NIH Office of Research on Women's Health, the National Center for Complementary and Alternative Medicine, the National Institute on Aging, and the NIH Clinical Center Department of Bioethics. Portions of the event are supported by the Foundation for the National Institutes of Health and Pfizer.

**DATES:** The summit will begin Wednesday evening, August 10, 2011, 7 p.m. to 9 p.m. and continue August 11–12.

**ADDRESSES:** The Summit will be held at the Hyatt Regency in Bethesda, Maryland, located at One Bethesda Metro Center (7400 Wisconsin Avenue), Bethesda, Maryland 20814.

**FOR FURTHER INFORMATION CONTACT:** To register for the summit, please visit *http://www.ninr.nih.gov/ResearchAndFunding/scienceofcompassion.htm.* For additional information, please contact Ms. Crystal Esler, NINR, at *crystal.esler@nih.gov* or 301–496–9629.

**SUPPLEMENTARY INFORMATION:** Increasing numbers of Americans live for years with serious, advanced illness and then later die from the consequences of these debilitating conditions. There is an urgent need to improve the quality of life for those with life-limiting conditions through increased use of evidence-based end-of-life and palliative care (EOL PC) services. The objectives of this summit are to examine the current status of EOL PC research and practice; propose strategies to overcome barriers and ensure scientific and methodologic rigor in EOL PC research; delineate new action items that galvanize progress in these vital areas of science; and envision and map pathways to ensure a future rich with EOL PC scientific endeavor and achievements. This summit, held in conjunction with NINR's commemoration of its 25th Anniversary, will bring together scientists, EOL PC health professionals, educators, members of professional organizations, and individuals with life-limiting illnesses, as well as their caregivers.

The summit will begin with a Town Hall discussion on the evening of August 10 on the ethics of science at the end-of-life. On August 11–12, the summit will feature keynote presentations, three plenary discussions, and break-out sessions. Leading experts from interdisciplinary fields of research will address a range of EOL PC issues. A special lunch-hour presentation on August 11 will feature a dialogue on parents and clinicians as partners in research. The summit will conclude at 2 p.m. on August 12.

Dated: August 1, 2011.

**Lawrence A. Tabak,**

*Deputy Director, National Institutes of Health.*

[FR Doc. 2011–20004 Filed 8–4–11; 8:45 am]

**BILLING CODE 4140–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Fiscal Year (FY) 2011 Funding Opportunity

**AGENCY:** Substance Abuse and Mental Health Services Administration, HHS.

**ACTION:** Notice of intent to award to the National Council for Behavioral Healthcare.

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**SUMMARY:** This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) intends to award approximately $3,800,000 (total costs) for up to one year to the National Council for Behavioral Healthcare. This is not a formal request for applications. Assistance will be provided only to the National Council for Behavioral Healthcare based on the receipt of a satisfactory application that is approved by an independent review group.

*Funding Opportunity Title:* SM–11–013.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.243.

**Authority:** Section 520(A) of the Public Health Service Act, as amended.

*Justification:* Eligibility for this funding opportunity is limited to the National Council for Community Behavioral Healthcare (NCCBH) based on the Council's expertise and existing relationship with the Primary and Behavioral Health Care Initiative (PBHCI) grantees.

The NCCBH, the current Training and Technical Assistance Center for Primary and Behavioral Health Care Initiative (TTA–PBHCI) grantee, has an existing relationship with the 56 PBHCI grantees, for whom half of the technical assistance will be developed. It already has the infrastructure established to provide day-to-day training and technical assistance (both onsite and e-based). The NCCBH also has the contacts and staff required to select and manage selected state-designated entities (SDEs) and provide the required technical assistance to them.

Since supplemental funding is for one-year, it is critical that the applicant be able to quickly and effectively initiate the activities required by the cooperative agreement and the PBHCI HIT grant. The NCCBH has the foundation in place to make the best use of the short period of time available. There is no other organization with the experience or background to ensure that the objectives will be met and accurate outcome measurements will be gathered through performance data. The Council has been involved in providing health information technology information/resources to its 1400+ members and has existing affiliations with IT systems that are acknowledged leaders in the field.

**FOR FURTHER INFORMATION CONTACT:** Shelly Hara, Substance Abuse and Mental Health Services Administration, 1 Choke Cherry Road, Room 8–1095, Rockville, MD 20857; telephone: (240)

276–2321; E-mail: *shelly.hara@samhsa.hhs.gov.*

**Cathy Friedman,**

*SAMHSA Public Health Analyst.*

[FR Doc. 2011–19860 Filed 8–4–11; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Indian Alcohol and Substance Abuse Memorandum of Agreement Between U.S. Department of Health and Human Services (DHHS), U.S. Department of the Interior (DOI), and U.S. Department of Justice (DOJ)

**AGENCY:** Substance Abuse and Mental Health Services Administration (SAMHSA), HHS.

**ACTION:** Memorandum of Agreement (MOA).

**SUMMARY:** This serves as notice that the Department of Health and Human Services (DHHS), the Department of the Interior (DOI), and the Department of Justice (DOJ), have entered into a Memorandum of Agreement (MOA), pursuant to the Indian Alcohol and Substance Abuse Treatment Act of 1986 (the Act), as amended by the Tribal Law and Order Act of 2010 (TLOA).

**DATES:** This is effective on July 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dennis O. Romero, MA, Director (Acting), Office of Indian Alcohol and Substance Abuse, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (DHHS), 1 Choke Cherry Road, Room 7–1111, Rockville, MD 20857, Phone: 240–276–2495, Fax: 240–276–1120, E-mail: *dennis.romero@samhsa.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

DHHS, DOI, and DOJ have entered into a MOA pursuant to the Act, Title IV, Subtitle C of Public Law 99–570 (25 U.S.C. 2401 *et seq.*), as amended by TLOA, Title II of Public Law 111–211. The MOA is being published in the **Federal Register** in accordance with specific provisions of the Act, codified at 25 U.S.C. 2411.

The Secretaries of DOI and DHHS executed the original MOA (published at 52 FR 9709 (Mar. 26, 1987)) pursuant to the 1986-enacted version of the Act. Subsequent updates to that original MOA were executed as between DOI's Bureau of Indian Affairs (BIA) and DHHS' Indian Health Service (IHS). Section 241 of TLOA amended the Act by, among other things, incorporating a coordinating role for DHHS' Substance Abuse and Mental Health Services Administration (SAMHSA), and also by adding DOJ to the pre-existing Federal partnership (between DOI and DHHS) on Indian alcohol and substance abuse issues.

The present MOA—developed in accordance with the TLOA amendments to the Act—commits the Departments to, among other things, align and coordinate Federal efforts and resources to determine the scope of the alcohol and substance abuse problems faced by American Indians and Alaska Natives, identify the resources and programs of each Federal department that would be relevant to a coordinated effort to combat alcohol and substance abuse among American Indians and Alaska Natives, and coordinate existing Federal department programs with those established under the Act.

Upon publication of the MOA in the **Federal Register**, the Office of Indian Alcohol and Substance Abuse within the DHHS' Center for Substance Abuse Prevention, working in conjunction with the DOI's BIA, shall provide a copy of the MOA to each federally recognized Indian tribe.

*Development of the MOA.* As required by the Act codified at 25 U.S.C. 2411(c), DHHS, DOI, and DOJ (collectively, the ''MOA partners'') were to ''consult with and solicit the comments of'' American Indian and Alaska Native individuals, organizations, tribes, and villages, as well as alcohol and substance abuse treatment professionals in developing an MOA. The MOA partners gathered and reviewed consultation feedback from TLOA consultations, beginning with a consultation sponsored by DOI in October, 2010. The partners also sought additional input—including through the dissemination of an MOA draft—during a period lasting from the fall of 2010 through the spring and early summer of 2011.

A draft of the MOA was distributed to tribes for discussion and comment during the TLOA consultation at the Interdepartmental Tribal Justice, Safety and Wellness Session 12 in Palm Springs, California. On December 8, 2010, the draft MOA was published via multiple Web sites for a comment period lasting through January 14, 2011. These Web sites included the Web sites of the National Indian Health Board, the National Congress of American Indians, the National Council of Urban Indian Health, and the Native American Center of Excellence. During the same week of December 2010, SAMHSA distributed the draft MOA to all federally-recognized tribes to solicit comments. An MOA Workgroup composed of Federal MOA partner representatives was organized and, charged with the development and drafting of the MOA, solicited comments from Federal subject matter experts from across the Federal Government during March and April of 2011. Comments were received from a number of interested parties: Indian tribes, individuals, and organizations, United States Attorneys serving multiple jurisdictions, and Federal subject matter experts working in areas involving substance abuse and mental health, health care, juvenile justice, crime victim assistance, and social services and other supports for children and families. These comments were carefully reviewed, analyzed, and considered in the development of the MOA.

Some commenters expressed support for the MOA concept, but had general comments regarding the process for its development, or its content. More than one commenter expressed general satisfaction with the content of the MOA draft circulated, but also offered comments on other aspects of Federal/tribal coordination on Indian alcohol and substance abuse initiatives and other programs focused on children and families. Other commenters made specific suggestions for content and structure of the MOA. A general discussion of comments received and how issues raised are addressed, including through changes made to the MOA, follows below.

*Tribal Action Plans.* Commenters focused with some frequency on the Tribal Action Plan (TAP) and TAP-related provisions in the MOA. Multiple comments in this regard focused on the MOA language derived from 25 U.S.C. 2412(e) of the Act, which states, in relevant part, that, for ''any Indian tribe'' that has not elected to adopt a tribal resolution to establish a TAP ''within 90 days after [the MOA's publication] in the **Federal Register''** the Federal Government must initiate action to assist such tribe by ''identify[ing] and coordinat[ing] available programs and resources in support of tribal alcohol and substance abuse programs and initiatives. Comments from tribes expressed concerns that Federal versus tribal accountabilities regarding the TAPs were unclear and that there needed to be more information about plans for implementation—and associated Federal resources—in this area. Related to this issue of what the Federal role and accountability would be in the event that a tribe had not elected to adopt a resolution within the 90-day window were questions about the impact of this provision on tribal sovereignty. With respect to the tribal resolution requirement, one tribe recommended that other formal means of tribal action, in lieu of tribal resolutions, should also be accepted, given variations in tribal governance structures. Other comments expressed concern about whether and how TAPs would be used, noting that the TAP concept was not new to the TLOA-amended version of the Act.

It is important to note here that a separate Federal workgroup (a TAP Workgroup) has been engaged for the better part of the year following TLOA's enactment (on July 29, 2010) in developing and updating guidelines designed to provide technical assistance to tribes in the process of TAP development and implementation. The TAP Workgroup, part of a larger Interdepartmental Coordinating Committee described in the MOA and the Attachment to the MOA below, will publish these informational guidelines to assist tribes following shortly upon the publication of this MOA. Input received relative to TAPs during the MOA development process will also be informative for this process as it unfolds. It is expected that a final TAP guidelines document will be released and available for use by tribes by the end of calendar year 2011. Further information and details regarding Federal department activities relating to TAPs may be obtained by contacting Dr. Rose Weahkee, Director, Behavioral Health Division, IHS, at *Rose.Weahkee@ihs.gov*, or by calling (301) 443–2038.

Generally speaking, with regard to questions relating to the allocation of responsibilities and accountabilities as between tribes and the Federal Government, and to tribal sovereignty, the Act makes clear that ''primary responsibility for protecting and ensuring the well-being of [tribal] members'' rests with the tribes and that ''resources made available under [the Act are to] assist Indian tribes in meeting that responsibility.'' 25 U.S.C. 2401(12). The MOA partners, as among themselves, ''bear equal responsibility for the implementation of [the Act] in cooperation with Indian tribes.'' 25 U.S.C. 2413(a). In keeping with these principles, the TAP provisions of the Act are written so as to suggest that the choice of whether or not a tribe will implement a TAP to aid the tribe in addressing alcohol and substance abuse concerns impacting its members rests solely with the tribe in its discretion whether to adopt a resolution to establish a TAP. See 25 U.S.C. 2412(a). The Act, however, requires the Federal Government to work collaboratively to provide its support and cooperation in the TAP process by assisting in the coordination of available programs and resources that may serve to advance tribes' alcohol and substance abuse programming efforts—even in the absence of a formal resolution to establish a TAP—and by participating on Tribal Coordinating Committees established by a tribe as part of any tribally-established TAP. 25 U.S.C. 2412.

*Comments on MOA Structure and Development.* Multiple comments from tribes and tribal organizations focused on the need for transparency and a greater tribal leadership role with respect to the development of Federal program initiatives impacting tribes, such as through strengthened partnerships with tribes and participation of tribes in the development of the MOA. One tribe's comments contained a specific recommendation for a ''Tribal Advisory Group'' to be established to coordinate with the Federal Government in developing and implementing specific functions outlined in the MOA, including through involvement with Interdepartmental Coordinating Committee (*i.e.,* Workgroup) activities.

As discussed above, the MOA was developed with significant input from tribes, tribal organizations, and other interested parties. Though the MOA is being executed among the Federal departments specified in the Act in order to provide for better coordination of Federal efforts across the departments, the MOA specifies multiple areas of planned coordination and consultation with tribes that would precede implementation of new programs or adjustments to existing programs, wherever appropriate, and consistent with applicable law. The MOA provides for consistent information sharing between MOA partners and tribes, such as through the newsletter described at 25 U.S.C. 2416 and other appropriate public information venues. Consistent with E.O. 13175 and associated Federal guidance, the MOA partners, under MOA Section XI, ''Tribal Consultation,'' have agreed to coordinate consultation activities to help ensure regular and meaningful consultation and collaboration with tribes. Moreover, under the provisions of the Act at 25 U.S.C. 2413, SAMHSA's Office of Indian Alcohol and Substance Abuse is established, among other responsibilities, to serve as a point of contact for tribes implementing TAPs and Tribal Coordinating Committees and other programs and activities described in the Act. The MOA includes a provision for annual review; these various consultation, feedback, and input points will provide multiple opportunities for tribes and Federal departments to engage and collaborate in program development and improvement.

Also, some tribal commenters recommended that the Federal Government take a greater role, including by outlining such a role in the MOA, in supporting tribes in their efforts to encourage State and local governments to engage in more frequent and more effective partnering activities with tribes, especially on law enforcement and criminal justice and social welfare initiatives with cross-jurisdictional implications. The MOA addresses this concern in multiple sections—specifically, with regard to activities relating to the identification of the scope of the problem, the identification of programs and existing standards, and the assessment of available program resources, as examples—and calls for coordination with non-Federal partners, including State and local partners, to support the achievement of the goals of the Act as implemented under the MOA.

*Additional Comments on MOA Content.* Multiple tribal commenters (and some Federal subject matter experts) mentioned the need to emphasize the scope of the harmful impact of alcohol and substance abuse on American Indian and Alaska Native individuals and families and the need for holistic approaches to address these issues. In response to these comments, the MOA draft was restructured and revised—as reflected in the final MOA shown below—to lead with a more comprehensive description and discussion of these concerns and their great significance to the development and implementation of tribal programs and activities.

Other comments, received from United States Attorneys, raised a number of additional issues of vital interest with regard to Indian alcohol and substance abuse-related concerns. One commenter, referencing the juvenile detention centers MOA provision tied to 25 U.S.C. 2453, strongly recommended that the long-term plan for detention and alternatives to detention for juveniles should include some treatment of the absence of ''half-way house'' type facilities in Indian country that support juveniles recovering from alcohol and substance abuse in detention or treatment facilities who are transitioning back to their home communities, tribes, and villages. The MOA Workgroup provided this comment to a separate multi-Federal department working group, involving DOI, DOJ, DHHS, and other Federal departments (including the Department of Education and the Department of Housing and Urban Development), so that it could be given full consideration in the development of the final long-term plan, which is being developed pursuant to 25 U.S.C. 2453.

Finally, another United States Attorney urged that careful consideration in the development and implementation of the MOA should be given to the impact of certain provisions on States with concurrent jurisdiction (such as Public Law 280 States) over certain crimes and offenses in Indian country. Among the concerns expressed were that the law enforcement and judicial training provisions tied to 25 U.S.C. 2451 could be misinterpreted as requiring that ''all Tribal police officers [be trained by BIA]'' thus imposing additional administrative and cost burdens on these officers to obtain additional certification (in addition to State-based certification)—which could result in additional time spent away from tribal policing activities. Though the commenter's apprehension with regard to the potential negative implications in the event that the underlying statutory provision is misread may be understandable, no changes were made to the MOA in response to this particular comment. This statutory provision makes clear that what is required is that the Secretary of the Interior ''shall ensure * * * that all [BIA] and tribal law enforcement and judicial personnel have *access* to [specified types] of training[,]'' and not that tribal law enforcement are required to obtain such training only from and through DOI. 25 U.S.C. 2451(a)(1). (emphasis added). In addition, the same commenter expressed concern that the child abuse and neglect data provision in the MOA, tied to 25 U.S.C. 2434, did not appear to provide a mechanism for a State to report its tribal cases, which may lead to underreporting of the prevalence of such events. The commenter also expressed general concern that States should be included in discussions and coordination on these issues to help ensure an adequate reflection of States' involvement in these matters. As efforts to collect and update these data consistent with the Act and as described in the MOA get underway, such concerns will be given careful and deliberate consideration in the planning and implementation of these efforts. In addition, this commenter addressed the model juvenile code provision—tied to 25 U.S.C. 2454—in the MOA by cautioning that any model juvenile code, prior to its codification, must be carefully crafted so as not to create unanticipated problems in the administration of State laws in those States that handle tribal juveniles in State juvenile systems. As with the previous comment on child abuse and neglect data, no change was made to the MOA itself in light of this comment; however, input such as this will be of great value as Federal efforts to develop and update any model juvenile code move forward.

**Janine Denis Cook,**

*Chemist, Division of Workplace Programs.*

## II. Memorandum of Agreement

## INDIAN ALCOHOL AND SUBSTANCE ABUSE MEMORANDUM OF AGREEMENT BETWEEN U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF THE INTERIOR, AND U. S. DEPARTMENT OF JUSTICE

I. Purpose and Parties

Alcoholism, addiction, and alcohol and substance abuse are among the most severe public health and safety problems facing American Indian and Alaska Native individuals, families, and communities, resulting in devastating social, economic, physical, mental and spiritual consequences. American Indians and Alaska Natives suffer disproportionately from substance abuse disorder compared with other racial groups in the United States. In a 2010 report from the National Survey on Drug Use and Health (NSDUH), the rates of past month binge alcohol use and illicit drug use were higher among American Indian or Alaska Native adults compared to national averages (30.6 vs. 24.5 percent and 11.2 vs. 7.9 percent, respectively) and the percentage of American Indian or Alaska Native adults who needed treatment for an alcohol or illicit drug use problem in the past year was higher than the national average for adults (18.0 vs. 9.6 percent).[1]

The Department of Health and Human Services (DHHS), Department of the Interior (DOI), and the Department of Justice (DOJ) have multiple programs, including prevention and treatment programs, that respond to the consequences of alcoholism, addiction, and alcohol and substance abuse, and its impact on public health and safety (e.g., education, social services, justice services, law enforcement, mental health, acute and chronic medical care services). However, there is a need to align, leverage and coordinate federal efforts and resources at multiple levels within each department to effectuate comprehensive alcohol and substance abuse services and programs for American Indian and Alaska Native individuals, families, and communities.

Pursuant to the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (Title IV, Subtitle C of Public Law 99–570) (the Act), DHHS and DOI entered into a Memorandum of Agreement (MOA) to develop and implement a coordinated program for the prevention and treatment of alcohol and substance abuse at the local level. Through the Tribal Law and Order Act of 2010 (Title II of Public Law 111–211) (TLOA) amendments to the Act, Congress sought to engage new federal partners to build upon those efforts. Pursuant to the TLOA amendments to the Act, the Secretary of Health and Human Services, the Secretary of the Interior, and the Attorney General, are to develop and enter into a MOA to, among other things:

1. Determine the scope of the alcohol and substance abuse problems faced by Indian tribes, as defined at 25 U.S.C. § 2403(3);
2. Identify the resources and programs of each department that would be relevant to a coordinated effort to combat alcohol and substance abuse among American Indians and Alaska Natives; and
3. Coordinate certain existing department programs with those established under the Act.

The purpose of this MOA is to establish a framework for collaboration in the implementation of the Act, that results in the coordination of resources and programs of DHHS' Substance Abuse and Mental Health Services Administration (SAMHSA) and the Indian Health Service (IHS), DOI's Bureau of Indian Affairs (BIA) and Bureau of Indian Education (BIE), and DOJ, to assist American Indian and Alaska Native communities in achieving their goals in the prevention, intervention, and treatment of alcohol and substance abuse. A wide variety of federal programs and activities exist that can support and supplement the efforts of these communities to address alcohol and substance abuse issues affecting their peoples; relevant programs and activities are currently underway across

[1] Substance Abuse and Mental Health Services Administration, Office of Applied Studies (June 24, 2010). The NSDUH Report: Substance Use among American Indian or Alaska Native Adults, Rockville, MD.

the various components of the MOA partner departments—and elsewhere in the federal government, such as in the Department of Education and the Department of Housing and Urban Development. As a core effort of this collaboration, the federal partners will develop and maintain a sustainable partnership infrastructure that enables these various resources to be more fully engaged and coordinated to offer a truly holistic approach in support of tribal alcohol and substance abuse efforts to address alcohol and substance abuse by American Indians and Alaska Natives.

II. Authorities

Authorities for this MOA include, the Snyder Act (25 U.S.C. § 13), the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450, et seq.), and the Act, as amended by TLOA (25 U.S.C. § 2401, et seq.).

III. Policy

As required by the Act, it is the policy of DHHS, DOI, and DOJ that all activities undertaken pursuant to the Act will be done in a manner that is least disruptive to tribal control, in accordance with the Indian Self-Determination and Education Assistance Act. DHHS, DOI, and DOJ, through each department's respective components, shall coordinate existing alcohol and substance abuse programs and resources. All new activities undertaken pursuant to the Act, as amended by TLOA, shall supplement, not supplant, ongoing activities and programs. The Secretary of Health and Human Services, the Secretary of the Interior, and the Attorney General, acting through these respective department's components, as appropriate, shall bear equal responsibility for the implementation of the Act in cooperation with Indian tribes, who have the primary responsibility for protecting and ensuring the wellbeing of their members and for the coordination of resources made available under this MOA through implementation of Tribal Action Plans (TAPs).

IV. Organization Responsibilities

DHHS, DOI, and DOJ, through these department's respective components, are responsible for ensuring compliance, monitoring of performance, subsequent evaluation and follow-up activities for this MOA. Each department will determine which officials and offices within that department will be responsible for implementing the provisions of this MOA, including which officials and offices will be charged with coordinating resources and programs and providing technical assistance at the regional and local levels, as appropriate.

The Office of Indian Alcohol and Substance Abuse (OIASA), established within SAMHSA pursuant to the Act, is charged with, among other things, improving coordination among the federal agencies and departments in carrying out the responsibilities delineated in the Act. (25 U.S.C. § 2413(b)). SAMHSA, acting through its OIASA, will initiate the development, in coordination and consultation with tribal governments, of a framework for inter-agency and tribal coordination, in accordance with 25 U.S.C. § 2413. This framework, which will be developed by July 29, 2011, will be designed to provide for ongoing process and performance review and improvement of the coordination among federal partners, and between federal partners and tribes, with regard to Indian alcohol and substance abuse programming. In addition, the framework will provide—among other beneficial tools—resource and information-sharing guidelines, technical assistance to facilitate federal partner communication and coordination of program initiatives, and assessments of the feasibility and cost-effectiveness of department collaborative efforts.

OIASA will use its expertise in the prevention and treatment of alcohol and substance abuse to inform MOA partner departments, Indian tribes, and other interested parties and stakeholders about coordination of activities undertaken pursuant to 25 U.S.C. § 2413. OIASA will coordinate with the MOA partner departments to provide the most effective, accessible, culturally-adaptive, medically-sound, and evidence-based services to address the causes, correlates, and effects of alcohol and substance abuse affecting American Indian and Alaska Native communities.

OIASA will coordinate with the departments participating under this MOA to monitor the performance and compliance of the relevant federal programs in achieving the goals and purposes of the Act, and this MOA, and will serve as a point of contact for Indian tribes and Tribal Coordinating Committees as described at 25 U.S.C. § 2413.

With regard to Area-/Regional-level coordination and implementation, a joint Area/Regional-level work plan will be developed and updated, as appropriate, by IHS/BIA and appropriate components, to identify specific organizational challenges, resources, and programs within that jurisdiction.

If any Indian tribe does not adopt a resolution for the establishment of a TAP as provided in 25 U.S.C. § 2412(a) within 90 days after the publication of this MOA in the **Federal Register**, appropriate officials from BIA, where appropriate, and IHS who serve such tribe, shall enter into an agreement to identify and coordinate available alcohol and substance abuse prevention and treatment programs and resources for such tribe.

Responsibilities include:

1. Scope of problem: DHHS, DOI, and DOJ, as facilitated by the Interdepartmental Coordinating Committee (see Section VII below), will coordinate with tribes and other non-federal partners to determine the scope of the ongoing problem of alcohol and substance abuse for Indian tribes, their members, and those eligible for the programs and services of IHS who are directly or indirectly affected by alcohol and substance abuse.

2. Identification of programs: SAMHSA, through OIASA, will take the lead role, in collaboration with IHS, BIA, and DOJ, in compiling a listing of national, state, tribal, and local alcohol and substance abuse programs and resources.

3. Minimum program standards: DHHS, DOI, and DOJ, in consultation with Indian tribes, will develop and establish minimum program standards, as appropriate, for alcohol and substance abuse prevention, intervention, and treatment. These standards may be based upon existing federal, state, or tribal standards currently in effect. OIASA will, where appropriate, facilitate the provision of any necessary technical assistance to develop such standards. The Interdepartmental Coordinating Committee will provide a forum for the overall coordination of efforts to assist each MOA partner in the identification of common standards for similar programs and activities to facilitate incorporation of those standards into departmental programs.

4. Assessment of resources: DHHS, DOI, and DOJ, via the Interdepartmental Coordinating Committee, will coordinate with tribes and other non-federal partners to develop a methodology to estimate the funding necessary for prevention, intervention, treatment, and recovery of Indians affected by alcohol and substance abuse.

5. TAP development: BIA Agency Superintendents, BIE Education Line Officers, IHS Chief Executive Officers (CEOs), and Office of Justice Programs (OJP) and SAMHSA agency representatives are directed to cooperate

fully with tribal requests pursuant to 25 U.S.C. § 2412 to assist in the development of a TAP. Once that plan has been developed, the BIA Agency Superintendents, BIE Education Line Officers, and IHS CEOs shall proceed to enter into an agreement with the tribe for the implementation of that TAP within funding constraints and program regulations.

6. Newsletter: DOI will continue to publish the newsletter, as described in 25 U.S.C. § 2416. The newsletter shall be published quarterly and include reviews of exemplary alcohol and substance abuse programs. All federal MOA partners agree to provide relevant content for distribution.

7. Law enforcement and judicial training: BIA, in coordination with DOJ, will take the lead role in development and implementation of the law enforcement and judicial personnel training, as described in 25 U.S.C. § 2451.

8. Emergency medical assessment: IHS and BIA will jointly, in collaboration with tribal communities, develop, implement, and maintain procedures, policies and protocols for emergency medical assessments for Indian youth arrested or detained for an offense relating to, or involving, alcohol or substance abuse, as provided in 25 U.S.C. § 2452. To the extent that other DHHS, DOI, and DOJ partners may have resources for use related to these assessments, those resources will be coordinated.

9. Emergency shelters: As described in 25 U.S.C. § 2433(d) and subject to the availability of appropriations, BIA will update, maintain, and, where necessary, promulgate standards for the establishment and operation of emergency shelters or halfway houses under programs pursuant to 25 U.S.C. § 2433(a). Under 25 U.S.C. § 2433(a), IHS, BIA, and tribes are authorized to use available resources to establish and operate emergency shelters or halfway houses for Indian youth with alcohol or substance abuse problems.

10. Child abuse and neglect data: As provided in 25 U.S.C. § 2434, and in accordance with applicable confidentiality laws, BIA, in cooperation with DOJ, will compile data relating to the number and types of child abuse and neglect cases and the type of assistance provided, reflecting those cases that involve, or appear to involve, alcohol and substance abuse, those cases which are recurring and those cases that involve other minor siblings. To the extent that the sharing of such data is not prohibited by law, BIA will provide child abuse and neglect data compiled by BIA and DOJ to the affected Indian tribe and Tribal Coordinating Committee, as described in 25 U.S.C. § 2412, to assist them in developing or modifying a TAP. In the compilation and reporting of the data, all necessary measures will be taken and safeguards put in place to preserve the confidentiality of families and individuals and to protect personally-identifiable information from unauthorized or inappropriate use and disclosure.

11. Juvenile detention centers: DHHS, DOI, and DOJ, in consultation with tribal leaders and tribal justice officials, will coordinate in developing a long-term plan for the construction, renovation, and operation of Indian juvenile detention and treatment centers and alternatives to detention for juvenile offenders, as described in 25 U.S.C. § 2453.

12. Model juvenile code: DOI and DOJ, in cooperation with Indian organizations having law enforcement and judicial procedure expertise and in consultation with Indian tribes, will coordinate in the development of a model juvenile code, as described in 25 U.S.C. § 2454.

## V. Period of Agreement

This MOA shall be effective from the last date of all signatures below in this MOA (date of effectuation of this MOA) and shall remain in effect until terminated or amended by DHHS, DOI, and DOJ acting jointly, or until there is a change in law authorizing and requiring this MOA.

## VI. Modification/Provisions for Amendment

This MOA, or any of its specific provisions, may be modified with the written approval of each signatory to the MOA. Such approval must be provided in writing and must be signed by an authorized representative of the signatory. OIASA will then publish a copy of the amended MOA in the **Federal Register** and DOI will disseminate it to each federally recognized Indian tribe.

## VII. Interdepartmental Coordinating Committee

The mechanism by which this federal collaboration will occur is through an Interdepartmental Coordinating Committee (the Committee) including DHHS, DOI, and DOJ representatives, as well as representatives from other agencies or departments, such as the Department of Education. The MOA formally establishes this Committee. (The attached Exhibit A titled, ''Tribal Law and Order Act Indian Alcohol and Substance Abuse (IASA) Interdepartmental Coordinating Committee,'' describes the initial composition and functions of the Committee.)

In order to assure that these cooperative efforts are pursued in a continuing and timely fashion, DHHS, DOI, and DOJ representatives and Committee representatives from other federal collaborative partners will meet on a regular basis, not less than quarterly, to review the activities supported by this MOA and will share information, report on progress, and explore new areas for cooperation. In addition, other meetings may be arranged to discuss specific projects.

As needed, in order to accomplish the purposes of this MOA, the federal collaborative partners may realign or otherwise restructure any workgroups working under the auspices of the Committee. Individual participating federal partners reserve the right to change department or agency representatives at will.

An annual progress report and a summary of meetings and activities conducted under this MOA will be prepared and submitted by the Committee to designated DHHS, DOI, and DOJ officials at the completion of each fiscal year, beginning with fiscal year 2012.

OIASA, in coordination with the MOA partners, will share information regarding activities under this MOA with American Indians and Alaska Natives, such as through periodic news features and updates in the newsletter (described at 25 U.S.C. § 2416), or other appropriate public information venues.

## VIII. Public Information Coordination

The Freedom of Information Act as amended (5 U.S.C. § 552), the Privacy Act of 1974 as amended (5 U.S.C. § 552a), and any additional applicable federal department implementing regulations govern any disclosure of information under this MOA. The departments will provide notice to the other partners, through the Committee, prior to the disclosure of requested information.

This MOA does not contemplate the use or disclosure of alcohol or drug abuse patient records, except as expressly provided under applicable statutes and regulations.

## IX. Discontinuance of Participation

A participating department may, subject to applicable federal law, by written notice (with at least 60 calendar days notification to each of the other participating departments), end its participation in this MOA, in whole or in part, when that department determines that it is unable to continue participation in the activities of this MOA.

X. Review of the MOA

DHHS, DOI, and DOJ, via the Committee, will review this MOA annually within a month of the anniversary of the signing of this MOA.

XI. Tribal Consultation

Consistent with Executive Order 13175 of November 6, 2000, and the Presidential Memorandum on Tribal Consultation of November 5, 2009, and applicable federal law, the federal parties to this MOA will establish a framework for the coordination of consultation activities, as necessary, relating to the federal efforts to be developed and implemented in accordance with this MOA. Participating departments, consistent with each of the departments' individual consultation policies, as required, will engage in such coordination of consultation activities in order to help ensure that regular and meaningful consultation and collaboration with tribal officials, as appropriate, occurs during the course of the development and implementation of multi-department activities under this MOA.

XII. Limitations

Nothing in this MOA constitutes an obligation of funds by any of the parties or an authorization to engage in activities that are inconsistent with applicable law or policy.

Similarly, nothing in this MOA restricts or otherwise limits departments from engaging in activities that are otherwise consistent with applicable law or policy.

In addition, nothing in this MOA creates or conveys any rights or potential causes of action to any person, federally recognized Indian tribe, or other entity that may be affected by this MOA.

All activities and projects initiated or implemented as a result of this MOA are subject to the availability of appropriated funds.

Nothing in this MOA precludes the signatories from entering into inter-departmental agreements for services to be provided in furtherance of the Act.

XIII. Full-Time Equivalency (FTE) Responsibility

Under this MOA, no transfer of FTEs is required between federal partner departments.

XIV. Approval by Signatories

/Kathleen Sebelius/
Secretary of Health and Human Services
/Ken Salazar/
Secretary of the Interior
/Eric H. Holder, Jr./
Attorney General

**EXHIBIT A:** See the document titled, ''Tribal Law and Order Act Indian Alcohol and Substance Abuse (IASA) Interdepartmental Coordinating Committee'' on the pages that follow.

## TRIBAL LAW AND ORDER ACT IASA INTERDEPARTMENTAL COORDINATING COMMITTEE

### 1. Tribal Coordinating Committee:

The Tribal Coordinating Committee—under the chairmanship of a tribal representative—has primary responsibility for the implementation of a tribe's TAP. With respect to federal involvement in support of tribal TAP implementation, the Executive Steering Committee of the IASA Interdepartmental Coordinating Committee will serve in the federal roles in support of Tribal Coordinating Committees, providing final guidance, direction, and coordination of the appropriate federal efforts in assisting tribes to implement TAPs as they relate to alcohol and substance abuse prevention and treatment.

### 2. MOA:

An interdepartmental workgroup convened as a precursor to the MOA Workgroup oversaw the development of and the policy and legal review of the MOA; established and managed the overall coordination of comments from the various federal departments and other entities; shepherded the MOA through MOA partner department clearance processes; secured final signatures; and coordinated the submission of the MOA to Congress, its dissemination to Indian tribes, and its publication in the **Federal Register**, as required by law. The MOA Workgroup will provide leadership in the annual review of the MOA, as required by the MOA.

- 25 U.S.C. § 2411: The Secretary of the Interior, the Attorney General, and the Secretary of Health and Human Services shall develop and enter into an MOA by no later than July 29, 2011, which shall, among other things:

1. Determine and define the scope of the problem of alcohol and substance abuse for Indian tribes and their members and its financial and human costs, and specifically identify such problems affecting Indian youth;
2. Identify BIA, OJP, SAMHSA, and IHS resources and programs, and other federal, tribal, state and local, and private resources and programs that would be relevant to a coordinated effort to combat alcohol and substance abuse among Indian people;
3. Develop and establish appropriate minimum standards for each agency's program responsibilities under the MOA;
4. Coordinate certain existing BIA, DOJ, SAMHSA, and IHS alcohol and substance abuse programs with current and newly established efforts under the Act;
5. Delineate BIA, DOJ, SAMHSA, and IHS responsibilities to coordinate alcohol and substance abuse-related services at the central, area, agency, and service unit levels;
6. Direct BIA agency superintendents and education line officers, where appropriate, and the IHS CEOs to cooperate fully with tribal requests for TAP assistance; and
7. Provide for annual review of TAP implementation agreements by the DOI Secretary, the AG, and the HHS Secretary.

### 3. Tribal Action Plan:

The TAP Workgroup will establish the operating framework of the TAP, develop an inventory of current proven strategies to recommend to tribes utilizing practice based evidence models, manage the overall coordination of tribal requests for assistance in the development of a TAP, coordinate assistance and support to tribes as deemed feasible, and collaborate with the Inventory Workgroup in developing an appropriate response back to tribal entities seeking assistance.

- 25 U.S.C. § 2412(e): If the governing body of any Indian tribe does not adopt a resolution, as provided in the Act, within 90 days after the publication of this MOA in the **Federal Register**, appropriate officials from BIA, where appropriate, and IHS who serve such tribe, shall enter into an agreement to identify and coordinate available alcohol and substance abuse prevention and treatment programs and resources for such tribe. After such an agreement has been entered into for a tribe for the identification and coordination of these resources, such tribe may adopt a resolution for the establishment of the tribe's TAP.
- 25 U.S.C. § 2412(c)(3): TAPs are to be updated every 2 years.
- 25 U.S.C. § 2412(c)(1)(A): TAPs will establish a Tribal Coordinating Committee which shall—

1. Consist, at minimum, of a tribal

representative who shall serve as Chairman and the BIA agency superintendents and education line officers, where appropriate, OJP, SAMHSA, and the IHS CEO, or their representatives;
2. Have primary responsibility for TAP implementation;
3. Provide for ongoing review and evaluation of the TAP;
4. Make recommendations to the tribe relating to the TAP; and
5. Schedule federal, tribal or other personnel for training in the prevention and treatment of alcohol and substance abuse among American Indians and Alaska Natives, as appropriate.

**4. Program Review:**

The Inventory/Resource Workgroup will establish an operating model, by which it gathers, maintains and updates the current federal effort/capacity, not limited to technical assistance contracts and services, grants, contracts, and cooperative agreements; manage the overall coordination of these efforts; and collaborate with the TAP Workgroup in developing an appropriate response back to tribal entities seeking assistance.

• 25 U.S.C. § 2414a(a): In the development of the MOA, the Secretary of the Interior, the Attorney General, and the Secretary of Health and Human Services shall review and consider:

1. The various programs established by federal law providing health services and benefits to Indian tribes, including those relating to mental health and alcohol and substance abuse prevention and treatment;
2. Tribal, state and local, and private health resources and programs;
3. Where facilities to provide such treatment are or should be located; and
4. The effectiveness of certain existing public and private alcohol and substance abuse treatment programs.

• 25 U.S.C. § 2414a(b): The results of these program reviews shall be provided to every Indian tribe as soon as possible for their consideration and use in the development or modification of a TAP.

**5. Newsletter:**

The Newsletter Workgroup will establish the operating protocol and procedures in order to publish a newsletter to report on Indian alcohol and substance abuse projects and programs.

• 25 U.S.C. § 2416: The newsletter will—

1. Be published once in each calendar quarter;
2. Include reviews of exemplary alcohol and substance abuse programs;
3. Provide sufficient information to enable interested persons to obtain further information about such programs; and
4. Be circulated without charge to—

- Schools;
- Tribal offices;
- BIA agency and area offices;
- IHS area and service unit offices;
- IHS alcohol programs; and
- Other entities providing alcohol and substance abuse-related services or resources to American Indians and Alaska Natives.

**6. Review of Programs:**

The Educational Services Workgroup will establish an operating model, by which it gathers, maintains and updates the current federal effort/capacity with respect to federal programs providing education services or benefits to American Indian and Alaska Native children.

• 25 U.S.C. § 2431(a): In the development of the MOA, the Secretary of the Interior, the Attorney General, and the Secretary of Health and Human Services, in cooperation with the Secretary of Education shall review and consider:

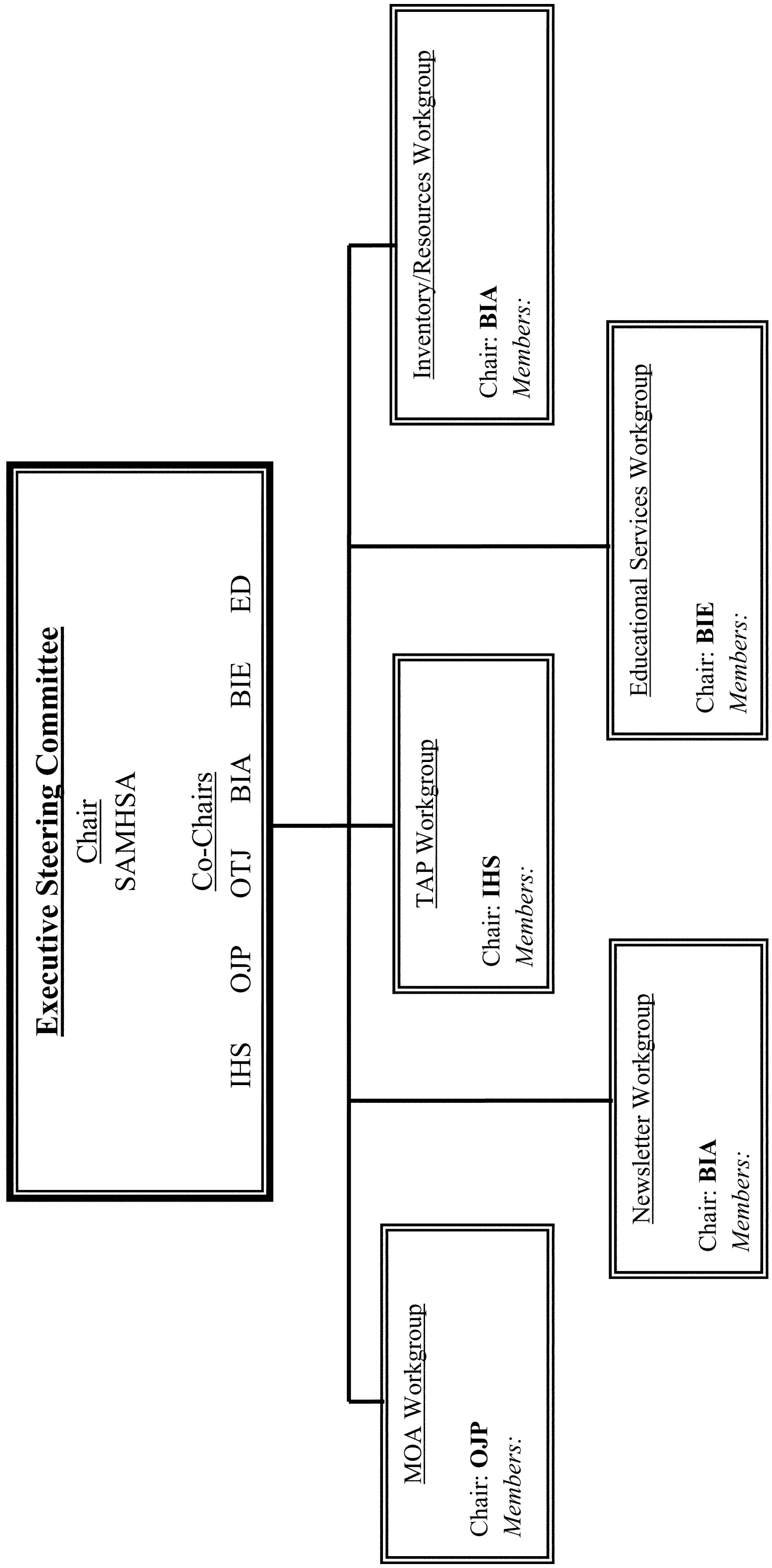
1. Federal programs providing education services or benefits to Indian children;
2. Tribal, state, local, and private educational resources and programs;
3. Federal programs providing family and social services and benefits for Indian families and children;
4. Federal programs relating to youth employment, recreation, cultural, and community activities; and
5. Tribal, state, local, and private resources for programs similar to those cited in paragraphs (3) and (4).

• 25 U.S.C. § 2431(b): The results of this review shall be provided to each Indian tribe as soon as possible for their consideration and use in the development or modification of a TAP.

BILLING CODE 4162–20–P

**TRIBAL LAW AND ORDER ACT**

**IASA INTERDEPARTMENTAL COORDINATING COMMITTEE**




[FR Doc. 2011–19816 Filed 8–4–11; 8:45 am]

**BILLING CODE 4162–20–C**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5484–N–27]**

## Notice of Proposed Information Collection: Comment Request; Energy Efficient Mortgages (EEMs)

**AGENCY:** Office of the Assistant Secretary for Housing, HUD.

**ACTION:** Notice.

**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: October 4, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/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:** Arlene Nunes, Acting Director, Home Mortgage Insurance Division, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

**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 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:* Energy Efficient Mortgages.

*OMB Control Number, if applicable:* 2502–0561.

*Description of the need for the information and proposed use:* Section 106 of the Energy Policy Act of 1992 (42 U.S.C. 1721 Section 106 of the Energy Policy Act of 1992 (42 U.S.C 12712) provides the Department of Housing and Urban Development, Federal Housing Administration (FHA), with the authority to insure mortgages where the costs of energy efficient improvements are incorporated into the mortgage. To be eligible, the statute requires that the improvements be cost effective, which are determined pursuant to a Home Energy Rating Systems (HERS) Report. The statute also defines cost effective as the total cost of the improvements (including any maintenance and repair expenses) that is less than the total present value of the energy saved over the useful life of the improvement. Section 2123 of the Housing Economic Recovery Act of 2008 (HERA) (Public Law 110–289, approved July 30, 2008)) amended Section 106 of the Energy Policy Act of 1992 which revised the maximum additional dollar amount that can be added to an FHA insured mortgage for energy efficient improvements. Lenders are responsible for reviewing the documents submitted and determining the cost effectiveness of the improvements so these costs can be added to the base loan amount. The borrower cannot obtain an EEM without providing this information. Specifically, the information includes:

a. The Home Energy Rating (HERS) Report, completed by the energy rater or consultant, which describes the energy improvements that can be made to the home. Guidance provided to the lender for determining the cost effectiveness of the energy package.

b. An attestation of the Direct Endorsement Underwriter for TOTAL Scorecard, which requires an underwriter to attest on the Underwriting and Transmittal Summary or the Mortgage Credit Analysis Worksheet that the determinations have been made regarding the energy improvements and finds the mortgage and the property to be in compliance with FHA's guidelines.

c. Information that the work has been completed and the escrow account has been cleared.

*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 frequency of response is based on the review and certifications required per loan and the total number of burden hours for entry is 4–1/4 hours per endorsed case from origination to closeout. The total number of responses is 1,320 which represent the total number of FHA cases endorsed for EEMs. The total number of burden hours is estimated at 5,610 which represent the time required to review and certify documents for EEMs insured.

*Status of the proposed information collection:* This is an extension of OMB Control No. 2502–0561.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: August 2, 2011.

**Ronald Y. Spraker,**

*Associate General Deputy Assistant Secretary for Housing-Associate Deputy Federal Housing Commissioner.*

[FR Doc. 2011–19926 Filed 8–4–11; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5484–N–26]**

## Notice of Proposed Information Collection: Comment Request; Annual Adjustment Factors (AAF) Rent Increase Requirement

**AGENCY:** Office of the Assistant Secretary for Housing, HUD.

**ACTION:** Notice.

**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: October 4, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/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:** Catherine Brennan, Director, Office of Housing Assistance & Grant

Administration, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–3000 (this is not a toll free number) for copies of the proposed forms and other available information.

**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 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:* Annual Adjustment Factors (AAF) Rent Increase Requirement.

*OMB Control Number, if applicable:* 2502–0507, an extension of currently approved collection.

*Description of the need for the information and proposed use:* Owners of project-based section 8 contracts that utilize the AAF as the method of rent adjustment provide this information which is necessary to determine whether or not the subject properties' rents are to be adjusted and, if so, the amount of the adjustment.

*Agency form numbers, if applicable:* HUD–92273–S8.

*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 number of burden hours is 918. The number of respondents is 4,287, the number of responses is 612, the frequency of response is on occasion, and the burden hour per response is 1.5.

*Status of the proposed information collection:* This is an extension of currently approved collection.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: August 2, 2011.

**Ronald Y. Spraker,**

*Associate General Deputy Assistant, Secretary for Housing-Associate Deputy Federal Housing Commissioner.*

[FR Doc. 2011–19931 Filed 8–4–11; 8:45 am]

**BILLING CODE 4210–67–P**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5477–N–31]**

## Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: July 28, 2011.

**Mark R. Johnston,**

*Deputy Assistant Secretary for Special Needs.*

[FR Doc. 2011–19588 Filed 8–4–11; 8:45 am]

**BILLING CODE 4210–67–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–EA–2011–N149; 97600–9792–0000–5D]**

## Sport Fishing and Boating Partnership Council

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce a public meeting of the Sport Fishing and Boating Partnership Council (Council).

**DATES:** The meeting will be held on Wednesday, August 31, 2011, from 9 a.m. to 5 p.m. and Thursday, September 1, 2011, from 9 a.m. to 3 p.m. (Pacific time). Members of the public who wish to attend the meeting must notify Douglas Hobbs by August 22, 2011. For deadlines and directions on registering to attend, submitting written material, and giving an oral presentation, please see ''Public Input'' under **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** The meeting will be held at the Sheraton Fisherman's Wharf Hotel, 2500 Mason Street, San Francisco, CA 94133; (415) 362–5500 (phone).

**FOR FURTHER INFORMATION CONTACT:** Douglas Hobbs, Council Coordinator, 4401 North Fairfax Drive, Mailstop 3103–AEA, Arlington, VA 22203; telephone (703) 358–2336; fax (703) 358–2548; or *Doug_Hobbs@fws.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that the Sport Fishing and Boating Partnership Council will hold a meeting (see **DATES**).

### Background

The Council was formed in January 1993 to advise the Secretary of the Interior, through the Director of the U.S. Fish and Wildlife Service, on nationally significant recreational fishing, boating, and aquatic resource conservation issues. The Council represents the interests of the public and private sectors of the sport fishing, boating, and conservation communities and is organized to enhance partnerships among industry, constituency groups, and government. The 18-member Council, appointed by the Secretary of the Interior, includes the Director of the Service and the president of the Association of Fish and Wildlife Agencies, who both serve in ex officio capacities. Other Council members are Directors from State agencies responsible for managing recreational fish and wildlife resources and individuals who represent the interests of saltwater and freshwater recreational fishing, recreational boating, the recreational fishing and boating industries, recreational fisheries resource conservation, Native American Tribes, aquatic resource outreach and education, and tourism. Background information on the Council is available at *http://www.fws.gov/sfbpc.*

**Upcoming Meeting**

The Council will convene to consider:

1. Progress in implementing the Council's assessment of the Fish and Wildlife Service Fisheries Program;
2. Progress in implementing the Council's assessment of the activities of the Recreational Boating and Fishing Foundation;
3. Issues related to implementation of the America's Great Outdoors Initiative;
4. Issues related to Marine Protected Areas and implementation of the National Ocean Policy;
5. Updates on activities of the Service's Wildlife and Sport Fish Restoration Program and Fisheries Program; and
6. Other Council business.

The final agenda will be posted on the Internet at *http://www.fws.gov/sfbpc.*

**Public Input**

| If you wish to | You must contact Douglas Hobbs (see FOR FURTHER INFORMATION CONTACT) no later than |
|---|---|
| Attend the meeting | August 22, 2011. |
| Submit written information or questions before the meeting for the council to consider during the meeting. | August 22, 2011. |
| Give an oral presentation during the meeting | August 17, 2011. |

*Attendance*

In order to attend this meeting, you must register by close of business on the date above. Because entry to Federal buildings is restricted, all visitors are required to preregister to be admitted. Please submit your name, time of arrival, e-mail address, and phone number to Douglas Hobbs (see **FOR FURTHER INFORMATION CONTACT**).

*Submitting Written Information or Questions*

Interested members of the public may submit relevant information or questions for the Council to consider during the public meeting. Written statements must be received by the date under DATES, so that the information may be made available to the Council for their consideration prior to this meeting. Written statements must be supplied to the Council Coordinator in both of the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file formats are Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or rich text file).

*Giving an Oral Presentation*

Individuals or groups requesting to make an oral presentation at the meeting will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact Douglas Hobbs, Council Coordinator, in writing (preferably via e-mail; see **FOR FURTHER INFORMATION CONTACT**), to be placed on the public speaker list for this meeting. Nonregistered public speakers will not be considered during the meeting. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, are invited to submit written statements to the Council after the meeting.

**Meeting Minutes**

Summary minutes of the conference will be maintained by the Council Coordinator at 4401 N. Fairfax Drive, MS– 3103–AEA, Arlington, VA 22203, and will be available for public inspection during regular business hours within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

Dated: July 28, 2011.

**James J. Slack,**

*Acting Director.*

[FR Doc. 2011–19871 Filed 8–4–11; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLNVS00530 L13300000.EP0000 241A; 10–08807; MO#4500013258; TAS: 14X1109]**

### Notice of Availability of the Draft Environmental Impact Statement for the Proposed Sloan Hills Competitive Mineral Material Sales, Clark County, NV

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, the Bureau of Land Management (BLM), Southern Nevada District Office in Las Vegas, Nevada has prepared a Draft Environmental Impact Statement (EIS) for the proposed competitive sale of mineral materials in the Sloan Hills of Southern Nevada, and by this notice announces the availability of the Draft EIS and the opening of the comment period.

**DATES:** To ensure comments will be considered, the BLM must receive written comments on the Proposed Sloan Hills Competitive Mineral Materials Sales Draft EIS within 120 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

**ADDRESSES:** You may submit written comments related to the Proposed Sloan Hills Competitive Mineral Materials Sales by any of the following methods:

- *Web site: http://www.blm.gov/nv/st/en/fo/lvfo.html.*
- *E-mail: sloanhillseis@blm.gov.*
- *Fax:* 702–515–5023, Attention Robert B. Ross, Jr.
- *Mail:* Robert B. Ross, Jr., Field Manager, BLM Las Vegas Field Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130–2301.

Copies of the Draft EIS for the Proposed Sloan Hills Competitive Mineral Materials Sales are available in the Las Vegas Field Office at the above address and at the following public library locations in Nevada:

- Paseo Verde Library, 280 South Green Valley Parkway, Henderson.
- James I Gibson Library, 280 South Water Street, Henderson.
- Enterprise Library, 25 East Shelbourne Avenue, Las Vegas.

**FOR FURTHER INFORMATION CONTACT:** For further information contact Shonna Dooman at (702) 515–5174 or e-mail: *sloanhillseis@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal

Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The Draft EIS describes and analyzes the proposed competitive sale of mineral materials within the Sloan Hills of Southern Nevada. The proposed project site consists of a total of 640 acres south of Las Vegas and east of Interstate 15 near the community of Sloan. The proposed project site includes the entire south half Section 29 (the North Site) and the entire north half of Section 32 (the South Site) located in Township 23 South, Range 61 East. The proposed action is consistent with 43 CFR 3600 and is authorized under the Mineral Materials Act of 1947 and the Federal Land Policy Management Act of 1976.

Two mining companies, CEMEX and Service Rock Products Corporation, have submitted mining plans of operations proposing to mine and process limestone and dolomite from the proposed project site. In addition to open pit mines, each proponent is proposing ancillary facilities that would include a minerals processing plant and other support facilities, which may include office buildings, truck maintenance buildings, fueling facilities, scale houses, parking facilities, an employee training facility, parts storage area, and a quality control/quality assurance laboratory.

Four action alternatives are analyzed in the Draft EIS, ranging from 320 acres to 640 acres. Alternative 1, at 640 acres, includes the sale of mineral materials in the North Site and the South Site to two mining companies that would operate independently and results in a single open pit mine. Alternative 2, at 320 acres, includes the sale of mineral materials in the North Site only. Alternative 3, at 320 acres, includes the sale of mineral materials in the South Site only. Alternative 4, at 640 acres, includes the sale of mineral materials in both the North Site and the South Site to a single mining company. Alternative 5 is the No Action Alternative.

A Notice of Intent to prepare a Draft EIS was published in the **Federal Register** on Monday, June 11, 2007. Scoping of the project occurred from June 11, 2007 to January 5, 2008. Two public scoping meetings were held at the Henderson Executive Airport on December 5 and 6, 2007. A total of 126 individuals submitted comments during the scoping period. Comments received pertained to a variety of broad categories, including alternatives, mining operations, and physical/natural resources.

The Draft EIS addresses the following issues identified during scoping: NEPA process (consultations/coordination, proposal description, alternatives, and connected action/cumulative impacts); social resources (cultural resources, visual resources, noise, land use, recreation, transportation, and socioeconomic resources); and physical/natural resources (biological resources, water resources, paleontological resources and geologic/soil resources).

Please note that public comments and information submitted including names, street addresses, and e-mail addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4:30 p.m.), Monday through Friday, except holidays.

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. While you may 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.

**Authority:** 40 CFR 1506.6 and 1506.10.

**Robert B. Ross Jr.,**

*Manager, Las Vegas Field Office.*

[FR Doc. 2011–19651 Filed 8–4–11; 8:45 am]

BILLING CODE 4310–HC–P

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CACA 51022 DOE/EIS–0439]**

### Notice of Availability of the Final Environmental Impact Statement for the Rice Solar Energy, LLC Rice Solar Energy Project and Proposed California Desert Conservation Area Plan Amendment

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Western Area Power Administration (Western), the Bureau of Land Management (BLM), and the California Energy Commission (CEC) prepared a Final Environmental Impact Statement (EIS) and California Desert Conservation Area (CDCA) Plan Amendment for the Rice Solar Energy Project (RSEP) in Riverside County, California. By this Notice, the BLM is announcing the availability of the Proposed CDCA Plan Amendment/Final EIS.

**DATES:** The BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the BLM's Proposed CDCA Plan Amendment. A person who meets the conditions and files a protest must file the protest by September 6, 2011.

**ADDRESSES:** Copies of the RSEP Proposed CDCA Plan Amendment/Final EIS have been sent to affected Federal, State, and local government agencies and to other stakeholders. Copies are available for public inspection at the Palm Springs South Coast Field Office, 1201 Bird Center Drive, Palm Springs, California 92262. Interested persons may also review the document at the following Web site: *http://www.wapa.gov/transmission/RiceSolar.htm.* All protests must be in writing and mailed to one of the following addresses:

*Regular Mail:* BLM Director (210), Attention: Brenda Hudgens-Williams, P.O. Box 71383, Washington, DC 20024–1383.

*Overnight Mail:* BLM Director (210), Attention: Brenda Hudgens-Williams, 20 M Street, SE, Room 2134LM, Washington, DC 20003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Liana Reilly, NEPA Document Manager, Western Area Power Administration, P.O. Box 281213, Lakewood, Colorado 80228–8213, e-mail: *RiceSolar@wapa.gov;* or Ms. Allison Shaffer, Realty Specialist, telephone 760–833–7100, address (see above field office address), e-mail *CAPSSolarRice@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The proposed Rice Solar Energy Project (Project) is a 150 megawatt (MW) solar electric power plant that would use concentrating solar ''power tower'' technology to capture the sun's heat to make steam, which would power traditional steam turbine generators.

The solar generation facility, located on privately owned land, would contain the power block, a central receiver or tower, a solar field consisting of mirrors or heliostats to reflect the sun's energy to the central tower, a thermal energy storage system, technical and non-technical buildings, a storm water system, a water supply and treatment system, a wastewater system, evaporation ponds, construction parking and laydown areas, and other supporting facilities. The Project would use an air-cooled condenser (*i.e.,* dry cooling technology) for power plant cooling. Water for the project (approximately up to 180 acre-feet per year) would be obtained from two new on-site wells.

Rice Solar Energy, LLC (RSE) has applied to Western to interconnect the proposed Project to Western's transmission system. A new 10-mile-long 230-kV generator tie-line would extend from the southern boundary of the solar facility to a new substation adjacent to Western's existing Parker-Blythe transmission line. The substation would be owned and operated by Western and would be approximately 3 acres in size. RSE has submitted a right-of-way (ROW) application to the BLM for the Project components (the generator tie-line, substation, and access road) to be constructed on a total of about 150 acres of land managed by the BLM. The project site is in an undeveloped area of the Mojave Desert in eastern Riverside County, California, near State Route 62, about 40 miles west of Blythe, California, and 15 miles west of Vidal Junction, California, on lands managed by the BLM.

The BLM's purpose and need for the RSEP is to respond to RSE's application under Title V of FLPMA (43 U.S.C. 1761) for a ROW grant to construct the 161-kV/230-kV transmission line, substation, and access road on public lands in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws. The BLM will decide whether to approve, approve with modification, or deny the ROW for the proposed RSEP project. The BLM will also consider amending the CDCA Plan (1980, as amended) in this analysis. The CDCA Plan, while recognizing the potential compatibility of solar generation facilities on public lands, requires that all sites associated with power generation or transmission not identified in that plan be considered through the plan amendment process. If the BLM decides to grant a ROW, the BLM would also amend the CDCA Plan, as required.

The Final EIS evaluates the potential impacts of the proposed RSEP and CDCA Plan Amendment on air quality, biological resources, cultural resources, water resources, geological resources and hazards, land use, noise, paleontological resources, public health, socioeconomics, soils, traffic and transportation, visual resources, wilderness characteristics, and other resources.

A Notice of Availability for the RSEP Draft CDCA Plan Amendment/Draft EIS was published by the EPA in the **Federal Register** on October 27, 2010 (75 FR 66078). The formal 90-day comment period ended on January 20, 2011. Comments were considered and incorporated as appropriate into the Proposed CDCA Plan Amendment/Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change proposed land use plan decisions.

On June 10, 2011, the EPA published a Notice of Availability in the **Federal Register** for the RSEP (76 FR 34073). That notice, however, did not identify the BLM's proposed plan amendment or the associated opportunity for protest. Today's notice fulfills the BLM's requirement, found at 43 CFR 1610.5–2, to provide eligible persons such opportunity.

Instructions for filing a protest with the BLM Director regarding the Proposed CDCA Plan Amendment may also be found at 43 CFR 1610.5–2. E-mail and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at 202–912–7212, and e-mails to *Brenda_hidgens-williams@blm.gov.* All protests, including the follow-up letter to e-mails or faxes, must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above.

Before including your phone number, e-mail address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority:** 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2, 43 CFR 1610.5.

**Thomas Pogacnik,**

*Deputy State Director, Natural Resources.*

[FR Doc. 2011–19916 Filed 8–4–11; 8:45 am]

BILLING CODE 6450–01–P

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## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NRSS–0811–8097; 9865–PZS]**

### Information Collection Sent to the Office of Management and Budget (OMB) for Approval; Community Harvest Assessments for Alaskan National Parks, Preserves, and Monuments

**AGENCY:** National Park Service (NPS), Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (National Park Service) will ask the Office of Management and Budget (OMB) to approve the Information Collection Request (ICR) described below (OMB Control No. 1024–New). As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this ICR. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**DATES:** Public comments must be submitted on or before October 4, 2011.

**ADDRESSES:** Please send your comments to the ICR to Phadrea Ponds, Information Collections Coordinator, National Park Service, 1201 Oakridge Drive, Fort Collins, CO 80525 (mail); or *phadrea_ponds@nps.gov* (e-mail). Please reference Information Collection 1024–NEW, Community Harvest Assessments.

**FOR FURTHER INFORMATION CONTACT:** Barbara Cellarius, PhD, Wrangell-St. Elias National Park and Preserve, PO Box 439, Copper Center, AK 99573; *barbara_cellarius@nps.gov* (e-mail); or 907–822–7236 (phone). You are entitled to a copy of the entire ICR package free-of-charge. You may access this ICR at *http://www.reginfo.gov.*

**SUPPLEMENTARY INFORMATION:** *OMB Number:* 1024–New (This is a new collection.)

*Title:* Community Harvest Assessments for Alaskan National Parks, Preserves, and Monuments.

*Service Form Number:* None.

*Type of Request:* New.

*Description of Respondents:* Individual households eligible to engage in subsistence hunting, fishing, trapping, and gathering under NPS and Federal Subsistence Program regulations in Gates of the Arctic and Wrangell-St. Elias National Parks and Preserves.

*Respondent's Obligation:* Voluntary.

*Frequency of Collection:* One-time; on occasion.

*Estimated Number of Annual Responses:* 354.

*Annual Burden Hours:* 413 hours. We estimate the public reporting burden averages 10 minutes per initial contact and 60 minutes per completed survey.

*Estimated Annual Nonhour Burden Cost:* None.

*Abstract:* The National Park Service (NPS) Act of 1916, 38 Stat 535, 16 U.S.C. 1, *et seq.*, requires that the NPS preserve national parks for the use and enjoyment of present and future generations. At the field level, this means resource preservation, public education, facility maintenance and operation, and physical developments that are necessary for public use, health, and safety.

National parks, preserves and monuments in Alaska created or expanded in 1980 under the Alaska National Interest Lands Conservation Act (ANILCA) provide the opportunity for qualified rural residents to harvest fish, wildlife, and other subsistence resources. Section 812 of ANILCA states, ''The Secretary [of the Interior], in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands.'' To develop resource management strategies for the parklands, the NPS needs information on harvest patterns among residents of communities with subsistence eligibility, resource distribution systems, and the impact of the changing rural economy on subsistence activities. A survey will be used to estimate subsistence harvests and to describe community subsistence economies. This project will survey residents of several communities in Wrangell-St. Elias National Park and Preserve and Gates of the Arctic National Park and Preserve on these topics. The surveyed communities have been designated as resident zone communities for the respective park in recognition that many residents of these communities have customarily and traditionally engaged in subsistence uses within a national park or monument. The resulting information will assist park managers in their subsistence management responsibilities and will also be of use to local and regional advisory councils in making recommendations and by the State of Alaska and the Federal Subsistence Board in making decisions regarding the management of fish and wildlife in the region.

*Comments: Comments are invited on:* (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: August 1, 2011.

**Robert M. Gordon,**

*Information Collection Clearance Officer, National Park Service.*

[FR Doc. 2011–19834 Filed 8–4–11; 8:45 am]

**BILLING CODE 4312–52–P**

## INTERNATIONAL TRADE COMMISSION

**[Inv. No. 337–TA–796]**

### Certain Electronic Digital Media Devices and Components Thereof; Notice of Institution of Investigation; Institution of Investigation Pursuant to 19 U.S.C. 1337

**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 July 5, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Apple, Inc. of Cupertino, California. A letter supplementing the Complaint was filed on July 22, 2011. The complaint 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 electronic digital media devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 7,479,949 (''the '949 patent''); U.S. Patent No. RE 41,922 (''the '922 patent''); U.S. Patent No. 7,863,533 (''the '533 patent''); U.S. Patent No. 7,789,697 (''the '697 patent''); U.S. Patent No. 7,912,501 (''the '501 patent''); U.S. Patent No. D558,757 (''the '757 patent''); and U.S. Patent No. D618,678 (''the '678 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 cease and desist orders.

**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 July 29, 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 electronic digital media devices and components thereof

that infringe one or more of claims 1, 3–6, and 9–20 of the '949 patent; claims 29–35 of the '922 patent; claims 1, 4, 7, 9, 11, 12, 15–17, 19, and 20 of the '533 patent; claims 1–3, 11–16, and 21–27 of the '697 patent; claims 1–4 and 8 of the '501 patent; the claim of the '757 patent; and the claim of the '678 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 is: Apple Inc., 1 Infinite Loop, Cupertino, CA 95014.

(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:

Samsung Electronics Co., Ltd., 416 Maetan-3dong, Yeongtong-gu, Suwon-City, Gyeonggi-do, Korea 443–742;
Samsung Electronics America, Inc., 85 Challenger Road, Ridgefield Park, NJ 07660;
Samsung Telecommunications America, LLC, 1301 East Lookout Drive, Richardson, TX 75082.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, D.C. 20436; and

(3) For the investigation so instituted, the 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 therefor 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.

By order of the Commission.

Issued: August 2, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–19890 Filed 8–4–11; 8:45 am]

BILLING CODE 7020–02–P

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–11–021]**

## Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** August 15, 2011 at 3 p.m.

**PLACE:** Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**Matters To Be Considered**

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. No. 731–TA–459 (Third Review) (Polyethylene Terephthalate (PET) Film from Korea). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before August 29, 2011.
5. Vote in Inv. No. 731–TA–718 (Third Review) (Glycine from China). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before August 30, 2011.
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: August 3, 2011.

By order of the Commission.

**William R. Bishop,**

*Hearings and Meetings Coordinator.*

[FR Doc. 2011–19987 Filed 8–3–11; 4:15 pm]

BILLING CODE P

## NATIONAL SCIENCE FOUNDATION

## Advisory Committee for Environmental Research And Education; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Environmental Research and Education (9487).

*Dates:*September 8, 2011, 8:30 a.m.–5 p.m.
September 9, 2011, 8:30 a.m.–2 p.m.

*Place:* Stafford I, Room 1235, National Science Foundation, 4201Wilson Blvd., Arlington, Virginia 22230.

*Type of Meeting:* Open.

*Contact Person:* Beth Zelenski, National Science Foundation, Suite 705, 4201 Wilson Blvd, Arlington, Virginia 22230. Phone 703–292–8500.

*Minutes:* May be obtained from the contact person listed above.

*Purpose of Meeting:* To provide advice, recommendations, and oversight concerning support for environmental research and education.

**Agenda**

*September 8, 2011*

- Update on NSF environmental research and education activities;
- Update on national and international collaborations;
- Meeting with the NSF Director.

*September 9, 2011*

- Update on NSF's Science, Engineering and Education for Sustainability portfolio (SEES).

Dated: August 2, 2011.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 2011–19864 Filed 8–4–11; 8:45 am]

BILLING CODE 7555–01–P

## NATIONAL SCIENCE FOUNDATION

## Notice of Permit Modification Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit modification issued under the Antarctic Conservation Act of 1978, Public Law 95–541.

**SUMMARY:** The National Science Foundation (NSF) is Required to Publish Notice of Permits Issued Under the Antarctic Conservation Act of 1978. This is the Required Notice.

**FOR FURTHER INFORMATION CONTACT:** Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

**SUPPLEMENTARY INFORMATION:** On May 25, 2011, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit modification was issued on August 1, 2011 to: Robert Pitman, Permit No. 2009–013 Mod 2.

**Nadene G. Kennedy,**

*Permit Officer.*

[FR Doc. 2011–19825 Filed 8–4–11; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0177; Docket No. 40–00235, License No. STB–0362 (Terminated)]**

### AAR Manufacturing, Inc.; Completion of Radiological Survey Activities at CSX Transportation Property Near Inkster Road in Livonia, MI

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of acceptability.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is noticing the acceptability for unrestricted use of the CSXT property near Inkster Road in Livonia, Michigan.

**ADDRESSES:** 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, Room 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 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.*

**FOR FURTHER INFORMATION CONTACT:** Duane Schmidt, Senior Health Physicist, FSME, Division of Waste Management and Environmental Protection, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6919, e-mail: *duane.schmidt@nrc.gov.*

Background: The CSXT property located near Inkster Road is not subject to a license issued by the NRC. It consists of operating rail lines and associated right-of-way and is located to the west of Inkster Road in Livonia, Michigan. The parcel is adjacent to, and runs parallel to, the southern boundary of the AAR Manufacturing, Inc. (AAR) site. The AAR site was formerly owned by Brooks and Perkins, Inc. (B&P), a licensee of the NRC's predecessor agency, the U.S. Atomic Energy Commission (AEC). AEC Source Material License No. D–547 was issued to B&P on January 17, 1957, and was superseded by License STB–0362 on August 10, 1961. AEC terminated License STB–0362 on May 17, 1971. In 1981, AAR purchased B&P and obtained the property. In March 1994, the NRC informed AAR that radioactive thorium surface and subsurface contamination had been detected at several locations on the site and requested that AAR perform radiological surveys and remediation activities (ADAMS Accession No. ML110670259). The AAR site was added to the Site Decommissioning Management Plan list in August 1994.

In May 1997, NRC inspectors performed a limited radiation survey of the CSXT right-of-way adjacent to the AAR site. NRC staff provided the inspection report to CSXT in a June 12, 1997, letter; the report identified three locations with elevated levels of thorium in the soil (ADAMS Accession No. ML091000360). NRC staff considered the possibility that some residual radioactive material may have spread from the AAR site onto the CSXT property. In a September 8, 1997, letter, NRC requested that CSXT provide an accurate characterization of the property (ADAMS Accession No. ML101250613). CSXT submitted the report to NRC on September 13, 2000 (ADAMS Accession No. ML090680748). The CSXT conclusion in this report was that the dose modeling results demonstrate that no remedial actions or restrictions on site usage are required and that the total site dose does not exceed the 25 mrem/year NRC criteria for unrestricted release. NRC staff reviewed the CSXT report and concluded that the surveys and measurements were generally not consistent with NRC guidance. After evaluating the existing data for the CSXT property, the NRC staff decided to have the NRC independent survey contractor perform confirmatory surveys of the CSXT property.

Based on the survey and sampling results, as well as an all-pathways analysis of the potential doses to the public from the residual radioactivity at the site, it was determined that contamination on the CSXT property would result in doses well below NRC's criteria for unrestricted use. Therefore the NRC staff concludes that no further action is needed by CSXT. NRC will not require remediation activities at the site unless new information demonstrates that the criteria in 10 CFR Part 20, Subpart E, ''Radiological Criteria for License Termination,'' are not being met and residual radioactivity at the site could result in a significant threat to public health and safety. The NRC staff documented its review in a Safety Evaluation Report (SER) (ADAMS Accession No. ML111370451).

Dated at Rockville, Maryland this 28th day of July, 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. 2011–19876 Filed 8–4–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0206; Docket No. 50–443]**

### NextEra Energy Seabrook, LLC; Notice of Availability of Draft Supplement 46 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants and Public Meetings for the License Renewal of Seabrook Station, Unit 1

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) has published a draft plant-specific supplement to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS), NUREG–1437, regarding the renewal of operating license NPF–86 for an additional 20 years of operation for Seabrook Station, Unit 1 (Seabrook). Seabrook is located 13 miles south of Portsmouth, New Hampshire. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be considered, comments on the draft supplement to the GEIS and the proposed action must be received by October 26, 2011. The NRC staff is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** Please include Docket ID NRC–2010–0206 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–2010–0206. Address questions about NRC dockets to Carol Gallagher at 301–492–3668 or by e-mail at *Carol.Gallagher@nrc.gov.*

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *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, Public File Area O–1F21, 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 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 at *pdr.resource@nrc.gov.* The Accession Number for draft Supplement 46 to the GEIS is ML11213A080.

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching for Docket ID NRC–2010–0206.

In addition, a copy of the draft supplement to the GEIS is available to local residents near the site at the Seabrook Library located at 25 Liberty Street, Seabrook, NH 03874, and at the Amesbury Public Library located at 149 Main Street, Amesbury, MA 01913.

All comments received by the NRC, including those made by Federal, State, and local agencies; Native American Tribes; or other interested persons, will be made available electronically at the NRC's PDR in Rockville, Maryland, and through ADAMS. Comments received after the due date will be considered only if it is practical to do so.

The NRC staff will hold public meetings prior to the close of the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. Two meetings will be held at One Liberty Lane in Hampton, New Hampshire, on Thursday, September 15, 2011. The first session will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will convene at 7 p.m. and will continue until 10 p.m., as necessary. The meetings will be transcribed and will include: (1) a presentation of the contents of the draft plant-specific supplement to the GEIS and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. Michael Wentzel, the NRC Environmental Project Manager, at 1–800–368–5642, extension 6459, or by e-mail at *michael.wentzel@nrc.gov* no later than Friday, September 9, 2011. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Wentzel's attention no later than September 9, 2011, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Wentzel, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Mail Stop O–11F1, Washington, DC 20555–0001. Mr. Wentzel may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland this 1st day of August 2011.

For the Nuclear Regulatory Commission.

**Lisa M. Regner,**

*Acting Chief, Projects Branch 2, Division of License Renewal, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–19875 Filed 8–4–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR WASTE TECHNICAL REVIEW BOARD

### Board Meeting: September 13–14, 2011—Salt Lake City, UT; the U.S. Nuclear Waste Technical Review Board Will Meet To Discuss DOE Plans for Used Fuel Disposition R&D

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act of 1987, the U.S. Nuclear Waste Technical Review Board will hold a public meeting in Salt Lake City, Utah, on Tuesday, September 13, and Wednesday, September 14, 2011, to discuss the Department of Energy's (DOE) plans for research and development (R&D) related to its Used Fuel Disposition Program. The Board will hear presentations on a range of studies being supported by the Office of Used Fuel Disposition, including research on transportation and long-term storage of spent nuclear fuel (SNF), studies of various geologic media that might be considered for disposing of SNF and high-level radioactive waste (HLW), and DOE's Used Fuel Disposition R&D ''Roadmap.'' Other issues that will be discussed at the meeting include a preliminary report by the Blue Ribbon Commission on America's Nuclear Future and the implications for waste management of the experiences of commercial nuclear reactors using MOX fuel.

The meeting sessions will begin on both days at 8 a.m. and will be held at the Little America Hotel; 500 South Main Street; Salt Lake City, Utah 84101;

(tel) 801–258–6740; (fax) 801–258–6858. A block of rooms has been reserved at the hotel for meeting attendees. To ensure receiving the meeting rate, room reservations must be made by Tuesday, August 16. To reserve a room, call 800–437–5288 and request a reservation in the U.S. Nuclear Waste Technical Review Board room block.

A detailed agenda will be available on the Board's Web site at *http://www.nwtrb.gov* approximately one week before the meeting. The agenda also may be obtained by telephone request at that time.

The meeting will be open to the public, and opportunities for public comment will be provided at the end of each day's session. Those wanting to speak are encouraged to sign the ''Public Comment Register'' at the check-in table. A time limit may need to be set for individual remarks, but written comments of any length may be submitted for the record.

Transcripts of the meeting will be available on the Board's Web site, by e-mail, on computer disk, and on library-loan in paper form from Davonya Barnes of the Board's staff after October 10, 2011.

The Board was established as an independent Federal agency to provide ongoing objective expert advice to Congress and the Secretary of Energy on technical issues related to nuclear waste management and to review the technical validity of DOE activities related to implementing the Nuclear Waste Policy Act. Board members are experts in their fields and are appointed to the Board by the President from a list of candidates submitted by the National Academy of Sciences. The Board is required to report to Congress and the Secretary no fewer than two times each year. Board reports, correspondence, congressional testimony, and meeting transcripts and materials are posted on the Board's Web site.

For information on the meeting agenda, contact Karyn Severson. For information on lodging or logistics, contact Linda Coultry. They can be reached at 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201–3367; (tel) 703–235–4473; (fax) 703–235–4495.

Dated: July 29, 2011.

**Nigel Mote,**

*Executive Director, U.S. Nuclear Waste Technical Review Board.*

[FR Doc. 2011–19801 Filed 8–4–11; 8:45 am]

**BILLING CODE 6820–AM–M**

## POSTAL REGULATORY COMMISSION

**[Docket No. MC2011–27; Order No. 785]**

### Mail Classification Change

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request for a change in classification to the ''Reply Rides Free'' program. The change increases the qualifying First-Class mail letter weight. This notice addresses procedural steps associated with this filing.

**DATES:** *Comments are due:* August 12, 2011.

**ADDRESSES:** Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

**SUPPLEMENTARY INFORMATION:** On July 29, 2011, the Postal Service filed a notice of classification change pursuant to 39 CFR 3020.90 and 3020.91 concerning the Reply Rides Free program.[1] The classification change increases the qualifying First-Class Mail letter weight from no more than 1.2 ounces to no more than 2 ounces. The volume commitment for customers who begin participation in the program on September 1, 2011 or later will be prorated based on their volume during September—December 2010, as a proportion of total 2010 volume. The Postal Service states the change will be effective on September 1, 2011.

The Commission establishes Docket No. MC2011–27 for consideration of matters related to the proposed classification change identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's request is consistent with the policies of 39 U.S.C. 3642 and generally with the provisions of title 39.

[1] Notice of the United States Postal Service of Classification Change Related to Reply Rides Free Program, July 29, 2011 (Notice).

Comments are due no later than August 12, 2011. The Postal Service's Notice can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow to serve as Public Representative in the captioned proceeding.

*It is ordered:*

1. The Commission establishes Docket No. MC2011–27 for consideration of matters raised by the Postal Service's Notice.
2. Comments by interested persons are due no later than August 12, 2011.
3. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as the officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2011–19888 Filed 8–4–11; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. A2011–35; Order No. 786]**

### Post Office Closing

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document informs the public that an appeal of the closing of the Pilot Grove, Iowa post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

**DATES:** *Administrative record due (from Postal Service*): August 11, 2011; *deadline for notices to intervene:* August 26, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

**ADDRESSES:** Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on July 27, 2011, the Commission received two petitions for review of the Postal Service's determination to close the post office in Pilot Grove, Iowa. The first petition was filed by Sylvan J. Nichting and is postmarked July 18, 2011. The second petition was filed by Joan M. Nichting and is postmarked July 19, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–35 to consider Petitioners' appeal. If Petitioners' would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than August 31, 2011.

*Categories of issues apparently raised.* Petitioners contend that the Postal Service failed to consider the effect of the closing on the community. *See* 39 U.S.C. 404(d)(2)(A)(i).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is August 11, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is August 11, 2011.

*Availability; Web site posting.* The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

*Filing of documents.* All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

*Intervention.* Persons, other than Petitioners and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before August 26, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

*Further procedures.* By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

*It is ordered:*

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than August 11, 2011.
2. Any responsive pleading by the Postal Service to this notice is due no later than August 11, 2011.
3. The procedural schedule listed below is hereby adopted.
4. Pursuant to 39 U.S.C. 505, Emmett Rand Costich is designated officer of the Commission (Public Representative) to represent the interests of the general public.
5. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

PROCEDURAL SCHEDULE

| | |
|---|---|
| July 27, 2011 | Filing of Appeal. |
| August 11, 2011 | Deadline for the Postal Service to file the applicable administrative record in this appeal. |
| August 11, 2011 | Deadline for the Postal Service to file any responsive pleading. |
| August 26, 2011 | Deadline for notices to intervene (*see* 39 CFR 3001.111(b)). |
| August 31, 2011 | Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)). |
| September 20, 2011 | Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)). |
| October 5, 2011 | Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)). |
| October 12, 2011 | Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116). |
| November 16, 2011 | Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)). |

[FR Doc. 2011–19901 Filed 8–4–11; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2011–66; Order No. 784]**

## Postal Rate Changes

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request to change rates for Inbound International Expedited Services 2 rates. This notice

addresses procedural steps associated with this filing.

**DATES:** *Comments are due:* August 11, 2011. **SUPPLEMENTARY INFORMATION** *submitted by Postal Service due*: August 8, 2011.

**ADDRESSES:** Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

**SUPPLEMENTARY INFORMATION:**

## Table of Contents



## I. Introduction

On July 28, 2011, the Postal Service filed a notice announcing changes in rates not of general applicability for Inbound International Expedited Services 2 effective January 1, 2012.[1] The Postal Service incorporates by reference a listing of countries in each pricing tier and the description of Inbound International Expedited Services 2 contained in the supporting documentation filed in Docket Nos. MC2009–10, CP2009–12 and CP2009–57. *Id.* at 2 and n.4. The following four documents are attached to the Notice: (1) An application for non-public treatment of specific materials; (2) Redacted Governors' Decision No. 08–20 establishing the Inbound Express Mail International (EMS) classification along with a certified statement establishing compliance with 39 U.S.C. 3633; (3) A redacted copy of the 2012 rates; and (4) A certified statement required by 39 CFR 3015.5(c)(2).

## II. Background

The Notice states that in Docket No. MC2009–10, the Governors established prices and classifications not of general applicability for Inbound Express Mail International. *Id.* at 1. In Order No. 162, the Commission added Inbound International Expedited Service 2 to the competitive product list as a new product under Express Mail, Inbound International Expedited Services.[2] The rates took effect on January 1, 2009. In Order No. 281, the Commission accepted the change in rates not of general applicability for Inbound International Expedited Services 2 effective January 1, 2010.[3] The Commission also directed the Postal Service to provide the 2010 EMS Pay-for-Performance Plan as approved by the EMS Cooperative of the Universal Postal Union (UPU). On February 17, 2010, the Postal Service provided the requested information.[4] In Order No. 523, the Commission accepted the change in rates not of general applicability for Inbound International Expedited Services 2 effective January 1, 2011.[5] The Postal Service also provided a copy of the 2011 EMS Pay-for-Performance Plan as directed by the Commission.[6]

In accordance with the provisions of the EMS Cooperative of the UPU, rates for the delivery of inbound Express Mail International must be communicated to the UPU by August 31 of the year before which they are to take effect. As a member of the EMS Cooperative, the Postal Service may not change its rates for the coming year after August 31.

The Postal Service indicates that it proposes no changes to the classification of Inbound International Expedited Services 2 included with its Notice. Notice at 2. It acknowledges that it incorporates by reference the explanations of the Inbound International Expedited Services 2 contained in its Request in Docket Nos. MC2009–10 and CP2009–12 and other materials filed in Docket No. CP2009–57. In Docket No. CP2009–57, the Postal Service explained that, ''the two-tiered rate structure for Inbound Expedited Services exists as a result of the EMS Cooperative's expectation that all of its members will participate in the Pay-for-Performance Plan.'' *Id.*

The Postal Service asserts that its filing demonstrates compliance with 39 U.S.C. 3633. *Id.* at 3.

## III. Supplemental Information

Pursuant to 39 CFR 3015.6, the Commission requests the Postal Service to provide the following supplemental information by August 8, 2011:

- The Postal Service's EMS Cooperative Report Cards, including performance measurements, for calendar year 2010.

## IV. Notice of Filing

The Commission establishes Docket No. CP2011–66 for consideration of matters related to the issues identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3633 or 3642. Comments are due no later than August 11, 2011. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow as Public Representative in this proceeding.

## V. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2011–66 for consideration of the issues raised in this docket.

2. Comments by interested persons in these proceedings are due no later than August 11, 2011.

3. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as officer of the Commission (Public Representative) to represent the interest of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2011–19848 Filed 8–4–11; 8:45 am]

**BILLING CODE 7710–FW–P**

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[1] Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability and Application for Non-Public Treatment of Material Filed Under Seal, July 28, 2011 (Notice).

[2] *See* Docket Nos. MC2009–10 and CP2009–12, Order Adding Inbound International Expedited Services 2 to Competitive Product List, December 31, 2008 (Order No.162).

[3] *See* Docket No. CP2009–57, Order Concerning Filing of Changes in Rates for Inbound International Expedited Services 2, August 19, 2009 (Order No. 281).

[4] *See* Docket No. CP2009–57, Response of the United States Postal Service to Order No. 281, Notice of Filing Requested Materials, and Application for Non-Public Treatment of Materials Filed Under Seal, February 17, 2010.

[5] *See* Docket No. CP2010–90, Order Concerning Filing of Changes in Rates for Inbound International Expedited Services 2, August 23, 2010 (Order No. 523).

[6] *See* Docket No. CP2010–90, Response of the United States Postal Service to Order No. 515, August 19, 2010.

**SECURITIES AND EXCHANGE COMMISSION**

**[Investment Company Act Release No. 29741; 812–13916]**

## BofA Funds Series Trust, *et al.;* Notice of Application

August 1, 2011.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 17(a) of the Act.

**APPLICANTS:** BofA Funds Series Trust (''BAFST'' or ''Trust''), on behalf of its series (the ''Funds'', BofA Advisors, LLC) (together with any successor, ''BAA'' or the ''Advisor'') and Merrill Lynch, Pierce, Fenner & Smith Incorporated (together with any successor, ''MLPF&S'') (Trust, Advisor and MLPF&S, the ''Applicants'').[1]

**SUMMARY:** *Summary of Application:* Applicants request an order to permit the Funds to engage in principal transactions in certain taxable money market instruments including repurchase agreements with MLPF&S.

**DATES:** *Filing Dates:* The application was filed on June 29, 2011.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 23, 2011, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: BAFST and BAA, 100 Federal Street, Boston, Massachusetts 02110; MLPFS, Bank of America Tower, One Bryant Park, New York, New York 10036.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Senior Counsel, (202) 551–6868 or Janet M. Grossnickle, Assistant Director, (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

### Applicants' Representations

1. The Trust, an open-end investment company registered under the Act, is organized as a Delaware statutory trust. The Trust is currently comprised of eleven Funds, each of which is a money market fund subject to rule 2a–7 under the Act (''Rule 2a–7'') and permitted to invest in taxable money market instruments, including repurchase agreements. The term ''Funds'' also includes all future series of the Trust and any or any other registered investment company or series thereof that is advised or sub-advised by the Advisor, and that is permitted to invest in taxable money market instruments, including repurchase agreements (''Future Funds'').

2. The BAA serves as the primary investment adviser for the Funds and is a direct wholly owned subsidiary of BofA Global Capital Management Group, LLC, which is wholly owned subsidiary of Bank of America, N.A., which is an indirect wholly owned banking subsidiary of Bank of America Corporation (''BAC''). The Advisor is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (''Advisers Act''). The term ''Advisor'' also includes any other existing or future investment adviser registered under the Advisers Act which acts as investment adviser or sub-adviser to a Fund and which controls, is controlled by, or is under common control (as defined in section 2(a)(9) of the Act) with BAA or MLPF&S.

3. MLPF&S, a wholly owned subsidiary of ML&Co., which is a wholly subsidiary of BAC, is a broker-dealer registered under the Securities Exchange Act of 1934, as amended (the ''1934 Act'') and a full service investment banking firm.[2] MLPF&S, which is a primary dealer in U.S. Government securities, has grown into one of the largest dealers in commercial paper, repurchase agreements and other taxable money market instruments in the United States. The Applicants believe that MLPF&S's extensive dealing in taxable money market instruments and repurchase agreements makes it a very significant source for money market investment opportunities as well as related market information and expertise.

4. On December 29, 2008, the Advisor (formerly known as Columbia Management Advisors, LLC), Banc of America Securities, LLC (''BAS''), a broker-dealer that was merged with and into MLPF&S, and predecessor registered investment companies or series thereof to the Funds (''Original Applicants'') received an order of exemption (the ''BAS Order'') from the Commission under Sections 6(c) and 17(b) of the Act, providing relief from the provisions of Section 17(a) of the Act that permitted the Funds to buy from, or sell to, BAS, certain taxable money market instruments including repurchase agreements.[3] On November 1, 2010, BAS was merged into MLPF&S (the ''Merger''), with MLPF&S as the surviving corporation. Applicants filed the application to obtain the same relief for MLPF&S and the Applicants as that provided to BAS and the Original Applicants under the BAS Order.

5. Applicants state that MLPF&S and the Advisor are functionally independent of each other and operate as separate entities under the umbrella of BAC, the parent holding company. While MLPF&S and the Advisor are under common control, each company has its own separate directors, has separate officers and employees, is separately capitalized and maintains its own books and records, except for one dual officer as more fully discussed in the application. The Advisor and MLPF&S operate on different sides of appropriate information barriers with respect to portfolio management activities and investment banking activities, and maintain physically separate offices.

6. Investment management decisions for the Funds are determined solely by the Advisor and other investment advisers (as defined in section 2(a)(20) of the Act) that serve as subadvisers to the Funds, that are unaffiliated with the Advisor, and that do not include MLPF&S. The portfolio managers and other employees that are responsible for

[1] Any succession shall be solely by way of change in organization, such as reincorporation or reorganization as a partnership or similar entity. Any entity that currently intends to rely on the requested order is named as an Applicant. Any entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] MLPF&S is also registered as an investment adviser under the Advisers Act. For purposes of this application, the relief sought applies to MLPF&S as broker-dealer only. The requested relief will not extend to any investment company advised or sub-advised by MLPF&S.

[3] *See* Banc of America Funds Trust, *et al.,* Investment Company Act Release Nos. 28526 (Dec. 1, 2008) (notice) and 285736 (Dec. 29, 2008) (order).

portfolio management for registered investment companies function exclusively on behalf of the Advisor (or its affiliates), and not MLPF&S. The personnel assigned to the Advisor's investment advisory operations that are also involved with the business of other affiliates have absolutely no function or responsibility with respect MLPF&S. The compensation of persons employed by the Advisor will not depend on the volume or nature of trades effected by the Advisor for the Funds with MLPF&S under the requested exemption, except to the limited extent that such trades may minimally affect the profits and losses of BAC and its subsidiaries as a whole or to the extent that such trades affect the investment performance of a Fund.

7. The portfolio securities in which each of the Funds, consistent with their stated investment objectives and practices, may invest consist of high-credit quality short-term taxable money market instruments, including repurchase agreements. Future Funds may also be authorized to invest in taxable money market instruments, in addition to the other instruments permitted by their respective investment policies and strategies. Practically all trading in money market instruments takes place in over-the-counter markets consisting of groups of dealer firms that are primarily major securities firms or large banks. Money market instruments are generally traded in round lots of $1,000,000 on a net basis and do not normally involve either brokerage commissions or transfer taxes. The cost of portfolio transactions to the Funds consists primarily of dealer or underwriter spreads. Spreads vary among money market instruments but dealer spreads generally do not exceed 1–5 basis points (.01% to .05%). It has been the experience of the Funds that spreads have narrowed and there is not a great deal of variation in the spreads charged by the various dealers, except during turbulent market conditions.

8. The money market relies upon elaborate communications networks among dealer firms, principal issuers of money market instruments and principal institutional buyers of such instruments. Because the money market is a dealer market rather than an auction market, there is not a single obtainable price for a given instrument that generally prevails at any given time. A dealer acts either as ''agent'' on behalf of issuer clients or as ''principal'' for its own account. In either capacity, a dealer posts rates throughout its internal, private distribution networks that are intended to reflect ''market clearing price levels,'' as determined by the dealer. Only customers of the dealer seeking to purchase money market instruments have access to these postings.

9. Because of the variety of types of money market instruments, the money market is very segmented. The market for the different types of instruments will vary in terms of price, volatility, liquidity and availability. Although the rates for the different types of instruments tend to fluctuate closely together, there are significant differences in yield among the various types of instruments, and even within the particular type, depending upon the maturity date and the credit quality of the issuer. Moreover, from time to time segmenting exists within money market instruments with the same maturity date and rating. The segmenting is based on such factors as whether the issuer is an industrial or financial company, whether the issuer is domestic or foreign and whether the instruments are asset-backed or unsecured. Because dealers tend to specialize in certain types of money market instruments, the particular needs of a potential buyer or seller in terms of type of instrument, maturity or credit quality may limit the number of dealers who can provide the most beneficial terms available. Hence, with respect to any given type of instrument, there may be only a few dealers that have such instruments in inventory (or can readily add such instruments to inventory) and can be in a position to quote a competitive price.

10. MLPF&S has become one of the world's largest dealers in taxable money market instruments, ranking among the top firms in each of the major markets and product areas, as more fully discussed in the application. As of May 4, 2011, MLPF&S was the largest dealer in terms of the number of U.S. commercial paper programs in which it participates as a dealer. It also has been designated as placement agent on 656 commercial paper programs, representing 66% of the total market. Applicants state that MLPF&&S plays a relatively significant role in the repurchase agreement market and that MLPF&S's market position is among the ten leading dealers. For the calendar year ended 2010, MLPF&S' average daily repurchase agreement transaction volume was approximately $198 billion. As of March 1, 2011, MLPF&S was one of twenty primary dealers and has been active in this role since the 1980s. MLPF&S' primary dealer desk actively participates in the U.S. Treasury Bill market (which consists of short-term government obligations that are sold on a weekly basis through public auctions). As of March 31, 2011, MLPF&S market share in the U.S. Treasury Bills' secondary market was 11.9%. Since 2000, MLPF&S has experienced growth in activity involving instruments issued by U.S. Government agencies and government sponsored enterprises. MLPF&S ranked seventh at the year ended 2010 in underwriting activity involving agency instruments with a market share of approximately 5% in 2010. In the Agency Discount Note market, consisting of notes maturing in one year or less, MLPF&S is a major dealer in all of the top-tier discount note programs. MLPF&S is also one of the leading participants in the market for medium-term notes (''MTNs''). MTNs are offered continuously in public or private offerings, with maturities between nine months and thirty years. MTNs represent a significant portion of the longer-term money market investment alternatives because commercial paper is not issued with maturities greater than nine months and bankers' acceptances cannot have an initial maturity of more than six months. MLPF&S is a significant placement agent/dealer for MTN programs, and through May 15, 2011, ranked ninth with a 4.5% market share.

11. Applicants state that over the past seven years, there have been a significant number of mergers and acquisitions involving major banks. From 1990 to March 31, 2011, the number of FDIC-insured commercial banks has declined by 48%. During this period, there has also been a significant decline in the number of primary dealers. As a result, there is a substantially smaller number of major dealers who are active in the money market than was the case only a few years ago. The reduction in the number of participants makes it even more critical for investors to have access to as many dealers that are actively engaged in the market as possible. The availability of MLPF&S to the Funds is important not only because the number of industry participants has declined but because high-credit quality participants such as MLPF&S are becoming more important in the money market. Applicants state that the Funds not having access to MLPF&S, which is one of the more significant remaining dealers, would place them at a distinct disadvantage compared to other institutional investors.

12. Subject to the general supervision of the Trust's board of trustees (''Board,''), the Advisor is responsible for portfolio decisions and placing execution of the Funds' portfolio transactions. The Advisor, on behalf of the Funds, has no obligation to deal with any dealer or group of dealers in

the execution of their portfolio transactions. When placing orders, an Advisor must attempt to obtain the best net price and the most favorable execution of its orders. In doing so, it takes into account such factors as price, the size, type and difficulty of the transaction involved and the firm's general execution and operational facilities. For repurchase agreement transactions in particular, the Advisor places great emphasis on the creditworthiness of the counterparty.

**Applicants' Legal Analysis**

1. Applicants request an order pursuant to sections 6(c) and 17(b) of the Act exempting certain transactions from the provisions of section 17(a) of the Act to permit MLPF&S, acting as principal, to sell to or purchase from the Funds taxable money market instruments, and to engage in repurchase agreement transactions with the Funds, subject to the conditions set forth below.

2. Section 17(a) of the Act generally prohibits an affiliated person or principal underwriter of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company, or any company controlled by such registered company, any security or other property. Because MLPF&S and the Advisor are under common control of BAC, MLPF&S could be deemed to be an affiliated person of the Advisor within the meaning of section 2(a)(3)(C) of the Act. Accordingly, MLPF&S could be deemed to be an affiliated person of an affiliated person of the Funds, because the Advisor, as the investment adviser of the Funds, could be deemed to be an affiliated person of the Funds under section 2(a)(3)(E) of the Act. Thus, section 17(a) would prohibit the Funds from selling or purchasing taxable money market instruments to or from MLPF&S to the extent MLPF&S is deemed an affiliated person of an affiliated person of the Funds.

3. Section 17(b) of the Act provides that the Commission, upon application, may exempt a transaction from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair, and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Act or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants contend that the rationale behind the proposed order is based upon the reduction in the number of participants in the money market, the growing and significant role played in the money market by MLPF&S and the growing investment requirements of the Funds. In particular Applicants note the following:

(a) With approximately $52 billion invested in money market instruments (including repurchase agreements) as of April 30, 2011, the Funds are major buyers and sellers in the money market with a strong need for unrestricted access to large quantities of high credit quality taxable money market instruments. The Applicants believe that denial of access to such a major dealer as MLPF&S in these markets will hinder the Funds' ability to manage their respective portfolios in the most effective manner.

(b) The policy of the Funds of investing in instruments with short maturities and repurchase agreements, combined with the active portfolio management techniques employed by the Advisor, results in the need to make ongoing purchases and sales of taxable money market instruments. This dynamic makes the need to obtain suitable portfolio instruments and repurchase agreements and the most beneficial terms available from the broadest possible range of major participants in the market especially compelling.

(c) MLPF&S is such a major participant in the money market that being unable to deal directly with it may, upon occasion, deprive the Funds of obtaining the most beneficial terms available.

(d) The money market, including the market for repurchase agreements, is highly competitive and precluding a competitor as important as MLPF&S from engaging in principal transactions with the Funds could indirectly deprive the Funds of obtaining the most beneficial terms available even when the Funds trade with other dealers.

5. Applicants believe that the requested order will provide the Funds with broader and more complete access to the money market, which is necessary to carry out the policies and objectives of each of the Funds in obtaining the most beneficial terms in all portfolio transactions. In addition, the Applicants respectfully submit that the requested relief will provide the Funds with important information sources in the money market, to the direct benefit of shareholders in the Funds. Applicants believe that the transactions contemplated by this application are identical to those in which they are currently engaged pursuant to the BAS Order except for the proposed participation of MLPF&S, and that such transactions are consistent with the policies of the Funds as recited in their registration statements and reports filed under the Act. Applicants further believe that the procedures set forth with respect to transactions with MLPF&S are structured in such a way as to insure that the transactions will be, in all instances, reasonable and fair, will not involve overreaching on the part of any person concerned, and that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

**Applicants' Conditions**

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. *Transactions Subject to the Exemption*—The exemption shall be applicable to principal transactions in the secondary market and primary or secondary fixed-price dealer offerings not made pursuant to underwriting syndicates. The principal transactions that may be conducted pursuant to the exemption shall be limited to transactions in *Eligible Securities*.[4] To the extent a Fund is subject to Rule 2a–7, such *Eligible Securities* must meet the portfolio maturity and credit quality requirements of paragraphs (c)(2) and (c)(3) of Rule 2a–7. To the extent a Fund is not subject to Rule 2a–7, such *Eligible Securities* must meet the requirements of clauses (i), (iii) and (iv) of paragraph (c)(3) of Rule 2a–7. Additionally:

(a) No Fund shall make portfolio purchases pursuant to the exemption that would result directly or indirectly in a Fund investing pursuant to the exemption more than 2% of its *Total Assets* (or, in the case of a Fund that is not subject to Rule 2a–7, more than 2% of the total of its cash, cash items and *Eligible Securities*) in instruments that, when acquired by the Fund (either initially or upon any subsequent

[4] Italicized terms are defined as set forth in paragraph (a) of Rule 2a–7, unless otherwise indicated.

rollover) were *Second Tier Securities;* provided that any Fund may make portfolio sales of *Second Tier Securities* pursuant to the exemption without regard to this limitation.

(b) The exemption shall not apply to an *Unrated Security* other than a *Government Security.*

(c) The exemption shall not apply to any instrument, other than a repurchase agreement, issued by BAC or any affiliated person thereof or to any instrument subject to a *Demand Feature* or *Guarantee* issued by BAC or any affiliated person thereof.

2. *Repurchase Agreement Requirements*—The Funds may engage in repurchase agreements with MLPF&S only if MLPF&S has: (a) Net capital, as defined in rule 15c3–1 under the 1934 Act, of at least $100 million and (b) a record (including the record of predecessors) of at least five years continuous operations as a dealer during which time it engaged in repurchase agreements relating to the kind of instrument subject to the repurchase agreement. MLPF&S shall furnish the Advisor with financial statements for its most recent fiscal year and the most recent semi-annual financial statements made available to their customers. The Advisor shall determine that MLPF&S complies with the above requirements and with the repurchase agreement guidelines adopted by the Boards. Each repurchase agreement will be *Collateralized Fully.*

3. *Volume Limitations on Transactions*—Transactions other than repurchase agreements conducted pursuant to the exemption shall be limited to no more than 25% of (a) The direct or indirect purchases or sales, as the case may be, by each Fund of *Eligible Securities* other than repurchase agreements; and (b) the purchases or sales, as the case may be, by MLPF&S of *Eligible Securities* other than repurchase agreements. Transactions comprising repurchase agreements conducted pursuant to the exemption shall be limited to no more than 10% of (a) The repurchase agreements directly or indirectly entered into by the relevant Fund and (b) the repurchase agreements transacted by MLPF&S. These calculations shall be measured on an annual basis (the fiscal year of each Fund and of MLPF&S) and shall be computed with respect to the dollar volume thereof.

4. *Information Required to Document Compliance with Price Test*—Before any transaction may be conducted pursuant to the exemption, the relevant Fund or the Advisor must obtain such information as it deems necessary to determine that the price test (as defined in condition 5 below) applicable to such transaction has been satisfied. In the case of purchase or sale transactions, the Funds or the Advisor must make and document a good faith determination with respect to compliance with the price test based upon current price information obtained through the contemporaneous solicitation of bona fide offers in connection with the type of instrument involved (comparable security falling within the same category of instrument, credit rating, maturity and segment, if any, but not necessarily the identical instrument or issuer). With respect to prospective purchases of instruments, these dealers must be those who have, in their inventories, or who otherwise have access to taxable money market instruments of the categories and the types desired and who are in a position to quote favorable prices with respect thereto. With respect to the prospective disposition of instruments, these dealers must be those who, in the experience of the Funds and the Advisor, are in a position to quote favorable prices. Before any repurchase agreements are entered into pursuant to the exemption, the Funds or the Advisor must obtain and document competitive quotations from at least two other dealers with respect to repurchase agreements comparable to the type of repurchase agreement involved, except that if quotations are unavailable from two such dealers, only one other competitive quotation is required.

5. *Price Test*—In the case of purchase and sale transactions, a determination will be required in each instance, based upon the information available to the Funds and the Advisor, that the price available from MLPF&S is at least as favorable as that available from other sources. In the case of ''swaps'' involving trades of one instrument for another, the price test shall be based upon the transaction viewed as a whole, and not upon the two components thereof individually. With respect to transactions involving repurchase agreements, a determination will be required in each instance, based on the information available to the Funds and the Advisor, that the income to be earned from the repurchase agreement is at least equal to that available from other sources in connection with comparable repurchase agreements.

6. *Permissible Dealer Spread*—MLPF&S' spreads in regard to any transaction with the Funds will be no greater than its customary dealer spreads, which will in turn be consistent with the average or standard spread charged by dealers in taxable money market instruments for the type of instrument and the size of transaction involved.

7. *Parties Must Be Factually Independent*—The Advisor on the one hand, and MLPF&S, on the other, will operate on different sides of appropriate walls of separation with respect to the Funds and *Eligible Securities.* The walls of separation will include all of the following characteristics and such others as may from time to time be considered reasonable by MLPF&S and the Advisor to facilitate the factual independence of the Advisor from MLPF&S.

(a) The Advisor will maintain offices physically separate from those of MLPF&S.

(b) The compensation of persons assigned to the Advisor (*i.e.,* executive, administrative or investment personnel) will not depend on the volume or nature of trades effected by the Advisor for the Funds with MLPF&S under this exemption, except to the extent that such trades may affect the profits and losses of BAC and its subsidiaries as a whole or to the extent that such trades affect the investment performance of a Fund.

(c) MLPF&S will not share any of its respective profits or losses on such transactions with the Advisor, except to the extent that such profits and losses affect the general firmwide compensation of BAC and its subsidiaries as a whole.

(d) Personnel assigned to the Advisor's investment advisory operations on behalf of the Funds will be exclusively devoted to the investment advisory business and affairs of the Advisor and the businesses of its affiliates (other than MLPF&S), and have lines of reporting solely within the Advisor or its affiliates (other than MLPF&S). The personnel assigned to the Advisor's investment advisory operations that are also involved with the business of other affiliates have absolutely no function or responsibility with respect to MLPF&S.

(e) Personnel assigned to MLPF&S will not participate in the decision-making process for or otherwise seek to influence the Advisor other than in the normal course of sales and dealer activities of the same nature as are simultaneously being carried out with respect to nonaffiliated institutional clients. The Advisor, on the one hand, and MLPF&S, on the other, may nonetheless maintain affiliations other than with respect to the Funds, and in addition with respect to the Funds as follows:

(i) Advisor personnel may rely on research, including credit analysis and reports prepared internally by various subsidiaries and divisions of MLPF&S.

(ii) Certain senior executives of BAC with responsibility for overseeing operations of various divisions, subsidiaries and affiliates of BAC are not precluded from exercising those functions over the Advisor because they oversee MLPF&S as well; provided that such persons shall not have any involvement with respect to proposed transactions pursuant to the exemption and will not in any way attempt to influence or control the placing by the Funds or the Advisor of orders in respect of *Eligible Securities* with MLPF&S.

8. *Record-Keeping Requirements*—The Funds and the Advisor will maintain such records with respect to those transactions conducted pursuant to the exemption as may be necessary to confirm compliance with the conditions to the requested relief. In this regard:

(a) Each Fund shall maintain an itemized daily record of all purchases and sales of instruments pursuant to the exemption, showing for each transaction: the name and quantity of instruments; the unit purchase or sale price; the time and date of the transaction; and whether such instrument was a *First Tier Security* or a *Second Tier Security.* Such records also shall, for each transaction, document two quotations received from other dealers for comparable instruments (except that, in the case of repurchase agreements and consistent with condition 4, if quotations are unavailable from two such dealers only one other competitive quotation is required), including: the names of the dealers; the names of the instruments; the prices quoted; the times and dates the quotations were received; and whether such instruments were *First Tier Securities* or *Second Tier Securities.*

(b) Each Fund shall maintain a ledger or other record showing, on a daily basis, the percentage of the Fund's *Total Assets* (or, in the case of a Fund that is not subject to Rule 2a–7, the percentage of the total of its cash, cash items and *Eligible Securities*) represented by *Second Tier Securities* acquired from MLPF&S.

(c) Each Fund shall maintain records sufficient to verify compliance with the volume limitations contained in condition 3, above. MLPF&S will provide the Funds with all records and information necessary to implement this requirement.

(d) Each Fund shall maintain records sufficient to verify compliance with the requirements related to repurchase agreements contained in condition 2, above.

The records required by this condition 8 will be maintained and preserved in the same manner as records required under rule 31a–1(b)(1) of the Act.

9. *Guidelines*—MLPF&S and the Advisor, with the assistance of their compliance departments, will prepare and, as necessary, update guidelines for personnel of the MLPF&S or the Advisor, as the case may be, to make certain that transactions conducted pursuant to the exemption comply with the conditions set forth therein, and that the parties generally maintain arm's-length relationships. In training personnel of MLPF&S, particular emphasis will be given to the fact that the Funds are to receive rates as favorable as other institutional purchasers buying the same quantities. The compliance departments of MLPF&S and the Advisor will periodically monitor the activities of MLPF&S and the Advisor to make certain that the conditions set forth in the exemption are adhered to.

10. *Audit Committee Review*—The audit committee or another committee which, in each case, consists of members of the Board who are not interested persons as defined in section 2(a)(19) of the Act (''Independent Members''), will approve, periodically review and update as necessary, guidelines for the Advisor and MLPF&S reasonably designed to ensure that transactions conducted pursuant to the exemption comply with the conditions set forth herein and that the procedures described herein are followed in all respects. The respective audit committees will periodically monitor the activities of the Funds, the Advisor and MLPF&S in this regard to ensure that these matters are being accomplished.

11. *Scope of Exemption*—Applicants expressly acknowledge that any order issued on the application would grant relief from section 17(a) of the Act only, and would not grant relief from any other section of, or rule under, the Act including, without limitation, Rule 2a–7.

12. *Board Review*—The Board, including a majority of the Independent Members, will have approved each Fund's participation in transactions conducted pursuant to the exemption and determined that such participation by the Fund is in the best interests of the Fund and its shareholders. The minutes of the meeting of the Board at which this approval is given will reflect in detail the reasons for the Board's determinations. The Boards will review no less frequently than annually a Fund's participation in transactions conducted pursuant to the exemption during the prior year and determine whether the Fund's participation in such transactions continues to be in the best interests of the Fund and its shareholders. Such review will include (but not be limited to): (a) A comparison of the volume of transactions in each type of instrument conducted pursuant to the exemption to the market presence of MLPF&S in the market for that type of instrument; and (b) a determination that the Funds are maintaining appropriate trading relationships with other sources for each type of instrument to ensure that there are appropriate sources for the quotations required by condition 4 above. The minutes of the meetings of the Boards at which this determination is made will reflect in detail the reasons for the Boards' determinations.

For the Commission, by the Division of Investment Management, under delegated authority.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19852 Filed 8–4–11; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64994; File No. SR–NASDAQ–2011–091]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer an Optional Derived Data Fee for NASDAQ Basic

July 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 25, 2011, The NASDAQ Stock Market LLC (''NASDAQ'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ proposes to offer an optional NASDAQ Basic Derived Data

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Fee for distribution of data derived from an existing NASDAQ Basic data feed to non-professional users.

The text of the proposed rule change is below. Proposed new language is in italics.[3]

* * * * *

**7047. Nasdaq Basic**

(a)–(b) No change.

(c) Distributor Fees.

(1)–(4) No change.

(5) *A Distributor may pay $1,500 per month to distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers. This fee is in addition to the Distributor Fee listed in (c)(1).*

*(6)* The terms ''Distributor'' and ''Direct Access'' shall have the same meanings as set forth in Rule 7019.

* * * * *

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

*Current Proposal.* NASDAQ will begin offering a voluntary NASDAQ Basic Derived Data Fee for non-professional usage of data derived from the NASDAQ Basic product (NASDAQ Rule 7047), which will cost $1,500 per month. The $1,500 NASDAQ Basic Derived Data Fee would be in lieu of the non-professional subscriber fees only. Therefore, a customer taking advantage of this fee will no longer pay non-professional subscriber fees. The non-professional fees will no longer apply to those customers taking advantage of this new fee since they will be able to redistribute this data (in the manner described herein) to an unlimited number of non-professional users. Customers redistributing this data to professional customers will still be liable for the professional user fees.

The NASDAQ Basic Derived Data Fee would be in addition to the existing $1,500 per month Distributor Fee in NASDAQ Rule 7047(c)(1). Therefore, firms that choose the NASDAQ Basic Derived Data Fee pay $1,500 to derive data from NASDAQ Basic plus $1,500 for the NASDAQ Basic Distributor Fee and, if applicable, NASDAQ Basic professional subscriber fees. The NASDAQ Basic Derived Data Fee does not involve the creation of a new data feed, but rather is a new pricing option for an existing data feed. The NASDAQ Basic Derived Data Fee allows firms to use the NASDAQ Basic data feed and display/re-distribute it in a derived manner. This is not a new service or a new product. NASDAQ is merely creating a new fee for a different use of its data.

*Background.* NASDAQ disseminates market data feeds in two capacities. First, NASDAQ disseminates consolidated or ''core'' data in its capacity as Securities Information Processor (''SIP'') for the national market system plan governing securities listed on NASDAQ as a national securities exchange (''NASDAQ UTP Plan'').[4] Second, NASDAQ separately disseminates proprietary or ''non-core'' data in its capacity as a registered national securities exchange. Non-core data is any data generated by the NASDAQ Market Center Execution System that is voluntarily disseminated by NASDAQ separate and apart from the consolidated data.[5] NASDAQ has numerous proprietary data products, such as NASDAQ TotalView, NASDAQ Last Sale, and NASDAQ Basic.

NASDAQ continues to seek broader distribution of non-core data and to reduce the cost of providing non-core data to larger numbers of investors. In the past, NASDAQ has accomplished this goal in part by offering similar capped fees, flat fees or enterprise licenses for professional and non-professional usage of TotalView which contains the full depth of book data for the NASDAQ Market Center Execution System. NASDAQ has also implemented these capped/flat fees with other products, such as NASDAQ Last Sale. NASDAQ believes that the adoption of flat fee structures or enterprise licenses has led to greater distribution of market data, particularly among non-professional users.

Based on input from market participants and market data distributors, NASDAQ believes that this increase in distribution is attributable in part to the relief it provides distributors from the NASDAQ requirement that distributors count and report each non-professional user of NASDAQ proprietary data. In addition to increased administrative flexibility, flat fees and enterprise licenses also encourage broader distribution by firms that are currently over the fee cap as well as those that are approaching the cap and wish to take advantage of the benefits of the program. Further, NASDAQ believes that capping fees in this manner creates goodwill with broker-dealers and increases transparency for non-professional users.

Accordingly, NASDAQ is establishing the NASDAQ Basic Derived Data Fee for distributors who derive data from NASDAQ Basic under NASDAQ Rule 7047(c)(5), a non-professional fee option for distributors of NASDQ Basic.[6] The NASDAQ Basic Derived Data Fee covers derived data and consists of pricing data or other information that is created in whole or in part from NASDAQ Basic data (*e.g.,* real-time volume weighted data).

The NASDAQ Basic Derived Data Fee is completely optional and does not impact individual usage fees for any product or in any way raise the costs of any user of any NASDAQ data product.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(4) of the Act,[8] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself

[3] Changes are marked to the rules of The NASDAQ Stock Market LLC found at *http://nasdaq.cchwallstreet.com.*

[4] *See* Securities Exchange Act Release No. 59039 (Dec. 2, 2008) at p. 41.

[5] *Id.*

[6] NASDAQ relies on distributor self-reporting of usage rather than on individual contact with each end-user customer. NASDAQ permits distributors to designate an entire user population as ''non-professional'' provided that the number of professional subscribers within that user population does not exceed ten percent (10%) of the total population and does not exceed fifty percent (50%) of the total subscriber population through any one of the Distributor's systems.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[9]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well. NASDAQ Basic is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase ''on any person, whether or not the person is a member of the self-regulatory organization'' after ''due, fee or other charge imposed by the self-regulatory organization.'' As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Exchange Act to read, in pertinent part, ''At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.''

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* No. 09–1042 (DC Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' '' *NetCoalition,* at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

NASDAQ believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of NASDAQ Basic Derived Data. The dissemination is designed to increase not only transparency for non-professional users, but also to reduce burdensome administrative costs in addition to actual per user costs. NASDAQ notes also that NASDAQ Basic data is already distributed and that this filing proposes to distribute no additional data elements. NASDAQ Basic is distributed and purchased on a voluntary basis, in that neither NASDAQ nor market data distributors are required by any rule or regulation to make this data available. Accordingly, distributors and users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoalition* court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. NASDAQ believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected

[9] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition* at 24. However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platform may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of after-market alternatives to the manufacturer-supplied system.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including ten self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE Amex, NYSEArca, and BATS.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Yahoo, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson-Reuters.

The court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's *NetCoalition* order because, in the court's view, the Commission had not adequately demonstrated that the depth-of-book data at issue in the case is used to attract order flow. NASDAQ believes, however, that evidence not before the court clearly demonstrates that availability of depth data attracts order flow. For example, NASDAQ submits that in and of itself, NASDAQ's decision voluntarily to cap fees on existing products, as is the effect of a flat fee or an enterprise license, is evidence of market forces at work.

The court in *NetCoalition* did cite favorably an economic study by Ordover and Bamberger which concluded that ''[a]lthough an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of ''platform'' competition the exchange nonetheless receives the same return from the two ''joint products'' in the aggregate.'' [10] Ordover and Bamberger also provided additional comments expanding upon the impact of platform competition.[11] Among the conclusions that Ordover and Bamberger reach are: NASDAQ is subject to significant competitive forces in setting the prices and other terms of execution services and proprietary data products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of the array of its products, including the joint products at issue here. In particular, cross-platform competition, and the adverse effects from overpricing proprietary information on the volume of trading on the platform, constrain the pricing of proprietary information.

Competitive forces constrain the prices that platforms can charge for non-core market information. A trading platform cannot generate market information unless it receives trade orders. For this reason, a platform can be expected to use its market data product as a tool for attracting liquidity and trading to its exchange.

While, by definition, information that is proprietary to an exchange cannot be obtained elsewhere, this does not enable the owner of such information to exercise monopoly power over that information vis-à-vis firms with the need for such information. Even though market information from one platform may not be a perfect substitute for market information from one or more other platforms, the existence of alternative sources of information can be expected to constrain the prices platforms charge for market data.

Besides the fact that similar information can be obtained elsewhere, the feasibility of supra-competitive pricing is constrained by the traders' ability to shift their trades elsewhere, which lowers the activity on the exchange and so in the long run reduces the quality of the information generated by the exchange.

Competition among platforms has driven NASDAQ continually to improve its platform data offerings and to cater to customers' data needs. For example, NASDAQ has developed and maintained multiple delivery mechanisms (IP, multi-cast, and compression) that enable customers to receive data in the form and manner they prefer and at the lowest cost to them. NASDAQ offers front end applications such as its ''Bookviewer'' to help customers utilize data. NASDAQ has created new products like TotalView Aggregate to complement TotalView ITCH and Level 2, because offering data in multiple formatting allows NASDAQ to better fit customer needs. NASDAQ offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. NASDAQ has developed an online administrative system to provide customers transparency into their data feed requests and streamline data usage reporting. NASDAQ has also expanded its flat fee or enterprise license options to reduce the administrative burden and costs to firms that purchase market data.

Despite these enhancements and a dramatic increase in message traffic, NASDAQ's fees for depth-of-book data have remained flat. In fact, as a percent of total customer costs, NASDAQ data fees have fallen relative to other data usage costs—including bandwidth, programming, and infrastructure—that have risen. The same holds true for execution services; despite numerous enhancements to NASDAQ's trading platform, absolute and relative trading costs have declined. Platform competition has intensified as new entrants have emerged, constraining prices for both executions and for data.

The vigor of competition for non-core data information is significant and the Exchange believes that this proposal clearly evidences such competition. NASDAQ is offering a new pricing model in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new customers, as well as retaining existing customers.

The Exchange has witnessed competitors creating new products and innovative pricing in this space over the course of the past year. NASDAQ continues to see firms challenge its pricing on the basis of the Exchange's explicit fees being higher than the zero-priced fees from other competitors such as BATS. In all cases, firms make decisions on how much and what types of data to consume on the basis of the total cost of interacting with NASDAQ or other exchanges. Of course, the explicit data fees are but one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this non-core data information is highly competitive and continually evolves as products develop and change.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend

[10] *See NetCoalition* at fn. 16.

[11] *See* Securities Exchange Act Release No. 63745 (Jan. 20, 2011); 76 FR 4970 (Jan. 27, 2011) (SR–NASDAQ–2011–010) (attached to original filing as Exhibit 3).

[12] 15 U.S.C. 78s(b)(3)(a)(ii).

such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–091 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–NASDAQ–2011–091. This file number should be included on the subject line if e-mail is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–091, and should be submitted on or before August 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19911 Filed 8–4–11; 8:45 am]

**BILLING CODE 8011–01–P**

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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34–64997; File No. SR–NYSE–2011–37]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees Charged for the Floor Member Continuing Education Program for Qualified Floor Members Pursuant to NYSE Rule 103A, From a Fixed Flat Fee of $80 Per Training Module to a Fixed Flat Fee of $150 Per Qualified Member Per Bi-Annual Session for a Total Cost Per Member Per Year of $300

August 1, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 21, 2011, New York Stock Exchange LLC (the ''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend, effective immediately, the fees charged for the Floor Member Continuing Education Program for qualified Floor members pursuant to NYSE Rule 103A, from a fixed flat fee of $80 per training module to a fixed flat fee of $150 per qualified member per bi-annual session for a total cost per member per year of $300. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com,* at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

As required by NYSE Rule 103A, the Exchange provides Floor members with mandatory continuing education program, known as the Floor Member Continuing Education Program (''FMCE Program''). Since June 14, 2010, the Financial Industry Regulatory Authority (''FINRA'') has been developing and administering the FMCE Program on the Exchange's behalf pursuant to a regulatory services agreement.

The Exchange proposes to amend, effective immediately, the fees charged for the FMCE Program. Currently, members pay a fee of $80 per training module. Because the number of modules that the Exchange administers per year can vary (ranging from four to six modules per year), Floor members are currently faced with a level of uncertainty of the amount of fees that they may be charged in connection with the FMCE program. In addition, because modules can be issued throughout the year, Floor members face additional uncertainty as to when such fees will be charged.

To eliminate this uncertainty, the Exchange proposes to delete the per module fee and instead charge a flat $150 fee per session per member per year, with two sessions a year amounting to a total of $300 total charges per year for the FMCE Program. Consistent with Rule 103A and current practice, each session will include two to three modules of education programming, for a total of four to six modules per year. Accordingly, this proposed fee change will not impact the quantity or quality of educational training that will be issued to Floor members. Rather, the same level of

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

training will be provided via the same delivery method, except with more certainty both as to when the FMCE Program will be delivered and the total cost.

In the past, the Exchange has sought to assess the FMCE Program fee to recoup development and delivery costs, crediting revenues exceeding a year's actual development and delivery costs to the succeeding year's budgeted costs. Now that FINRA develops and administers the FMCE Program on the Exchange's behalf, the FINRA costs are subsumed in the larger fee paid to FINRA for the provision of regulatory services. The Exchange continues to incur costs related to configuration, maintenance and hosting associated with FMCE delivery and billing. In balancing the costs to the Exchange, the Exchange also weighs the increasing burden on Floor members to absorb those costs. At the time the fee was last assessed in 2009, the number of qualified members subject to the FMCE Program requirement was 524. That number is now 467. In view of these declining membership numbers, the Exchange believes that the full costs associated with the FMCE Program should not be shifted to the Floor members. The Exchange believes that the proposed $300 annual fee strikes the appropriate balance between recouping certain costs associated with the FMCE Program from Floor members, without burdening a shrinking population with the full costs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[3] in general, and Section 6(b)(4) of the Act,[4] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[5] of the Act and subparagraph (f)(2) of Rule 19b–4[6] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2011–37 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–NYSE–2011–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2011–37 and should be submitted on or before August 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19853 Filed 8–4–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–65000; File No. SR–ISE–2011–44]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Two Market Data Feeds

August 1, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 1, 2011, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to adopt two new market data offerings, the ISE Top Quote Feed and the ISE Spread Book Feed. The proposed rule change is available on the Exchange's Web site *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

ISE proposes to adopt two new market data offerings, the ISE Top Quote Feed and the ISE Spread Book Feed. These two new data feeds were created as part of the Exchange's transition to its new trading platform called Optimise. The Exchange expects to fully transition to the Optimise trading platform by the end of July 2011. Thus, the Exchange proposes to implement both new market data offerings on August 1, 2011.

ISE Top Quote Feed

ISE currently produces a real-time data feed with the Best Bid/Offer, or BBO, that includes the aggregate size from all outstanding quotes and orders at the top price level, or the ''top of book'' and all trades that are executed on the Exchange. This ''core'' [3] data is formatted according to Options Price Reporting Authority (''OPRA'') specification and sent to OPRA for redistribution to the public.

The Exchange now proposes to offer a non-core data feed, called the ISE Top Quote Feed (''Top Quote''). Top Quote is a real-time feed that aggregates all quotes and orders at the top price level on the Exchange, on both the bid and offer side of the market. Top Quote provides subscribers with a consolidated view of tradable prices at the BBO, the same data that is displayed on the OPRA feed. Top Quote shows bid/ask quote size for Customer and Professional Customer option orders for ISE traded options that are not currently distinguishable through the OPRA feed.[4] The identification of Customer orders is useful for market makers and market participants generally since Customer orders take precedence over all other order types on the ISE. The Exchange believes it is not discriminatory or a burden on competition for these orders to be identified because doing so increases the likelihood that these orders will be executed as they have priority on the ISE while Professional Customers, *i.e.,* persons or entities that (i) are not a broker or dealer in securities, and (ii) place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), do not have priority on the Exchange.

Top Quote is currently imbedded in the Exchange's Depth of Market data feed offering and is available to subscribers of the Depth of Market data feed offering. With this proposal, the Exchange is offering Top Quote as a separate data feed. Top Quote will be available to members and non-members, and to both professionals and non-professionals.

ISE Spread Book Feed

The Exchange also proposes to offer another non-core data feed, called the ISE Spread Book Feed (''Spread Feed''). The Spread Feed is a real-time feed that consists of options quotes and orders for all complex orders (*i.e.,* spreads, buy-writes, delta neutral strategies, etc.) aggregated at the top price level on both the bid and offer side of the market as well as all aggregated quotes and orders for complex orders at the top five price levels on both the bid and offer side of the market. In addition, the Spread Feed provides real-time updates every time a new complex limit order that is not immediately executable at the BBO is placed on the ISE complex order book. The Spread Feed shows bid/ask quote size for Customer and Professional Customer option orders for ISE traded options. As noted above, since Customer orders take precedence over all other order types, the identification of these orders in the Spread Feed is useful information for market makers and market participants generally. Again, the Exchange believes it is not discriminatory or a burden on competition for these orders to be identified because doing so increases the likelihood that these orders will be executed as they have priority on the ISE while Professional Customers, *i.e.,* persons or entities that (i) are not a broker or dealer in securities, and (ii) place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), do not have priority on the Exchange.

The Exchange further notes that ISE Market Makers currently receive a spread book data feed as part of their membership. The Spread Feed will be available to members and non-members and to both professionals and non-professionals.

2. Basis

ISE believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[5] in general and with Section 6(b)(5) of the Act,[6] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. ISE believes that this proposal is in keeping with those principles by promoting increased

[3] ''Core'' data refers to the best-priced quotations and comprehensive last sale reports of all markets that the Commission requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans. ''Non-core'' data refers to products other than the consolidated products that markets offer collectively under joint industry plans.

[4] Customer and Professional Customer orders are identified in a number of market data offerings currently sold by other options exchanges. *See* Securities Exchange Act Release No. 63351 (November 10, 2010), 75 FR 73140 (November 29, 2010) (SR–PHLX–2010–154) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for the PHOTO Historical Data Product). *See also* Securities Exchange Act Release No. 63997 (March 1, 2011), 76 FR 12388 (March 7, 2011) (SR–CBOE–2011–014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify a Fee Schedule for the Sale by Market Data Express, LLC, of a BBO Data Feed for CBOE Listed Options).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

transparency through the dissemination of more useful proprietary data and also by clarifying its availability to market participants.

Additionally, ISE is making a voluntary decision to make this data available. ISE is not required by the Act in the first instance to make the data available, unlike the best bid and offer which must be made available under the Act. ISE chooses to make the data available as proposed in order to improve market quality, to attract order flow, and to increase transparency.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that Top Quote and Spread Feed will help attract new users and new order flow to the Exchange, thereby improving the Exchange's ability to compete in the market for options order flow and executions.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) [8] thereunder, the Exchange has designated this proposal as one that effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Rule 19b–4(f)(6) [9] requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Under Rule 19b–4(f)(6) of the Act,[10] a proposal does not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30 day operative period for this filing so that it may become effective and operative upon filing with the Commission pursuant to Section 19(b)(3)(A) [11] of the Act and subparagraph (f)(6) thereunder. The Exchange believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest as the waiver will allow the Exchange to provide equal access to the Spread Feed to all market participants on equal and non-discriminatory terms. Currently, only market makers receive a spread book data feed from the Exchange's legacy trading system; no other market participant has access to the legacy trading system's spread book data feed.[12] In the absence of the waiver, only market makers will be able to access the Spread Feed, albeit a subset of the feed, *i.e.,* the top of book, whereas all other market participants will not have any access to the Spread Feed.

Further, the Exchange notes that without access to Top Quote once the Exchange has fully transitioned to its new trading system, the likelihood that retail orders, who receive priority on the Exchange over other orders, being executed will be adversely affected as the existence of these orders will not be known to market participants who seek to interact with them. While market participants will be able to access the data in Top Quote by subscribing to the Exchange's Depth of Market data feed, they are unlikely to do so due to the cost of the Depth of Market data feed.

Additionally, waiver of the 30-day operative delay will allow the Exchange to compete for order flow with those exchanges that already sell market data offerings that compete with Top Quote and Spread Feed.[13]

For the reasons stated above, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposal as operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov.* Please include File No. SR–ISE–2011–44 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–ISE–2011–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] *Id.*

[10] *Id.*

[11] 15 U.S.C. 78s(b)(3)(A).

[12] The Spread Feed and the spread book data feed are essentially the same feed offered on different platforms.

[13] For example, NASDAQ Stock Market (''NASDAQ'') and NASDAQ OMX PHLX (''Phlx'') each offer a market data product that is similar to Top Quote. NASDAQ's Best of NASDAQ Options (''BONO℠) offering is a data feed that shows the top of the market. Phlx's Top of Phlx Options (''TOPO'') shows orders and quotes at the top of the market, as well as trades. Market Data Express, LLC, a subsidiary of the Chicago Board Options Exchange, Inc. (''CBOE''), offers a market data product that is similar to Spread Feed. The CBOE BBO Data Feed includes, among other things, customer versus non-customer contracts at the BBO and BBO data and last sale data for complex strategies (*e.g.,* spreads, straddles, buy-writes, *etc.*).

[14] For purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). *See also* 17 CFR 200.30–3(a)(59).

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2011–44 and should be submitted by August 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19854 Filed 8–4–11; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–65002; File No. SR–ISE–2011–50]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Market Data Fees

August 1, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 1, 2011, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees to adopt subscription fees for the sale of two market data offerings, the ISE Top Quote Feed and the ISE Spread Book Feed. The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

ISE proposes to amend its Schedule of Fees to adopt subscription fees for the sale of two market data offerings, the ISE Top Quote Feed and the ISE Spread Book Feed. The Exchange previously submitted a proposed rule change to establish the two data feeds.[3] The Exchange proposes to implement the proposed fees for both market data offerings on August 1, 2011.

ISE Top Quote Feed

The ISE Top Quote Feed (''Top Quote'') is a real-time feed that aggregates all quotes and orders at the top price level on the Exchange, on both the bid and offer side of the market. Top Quote provides subscribers with a consolidated view of tradable prices at the BBO, the same data that is displayed on the OPRA feed. Top Quote shows bid/ask quote size for Customer and Professional Customer option orders for ISE traded options that are not currently distinguishable through the OPRA feed.[4] The identification of Customer orders is useful for market makers and market participants generally since Customer orders take precedence over all other order types on the ISE. The Exchange believes it is not discriminatory or a burden on competition for these orders to be identified because doing so increases the likelihood that these orders will be executed as they have priority on the ISE while Professional Customers, *i.e.,* persons or entities that (i) Are not a broker or dealer in securities, and (ii) place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), do not have priority on the Exchange.

Top Quote is currently imbedded in the Exchange's Depth of Market data feed offering and is available to subscribers of the Depth of Market data feed offering. With this proposed rule change, the Exchange is offering Top Quote as a separate subscription-based data feed. Top Quote will be available to members and non-members, and to both professional and non-professional subscribers.

Proposed Fees for Top Quote

The Exchange proposes to charge distributors[5] of Top Quote $3,000 per month. In addition, the Exchange proposes to charge a monthly controlled device[6] fee of $20 per controlled device for Professionals at a distributor where the data is for internal and/or external use. There are no monthly controlled device fees proposed for Non-Professionals subscribers to Top Quote. Further, the Exchange proposes to adopt an enterprise license fee, regardless of the number of controlled devices, as follows: (i) $4,000 for Professionals at a distributor where the data is for internal use only, (ii) $5,000 for Professionals at a distributor where the data is for internal and/or external use in a controlled device and (iii) $3,000 per month for Non-Professionals.

ISE Spread Book Feed

The ISE Spread Book Feed (''Spread Feed'') is a real-time feed that consists

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* SR–ISE–2011–44.

[4] Customer and Professional Customer orders are identified in a number of market data offerings currently sold by other options exchanges on a subscription basis. *See* Securities Exchange Act Release No. 63351 (November 10, 2010), 75 FR 73140 (November 29, 2010) (SR–PHLX–2010–154) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for the PHOTO Historical Data Product). *See also* Securities Exchange Act Release No. 63997 (March 1, 2011), 76 FR 12388 (March 7, 2011) (SR–CBOE–2011–014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify a Fee Schedule for the Sale by Market Data Express, LLC, of a BBO Data Feed for CBOE Listed Options).

[5] ISE proposes that a ''distributor'' be defined as any firm that receives a ISE data feed directly from ISE or indirectly through a vendor and then distributes it either internally or externally. Further, ISE proposes that all distributors execute an ISE distributor agreement.

[6] ISE proposes that a ''controlled device'' be defined as any device that a distributor of the ISE Top Quote Feed permits to: (a) Access the information in the Top Quote Feed offering, or (b) communicate with the distributor so as to cause the distributor to access the information in the Top Quote Feed offering. If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden will be on the distributor to demonstrate that the particular controlled device should not be subject to the proposed fees.

of options quotes and orders for all complex orders (*i.e.,* spreads, buy-writes, delta neutral strategies, *etc.*) aggregated at the top price level on both the bid and offer side of the market as well as all aggregated quotes and orders for complex orders at the top five price levels on both the bid and offer side of the market. In addition, the Spread Feed provides real-time updates every time a new complex limit order that is not immediately executable at the BBO is placed on the ISE complex order book. The Spread Feed shows bid/ask quote size for Customer and Professional Customer option orders for ISE traded options. As noted above, since Customer orders take precedence over all other order types, the identification of these orders in the Spread Feed is useful information for market makers and market participants generally. Again, the Exchange believes it is not discriminatory or a burden on competition for these orders to be identified because doing so increases the likelihood that these orders will be executed as they have priority on the ISE while Professional Customers, *i.e.,* persons or entities that (i) Are not a broker or dealer in securities, and (ii) place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), do not have priority on the Exchange.

The Exchange further notes that ISE Market Makers currently receive a spread book data feed as part of their membership. Pursuant to this proposed rule change, however, all recipients, including ISE Market Makers, will be subject to the proposed fees to access the Spread Feed. The Spread Feed will be available to members and non-members and to both professional and non-professional subscribers and will not be available on a non-subscription basis.

Proposed Fees for Spread Feed

The Exchange proposes to charge distributors of Spread Feed $3,000 per month. In addition, the Exchange proposes to charge a monthly controlled device [7] fee of $25 per controlled device for Professionals at a distributor where the data is for internal and/or external use. There are no monthly controlled device fees proposed for Non-Professionals subscribers to the Spread Feed. Further, the Exchange proposes to adopt an enterprise license fee, regardless of the number of controlled devices, as follows: (i) $4,250 for Professionals at a distributor where the data is for internal use only, (ii) $5,500 for Professionals at a distributor where the data is for internal and/or external use in a controlled device, and (iii) $3,000 for Non-Professionals.

Multi-Product Subscription Discount

The Exchange currently offers two real-time market data feed offerings, the ISE Depth of Market Data Feed [8] and the ISE Order Feed.[9] With the addition of the Spread Feed and Top Quote, the Exchange will have four fee-liable real-time market data feed offerings. In order to encourage subscriptions to multiple market data feeds, ISE proposes to adopt a multi-product subscription discount, as follows: Ten percent (10%) discount for subscribers who subscribe to two feeds and twenty percent (20%) discount for subscribers who subscribe to three feeds.

2. Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[10] in general, and with Sections 6(b)(4) of the Act,[11] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which ISE operates or controls.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act [12] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The fees charged would be the same for all market participants, and therefore do not unreasonably discriminate among market participants.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[13]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase ''on any person, whether or not the person is a member of the self-regulatory organization'' after ''due, fee or other charge imposed by the self-regulatory organization.'' As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Exchange Act to read, in pertinent part, ''At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph

[7] ISE proposes that a ''controlled device'' be defined as any device that a distributor of the ISE Spread Feed permits to: (a) Access the information in the Spread Feed offering, or (b) communicate with the distributor so as to cause the distributor to access the information in the Spread Feed offering. If a controlled device is part of an electronic network between computers used for investment, trading or order routing activities, the burden will be on the distributor to demonstrate that the particular controlled device should not be subject to the proposed fees.

[8] *See* Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR–ISE–2007–97) (Order Approving Proposed Rule Change Relating to Market Data Fees).

[9] *See* Securities Exchange Act Release No. 62399 (June 28, 2010), 75 FR 38587 (July 2, 2010) (SR–ISE–2010–34) (Order Approving Proposed Rule Change Relating to Fees for the ISE Order Feed).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(8).

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

(2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.''

ISE believes that these amendments to Section 19 of the Act reflect Congress's intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a ''due, fee or other charge imposed by the self-regulatory organization,'' the Commission adopted a policy and subsequently a rule stipulating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. ISE believes that the amendment to Section 19 reflects Congress's conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission's prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned not-for-profit corporations into for-profit investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or nonmembers, so as to broaden distribution and grow revenues. Moreover, we believe that the change also reflects an endorsement of the Commission's determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoaliton* v. *SEC,* No. 09–1042 (DC Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' '' [14]

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

The Exchange believes that the proposed market data fees are consistent with the requirements of the Act for several reasons. First, the Exchange notes that the categories of Top Quote and Spread Feed market data and fees compare favorably with similar products offered by other markets such as NASDAQ Stock Market (''NASDAQ''), NASDAQ OMX PHLX (''Phlx''), and Chicago Board Options Exchange (''CBOE''). For example, NASDAQ offers a market data product that is similar to Top Quote: a data feed that shows the top of the market entitled Best of NASDAQ Options (''BONO℠).[15] Phlx also offers a market data feed, entitled Top of Phlx Options (''TOPO''), which is similar to Top Quote. TOPO shows orders and quotes at the top of the market, as well as trades.[16] Lastly, a subsidiary of CBOE for which CBOE charges fees offers a market data product that is similar to Spread Feed. The CBOE BBO Data Feed includes, among other things, customer versus non-customer contracts at the BBO and BBO data and last sale data for complex strategies (*e.g.,* spreads, straddles, buy-writes, *etc.*).[17]

The Exchange also believes that the proposed fee for Top Quote and Spread Feed are consistent with the requirements of the Act because competition provides an effective constraint on the market data fees that the Exchange has the ability and the incentive to charge. ISE has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on ISE to act reasonably in setting the fees for its market data offerings, particularly given that the market participants that will pay such fees often will be the same market participants from whom ISE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high market data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. ISE currently competes with eight options exchanges for order flow.[18]

ISE is constrained in pricing Top Quote and Spread Feed by the availability to market participants of alternatives to purchasing these products. ISE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data. For example, although Top Quote is separate from the core data feed made available by OPRA, all the information available in Top Quote is included in the core data feed. The core OPRA data is widely distributed and relatively

[14] *NetCoaltion,* at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323).

[15] BONO has a monthly base access fee of $1,500 plus a $5 user fee for internal use professionals; a monthly base access fee of $2,000 plus (i) a $5 user fee for internal use professionals or, (ii) $1 user fee for internal use non-professionals. NASDAQ also has a monthly enterprise license fee of $2,500. *See* Securities Exchange Act Release No. 64652 (June 13, 2011), 76 FR 35498 (June 17, 2011) (SR–NASDAQ–2011–075).

[16] TOPO has a monthly fee of $2,000 per firm for internal use and a monthly fee of $2,500 per firm for internal and external use. *See* Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR–PHLX–2009–54).

[17] The subsidiary is identified as Market Data Express, LLC (''MDX'') by CBOE, which indicates that the feed will also provide data regarding contingency orders and complex strategies, the latter being comparable to the Spread Feed proposed by this rule filing. The monthly fee charged by CBOE for the data is $3,500 plus a $25 per user or device fee. *See* Securities Exchange Act Release No. 63997 (March 1, 2011), 76 FR 12388 (March 7, 2011) (SR–CBOE–2011–014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify a Fee Schedule for the Sale by Market Data Express, LLC, of a BBO Data Feed for CBOE Listed Options).

[18] The Commission has previously made a finding that the options industry is subject to significant competitive forces. *See* Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR–ISE–2009–97) (order approving ISE's proposal to establish fees for a real-time depth of market offering).

inexpensive, thus constraining ISE's ability to price Top Quote. In this respect, the OPRA data feed, which includes the Exchange's transaction information, is a significant alternative to the Exchange's product. Further, other options exchanges have produced their own products and thus are sources of potential competition for both Top Quote and Spread Feed. As noted above, NASDAQ, Phlx and CBOE all offer market data products that compete with either Top Quote and Spread Feed or both.

For the reasons cited above, the Exchange believes that the proposed fees for Top Quote and Spread Feed are equitable, fair, reasonable and not unreasonably discriminatory. The Exchange further believes that the continued availability of Top Quote and Spread Feed data feeds enhances transparency, fosters competition among orders and markets, and enables buyers and sellers to obtain better prices. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed terms and fees for these products fail to meet the requirements of the Act.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

ISE does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the NetCoaltion court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive.

For the reasons discussed above, ISE believes that the Dodd-Frank Act amendments to Section 19 materially alter the scope of the Commission's review of future market data filings, by creating a presumption that all fees may take effect immediately, without prior analysis by the Commission of the competitive environment. Even in the absence of this important statutory change, however, ISE believes that a record may readily be established to demonstrate the competitive nature of the market in question.

As recently noted by a number of exchanges,[19] there is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it.

Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decrease, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable. Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce.' ''[20] However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For

[19] *See* Securities Exchange Act Release Nos. 63084 (October 13, 2010), 75 FR 64379 (October 19, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data) (SR–NASDAQ–2010–125); and 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Market Data Feeds) (SR–PHLX–2010–121).

[20] *NetCoalition,* at 24.

example, some platform may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including numerous self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE Amex, NYSEArca, and BATS.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless. The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

Competition among platforms has driven ISE continually to improve its platform data offerings and to cater to customers' data needs. For example, ISE has developed and maintained multiple delivery mechanisms that enable customers to receive data in the form and manner they prefer and at the lowest cost to them. ISE offers front end applications such as its PrecISE Trade application which helps customers utilize data. ISE offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. ISE also offers an enterprise license option to help reduce the administrative burden and costs to firms that purchase market data. Despite these enhancements and a dramatic increase in message traffic, ISE's fees for market data have, for the most part, remained flat.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [21] and Rule 19b–4(f)(2) [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2011–50 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–ISE–2011–50. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] 17 CFR 240.19b–4(f)(2).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2011–50 and should be submitted by August 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19856 Filed 8–4–11; 8:45 am]

**BILLING CODE 8011–01–P**

[23] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–65001; File No. SR–BX–2011–050]**

## Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposal to Amend Chapter VI, Section 15 (Automatic Quote Cancellation) of the BOX Trading Rules

August 1, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 28, 2011, NASDAQ OMX BX (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter VI, Section 15 (Automatic Quote Cancellation) of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to provide additional flexibility for BOX Market Makers to manage their risk. BOX will notify its Options Participants by Information Circular when the implementation schedule is finalized.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings,* at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to reflect in the BOX Trading Rules that BOX Market Makers will be able to establish new risk control parameters to better manage their quotations and related risk. Specifically, the Exchange proposes to amend Chapter VI, Section 15, Automatic Quote Cancellation. As explained below, the proposed functionality is substantially similar to that currently existing on the International Securities Exchange, LLC (''ISE'').

Chapter VI, Section 6 of the BOX Trading Rules requires BOX Market Makers to enter and maintain continuous quotations for the options classes to which they are appointed. To comply with this requirement, each Market Maker may employ its own proprietary quotation and risk management system to determine the prices and sizes at which it quotes. As Market Makers are required to continuously quote in assigned options, quoting across many series in an option creates the possibility of ''rapid fire'' executions that can create large and unintended principal positions that expose the Market Maker to unnecessary market risk. The proposed functionality enhancements to Automatic Quote Cancellation will provide BOX Market Makers protection from the risk of multiple executions across multiple series of an option, and is intended to assist them in managing their market risk. BOX Market Makers will not be required to use the proposed functionality and can program their own systems to perform similar functions if they prefer.

The risk to Market Makers is not limited to a single option series. Market Makers have exposure in all series of a particular options class in which they are appointed, requiring them to offset or hedge their overall position in each option to minimize risk. By limiting a Market Maker's exposure across series, BOX believes that a Market Maker will be better able to provide quotations at better prices. BOX believes that the proposed functionality should help BOX Market Makers, as key liquidity providers, to better manage their risk, aiding them in providing deeper and more liquid markets, beneficial to all BOX market participants.

Pursuant to the amended Chapter VI, Section 15 of the BOX Trading Rules, Automatic Quote Cancellation permits each Market Maker to establish specific parameters that, if triggered, will cause the BOX Trading Host to cancel the Market Maker's quotes in the specified class(es). To enable Automatic Quote Cancellation, a Market Maker must send an Automatic Quote Cancellation enabling message to the BOX Trading Host, including specific information setting forth the parameters the Market Maker would like to establish. Unless enabled, Automatic Quote Cancellation is disabled for all options classes.

The Market Maker may establish triggering parameters for when the Market Maker's quotes may be cancelled. The parameters the Market Maker may set include a time period of between one and nine seconds during which the Market Maker experiences a duration of no technical connectivity. This specific parameter currently exists on BOX and the Exchange is not proposing any change to this particular function. The Exchange is, however, proposing certain changes to reorganize the existing rule text of Section 15 related to this function. Additionally, the Exchange proposes to delete the text in current Section 15(b) as the proposed amendments to Section 15 will render this provision unnecessary.

The Exchange is proposing new text be added to Section 15 to reflect that a Market Maker may enable Automatic Quote Cancellation by establishing additional triggering parameters for when the Market Maker, during a time period specified by each Market Maker:

(a) Trades a specified number of contracts in the aggregate across all series of an options class;

(b) Trades a specified absolute dollar value of contracts bought and sold in a class;

(c) Trades a specified number of contracts in a class of the net between (i) Calls purchased plus puts sold, and (ii) calls sold and puts purchased; or

(d) Trades a specified absolute dollar value of the net position in a class between (i) calls purchased and sold, (ii) puts and calls purchased; (iii) puts purchased and sold; or (iv) puts and calls sold.

The specified time period will commence for an options class when a transaction occurs in any series in such class. When a Market Maker has traded the value or volume of an options class as specified in the Automatic Quote Cancellations enabling message, during the specified time period, the Trading Host will cancel such Market Maker's quotes in all series of the specified options class(es). While the proposed functionality is a useful feature that serves an important risk management purpose, it will not relieve a Market Maker of its obligations to provide continuous, two-sided quotes under Chapter VI, Section 6 of the BOX Trading Rules.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[4] in general, and Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed rule change is appropriate and reasonable because it will provide greater flexibility for BOX Market Makers in managing their risk, and in how they quote and trade. The Exchange believes this will enhance the overall market quality for options traded on BOX.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

This proposed rule change was filed pursuant to paragraph (A) of Section 19(b)(3) of the Exchange Act[6] and Rule 19b–4(f)(6) thereunder.[7] The Exchange asserts that the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.[8]

The Exchange believes that this proposed rule change is substantially similar to Supplementary Material .01 to ISE Rule 804, already in effect, and does not raise any new, unique, or substantive regulatory issues from those raised in the ISE filing.[9] For the foregoing reasons, the Exchange believes this rule filing qualifies for immediate effectiveness as a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2011–050 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–BX–2011–050. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] *See* Securities Exchange Act Release No. 63117 (October 15, 2010), 75 FR 65042 (October 21, 2010) (Notice of Filing and Immediate Effectiveness Relating to Enhancements to the ISE Electronic Trading Platform).

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–050 and should be submitted on or before August 26, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19855 Filed 8–4–11; 8:45 am]

BILLING CODE 8011–01–P

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12714 and #12715]**

### Montana Disaster #MT–00062

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for the State of Montana (FEMA–1996–DR), dated 07/26/2011.

*Incident:* Severe Storms and Flooding.

*Incident Period:* 04/03/2011 through 07/22/2011.

*Effective Date:* 07/26/2011.

*Physical Loan Application Deadline Date:* 09/26/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 04/26/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 07/26/2011, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

**Primary Counties (Physical Damage and Economic Injury Loans)**

Big Horn, Carbon, Cascade, Custer, Fergus, Garfield, Hill, Jefferson, Judith Basin, Lewis And Clark, Missoula, Musselshell, Petroleum, Sweet Grass, Valley, Yellowstone, and the Blackfeet Indian Reservation, Crow Indian Reservation, and the Fort Belknap Reservation.

**Contiguous Counties (Economic Injury Loans Only)**

*Montana*

Blaine, Broadwater, Carter, Chouteau, Daniels, Deer Lodge, Fallon, Flathead, Gallatin, Golden Valley, Granite, Lake, Liberty, Madison, McCone, Meagher, Mineral, Park, Phillips, Powder River, Powell, Prairie, Ravalli, Roosevelt, Rosebud, Sanders, Silver Bow, Stillwater, Teton, Treasure, Wheatland.

*Idaho*

Clearwater, Idaho.

*Wyoming*

Big Horn, Park, Sheridan.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Homeowners with Credit Available Elsewhere | 5.125 |
| Homeowners without Credit Available Elsewhere | 2.563 |
| Businesses with Credit Available Elsewhere | 6.000 |
| Businesses without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations with Credit Available Elsewhere | 3.250 |
| Non-Profit Organizations without Credit Available Elsewhere | 3.000 |
| *For Economic Injury:* | |
| Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 3.000 |

The number assigned to this disaster for physical damage is 12714B and for economic injury is 127150.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera.**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–19850 Filed 8–4–11; 8:45 am]

BILLING CODE 8025–01–P

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12720 and #12721]**

### Kansas Disaster #KS–00055

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–4010–DR), dated 07/29/2011.

*Incident:* Severe Storms, Straight-line Winds, Tornadoes, and Flooding.

*Incident Period:* 05/19/2011 through 06/04/2011.

*Effective Date:* 07/29/2011.

*Physical Loan Application Deadline Date:* 09/27/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 04/30/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 07/29/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Barton, Clay, Cloud, Hamilton, Jewell, Lincoln, Logan, Lyon, Marion, Mitchell, Morton, Osage, Osborne, Ottawa, Pottawatomie, Republic, Riley, Rooks, Rush, Russell, Sherman, Smith, Stafford, Stanton, Washington.

The Interest Rates are:

| | Percent |
|---|---|
| For Physical Damage: | |
| Non-Profit Organizations with Credit Available Elsewhere: | 3.250 |
| Non-Profit Organizations without Credit Available Elsewhere: | 3.000 |
| For Economic Injury: | |
| Non-Profit Organizations Without Credit Available Elsewhere: | 3.000 |

The number assigned to this disaster for physical damage is 12720B and for economic injury is 12721B.

[10] 17 CFR 200.30–3(a)(12).

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–19908 Filed 8–4–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12576 and #12577]**

## Missouri Disaster Number MO–00048

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 8.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1980–DR), dated 05/09/2011.

*Incident:* Severe Storms, Tornadoes, and Flooding.

*Incident Period:* 04/19/2011 through 06/06/2011.

*Effective Date:* 08/01/2011.

*Physical Loan Application Deadline Date:* 08/26/2011.

*EIDL Loan Application Deadline Date:* 02/09/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for the State of Missouri, dated 05/09/2011 is hereby amended to extend the deadline for filing applications for physical damage as a result of this disaster to 08/26/2011.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–19906 Filed 8–4–11; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Railroad Administration

## Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Denton County Transportation Authority (Waiver Petition Docket Number FRA–2010–0180)**

The Denton County Transportation Authority (DCTA) seeks a temporary waiver from some of the regulatory requirements of the CFR to operate new Stadler 2/6 GTW Diesel Multiple Units (DMUs) for use on its new ''A-train'' commuter rail service. This temporary relief is necessary so that DCTA can conduct vehicle acceptance, employee training, and equipment familiarization until such time that a second waiver request, relating to Alternate Vehicle Technology (AVT), is submitted.

DCTA has ordered 11 Stadler Bussnang AG, GTW 2/6 DMUs (the first of which will arrive in July 2011) for use on its new ''A-train'' commuter rail service between Dallas and Denton, TX. These vehicles are constructed by a European manufacturer and meet European safety standards for crashworthiness and related safety measures. DCTA submitted the first petition for relief (the ''Base Waiver'') in which it sought relief from certain requirements of 49 CFR Part 238, Passenger Equipment Safety Standards (Sections 238.115, 238.121, 238.223, 238.229, 238.230, 238.305, 238.309, and Appendix D—Requirements for External Fuel Tanks on Tier I Locomotives); part 229, Railroad Locomotive Safety Standards (§§ 229.31, 229.47, 229.51, 229.71, 229.135, and Appendix D—Criteria for Certification of Crashworthy Event Recorder Memory Module); part 231, Railroad Safety Appliance Standards (§ 231.14); and part 239, Passenger Train Emergency Preparedness (§ 239.101). FRA rendered its decision in a July 13, 2011, letter.

DCTA is currently in the process of developing the technical justification documentation to petition FRA for an AVT compliance waiver for use of this equipment on main tracks.

Until such documentation is submitted, DCTA would like to operate this equipment so it can conduct vehicle acceptance, employee training, and equipment familiarization. DCTA will implement temporal separation, and seeks temporary relief from certain requirements of 49 CFR, particularly § 238.203—Static end strength; § 238.205—Anti-climbing mechanism; § 238.207—Link between coupling mechanism and car body; § 238.209—Forward end structure of locomotives, including cab cars and MU locomotives; § 238.211—Collision posts; § 238.213—Corner posts; § 238.215—Rollover strength; § 238.217—Side structure; § 238.219—Truck-to-car-body attachment; and § 238.233—Interior fittings and surfaces.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0180) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the U.S. Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume

65, Number 70; Pages 19477–78) or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on August 1, 2011.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

[FR Doc. 2011–19827 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2011–0110]**

### Tesla Motors, Inc.; Receipt of Petition for Temporary Exemption From the Electronic Stability Control Requirements of FMVSS No. 126

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of receipt of a petition for temporary exemption from Federal Motor Vehicle Safety Standard (FMVSS) No. 126, *Electronic Stability Control Systems.*

**SUMMARY:** In accordance with the procedures in 49 CFR part 555, Tesla Motors, Inc., has petitioned the agency for a temporary exemption from the electronic stability control requirements of FMVSS No. 126. The bases for the application are that the petitioner avers that the exemption would make the development or field evaluation of a low-emission vehicle easier and would not unreasonably lower the safety level of that vehicle and that compliance would cause it substantial economic hardship and that it has tried in good faith to comply with the standard.[1] This notice of receipt of an application for a temporary exemption is published in accordance with statutory and administrative provisions. NHTSA has made no judgment on the merits of the application.

**DATES:** You should submit your comments not later than September 6, 2011.

**FOR FURTHER INFORMATION CONTACT:** David Jasinski, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–213, Washington, DC 20590. *Telephone:* (202) 366–2992; *Fax:* (202) 366–3820.

**ADDRESSES:** We invite you to submit comments on the application described above. You may submit comments identified by docket number at the heading of this notice by any of the following methods:

- *Web Site: http://www.regulations.gov.* Follow the instructions for submitting comments on the electronic docket site by clicking on ''Help and Information'' or ''Help/Info.''
- *Fax:* 1–202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below. We will consider all comments received before the close of business on the comment closing date indicated above. To the extent possible, we will also consider comments filed after the closing date.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 am and 5 pm, Monday through Friday, except Federal Holidays. *Telephone:* (202) 366–9826. *Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

*Confidential Business Information:* If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512).

**SUPPLEMENTARY INFORMATION:**

### I. Statutory Basis for Temporary Exemptions

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. chapter 301, authorizes the Secretary of Transportation to exempt, on a temporary basis and under specified circumstances, motor vehicles from a motor vehicle safety standard or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority in this section to NHTSA.

NHTSA established 49 CFR part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. A vehicle manufacturer wishing to obtain an exemption from a standard must demonstrate in its application (A) that an exemption would be in the public interest and consistent with the Safety Act and (B) that the manufacturer satisfies one of the following four bases for an exemption: (i) Compliance with the standard would cause substantial economic hardship to a manufacturer that has tried to comply with the standard in good faith; (ii) the exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of the standard; (iii) the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle; or (iv) compliance with the standard would prevent the manufacturer from selling a motor vehicle with an overall safety level at least equal to the overall safety level of nonexempt vehicles.

Only small manufacturers can obtain an economic hardship exemption. A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C.

[1] To view the application, go to *http://www.regulations.gov* and enter the docket number set forth in the heading of this document.

30113). In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether another entity also might be deemed a manufacturer of that vehicle and whether the production volumes of each of the two manufacturers should be combined in assessing whether the criterion is met. A second entity might be deemed a manufacturer of a vehicle in a variety of circumstances. For example, there are two manufacturers if one entity produces an incomplete vehicle [2] and another entity then modifies the incomplete vehicle so as to produce a completed vehicle.[3] NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

For an exemption petition to be granted on the basis that the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of the vehicle, the petition must include specified information set forth at 49 CFR 555.6(c). The main requirements of that section include: (1) Substantiation that the vehicle is a low-emission vehicle; (2) documentation establishing that a temporary exemption would not unreasonably degrade the safety of a vehicle; (3) substantiation that a temporary exemption would facilitate the development or field evaluation of the vehicle; (4) a statement of whether the petitioner intends to conform to the standard at the end of the exemption period; and (5) a statement that not more than 2,500 exempted vehicles will be sold in the United States in any 12-month period for which an exemption may be granted.

## II. Electronic Stability Control Systems Requirement

In April 2007, NHTSA published a final rule requiring that vehicles with a gross vehicle weight rating of 4,536 kilograms (kg) (10,000 pounds) or less be equipped with electronic stability control (ESC) systems. ESC systems use automatic computer-controlled braking of individual wheels to assist the driver in maintaining control in critical driving situations in which the vehicle is beginning to lose directional stability at the rear wheels (spin out) or directional control at the front wheels (plow out). An anti-lock brake system (ABS) is a prerequisite for an ESC system because ESC uses many of the same components as ABS. Thus, the cost of complying with FMVSS No. 126 is less for vehicle models already equipped with ABS.

Preventing single-vehicle loss-of-control crashes is the most effective way to reduce deaths resulting from rollover crashes. This is because most loss-of-control crashes culminate in the vehicle leaving the roadway, which dramatically increases the probability of a rollover. NHTSA's crash data study of existing vehicles equipped with ESC demonstrated that these systems reduce fatal single-vehicle crashes of passenger cars by 36 percent and fatal single-vehicle crashes of sport utility vehicles (SUVs) by 63 percent.[4] NHTSA estimates that ESC has the potential to prevent 70 percent of the fatal passenger car rollovers and 88 percent of the fatal SUV rollovers that would otherwise occur in single-vehicle crashes.[5]

The ESC requirement becomes effective for substantially all vehicles on September 1, 2011.

## III. Overview of Petition

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Tesla Motors, Inc. (Tesla) submitted a petition dated June 7, 2001 asking the agency for a temporary exemption from the electronic stability control requirements of FMVSS No. 126. The bases for the application are, first, that the exemption would make the development or field evaluation of a low-emission vehicle easier and would not unreasonably lower the safety level of that vehicle and, second, that compliance would cause substantial economic hardship to a petitioner that has tried in good faith to comply with the standard. Tesla has requested an exemption for the Roadster model for a period from September 1, 2011 to December 31, 2011.

Tesla is a Delaware corporation headquartered in California with sales offices throughout the United States and overseas. Tesla currently manufactures and sells only one vehicle, the Roadster. Tesla began production of the all-electric Roadster in 2008 plans to conclude production for the United States market by December 31, 2011.

The Roadster has a single-speed electrically actuated automatic transmission and three phase, four pole AC induction motor. The Roadster has a combined range of 245 miles on a single charge. Under an agreement with Group Lotus plc (Lotus), Tesla purchases the Roadster ''glider,'' which uses the chassis and several other systems of the Lotus Elise. The gliders are manufactured under Tesla's supervision and direction at a Lotus factory in the United Kingdom and then shipped to Menlo Park, California, where installation of the power train and other final steps are taken prior to sale of the vehicle in the United States.

Tesla sold or leased 276 Roadsters in the United States during 2010 and 62 Roadsters during the first quarter of 2011. Tesla's worldwide production for 2011 is planned to be fewer than 1,000 vehicles. Tesla contends that its relationship with Lotus does not involve any time of ownership, sponsorship, or any other type of control. However, Tesla also observes that the combined production of Lotus and Tesla was less than 10,000 vehicles for 2009 and 2010.

Tesla believes that granting the petition will support development and evaluation of a highway-capable electric vehicle. Tesla states that the development and sale of the Roadster model has allowed them to develop their next all-electric vehicle, the Model S. Tesla states that, with the permission of vehicle owners, it has used data from computers installed in on-road Roadsters related to charging condition and vehicle performance to determine how best to optimize its battery design and vehicle software for future vehicle offerings such as the Model S. Tesla believes that allowing the sale of additional Roadsters will continue to add to its database of information for its future vehicle offerings. Tesla states that it cannot replicate this data in laboratory or other environmental conditions.

Tesla believes that safety will not be unduly compromised if the exemption is granted. In support of this assertion, Tesla cites its inclusion of a traction control system (TCS) on its vehicles. Tesla's TCS is comprised of software, wheel speed sensors, and the drive system electronic control unit (ECU). Tesla states that its TCS has many elements of an ESC system required by FMVSS No. 126. Tesla claims that the TCS system is able to detect slip in the drive wheels through the vehicle's ECU and that the vehicle will limit drive power until wheel spin is controlled. However, Tesla notes that the TCS system does not have the capability to independently monitor or adjust steering inputs to prevent oversteer or understeer, nor is it capable of applying brakes independent of driver input, both of which are required by FMVSS No. 126.

[2] 49 CFR 567.3.

[3] *Id.*

[4] Dang, J., Statistical Analysis of the Effectiveness of Electronic Stability Control (ESC) Systems—Final Report, DOT HS 810 794, U.S. Department of Transportation, Washington, DC (July 2007). *Available at* Docket No. NHTSA–2007–28629, item 2.

[5] *Id.*

Further, Tesla believes that the lack of ESC systems on the Roadster will not unduly compromise safety based on the intended use of the Roadster. The Roadster is a low, two-seat sport coupe. Tesla believes that, while the Roadster is capable of handling slippery roads due to ice and snow, most owners either do not use their Roadsters during winter months or sharply limit their use.

Tesla also contends that the failure to obtain the exemption would result in substantial economic hardship. Tesla states that it has incurred cumulative net losses of $464 million since inception and nearly $50 million in the first three months of 2011. Tesla states that the loss of the ability to sell the Roadster in the United States could adversely impact its compliance with financial covenants with the U.S. Department of Energy, potentially depriving it of a source of capital. Further, because the Roadster is the only vehicle Tesla offers for sale in the United States, Tesla contends that the cancellation of the program would result in a significant loss of market for Tesla.

Tesla states that it spent between $2 million and $3 million developing an ESC system for the Model S. Tesla does not have a precise cost to equip the Roadster with an ESC system, but applying the per vehicle cost of its Model S to the Roadster, it would cost as much as $30,000 per vehicle to equip ESC systems onto Roadsters planned to be sold under the exemption.

Tesla notes that its chassis is based upon the Lotus Elise, which is equipped with ABS, but not an ESC system. Because Lotus is ending production of the Elise for the United States market by August 2011, Lotus will not invest in redesigns or additions to existing vehicle systems, including changes to comply with the ESC system requirements. Tesla states that, given the small number of Roadsters planned for production during the exemption period and the short time frame available to Tesla, it is technologically and economically infeasible to develop an ESC system for the Roadster.

Tesla contends that it has exerted good faith efforts to achieve compliance with FMVSS No. 126. Tesla has developed an ESC system for the upcoming Model S, which is scheduled to be introduced in the United States in 2012. Tesla also states that it has included a number of features not mandated by the FMVSSs, including the TCS system discussed earlier. Tesla notes that it had intended on ending Roadster production prior to September 1, 2011 and, thus, would not have been required to equip its vehicles with ESC systems. Thus, Tesla did not focus development activities on meeting the requirements of FMVSS No. 126. However, due to a shift in production priorities at Lotus, Tesla was informed that an additional quantity of Roadster gliders could be produced in 2011.

Tesla also believes that the exemption is in the public interest. Tesla states that, without the exemption, it may be required to lay off a significant number of employees. Further, Tesla notes that denying this petition would result in fewer electric vehicles for sale in the United States. Finally, Tesla believes that continuing to sell a long range, highway-capable, battery-powered electric vehicle in the United States will lead to more electric vehicles entering the fleet.

### IV. Completeness and Comment Period

Upon receiving a petition, NHTSA conducts an initial review of the petition with respect to whether the petition is complete and whether the petitioner appears to be eligible to apply for the requested petition. The agency has tentatively concluded that the petition from Tesla is complete and that Tesla is eligible for a temporary exemption. The agency has not made any judgment on the merits of the application, and is placing a non-confidential copy of the petition in the docket.

We are providing a 30-day comment period. After considering public comments and other available information, we will publish a notice of final action on the application in the **Federal Register.**

Issued on: August 2, 2011.

**Christopher J. Bonanti,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2011–19914 Filed 8–4–11; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2008–0181, Notice 2]**

## Pagani Automobili SpA; Denial of Application for Temporary Exemption From Advanced Air Bag Requirements of FMVSS No. 208

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of denial of petition for temporary exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection.*

**SUMMARY:** This notice denies the petition of Pagani Automobili SpA (Pagani)[1] for exemption from certain advanced air bag requirements of FMVSS No. 208, for the Huayra model.[2] The basis for the application is that the petitioner avers compliance would cause substantial economic hardship and that it has tried in good faith to comply with the standard.[3] The agency has determined that Pagani has failed to demonstrate that compliance would cause substantial economic hardship. Furthermore, the agency is unable to find that an exemption would be consistent with the public interest or the objectives of the Safety Act. This action follows our publication in the **Federal Register** of a document announcing receipt of Pagani's petition and soliciting public comments.

**FOR FURTHER INFORMATION CONTACT:** William H. Shakely, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–326, Washington, DC 20590. Telephone: (202) 366–2992; Fax: (202) 366–3820.

**SUPPLEMENTARY INFORMATION:**

### I. Advanced Air Bag Requirements and Small Volume Manufacturers

In general, frontal air bags for drivers and right front passengers have large net benefits. NHTSA estimates that they saved 30,232 lives from 1987 through the end of 2009.[4] Air bags reduce overall fatality risk in purely frontal crashes by 29 percent. They reduce overall fatality risk by 12 percent for drivers of passenger cars, and by 14 percent for right front passengers of passenger cars.[5]

In 2000, NHTSA published a final rule that upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as ''advanced air bags.'' [6] The upgrade was designed to meet the twin goals of improving protection for occupants of all sizes, belted and

[1] Pagani was formerly known by Modena Design, the name reflected in the notice of receipt of the petition.

[2] In the original petition, this model was referred to as the C9 model. In subsequent submissions, the company indicated that the model is now known as the Huayra.

[3] To view the application, go to *http://www.regulations.gov* and enter the docket number set forth in the heading of this document.

[4] Traffic Safety Facts—2009 Data—Occupant Protection, NHTSA Report No. DOT HS 811 390, Washington, DC, 2010.

[5] Kahane, C.J., Lives Saved by the Federal Motor Vehicle Safety Standards and Other Vehicle Safety Technologies, 1960–2002, NHTSA Technical Report No. DOT HS 809 833, Washington, 2004, pp. 108–115.

[6] *See* 65 FR 30680 (May 12, 2000).

unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes. The agency estimated that the upgraded requirements had the potential to reduce fatalities and nonfatal injuries from crashes, as well as protect more than 95 percent of the at-risk population (out-of-position infants, children, and small-statured adults) from the risks presented by air bag deployment.

The issuance of the advanced air bag requirements was a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of some air bag designs. This plan also included an extensive consumer education program to encourage the placement of children in rear seats.

The new requirements were phased-in, beginning with the 2004 model year. Small volume manufacturers were not subject to the advanced air bag requirements until the end of the phase-in period, i.e., September 1, 2006.

In recent years, NHTSA has addressed a number of petitions for exemption from the advanced air bag requirements of FMVSS No. 208. The majority of these requests have come from small manufacturers, each of which has petitioned on the basis that compliance would cause it substantial economic hardship and that it has tried in good faith to comply with the standard. In recognition of the more limited resources and capabilities of small motor vehicle manufacturers, authority to grant exemptions based on substantial economic hardship and good faith efforts was added to the Vehicle Safety Act in 1972 to enable the agency to give those manufacturers additional time to comply with the Federal safety standards.

NHTSA has granted a number of these petitions, usually in situations in which the manufacturer is supplying standard air bags in lieu of advanced air bags.[7] In addressing these petitions, NHTSA recognized that small manufacturers faced particular difficulties in acquiring or developing advanced air bag systems. Specifically, the agency noted that major air bag suppliers initially concentrated their efforts on working with large volume manufacturers and small volume manufacturers had limited access to advanced air bag technology.

[7] *See, e.g.,* Grant of petition of Panoz, 72 FR 28759 (May 22, 2007); Grant of petition of Koenigsegg Automotive AB, 72 FR 17608 (April 9, 2007).

Notwithstanding those previous grants of exemption, NHTSA has considered two key issues—

(1) Whether it is in the public interest to continue to grant such petitions, particularly in the same manner as in the past, given the number of years these requirements have now been in effect and the benefits of advanced air bags, and

(2) to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bag requirements, should be expected.[8]

While the exemption authority was created to address the problems of small manufacturers and the agency wishes to be appropriately attentive to those problems, it was not anticipated by the agency that use of this authority would result in small manufacturers being given much more than relatively short term exemptions from recently implemented safety standards, especially those addressing particularly significant safety problems.

Over time, the number of petitions for exemption from the advanced air bag requirements has decreased, and several small manufacturers that previously received exemptions now produce vehicles that comply with the advanced air bag requirements. The majority of current petitions before the agency are petitions for limited extension of previously granted exemptions.

Given the passage of time since the advanced air bag requirements were established and implemented, and in light of the benefits of advanced air bags, NHTSA has determined that it is not in the public interest to continue to grant exemptions from these requirements in the same circumstances and under the same terms as in the past.

[8] The agency requested comments on these issues in recent notices of receipt. *See, e.g.,* Notice of Receipt of Application of Spyker Automobielen, B.V., 76 FR 19179 (Apr. 6, 2011); Notice of Receipt of Applications of Koenigsegg AB and Morgan Motor Company Limited, 76 FR 20082 (Apr. 11, 2011). Advocates for Highway and Auto Safety (Advocates) concurred with NHTSA's concerns regarding the continuation of such exemptions and the agency's conclusions regarding the availability of advanced air bag technology. Docket Nos. NHTSA–2011–0030–0006, NHTSA–2011–0006–0004. Vision Motor Cars, Inc. (VMCI), agreed with NHTSA's concerns about advanced air bag exemptions but recommended that a distinction be made between initial exemptions and extensions, with extensions receiving more scrutiny. Docket No. NHTSA–2011–0030–0003. Koenigsegg Automotive AB (Koenigsegg) commented that a change to NHTSA policy regarding advanced air bag exemptions would be justified if there were evidence of a safety problem with the existing policy, but that, in the absence of such evidence, such exemptions should be considered in accordance with past policy. Docket No. NHTSA–2011–0006–0005.

The costs of compliance with the advanced air bag requirements of FMVSS No. 208 are costs that all entrants to the U.S. automobile marketplace should expect to bear. Furthermore, NHTSA understands that, in contrast to the initial years after the advanced air bag requirements went into effect, low volume manufacturers now have access to advanced air bag technology.[9] Accordingly, NHTSA concludes that the expense of advanced air bag technology is not now sufficient, in and of itself, to justify the grant of a petition for a hardship exemption from the advanced air bag requirements.

## II. Statutory Basis for Requested Part 555 Exemption

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. Chapter 301, provides the Secretary of Transportation authority to exempt, on a temporary basis and under specified circumstances, motor vehicles from a motor vehicle safety standard or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.

The Act authorizes the Secretary to grant a temporary exemption to a manufacturer of not more than 10,000 motor vehicles annually, on such terms as the Secretary deems appropriate, if the Secretary finds that the exemption would be consistent with the public interest and also finds that compliance with the standard would cause substantial economic hardship to the manufacturer and that the manufacturer has tried to comply with the standard in good faith.

NHTSA established Part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. Under Part 555, a petitioner must provide specified information in submitting a petition for exemption. These requirements are specified in 49 CFR 555.5, and include a number of

[9] The recent petitions for exemption support NHTSA's belief that advanced air bag technology has become more accessible to small volume manufacturers in recent years. In addition to the fact that several manufacturers who received exemptions in the past have been able to produce fully-compliant vehicles, many of the manufacturers who have petitions pending before the agency have been developing advanced air bag systems in-house or are working with suppliers to develop such systems. *See, e.g.,* Notice of Receipt of Application of Spyker Automobielen, B.V., 76 FR 19179 (Apr. 6, 2011) (manufacturer is working with a supplier to develop advanced air bag system); Notice of Receipt of Petition of Lotus Cars Ltd., 76 FR 33406 (June 8, 2011) (manufacturer has another model that fully complies with the advanced air bag requirements).

items. Foremost among them are that the petitioner must set forth the basis of the application under § 555.6, and the reasons why the exemption would be in the public interest and consistent with the objectives of 49 U.S.C. Chapter 301.

A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle. The statutory provisions governing motor vehicle safety (49 U.S.C. Chapter 301) do not state that a manufacturer has substantial responsibility as manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers the statutory definition of ''manufacturer'' (49 U.S.C. 30102) to be sufficiently broad to include sponsors, depending on the circumstances. Thus, NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

**III. Pagani's Petition**

*Background*—Pagani, an Italian corporation, was formed in 1991 and has been producing a small number of luxury sports cars since 1999. Pagani currently produces one vehicle, the C8 Zonda, which is not sold in the United States, but the company has been developing a new vehicle, the Huayra, a two-seat sports car, which it plans on selling in the United States and for which it seeks an exemption. The Huayra Pagani submitted its original petition in 2007 and a notice of receipt was published on November 25, 2008. Pagani subsequently requested that the agency delay a decision on its petition because of changes in the company's production plans. In 2008, 2010, and 2011, the company submitted supplementary information regarding its financial situation and its compliance efforts. This information is included in the summary below and the submissions have been posted to the docket.

*Requested Exemption*—Pagani originally requested a three-year exemption from paragraph S14 of FMVSS No. 208, *Occupant Crash Protection,* which establishes the advanced air bag requirements. In supplemental submissions, the company stated that it plans on beginning the production of the Huayra at the end of 2011 and clarified its plans with respect to S14 of FMVSS No. 208, stating that it will certify its vehicles to comply with the 30 mph belted 50th percentile male barrier impact test (S14.5.1(a)). Pagani has also since stated that it plans to certify to the unbelted 50th percentile male barrier impact test in force prior to September 1, 2006 (S5.1.2(a)) (with the unbelted sled test in S13 being an acceptable option for that requirement). Finally, Pagani indicated that it has accelerated its compliance testing and would only need a two-year exemption.

*Eligibility*—Pagani asserted that it produces, on average, no more than 25 vehicles per year. The company estimated that if the requested exemption were granted, it would sell 35 to 45 vehicles per year, 6 to 12 vehicles of which would be sold in the United States. The original petition stated that Pagani contracts out some aspects of vehicle development, but asserted that these are arms-length transactions.

*Economic Hardship*—The agency notes that the material submitted by Pagani consists of its original 2007 petition, as well as updated financial information the company provided in 2008, 2010, and 2011. In determining the existence of substantial economic hardship, we rely primarily on the most recent financial information. The original petition was based on estimated compliance costs at the time and financial projections for 2009 through 2011. Given the passage of time and the updated financial information, these projections are no longer relevant. The most recent financial records provide updated estimated compliance costs for the advanced air bag program as well as financial projections for 2011 through 2014, one set in the event an exemption is granted and one set in the event the exemption is denied. The most recent records, as well as Pagani's accompanying descriptions, reflect the company's current financial condition and the company's estimates of the projected effect of a grant or denial of the exemption petition. These records, and the relevant factual information from past submissions, are summarized below.

Pagani submitted financial records from 2004 to 2010 showing net incomes ranging from €13,327 to €832,000, with a total net income of approximately €1,947,846. The company also submitted projections estimating that if the petition for exemption is denied and no vehicles are sold in the United States, the company would make an estimated €5,398,000 in net income during the period of 2011 through 2014, compared to €8,613,000 in net income during the same period if an exemption were granted. The company asserted that the difference in gross revenue between granting and denying the exemption is approximately €34,000,000, and the financial records indicate a difference in projected net income of approximately €3,215,000.

Although Pagani has realized profits in recent years, the company asserted that immediate compliance with the advanced air bag requirements will cause substantial economic hardship. Specifically, Pagani stated that the company only operates on the cash on hand without lines of credit or debt financing, and its small profit margin is necessary to guard it from market fluctuations.

Pagani stated that without an exemption, it will not be able to fund the advanced air bag program, which is estimated as costing €4,000,000, from its non-U.S. sales and will not be able to enter the U.S. market until at least 2015.

Finally, Pagani stated that its production capacity is currently limited to approximately 25 units per year worldwide. The company indicated that its plan is to expand its production capacity to 50 to 60 units per year worldwide by building a new factory. However, the company stated that the new factory represents a significant investment for the company and could not be justified without the revenue from U.S. sales. Accordingly, construction of this new facility cannot begin unless an exemption is granted.

*Compliance Efforts*—Pagani asserted that small volume manufacturers have delayed access to ''off-the-shelf'' systems and must wait for technology to ''trickle down'' from larger manufacturers and suppliers. The company further noted that because small volume manufacturers build so few vehicles, the costs of developing custom advanced air bag systems, as compared to potential profits, discourages some air bag suppliers from working with these manufacturers. In a supplemental submission, the company stated that 65 percent of its costs have been focused on developing a U.S. version of the Huayra.

Pagani indicated that it has partnered with Applus+ IDIADA, a Spanish engineering services company that has previously provided advanced air bag development solutions and testing for small volume manufacturers, and Bosch Engineering GmbH to develop its advanced air bag systems. Pagani estimated that the cost of developing an advanced air bag system is €4,000,000. The project began in 2009 and was initially scheduled to be completed at the beginning of 2014, at which time Pagani would begin production of fully-compliant Huayra vehicles. As discussed above, Pagani indicated that it has accelerated its testing schedule and is requesting a two year, rather than, three year, exemption from the advanced air bag requirements.

According to Pagani, the vehicles produced during the exemption period will be equipped with a standard air bag system for both the driver and passenger seating positions and will comply with the pre-S14 provisions of FMVSS No. 208. Additionally, Pagani stated that it will certify its vehicles to comply with the belted 50th percentile male barrier impact test (S14.5.1(a)) and to the unbelted 50th percentile male barrier impact test in force prior to September 1, 2006 (S5.1.2(a)) (with the unbelted sled test in S13 being an acceptable option for that requirement).

*Public Interest*—Pagani stated that the Huayra comes equipped with numerous features that enhance safety, and that the granting of this exemption would be consistent with the public interest and the objectives of the Safety Act (*see* 49 U.S.C. chapter 301). The petitioner asserted that the vehicles incorporate design features that have significant safety benefits. These include the use of carbon-fiber technology, which provides great strength at a low weight. The fuel tank is incorporated into the carbon chassis for maximum protection, and the chassis also incorporates the monocoque protective ''cell'' design. Enhanced by a metal roll cage and alloy front and rear chassis subframes, the vehicle provides a significant safety benefit in the event of a crash or rollover. The monocoque design can stay rigid during repeated impacts, providing an additional source of protection in the event of a potentially penetrating impact. Pagani indicated that these features serve, in part, to increase the crashworthiness of the vehicle. Additionally, the company indicated that all exempted cars will have standard air bags which comply with the pre-S14 provisions of FMVSS No. 208.

Pagani stated that the risk to the public will be minimal given that only 6 to 12 vehicles will be sold per year in the United States, each vehicle is only expected to be driven approximately 2,500 miles annually, and children will rarely ride in the vehicle.[10] Finally, Pagani argued that if an exemption is not granted, U.S. consumer choice would be adversely affected.

## IV. Notice of Receipt

On November 25, 2008, we published in the **Federal Register** (73 FR 71725) a notice of receipt of Pagani's petition for temporary exemption, and provided an opportunity for public comment. We received one comment, which was from Pagani, containing additional information regarding the company's financial situation and compliance efforts as well as a request to delay a decision on the petition because of changes to the Huayra's production schedule.

## V. Agency Analysis and Decision

In this section, we provide our analysis and decision regarding Pagani's temporary exemption request concerning advanced air bag requirements of FMVSS No. 208. As discussed below, we are denying Pagani's petition because Pagani has failed to demonstrate that compliance would cause substantial economic hardship and because we are unable to conclude that an exemption would be in the public interest and consistent with the objectives of the Safety Act.

*Eligibility*—As discussed above, a manufacturer is eligible to apply for an economic hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113). Pagani asserted that it produces, on average, no more than 25 vehicles per year. The company estimated that if the requested exemption were granted, it would sell 35 to 45 vehicles per year, 6 to 12 vehicles of which would be sold in the United States. The original petition stated that Pagani contracts out some aspects of vehicle development, but asserted that these are arms-length transactions.

Accordingly, we have determined that Pagani is eligible to apply for an economic hardship exemption.

*Substantial Economic Hardship*—Pagani asserted that the difference between granting and denying the exemption is an approximately €34,000,000 reduction in gross revenue from 2011 to 2014. Additionally, the financial records show a reduction in projected net income of approximately €3,215,000 from 2011 to 2014. Pagani stated that without an exemption, it will not be able to fund the advanced air bag program, which is estimated as costing approximately €4,000,000, from its non-U.S. sales. The company further stated that, in the event of a denial, the company will not be able to enter the U.S. market until at least 2015. Additionally, denial would postpone construction of a new factory needed to increase the company's production capacity.[11]

The touchstone that NHTSA uses in determining the existence of substantial economic hardship is an applicant's financial health, as indicated by its income statements. NHTSA has tended to consider a continuing and a cumulative net loss position as strong evidence of hardship.[12] The theory behind NHTSA's rationale is that, if a company with a continuing net loss is required to divert its limited resources to resolve a compliance problem on an immediate basis, it may be unable to use those resources to solve other problems that may affect its viability. In this case, Pagani has made profits in recent years, and based on its projections, would continue to do so even if its petition is denied and the company is limited to selling vehicles outside of the United States.

As noted by Pagani in its petition, the existence of recent net income does not necessarily preclude a finding of substantial economic hardship. In situations where a petitioner's financial records show recent net income, the agency balances the net income against the costs of compliance and the effect of a denial on the company. In past petitions, we have noted that even where a small enterprise manages a net

[10] In the original petition, the company also indicated that the vehicle would be equipped with an on-off air bag switch. In a supplemental submission to the agency, the company indicated that no on-off switch would be installed.

[11] In its original petition, Pagani also asserted that, without an exemption, it would be unable to fund the €13,000,000 in investment costs it would have to make in the Huayra from 2009 to 2011. In a July 9, 2010 e-mail to the agency, Pagani briefly noted that investment in the Huayra had risen to €20,000,000 and that this would be funded by its net income from 2008 through 2010 as well as U.S. sales from 2011 to 2013 under an exemption. However, no further discussion of these investment costs was made in the company's most recent financial records or its February 22, 2011, description of its financial situation and the effect of a denial of the exemption on the company. In any event, the company did not explain in its original petition, or in any of its subsequent submissions, why all of the investment costs for the Huayra have to be recouped immediately during the exemption period, particularly in light of the long model life of the vehicle. See Denial of petition of Ferrari S.p.A, 55 FR 3785 (Feb. 5, 1990) (the agency found unpersuasive the manufacturer's bare assertion that an exemption was necessary to recoup its investment without further explanation as to why this recovery had to begin immediately).

[12] *See* Grant of petition of Bugatti Automobili, S.p.A., 59 FR 11649, 11650 (Mar. 11, 1994).

profit, the agency may find that hardship exists.[13]

In this case, Pagani earned profits of approximately €1,947,846 from 2004 to 2010. This amount is less than the €4,000,000 it will cost to complete the advanced air bag program. Accordingly, immediate compliance would result in net losses. However, considering the effect of a denial on the company, we believe that the fact that immediate compliance would cause Pagani to suffer short-term losses is insufficient to demonstrate substantial economic hardship.

Examining Pagani's petition and supplemental submissions, it appears that the hardship from denying the petition consists of decreased anticipated profits and the inability to enter the U.S. market until it fields a fully compliant vehicle. With an exemption, Pagani projects earning €8,613,000 in net income from 2011 to 2014. Without an exemption, Pagani projects earning €5,398,000 in net income during the same period. Based on these projections, Pagani would continue to earn increasing net income each year without an exemption. Additionally, the amount of net income projected over the next several years if the petition is denied would appear to cover the costs of the €4,000,000 advanced air bag program.

In contrast to most of the manufacturers that have been granted exemptions, Pagani has historically made profits and projects increasing profits even in the event that an exemption is denied.[14] Additionally, unlike several profitable manufacturers that have been granted exemptions in the past, Pagani currently only sells vehicles outside of the U.S., and the company expects to maintain and exceed its current sales levels in the event that an exemption is denied.[15]

Accordingly, the agency concludes that a measure of economic hardship may result from the denial, but it cannot be characterized as ''substantial'' given Pagani's current financial condition, its financial projections, and the continuing demand for its vehicles outside of the United States.

*Public Interest*—We have also examined whether an exemption in this case would be consistent with the public interest and the objectives of the Safety Act, as is required by the Act and the implementing regulations (49 CFR 555.5(b)(7)). Pagani has requested an exemption from all of the advanced air bag requirements except for the 30 mph belted 50th percentile male barrier impact test, compliance with which the agency has conditioned previous advanced air bag exemptions. Pagani stated that (1) the Huayra has several features that increase the crashworthiness of the vehicle, (2) a limited number of vehicles will be sold in the U.S. and each vehicle is expected to be driven approximately 2,500 miles annually, (3) the vehicle is expected to rarely carry children, and (4) a denial of the exemption would adversely affect consumer choice.

Although the agency supports additional crashworthiness features designed to increase the safety of occupants in the vehicle, we note that most of the requirements from which Pagani seeks exemption were implemented to minimize the risks posed by air bags to infants, children, and small-statured adults, especially in low-speed crashes. In the 2000 final rule, the agency estimated that these requirements had the potential to protect more than 95 percent of the at-risk population (out-of-position infants, children, and small-statured adults) from the risks presented by air bag deployment. The Huayra's crashworthiness features do not mitigate these risks, and although Pagani asserted that children will rarely ride in the Huayra, the company has not proposed any measures or warnings to reduce the chance that a child or small-statured adult would ride in the vehicle nor has the company described any vehicle features designed to mitigate the safety risks of standard air bags to vehicle occupants.[16] Accordingly, the agency is unable to find that an exemption would be consistent with the public interest and the objectives of the Safety Act.

*Decision*—Based on the foregoing, the agency is unable to make a finding of substantial economic hardship or that an exemption would be consistent with the public interest and the objectives of the Safety Act. Accordingly, Pagani's petition for temporary exemption is denied.

(49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8)

Issued on: July 29 2011.

**David L. Strickland,**

*Administrator.*

[FR Doc. 2011–19934 Filed 8–4–11; 8:45 am]

**BILLING CODE 4910–59–P**

[13] *See, e.g.,* Grant of petition of Panther Motor Car Co. Ltd., 54 FR 12731 (Mar. 28, 1989).

[14] *Compare* Denial of petition of Ferrari S.p.A, 55 FR 3785 (Feb. 5, 1990) (manufacturer had a history of earning profits and would continue to do so if the petition were denied), *with* Grant of petition of Koenigsegg Automotive AB, 72 FR 17608 (Apr. 9, 2007) (manufacturer had recently experienced losses and would experience further losses if its petition were denied); Grant of petition of YES! Sportscars, 71 FR 68888 (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied); Grant of petition of Morgan Motor Company Limited, 71 FR 52851 (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied); Grant of petition of Spyker Automobielen B.V., 70 FR 39007 (July 6, 2005) (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied).

[15] See, e.g., Grant of petition of Ferrari S.p.A and Ferrari North America, Inc., 71 FR 29389 (May 22, 2006) (denial of the petition would reduce the manufacturer's U.S. sales by 85 percent); Grant of petition of Panther Motor Car Co. Ltd., 54 FR 12731 (Mar 28, 1989) (denial of petition would result in temporary suspension of manufacturer's sales in the U.S. market); Grant of petition of Aston Martin Lagonda Limited, 52 FR 26760 (July 16, 1987) (denial of petition would delay further sales of vehicles in the U.S., which represented over one-third of the manufacturer's total sales).

[16] In the original petition, the company indicated that the vehicle would be equipped with an on-off air bag switch. In a supplemental submission to the agency, the company indicated that no on-off switch would be installed.

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35538]**

### CSX Transportation, Inc.—Trackage Rights Exemption—Norfolk Southern Railway Company

Pursuant to a written trackage rights agreement, Norfolk Southern Railway Company (NSR) has agreed to grant approximately 3,290 feet of overhead trackage rights to CSX Transportation, Inc. (CSXT),[1] between the point of switch at Track Station 55 + 65 and the point of switch at Track Station 30 + 70, and the portion of NSR's track parallel to CSXT's track between the point of switch at Track Station 30 + 55 and Track Station 22 + 75, in Hamilton County, Tenn.

The transaction is scheduled to be consummated on or after August 21, 2011, the effective date of the exemption (30 days after the exemption was filed).

CSXT states that it and NSR both own tracks between Craven's Yard and the riverfront in the vicinity of 19th Street in Chattanooga, Tenn. According to CSXT, NSR's single spur track crosses CSXT's single spur track at Chestnut Street, just north of Craven's Yard under provisions of an agreement dated January 30, 1907, as supplemented (the Lewis Street Crossing Agreement). To

[1] A redacted, executed trackage rights agreement between CSXT and NSR was filed with the notice of exemption. The unredacted version was concurrently filed under seal along with a motion for protective order, which will be addressed in a separate decision.

take advantage of operating efficiencies and conveniences, CSXT and NSR wish to cancel the Lewis Street Crossing Agreement and replace the current crossing diamond with a turnout and switches lining CSXT's spur into NSR's spur north of Craven's Yard. CSXT states that, by retiring the crossing diamond, the parties will reduce maintenance costs and improve the efficiency of operations. The purpose of the proposed trackage rights is to allow CSXT the use of the turnout and switches.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway, Inc.—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by August 12, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35538, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Steven C. Armbrust, Esq., CSX Transportation, Inc., 500 Water Street J–150, Jacksonville, FL 32202, and Louis E. Gitomer, Esq., Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 2, 2011.

By the Board.

**Rachel D. Campbell,**

*Director, Office of Proceedings.*

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2011–19889 Filed 8–4–11; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designation of Person Whose Property and Interests in Property Are Blocked Pursuant to Executive Order 13536 of April 12, 2010, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia.''

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of one individual whose property and interests in property are blocked pursuant to Executive Order 13536 of April 12, 2010, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia.''

**DATES:** The designation by the Director of OFAC of the individual identified in this notice was announced on July 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Sanctions Compliance and Evaluation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, *Tel.:* 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

### Electronic and Facsimile Availability

The List of Specially Designated Nationals and Blocked Persons (''SDN List'') and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, *Tel.:* 202/622–0077.

### Background

On April 12, 2010, the President issued Executive Order 13536, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia'' (the ''Order''), pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–06). In the Order, the President declared a national emergency to address the deterioration of the security situation and the persistence of violence in Somalia and acts of piracy and armed robbery at sea off the coast of Somalia.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, of persons listed in the Annex to the Order and of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to satisfy certain criteria set forth in the Order. The Annex to the Order lists eleven individuals and one entity whose property and interests in property are blocked pursuant to the Order.

On July 29, 2011, the Director of OFAC, in consultation with the Secretary of State and other relevant agencies, designated Omar Hammami as an individual whose property and interests in property are blocked pursuant to the Order for acting or purporting to act for or on behalf of, directly or indirectly, al-Shabaab pursuant to subsection 1(a)(ii)(E) of the Order; for engaging in acts that directly or indirectly threaten the peace, security, or stability of Somalia pursuant to subsections 1(a)(ii)(A)(1) and (2) of the Order and for materially assisting, sponsoring, or providing financial, material, logistical, or technical support for, or goods or services in support of al-Shabaab pursuant to subsection 1(a)(ii)(D) of the Order.

Omar Hammami is one of Al-Shabaab's key figures, who has commanded guerilla forces in combat, organized attacks, and plotted strategy with Al Qaeda. Omar Hammami's roles in Al-Shabaab include those of a military tactician, recruitment strategist and financial manager.

Omar Hammami is featured in an Al-Shabaab video in which militia members are shown training and explicitly stating their allegiance to Osama bin Laden, in what appeared to be an attempt to increase recruiting among Somalis, including Somali émigrés in the United States.

Omar Hammami was involved in organizing a suicide bombing attack carried out by a Somali-American from Minnesota who traveled to Somalia to join Al-Shabaab. That attack and four others organized by Omar Hammami and carried out on October 28, 2008, killed more than 20 people.

Omar Hammami, a U.S. citizen, has been indicted in the Southern District of Alabama on a three-count indictment for allegedly providing material support, including himself as personnel, to terrorists; conspiring to provide material support to a designated foreign terrorist organization, Al-Shabaab; and providing material support to Al-Shabaab.

As a result of this designation, all property and interests in property of Omar Hammami that are or hereafter come within the United States or within the possession or control of U.S. persons, including their overseas branches, are blocked. Blocked property may not be transferred, sold or otherwise dealt in without authorization. Any transaction or dealing by a U.S. person, or within the United States, in any property or interests in property of Omar Hammami is prohibited unless authorized, as is any transaction or dealing that evades or avoids this prohibition. It is also unlawful for any person to conspire to violate, attempt to violate, or cause a violation of this prohibition.

OFAC has discretion to issue licenses authorizing specific transactions that are otherwise prohibited by the Order. All requests for specific licenses should be made in writing to the Assistant Director for Licensing, U.S. Department of the Treasury, Office of Foreign Assets Control, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Licensing procedures are set forth in sections 501.801–802 of the Reporting, Procedures and Penalties Regulations (''RPPR''), 31 CFR part 501. The RPPR also provide procedures for submitting requests for unblocking funds and reconsideration of a designation. 31 CFR 501.806–807.

The listing of the blocked individual is as follows:

1. HAMMAMI, Omar (a.k.a. AL–AMRIKI, Abu Mansour; a.k.a. AL–AMRIKI, Abu Mansur; a.k.a. AL–AMRIKI, Abu Mansuur; a.k.a. ''Farouk''; a.k.a. ''Farouq''; a.k.a. HAMMAMI, Umar; a.k.a. HAMMAMI, Omar Shafik), DOB 06 May 1984; POB Alabama, USA; Passport 403062567 (United States); SSN 423–31–3021 (United States); (INDIVIDUAL) [SOMALIA].

Dated: July 29, 2011.

**Barbara C. Hammerle,**

*Acting Director, Office of Foreign Assets Control.*

[FR Doc. 2011–19842 Filed 8–4–11; 8:45 am]

**BILLING CODE 4810–AL–P**

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## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designation of Person Whose Property and Interests in Property Are Blocked Pursuant to Executive Order 13536 of April 12, 2010, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia.''

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of one individual whose property and interests in property are blocked pursuant to Executive Order 13536 of April 12, 2010, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia.''

**DATES:** The designation by the Director of OFAC of the individual identified in this notice was announced on July 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Sanctions Compliance and Evaluation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic and Facsimile Availability

The List of Specially Designated Nationals and Blocked Persons (''SDN List'') and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

#### Background

On April 12, 2010, the President issued Executive Order 13536, ''Blocking Property of Certain Persons Contributing to the Conflict in Somalia'' (the ''Order''), pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–06). In the Order, the President declared a national emergency to address the deterioration of the security situation and the persistence of violence in Somalia and acts of piracy and armed robbery at sea off the coast of Somalia.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, of persons listed in the Annex to the Order and of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to satisfy certain criteria set forth in the Order. The Annex to the Order lists eleven individuals and one entity whose property and interests in property are blocked pursuant to the Order.

On July 29, 2011, the Director of OFAC, in consultation with the Secretary of State, designated, pursuant to one or more of the criteria set forth in subparagraphs (a)(ii)(A) through (a)(ii)(E) of Section 1 of the Order, one individual as a person whose property and interests in property are blocked pursuant to the Order. The listing of the blocked individual is as follows:

1. OMAR, Hassan Mahat (a.k.a. ADAM, Sheikh Hassaan Hussein; a.k.a. HUSSEIN, Sheikh Hassaan; a.k.a. OMAR, Hassan Mahad), DOB 10 Apr 1979; POB Garissa, Kenya; nationality Kenya; Kenyan ID No. 23446085 (Kenya); Passport A1180173 (Kenya) expires 20 Aug 2017; (INDIVIDUAL) [SOMALIA]

Dated: July 29, 2011.

**Barbara C. Hammerle,**

*Acting Director, Office of Foreign Assets Control.*

[FR Doc. 2011–19841 Filed 8–4–11; 8:45 am]

**BILLING CODE 4810–AL–P**

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[REG–121063–97; TD 8972 (final)]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on 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)). Currently, the IRS is soliciting comments concerning Averaging of Farm Income.

**DATES:** Written comments should be received on or before October 4, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Elaine.H.Christophe@irs.gov.*

**SUPPLEMENTARY INFORMATION:** *Title:* Averaging of Farm Income.

*OMB Number:* 1545–1662.

*Form Number:* REG–121063–97; TD 8972 (Final).

*Abstract:* Section 1301 of the Internal Revenue Code allows an individual engaged in a farming business to elect to reduce his or her regular tax liability by treating all or a portion of the current year's farming income as if it had been earned in equal proportions over the prior three years. To take advantage of income averaging, § 1301 requires that the taxpayer calculate the § 1 tax using the three prior year's tax tables and, if applicable, Schedule D, Capital Gains and Losses, (to apply the maximum capital gains tax rates), as well as the current year's tax tables or tax rate schedules. The regulation requires the taxpayer to use Schedule J of Form 1040 to record and total the amount of tax for each year of the four year calculation.

*Current Actions:* There are no changes to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

The burden for this requirement is reflected in the burden estimate for Schedule J of Form 1040.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 27, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–19840 Filed 8–4–11; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 8850

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on 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)). Currently, the IRS is soliciting comments concerning Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits.

**DATES:** Written comments should be received on or before October 4, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov.*

**SUPPLEMENTARY INFORMATION:** *Title:* Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits.

*OMB Number:* 1545–1500.

*Form Number:* 8850.

*Abstract:* Employers use Form 8850 as part of a written request to a state employment security agency to certify an employee as a member of a targeted group for purposes of qualifying for the work opportunity credit or the welfare-to-work credit. The work opportunity credit and the welfare-to-work credit cover individuals who begin work for the employer before July 1, 1999.

*Current Actions:* There are no changes being made to Form 8850 at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit organizations.

*Estimated Number of Respondents:* 440,000.

*Estimated Time per Respondent:* 4 hr., 44 min.

*Estimated Total Annual Burden Hours:* 2,081,200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments Submitted In Response To This notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 27, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–19843 Filed 8–4–11; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 8697

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on 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)). Currently, the IRS is soliciting comments concerning Form 8697, Interest Computation Under the Look-Back Method for Completed Long-Term Contracts.

**DATES:** Written comments should be received on or before October 4, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe at Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the internet at *Elaine.H.Christophe@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Interest Computation Under the Look-Back Method for Completed Long-Term Contracts.

*OMB Number:* 1545–1031.

*Form Number:* Form 8697.

*Abstract:* Taxpayers who are required to account for all or part of any long-term contract entered into after February 28, 1986, under the percentage of completion method must use Form 8697 to compute and report interest due or to be refunded under Internal Revenue Code section 460(b). The IRS uses Form 8697 to determine if the interest has been figured correctly.

*Current Actions:* There are no changes being made to the Form 8697 at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations and individuals.

*Estimated Number of Respondents:* 3,333.

*Estimated Time per Respondent:* 16 hrs, 45 minutes.

*Estimated Total Annual Burden Hours:* 55,828.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 27, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–19845 Filed 8–4–11; 8:45 am]

BILLING CODE P

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[Notice 2005–38]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

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**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on 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)). Currently, the IRS is soliciting comments concerning Notice 2005–38, Limitations on Dividends Received Deduction and Other Guidance.

**DATES:** Written comments should be received on or before October 4, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulation should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at (*Elaine.H.Christophe@irs.gov.*)

**SUPPLEMENTARY INFORMATION:**

*Title:* Limitations on Dividends Received Deduction and Other Guidance.

*OMB Number:* 1545–1943.

*Regulation Project Number:* Notice—2005–38.

*Abstract:* This document provides guidance under new section 965, which was enacted by the American Jobs Creation Act of 2004 (Pub. L. 108–357). In general, and subject to limitations and conditions, section 975(a) provides that a corporation that is a U.S. shareholder of a controlled foreign corporation (CFC) may elect, for one taxable year, an 85 percent dividends received deduction (DRD) with respect to certain cash dividends it receives from its CFCs. This document addresses limitations imposed on the maximum amount of section 965(a) DRD under section 965(b)(1) (under which the maximum amount of an eligible dividend is the greatest of $500 million, or earnings permanently reinvested outside the United States), section 965(b)(2) (regarding certain base-period repatriations), section 965(b)(3) (regarding certain increases in related party indebtedness), and certain miscellaneous limitations (related to the foreign tax credit).

*Current Actions:* There is no change to this notice.

*Type of Review:* Extension of OMB approval.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 25,000.

*Estimated Time per Respondent:* 50 hours.

*Estimated Total Annual Burden Hours:* 1,250,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 27, 2011.

**Yvette Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–19846 Filed 8–4–11; 8:45 am]

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# FEDERAL REGISTER

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No. 151 August 5, 2011


## Part II

## Federal Deposit Insurance Corporation

12 CFR Parts 390 and 391

Transfer and Redesignation of Certain Regulations Involving State Savings Associations Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010; Interim Rule

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Parts 390 and 391**

**RIN 3064–AD82**

## Transfer and Redesignation of Certain Regulations Involving State Savings Associations Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act or the Act) provided that the functions, powers, and duties of the Office of Thrift Supervision (OTS) relating to State savings associations will transfer to the FDIC effective one year after July 21, 2010, the date that the Dodd-Frank Act was enacted. The Act also amended section 3 of the Federal Deposit Insurance Act (FDI Act) to designate the FDIC as the ''appropriate Federal banking agency'' for State savings associations. The FDIC is authorized to issue regulations pursuant to the FDI Act and other existing laws as the ''appropriate Federal banking agency'' (or under similar statutory terminology). As a result, pursuant to those laws, the FDIC, the newly-designated ''appropriate Federal banking agency'' for State savings associations, is authorized to issue certain regulations involving State savings associations.

Consistent with the authority provided to the FDIC by the Dodd-Frank Act, the FDI Act, and other statutory authorities, the FDIC is reissuing and redesigning certain transferring OTS regulations. In republishing these rules, the FDIC is making only technical changes to existing OTS regulations (such as nomenclature or address changes). The FDIC is not republishing those OTS regulations for which other appropriate Federal banking agencies are authorized to act. In the future, the FDIC may take other actions related to the transferred rules: Incorporating them into other FDIC regulations contained in Title 12, Chapter III, amending them, or rescinding them, as appropriate.

**DATES:** The interim rule becomes effective on July 22, 2011. Comments on the interim rule must be received by October 4, 2011.

**ADDRESSES:** You may submit comments on the Interim Rule by any of the following methods:

• *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html.* Follow instructions for submitting comments on the Agency Web Site.

*E-mail: Comments@FDIC.gov.* Include RIN 3064–AD82 on the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).

• *Federal eRulemaking Portal: http://www.regulations.gov.*

*Instructions:* All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at 1–(877) 275–3342 or 1–(703) 562–2200.

**FOR FURTHER INFORMATION CONTACT:** A. Ann Johnson, Counsel, Legal Division, (202) 898–3573 or *aajohnson@fdic.gov;* Rodney D. Ray, Counsel, Legal Division, (202) 898–3556 or *rray@fdic.gov;* or Martin P. Thompson, Senior Review Examiner, Division of Risk Management Supervision, (202) 898–6767 or *marthompson@fdic.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General

The Dodd-Frank Act, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, the powers, duties, and functions formerly performed by the OTS will be divided among the FDIC, as to State savings associations, the Office of Comptroller of the Currency (OCC), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act provided that all orders, resolutions, determinations, and regulations issued, made, prescribed, or allowed to become effective by the OTS that were in effect on the day before the transfer date continue in effect and are enforceable by the appropriate successor agency until modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act further directed the FDIC and the OCC to consult with one another and to publish a list of the OTS regulations continued which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC approved a List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act that was published in a Joint Notice in the **Federal Register** on July 6, 2011.[1] (The FRB is directed by the same section of the Act to identify and publish a list of OTS regulations relating to savings and loan holding companies that the FRB will enforce.)

Apart from providing for the continuation and enforcement of regulations previously issued by the OTS, section 312 of the Dodd-Frank Act provided rulemaking authority to the OCC, with respect to both State and Federal savings associations, and to the FRB with respect to savings and loan holding companies. Although the Dodd-Frank Act did not provide the FDIC with specific rulemaking authority over State savings associations, the FDIC was named the ''appropriate Federal banking agency'' for State savings associations by section 312(c) of the Act. Nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the FDI Act and other laws as the ''appropriate Federal banking agency'' (or under similar statutory terminology). As a result, pursuant to those laws, the FDIC, the newly-designated ''appropriate Federal banking agency'' for State savings associations, is authorized to issue regulations involving such associations.

The FDIC has independent rulemaking authority for each of the transferred OTS rules that are republished as FDIC rules in this Interim Rule. The rules republished here regulate only State savings associations, consistent with the Dodd-Frank Act's allocation to the FDIC of the duties and functions of the OTS relating to these associations. Similarly, the OCC and the FRB will republish former OTS rules relating to the functions and duties of the OTS transferred to those agencies, respectively. Since the Dodd-Frank Act did not give the FDIC authority over Federal savings associations or savings and loan holding companies, the sections of the OTS rules that previously regulated those entities are not republished by the FDIC in this Interim Rule.

[1] 76 FR 39246 (July 6, 2011).

The FDIC, through this Interim Rule, is formally transferring certain regulations applicable to State savings associations from 12 CFR chapter V to 12 CFR chapter III, as indicated in the Derivation Table. To expedite republication of the former OTS rules, the regulations contained in this Interim Rule will be transferred to the FDIC with only minor technical, conforming, or nomenclature changes. No changes are being made at this time to the substantive content of the transferred regulations. (For example, references in the former OTS rules to the ''OTS,'' the ''Director, and the ''Office'' [of Thrift Supervision] will be changed to the ''FDIC'' or the ''Board of Directors'' [of the FDIC].) FDIC staff will evaluate the transferred OTS rules and may later recommend incorporating the transferred rules into existing FDIC rules, amending them, or rescinding them, as appropriate.

A mass of transferred OTS rules are being republished in this Interim Rule. In republishing these rules, it is possible that some rules have been unintentionally omitted, that some nomenclature changes have not been identified, or that some internal cross-reference between transferring rules has not been changed. If there are such inadvertent errors they are not intended by the FDIC to alter the dictates of section 316(b) of the Dodd-Frank Act. That is, the former regulations of the OTS affecting State savings associations that are in effect the day before the transfer date continue in effect, and will be enforced by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law by the FDIC (or other Federal banking agency), any court of competent jurisdiction, or by operation of law.

Since the republished OTS rules previously were issued by the OTS pursuant to notice and comment rulemaking and since the FDIC's proposed revisions to those rules involve only non-substantive, largely nomenclature changes, the FDIC finds good cause to make the Interim Rule effective immediately upon the transfer date. Public comment will be accepted for 60 days.

## II. Description of Parts Effected by the Interim Rule and Derivation Table

The following general descriptions discuss changes made to each former OTS part that the FDIC is republishing:

*Part 390, Subpart A*

Former part 507 of the OTS regulations, addressing restrictions on post-employment activities of senior examiners, is being republished as subpart A of part 390. Revisions to the rule text have been made to reflect the abolishment of the OTS and internal cross-references have been revised to reflect new FDIC rule citations. Former § 507.3(b) has been removed because it is no longer needed.

*Part 390, Subpart B*

Former part 508 of the OTS regulations, addressing removals, suspensions, and prohibitions where a crime is charged or proven, is being republished as subpart B of part 390. Revisions to the rule text have been made to address the applicability of the regulation to State savings associations, reflect the FDIC's internal organization, and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart C*

Former subparts A and B of part 509 of the OTS regulations, addressing rules of practice and procedure for adjudicatory proceedings, are being republished as subpart C of part 390. Revisions to the rule text have been made to reflect the FDIC's internal organization and internal cross-references have been revised to reflect new FDIC rule citations. Former § 509.100 (b) has been removed because it relates to activities by certain savings and loan holding companies or their non-insured subsidiaries. Former § 509.103(b)(2) also has been removed to allow the FDIC greater flexibility regarding payments of civil money penalties in the event of an internal reorganization.

*Part 390, Subpart D*

Former part 512 of the OTS regulations, addressing rules for investigative proceedings and formal examination proceedings, is being republished as subpart D of part 390. Minor revisions to the rule text have been made to reflect the FDIC's internal organization and internal cross-references have been revised to reflect new FDIC rule citations. Citations to the Savings and Loan Holding Company Act and the Home Owners' Loan Act have also been removed.

*Part 390, Subpart E*

Former part 513 of the OTS regulations, addressing rules for practice before the FDIC, is being republished as subpart E of part 390. Minor revisions to the rule text have been made to reflect the FDIC's internal organization and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart F*

Former part 513 of the OTS regulations, addressing application processing procedures, is being republished as subpart F of part 390. The procedures will be applicable to applications filed under parts 390 and 391 by State savings associations. Minor revisions to the rule text have been made to reflect the FDIC's internal organization and responsibilities for State savings associations and internal cross-references have been revised to reflect new FDIC or OCC rule citations. Former § 516.40 also has been revised to reflect the states served by the FDIC's regional offices and former § 516.45(a)(3) has been removed because the FDIC does not charge filing fees for applications.

*Part 390, Subpart G*

Former part 528 of the OTS regulations, addressing nondiscrimination requirements, is being republished as subpart G of part 390. Internal cross-references have been revised to reflect new FDIC rule citations and appropriate FDIC office addresses have been added.

*Part 390, Subpart H*

Former part 533 of the OTS regulations, addressing disclosure and reporting of CRA-related agreements, is being republished as subpart H of part 390. Internal cross-references have been revised to reflect new FDIC and OCC rule citations. Former § 533.1(b)(2) has been removed because it addresses savings and loan holding companies and former § 533.10 has been removed because it is no longer needed.

*Part 390, Subpart I*

Former part 536 of the OTS regulations, addressing consumer protection in sales of insurance, is being republished as subpart H of part 390. Revisions to the rule text have been made to reflect the FDIC's responsibilities for State savings associations and internal cross-references have been revised to reflect new FDIC rule citations and appropriate FDIC office addresses have been added.

*Part 390, Subpart J*

Former part 550 of the OTS regulations, addressing fiduciary powers of savings associations, focused almost exclusively on fiduciary powers of Federal savings associations, which will be supervised by the OCC after the Transfer Date. Because the FDIC will be responsible for supervising State savings associations after that date, only that portion of former § 550.1(b) requiring compliance with State law and for the operations to be conducted in a safe and sound manner is being republished as subpart J.

*Part 390, Subpart K*

Former part 551 of the OTS regulations, addressing recordkeeping and confirmation requirements for securities transactions, is being republished as subpart K of part 390. Internal cross-references in the rule have been revised to reflect new FDIC rule citations.

*Part 390, Subpart L*

Former subpart B of part 555 of the OTS regulations, addressing electronic operations, is being republished as subpart H of part 390. Internal cross-references in the rule have been revised to reflect new FDIC rule citations and former § 555.310(b) has been removed because it is no longer needed.

*Part 390, Subpart M*

Former subpart C of part 557 of the OTS regulations, addressing deposits, is being republished as subpart M of part 390. The rule text has been revised to reflect the FDIC's supervisory responsibility for State savings associations.

*Part 390, Subpart N*

Former part 558 of the OTS regulations, addressing possession by conservators and receivers for Federal and State savings associations, is being republished as subpart N of part 390. The rule text has been revised to reflect certain responsibilities of the FDIC when it is appointed as conservator or receiver for a Federal or State savings association.

*Part 390, Subpart O*

Former §§ 559.1–559.2 and subpart B of part 559 of the OTS regulations, addressing subordinate organizations, is being republished as subpart O of part 390. Minor revisions to the rule text have been made to reflect the FDIC's supervisory responsibilities for State savings associations and internal cross-references have been revised to reflect new FDIC rule citations. References to ''operating subsidiary'' and ''service corporation'' have been removed from the rule because those terms relate to Federal savings associations.

*Part 390, Subpart P*

Portions of part 560 of the OTS regulations, addressing lending and investment, are being republished as subpart P of part 390. The republished portions are former § 560.1 and all of subpart B, except for §§ 560.93 and 560.110. The latter two sections will be republished by the OCC and will be applicable to all savings associations. Otherwise, internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart Q*

Former part 561 of the OTS regulations, addressing definitions for regulations affecting State savings associations, is being republished as subpart Q of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, address the applicability of the regulation to State savings associations, and internal cross-references have been revised to reflect new FDIC rule citations. A portion of former § 561.18 (definition of Director) and former § 561.34 (definition of Office) have been removed because they are no longer needed.

*Part 390, Subpart R*

Former part 562 of the OTS regulations, addressing regulatory reporting standards, is being republished as subpart R of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart S*

Former part 563 of the OTS regulations, addressing the operations of savings associations, is being republished as subpart S of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS and transfer of some regulatory authority to the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection. Internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart T*

Former part 563c of the OTS regulations, addressing accounting requirements, is being republished as subpart T of part 390. Minor revisions to the rule text have been made to conform to the FDIC's corporate structure, and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart U*

Former part 563d of the OTS regulations, addressing securities of State savings associations, is being republished as subpart U of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations. Former § 536d.2 has been removed the FDIC will not require filings required by this subpart to be made to the appropriate Regional Office, as had been the OTS' practice. Rather, filings related to this subpart will be required to be filed at the designated address for the FDIC's offices in Washington, DC.

*Part 390, Subpart V*

Former part 563f of the OTS regulations, addressing management official interlocks, is being republished as subpart V of part 390. Minor revisions to the rule have been made to reflect the abolishment of OTS, and internal cross-references have been revised to reflect new FDIC rule citations. The rule text has been amended to address its applicability solely to State savings associations.

*Part 390, Subpart W*

Former part 563g of the OTS regulations, addressing securities offerings, is being republished as subpart W of part 390. Minor revisions to the rule text have been made to reflect the abolishment of OTS and internal cross-references have been revised to reflect new FDIC rule citations and corporate structure. References to the rule's applicability to federal savings associations have not been republished, nor have references to the enforceability of the rule under provisions of the Home Owners' Loan Act.

*Part 390, Subpart X*

Former part 564 of the OTS regulations, addressing appraisals, is being republished as subpart X of part 390. Minor revisions to the rule text have been made to reflect the abolishment of OTS and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 390, Subpart Y*

Former part 565 of the OTS regulations, addressing prompt corrective action, is being republished as subpart Y of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS and internal cross-references have been revised to reflect new FDIC rule citations. Former section 565.5(h) will not be republished to avoid a filing redundancy.

*Part 390, Subpart Z*

Former part 567 of the OTS regulations, addressing capital, is being republished as subpart Z of part 390. Minor revisions to the rule text have been made to reflect the abolishment of the OTS and internal cross-references have been revised to reflect new FDIC rule citations. The term ''qualified supervisory goodwill'' has not been republished because of the lapse of the 20 year applicability provision provided for in the former regulation.

Former appendix C to part 567 of the OTS regulations, addressing risk-based capital requirements-internal ratings based and advanced measurement approaches, is being republished as appendix A to subpart Z. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations. The appendix has been revised to reflect the FDIC's internal corporate structure.

*Part 391, Subpart A*

Former part 568 of the OTS regulations, addressing security procedures, is being republished as subpart A of part 391. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 391, Subpart B*

Former part 570 of the OTS regulations, addressing safety and soundness guidelines and compliance procedures, is being republished as subpart B of part 391. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 391, Subpart C*

Former part 571 of the OTS regulations, addressing the Fair Credit Reporting Act, is being republished in part as subpart C of part 391. Minor revisions to the republished rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations. The FDIC has not republished sections of the former OTS rule regulating portions of the Fair Credit Reporting Act identified as ''enumerated consumer laws'' under Title X of the Dodd-Frank Act for which the Bureau of Consumer Financial Protection was given regulatory authority.

*Part 391, Subpart D*

Former part 572 of the OTS regulations, addressing loans in areas having special flood hazards, is being republished as subpart D of part 391. Minor revisions to the rule text have been made to reflect the abolishment of the OTS and internal cross-references have been revised to reflect new FDIC rule citations.

*Part 391, Subpart E*

Former part 574 of the OTS regulations, addressing the acquisition of control savings associations, is being republished as subpart E of part 391. Minor revisions to the rule text have been made to reflect the abolishment of the OTS, and internal cross-references have been revised to reflect new FDIC rule citations. Reference to acquisition of control by savings and loan holding companies have been removed because the Board of Governors of the Federal Reserve System was given regulatory authority over such entities by virtue of Title III of the Dodd-Frank Act.

The following Derivation Table is provided for reader reference:

OTS REGULATION TRANSFER

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| 508.4 | Contents and service of the Notice or Order. | 390.13 | Contents and service of the Notice or Order. |
| 508.5 | Petition for hearing. | 390.14 | Petition for hearing. |
| 508.6 | Initiation of hearing. | 390.15 | Initiation of hearing. |
| 508.7 | Conduct of hearings. | 390.16 | Conduct of hearings. |
| 508.8 | Default. | 390.17 | Default. |
| 508.9 | Rules of evidence. | 390.18 | Rules of evidence. |
| 508.10 | Burden of persuasion. | 390.19 | Burden of persuasion. |
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| 508.13 | Decision of the Office. | 390.22 | Decision of the FDIC Board of Directors. |
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| 509.5 | Authority of the administrative law judge. | 390.34 | Authority of the administrative law judge. |
| 509.6 | Appearance and practice in adjudicatory proceedings. | 390.35 | Appearance and practice in adjudicatory proceedings. |
| 509.7 | Good faith certification. | 390.36 | Good faith certification. |
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| 509.9 | Ex parte communications. | 390.38 | Ex parte communications. |
| 509.10 | Filing of papers. | 390.39 | Filing of papers. |
| 509.11 | Service of papers. | 390.40 | Service of papers. |
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| 509.14 | Witness fees and expenses. | 390.43 | Witness fees and expenses. |
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| 509.16 | Office's right to conduct examination. | 390.45 | The FDIC's right to conduct examination. |
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## III. Regulatory Analysis and Procedure

### *A. Administrative Procedure Act*

The OTS previously promulgated the transferred regulations after notice and opportunity for public comment, when required. Moreover, the FDIC's action in republishing regulations as they appear in one chapter of the Code of Federal Regulations in another chapter of the Code is technical, as opposed to substantive action. The republication is consistent with the Dodd-Frank Act. The republication includes technical, conforming, or nomenclature changes, but no substantive change has been made to the content of the transferring regulations. Therefore, in accordance with section 553(b)(B) of the Administrative Procedure Act (APA), the FDIC has determined that good cause exists to waive the general notice and opportunity for pubic comment requirements of the APA. Similarly, and to avoid any possible questions regarding the continuity of the subject regulations, the FDIC has determined that good cause exists to make this Interim Rule effective as of the transfer date.

### *B. Community Development and Regulatory Improvement Act*

The Riegle Community Development and Regulatory Improvement Act (RCDRIA) requires that any new rule prescribed by a Federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter unless the agency determines, for good cause published with the rule, that the rule should become effective before such time.[2] Because this Interim Rule merely republishes (with only technical changes) certain transferring rules of the OTS, no additional reporting, disclosure, or other new requirements have been imposed on an insured depository institution by the FDIC. As a result, the FDIC does not believe that the RCDRIA applies in this instance. In the event that the RCDRIA is determined to be applicable to this Interim Rule, based on the transfer of the functions from the OTS to the FDIC effective on the required statutory transfer date of July 21, 2011, the FDIC would invoke the RCDRIA's good cause exception to make this Interim Rule effective on the transfer date and not on the first date of a calendar quarter.

### *C. Small Business Regulatory Enforcement Fairness Act*

The Office of Management and Budget has determined that the Interim Rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.* As required by SBREFA, the FDIC will submit the Interim Rule and other appropriate reports to Congress and the General Accounting Office for review.

### *D. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* (RFA) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed above, consistent with section 553(b)(B) of the APA, the FDIC has determined that good cause exists in this case to waive the general notice and opportunity for public comment requirements of the APA; therefore, pursuant to 5 U.S.C. 601(2), the RFA does not apply.

### *E. Paperwork Reduction Act*

Through this Interim Rule, the FDIC is reissuing certain transferring rules of the OTS. Nineteen (19) of these transferring and republished rules are associated with one or more collections of information for which the OTS had previously obtained approval from the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501–3520). The Interim Rule adopted by the FDIC today does not introduce any new collections of information into the former OTS rules, nor does it amend the former OTS rules in a way that substantively modifies the collections of information that OMB has approved. Therefore, no PRA submission is being made to OMB at this time.

The FDIC notes, however, that the OMB's previous approval of the collections of information related to the transferring OTS rules was based on burden estimates provided by the OTS that included the rules' impact on both State and Federal savings associations. Section 312(c) of the Dodd-Frank Act provided that the FDIC would be the ''appropriate Federal banking agency'' only with respect to State, and not Federal savings associations. Of the approximately 700 savings associations currently regulated by the OTS, only about 60 of those are state savings

[2] 12 U.S.C. 4802.

associations for whom the FDIC will assume supervisory responsibility. As a result, the FDIC will review each of the relevant information collections, and, as necessary and appropriate, with OMB approval, incorporate the paperwork burden into FDIC's inventory by either establishing new FDIC collections of information or requesting nonmaterial, non-substantive changes to existing FDIC collections of information to include the burden for state savings associations.

### List of Subjects in 12 CFR Parts 390 and 391

Administrative practice and procedure, Advertising, Aged, Credit, Civil rights, Conflicts of interest, Crime, Equal employment opportunity, Ethics, Fair housing, Governmental employees, Home mortgage disclosure, Individuals with disabilities, OTS employees, Reporting and recordkeeping requirements, Savings associations.

Accordingly, for the reasons set forth in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends title 12 of the Code of Federal Regulations by adding new parts 390 and 391 to read as follows:

## PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

### Subpart A—Restrictions on Post-Employment Activities of Senior Examiners

Sec.


### Subpart B—Removals, Suspensions, and Prohibitions Where a Crime Is Charged or Proven



### Subpart C—Rules of Practice and Procedure in Adjudicatory Proceedings



### Subpart D—Rules for Investigative Proceedings and Formal Examination Proceedings



### Subpart E—Practice Before the FDIC



### Subpart F—Application Processing Procedures

#### Subpart G—Nondiscrimination Requirements



#### Subpart H—Disclosure and Reporting of CRA-Related Agreements



#### Subpart I—Consumer Protection in Sales of Insurance



#### Appendix A to Subpart I of Part 390—Consumer Grievance Process

#### Subpart J—Fiduciary Powers of State Savings Associations



#### Subpart K—Recordkeeping and Confirmation Requirements for Securities Transactions



#### Subpart L—Electronic Operations



#### Subpart M—Deposits



#### Subpart N—Possession by Conservators and Receivers for Federal and State Savings Associations



#### Subpart O—Subordinate Organizations



#### Subpart P—Lending and Investment



#### Subpart Q—Definitions for Regulations Affecting all State Savings Associations



#### Subpart R—Regulatory Reporting Standards



#### Subpart S—State Savings Associations—Operations

**Authority:** 12 U.S.C. 1819.

Subpart A also issued under 12 U.S.C. 1820.

Subpart B also issued under 12 U.S.C. 1818.

Subpart C also issued under 5 U.S.C. 504; 554–557; 12 U.S.C. 1464; 1467; 1468; 1817; 1818; 1820; 1829; 3349, 4717; 15 U.S.C. 78*l;* 78o–5; 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart D also issued under 12 U.S.C. 1817; 1818; 1820; 15 U.S.C. 78*l.*

Subpart E also issued under 12 U.S.C. 1813; 1831m; 15 U.S.C. 78.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 *et seq.*

Subpart G also issued under 12 U.S.C. 2810 *et seq.,* 2901 *et seq.;* 15 U.S.C. 1691; 42 U.S.C. 1981, 1982, 3601–3619.

Subpart H also issued under 12 U.S.C. 1464; 1831y.

Subpart I also issued under 12 U.S.C. 1831x.

Subpart J also issued under 12 U.S.C. 1831p–1.

Subpart K also issued under 12 U.S.C. 1817; 1818; 15 U.S.C. 78c; 78*l.*

Subpart L also issued under 12 U.S.C. 1831p–1.

Subpart M also issued under 12 U.S.C. 1818.

Subpart N also issued under 12 U.S.C. 1821.

Subpart O also issued under 12 U.S.C. 1828.

Subpart P also issued under 12 U.S.C. 1470; 1831e; 1831n; 1831p–1; 3339.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

Subpart R also issued under 12 U.S.C. 1463; 1464; 1831m; 1831n; 1831p–1.

Subpart S also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p–1; 1881–1884; 3207; 3339; 15 U.S.C. 78b; 78*l;* 78m; 78n; 78p; 78q; 78w; 31 U.S.C. 5318; 42 U.S.C. 4106.

Subpart T also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l;* 78m; 78n; 78w.

Subpart U also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l;* 78m; 78n; 78p; 78w; 78d–1; 7241; 7242; 7243; 7244; 7261; 7264; 7265.

Subpart V also issued under 12 U.S.C. 3201–3208.

Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78*l;* 78m; 78n; 78p; 78w.

Subpart X also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828; 3331 *et seq.*

Subpart Y also issued under 12 U.S.C.1831o.

Subpart Z also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828 (note).

## Subpart A—Restrictions on Post-Employment Activities of Senior Examiners

### § 390.1 What does this subpart part do?

This subpart implements section 10(k) of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1820(k)), which prohibits senior examiners from accepting compensation from certain companies following the termination of their employment. Except where otherwise provided, the terms used in this subpart have the meanings given in section 3 of the FDIA (12 U.S.C. 1813).

### § 390.2 Who is a senior examiner?

An individual is a senior examiner for a particular savings association or savings and loan holding company if—

(a) The individual was an officer or employee of the Office of Thrift Supervision (OTS) (including a special government employee) who was authorized by the OTS to conduct examinations or inspections of savings associations or savings and loan holding companies;

(b) The individual was assigned continuing, broad and lead responsibility for the examination or inspection of that savings association or savings and loan holding company; and

(c) The individual's responsibilities for examining, inspecting, or supervising that savings association or savings and loan holding company:

(1) Represented a substantial portion of the individual's assigned responsibilities at the OTS; and

(2) Required the individual to interact on a routine basis with officers and employees of the savings association, savings and loan holding company, or its affiliates.

### § 390.3 What post-employment restrictions apply to senior examiners?

(a) *Prohibition.* (1) *Senior examiner of savings association.* An individual who served as a senior examiner of a savings association for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from—

(i) The savings association; or

(ii) A savings and loan holding company, bank holding company, or any other company that controls the savings association.

(2) *Senior examiner of a savings and loan holding company.* An individual who served as a senior examiner of a savings and loan holding company for two or more of the last 12 months of his or her employment with OTS may not, within one year after the termination date of his or her employment with OTS, knowingly accept compensation as an employee, officer, director, or consultant from—

(i) The savings and loan holding company; or

(ii) Any depository institution that is controlled by the savings and loan holding company.

(b) [Reserved].

(c) *Definitions.* For the purposes of this section—

*Consultant.* An individual acts as a consultant for a savings association or other company only if he or she directly works on matters for, or on behalf of, the savings association or company.

*Control.* Control has the same meaning given in 12 CFR part 391, subpart E.

### § 390.4 When will the FDIC waive the post-employment restrictions?

The post-employment restriction in § 390.3 will not apply to a senior examiner if the Chairperson, or his or her designee, certifies in writing and on a case-by-case basis that a waiver of the restriction will not affect the integrity of the FDIC's supervisory program.

### § 390.5 What are the penalties for violating the post-employment restrictions?

(a) *Penalties.* A senior examiner who violates § 390.3 shall, in accordance with 12 U.S.C. 1820(k)(6), be subject to one or both of the following penalties:

(1) An order—

(i) Removing the person from office or prohibiting the person from further participating in the conduct of the affairs of the relevant depository institution, savings and loan holding company, bank holding company or other company for up to five years, and

(ii) Prohibiting the person from participating in the affairs of any insured depository institution for up to five years.

(2) A civil money penalty not to exceed $250,000.

(b) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a)(1) of this section shall be subject to 12 U.S.C. 1818(e)(6) and (7) in the same manner and to the same extent as a person subject to an order issued under 12 U.S.C. 1818(e).

(c) *Procedures.* 12 U.S.C. 1820(k) describes the procedures that are applicable to actions under paragraph (a) of this section and the appropriate Federal banking agency authorized to take the action, which may be an agency other than the FDIC. Where the FDIC is the appropriate Federal banking agency, it will conduct administrative proceedings under subpart C of this part.

(d) *Other penalties.* The penalties under this section are not exclusive. A senior examiner who violates the restriction in § 390.3 may also be subject to other administrative, civil, or criminal remedy or penalty as provided by law.

## Subpart B—Removals, Suspensions, and Prohibitions Where a Crime Is Charged or Proven

### § 390.10 Scope.

The rules in this subpart apply to hearings, which are exempt from the adjudicative provisions of the Administrative Procedure Act, afforded to any officer, director, or other person participating in the conduct of the affairs of a State savings association, where such person has been suspended or removed from office or prohibited from further participation in the conduct of the affairs of the State savings association by a Notice or Order served by the Board of Directors upon the grounds set forth in section 8(g) of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1818(g)).

### § 390.11 Definitions.

As used in this subpart—

(a) The term *Board of Directors* means the Board of Directors of the FDIC or its designee.

(b) The term *Notice* means a Notice of Suspension or Notice of Prohibition issued by the Board of Directors pursuant to section 8(g) of the FDIA.

(c) The term *Order* means an Order of Removal or Order of Prohibition issued by the Board of Directors pursuant to section 8(g) of the FDIA.

(d) The term *association* means a State savings association within the meaning of section 3(b)(3) of the FDIA, (12 U.S.C. 1813(b)(3)).

(e) The term *subject individual* means a person served with a Notice or Order.

(f) The term *petitioner* means a subject individual who has filed a petition for informal hearing under this part.

### § 390.12 Issuance of Notice or Order.

(a) The Board of Directors may issue and serve a Notice upon an officer, director, or other person participating in the conduct of the affairs of an association, where the individual is charged in any information, indictment, or complaint with the commission of or participation in a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under State or Federal law, if the Board of Directors, upon due deliberation, determines that continued service or participation by the individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association. The Notice shall remain in effect until the information, indictment, or complaint is finally disposed of or until terminated by the Board of Directors.

(b) The Board of Directors may issue and serve an Order upon a subject individual against whom a judgment of conviction, or an agreement to enter a pretrial diversion or other similar program has been rendered, where such judgment is not subject to further appellate review, and the Board of Directors, upon the deliberation, has determined that continued service or participation by the subject individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association.

### § 390.13 Contents and service of the Notice or Order.

(a) The Notice or Order shall set forth the basis and facts in support of the Board of Directors' issuance of such Notice or Order, and shall inform the subject individual of his right to a hearing, in accordance with this part, for the purpose of determining whether the Notice or Order should be continued, terminated, or otherwise modified.

(b) The Executive Secretary shall serve a copy of the Notice or Order upon the subject individual and the related association in the manner set forth in § 390.40.

(c) Upon receipt of the Notice or Order, the subject individual shall immediately comply with the requirements thereof.

### § 390.14 Petition for hearing.

(a) To obtain a hearing, the subject individual must file two copies of a petition with the Executive Secretary within 30 days of being served with the Notice or Order.

(b) The petition filed under this section shall admit or deny specifically each allegation in the Notice or Order, unless the petitioner is without knowledge or information, in which case the petition shall so state and the statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a petitioner intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder.

(c) The petition shall state whether the petitioner is requesting termination or modification of the Notice or Order, and shall state with particularity how the petitioner intends to show that his continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or to impair public confidence in the association.

### § 390.15 Initiation of hearing.

(a) Within 10 days of the filing of a petition for hearing, the Board of Directors shall notify the petitioner of the time and place fixed for hearing, and it shall designate one or more Board of Directors employees to serve as presiding officer.

(b) The hearing shall be scheduled to be held no later than 30 days from the date the petition was filed, unless the time is extended at the request of the petitioner.

(c) A petitioner may appear personally or through counsel, but if represented by counsel, said counsel is required to comply with § 390.35.

(d) A representative(s) of the FDIC enforcement staff also may attend the hearing and participate therein as a party.

### § 390.16 Conduct of hearings.

(a) Hearings provided by this section are not subject to the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557). The presiding officer is, however, authorized to exercise all of the powers enumerated in § 390.34.

(b) Witnesses may be presented, within time limits specified by the presiding officer, provided that at least 10 days prior to the hearing date, the party presenting the witnesses furnishes the presiding officer and the opposing party with a list of such witnesses and a summary of the proposed testimony. However, the requirement for furnishing such a witness list and summary of testimony shall not apply to the presentation of rebuttal witnesses. The presiding officer may ask questions of any witness, and each party shall have an opportunity to cross-examine any witness presented by an opposing party.

(c) Upon the request of either the petitioner or a representative of the FDIC enforcement staff, the record shall remain open for a period of 5 business days following the hearing, during which time the parties may make any additional submissions for the record. Thereafter, the record shall be closed.

(d) Following the introduction of all evidence, the petitioner and the representative of the FDIC enforcement staff shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

(e) All oral testimony and oral argument shall be recorded, and transcripts made available to the petitioner upon payment of the cost thereof. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record *sua sponte* or upon the motion of any party.

(f) The parties may, in writing, jointly waive an oral hearing and instead elect a hearing upon a written record in which all evidence and argument would be submitted to the presiding officer in documentary form and statements of individuals would be made by affidavit.

### § 390.17 Default.

If the subject individual fails to file a petition for a hearing, or fails to appear at a hearing, either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 390.16(d) or (f), the Notice shall remain in effect until the information, indictment, or complaint is finally disposed of and the Order shall remain in effect until terminated by the Board of Directors.

### § 390.18 Rules of evidence.

(a) Formal rules of evidence shall not apply to a hearing, but the presiding officer may limit the introduction of irrelevant, immaterial, or unduly repetitious evidence.

(b) All matters officially noticed by the presiding officer shall appear on the record.

### § 390.19 Burden of persuasion.

The petitioner has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of the association does not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association.

### § 390.20 Relevant considerations.

(a) In determining whether the petitioner has shown that his or her continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association, in order to decide whether the Notice or Order should be continued, terminated, or otherwise modified, the Board of Directors will consider:

(1) The nature and extent of the petitioner's participation in the affairs of the association;

(2) The nature of the offense with which the petitioner has been charged;

(3) The extent of the publicity accorded the indictment and trial; and

(4) Such other relevant factors as may be entered on the record.

(b) When considering a request for the termination or modification of a Notice, the Board of Directors will not consider the ultimate guilt or innocence of the petitioner with respect to the criminal charge that is outstanding.

(c) When considering a request for the termination or modification of an Order which has been issued following a final judgment of conviction against a subject individual, the Board of Directors will not collaterally review such final judgment of conviction.

**§ 390.21 Proposed findings and conclusions and recommended decision.**

(a) Within 30 days after completion of oral argument or the submission of written argument where oral argument has been waived, the presiding officer shall file with the Executive Secretary and certify to the Board of Directors for decision the entire record of the hearing, which shall include a recommended decision, the Notice or Order, and all other documents filed in connection with the hearing.

(b) The recommended decision shall contain:

(1) A statement of the issue(s) presented,

(2) A statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and

(3) An appropriate recommendation as to whether the suspension, removal, or prohibition should be continued, modified, or terminated.

**§ 390.22 Decision of the FDIC Board of Directors.**

(a) Within 30 days after the recommended decision has been certified to the Board of Directors, the Board of Directors shall issue a final decision.

(b) The Board of Director's final decision shall contain a statement of the basis therefor. The Board of Directors may satisfy this requirement where it adopts the recommended decision of the presiding officer upon finding that the recommended decision satisfies the requirements of § 390.67.

(c) The Executive Secretary shall serve upon the petitioner and the representative of the FDIC enforcement staff a copy of the Board of Director's final decision and the related recommended decision.

**§ 390.23 Miscellaneous.**

The provisions of §§ 390.39–390.41 shall apply to proceedings under this subpart.

## Subpart C—Rules of Practice and Procedure in Adjudicatory Proceedings

**§ 390.30 Scope.**

Sections 390.30–390.70 prescribe Uniform Rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the FDIC should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the FDIC is the appropriate regulatory agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d), (s) and (v);

(2) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(3) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(i) and (r);

(4) Any provisions of the Change in Bank Control Act, any regulation or order issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Sections 22(h) and 23 of the Federal Reserve Act, or any regulation issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1468;

(6) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(7) Section 1120 of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(8) The terms of any final or temporary order issued or enforceable pursuant to section 8 of the FDIA or of any written agreement executed by the FDIC, the terms of any conditions imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(9) Any provision of law referenced in section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(10) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties on senior examiners for violation of post-employment prohibitions; and

(h) Sections 390.30 through 390.70 of this part also apply to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

**§ 390.31 Rules of construction.**

For purposes of §§ 390.30 through 390.70 of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

**§ 390.32 Definitions.**

For purposes of §§ 390.30 through 390.70 of this part, unless explicitly stated to the contrary:

*Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

*Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

*Board of Directors* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

*Decisional employee* means any member of the FDIC's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

*Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

*FDIC* means the Federal Deposit Insurance Corporation.

*Final order* means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

*Institution* includes any State savings association as that term is defined in section 3(b) of the FDIA, (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof whether wholly or partly owned (other than a bank) as those terms are defined in section 10(a) of the HOLA, (12 U.S.C. 1467(a)).

*Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA, (12 U.S.C. 1813(u)).

*Local Rules* means those rules found in §§ 390.71 through 390.75 of this part.

*Office of Financial Institution Adjudication* or *OFIA* means the executive body charged with overseeing the administration of administrative enforcement proceedings for the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the National Credit Union Administration, and the FDIC.

*Party* means the FDIC and any person named as a party in any notice.

*Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

*Respondent* means any party other than the FDIC.

*Uniform Rules* means those rules in §§ 390.30 through 390.70 of this part.

*Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

**§ 390.33 Authority of the Board of Directors.**

The Board of Directors may, at any time during the pendency of a proceeding perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

**§ 390.34 Authority of the administrative law judge.**

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 390.60;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

**§ 390.35 Appearance and practice in adjudicatory proceedings.**

(a) *Appearance before an FDIC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

**§ 390.36 Good faith certification.**

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

**§ 390.37 Conflicts of interest.**

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 390.35(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

**§ 390.38 Ex parte communications.**

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Board of Directors until the date that the Board of Directors issues the final decision pursuant to § 390.69(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an *ex parte* communication to the Board of Directors, the administrative law judge, or a decisional employee; and

(2) The Board of Directors, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the FDIC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the administrative law judge, the Board of Directors or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation-of-functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 390.69, except as witness or counsel in public proceedings.

**§ 390.39 Filing of papers.**

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 390.54 and 390.55, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board of Directors or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section as to form.

(c) *Formal requirements as to papers filed*— (1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ x 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 390.36.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the

filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board of Directors, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

**§ 390.40 Service of papers.**

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 390.39(c) as to form.

(c) *By the Board of Directors or the administrative law judge.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding through a counsel of record, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 390.35, the Board of Directors or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

**§ 390.41 Construction of time limits.**

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

**§ 390.42 Change of time limits.**

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 390.67, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or on the Board of Director's or the administrative law judge's own motion after notice and opportunity to respond is afforded all non-moving parties.

**§ 390.43 Witness fees and expenses.**

Witnesses subpoenaed for testimony or deposition shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

**§ 390.44 Opportunity for informal settlement.**

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FDIC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

**§ 390.45 The FDIC's right to conduct examination.**

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

**§ 390.46 Collateral attacks on adjudicatory proceeding.**

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

**§ 390.47 Commencement of proceeding and contents of notice.**

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by the Executive Secretary upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board of Directors.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) The answer and/or request for a hearing shall be filed with OFIA.

**§ 390.48 Answer.**

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

**§ 390.49 Amended pleadings.**

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

**§ 390.50 Failure to appear.**

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

**§ 390.51 Consolidation and severance of actions.**

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

**§ 390.52 Motions.**

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, but upon the filing of the recommended decision, motions must be filed with the Executive Secretary for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Executive Secretary, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 390.58 and 390.59.

**§ 390.53 Scope of document discovery.**

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 390.73.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 390.54.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph (d).

**§ 390.54 Request for document discovery from parties.**

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed under part 309 for requests under the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 390.52 to revoke or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 390.52 are waived.

(2) The party who served the request that is the subject of a motion to revoke or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 390.52 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this subpart, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

### § 390.55 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 390.53(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 390.54(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

### § 390.56 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with or procures a failure to comply with, a subpoena issued under this section.

**§ 390.57 Interlocutory review.**

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 390.52.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of the administrative law judge if the Board of Directors finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 390.52. Any party may file a response to a request for interlocutory review in accordance with § 390.52(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.

**§ 390.58 Summary disposition.**

(a) *In general.* The administrative law judge shall recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the

points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

**§ 390.59 Partial summary disposition.**

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

**§ 390.60 Scheduling and prehearing conferences.**

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at its expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

**§ 390.61 Prehearing submissions.**

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

**§ 390.62 Public hearings.**

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Executive Secretary a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Executive Secretary. The form of, and procedure for, these requests and replies are governed by § 390.52. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

**§ 390.63 Hearing subpoenas.**

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she

may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to section § 390.55(c).

**§ 390.64 Conduct of hearings.**

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

**§ 390.65 Evidence.**

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board of Directors shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the appropriate Federal financial institution regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

**§ 390.66 Post-hearing filings.**

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

**§ 390.67 Recommended decision and filing of record.**

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 390.66(b), the administrative law judge shall file with and certify to the Executive Secretary, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Board of Directors for final determination the record of the proceeding, the administrative law judge shall furnish to the Executive Secretary a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

**§ 390.68 Exceptions to recommended decision.**

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 390.67, a party may file with the Executive Secretary written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

**§ 390.69 Review by the Board of Directors.**

(a) *Notice of submission to the Board of Directors.* When the Executive Secretary determines that the record in the proceeding is complete, the Board of Directors shall serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Executive Secretary within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Director's final decision. Oral argument before the Board of Directors must be on the record.

(c) *Board of Director's final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the director may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate state or Federal supervisory authority.

**§ 390.70 Stays pending judicial review.**

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the Board of Directors. The Board of Directors may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of the order.

**§ 390.71 Scope.**

The rules and procedures in §§ 390.71 through 390.75 shall apply to those proceedings covered by §§ 390.30 through 390.70. In addition, §§ 390.30 through 390.75 shall apply to adjudicatory proceedings for which hearings on the record are provided for by the following statutory provisions:

(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of a State savings association or any other company;

(b) [Reserved]; and

(c) Proceedings under section 15(c)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(c)(4)) (Exchange Act) to determine whether any association or person subject to the jurisdiction of the FDIC pursuant to section 12(i) of the Exchange Act (15 U.S.C. 78*l*(i)) has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d) or 14(f) of the Exchange Act.

**§ 390.72 Appointment of Office of Financial Institution Adjudication.**

Unless otherwise directed by the FDIC, all hearings under sections 390.30–390.75 shall be conducted by administrative law judges under the direction of the Office of Financial Institution Adjudication, 1700 G Street, NW., Washington, DC 20552.

**§ 390.73 Discovery.**

(a) *In general.* A party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant and material matters of which the witness has factual, direct and personal knowledge. Objections to questions or exhibits shall be in short form, stating the grounds for objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, investigative, trial preparation, irrelevant or immaterial matters; or

(3) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States Government is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

(g) *Deposition subpoenas.* (1) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(2) *Service.* The party requesting the subpoena must serve it on the person named therein or upon that person's counsel, by any of the methods identified in § 390.40(d). The party serving the subpoena must file proof of service with the administrative law judge.

(3) *Motion to quash.* A person named in the subpoena or a party may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(4) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 390.56(d).

**§ 390.74 Civil money penalties.**

(a) *Assessment.* In the event of consent, or if upon the record developed at the hearing the Board of Directors finds that any of the grounds specified in the notice issued pursuant to § 390.47 have been established, the Executive Secretary may serve an order of assessment of civil money penalty upon the party concerned. The assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the Board of Directors or by a reviewing court.

(b) *Payment.* (1) Civil penalties assessed pursuant to §§ 390.30 through 390.75 are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the Board of Directors fixes a different time for payment where it determines that the purpose of the civil money penalty would be better served thereby; however, if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party may not be required to pay such penalty until the Board of Directors has issued a final order of assessment following the hearing. In such instances, the penalty shall be paid within 60 days of service of such order unless the Board of Directors fixes a different time for payment. Notwithstanding the foregoing, the FDIC may seek to attach the party's assets or to have a receiver appointed to secure payment of the potential civil money penalty or other obligation in advance of the hearing in accordance with section 8(i)(4) of the FDIA (12 U.S.C. 1818(i)(4)).

(2) [Reserved].

(c) *Inflation adjustment.* Under the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note), FDIC must adjust for inflation the civil money penalties in statutes that it administers. The following chart displays the adjusted civil money penalties. The amounts in this chart apply to violations that occur after October 27, 2008:

| U.S. Code citation | CMP description | New maximum amount |
|---|---|---|
| 12 U.S.C. 1464(v)(4) | Reports of Condition—1st Tier | $2,200 |
| 12 U.S.C. 1464(v)(5) | Reports of Condition—2nd Tier | 32,500 |
| 12 U.S.C. 1464(v)(6) | Reports of Condition—3rd Tier | 1,375,000 |
| 12 U.S.C. 1467(d) | Refusal to Cooperate in Exam | 7,500 |
| 12 U.S.C. 1467a(i)(2) | Holding Company Act Violation | 32,500 |
| 12 U.S.C. 1467a(i)(3) | Holding Company Act Violation | 32,500 |
| 12 U.S.C. 1467a(r)(1) | Late/Inaccurate Reports—1st Tier | 2,200 |
| 12 U.S.C. 1467a(r)(2) | Late/Inaccurate Reports—2nd Tier | 32,500 |
| 12 U.S.C. 1467a(r)(3) | Late/Inaccurate Reports—3rd Tier | 1,375,000 |
| 12 U.S.C. 1817(j)(16)(A) | Change in Control—1st Tier | 7,500 |
| 12 U.S.C. 1817(j)(16)(B) | Change in Control—2nd Tier | 37,500 |
| 12 U.S.C. 1817(j)(16)(C) | Change in Control—3rd Tier | 1,375,000 |
| 12 U.S.C. 1818(i)(2)(A) | Violation of Law or Unsafe or Unsound Practice—1st Tier | 7,500 |
| 12 U.S.C. 1818(i)(2)(B) | Violation of Law or Unsafe or Unsound Practice—2nd Tier | 37,500 |
| 12 U.S.C. 1818(i)(2)(C) | Violation of Law or Unsafe or Unsound Practice—3rd Tier | 1,375,000 |
| 12 U.S.C. 1820(k)(6)(A)(ii) | Violation of Post Employment Restrictions | 275,000 |
| 12 U.S.C. 1884 | Violation of Security Rules | 110 |
| 12 U.S.C. 3349(b) | Appraisals Violation—1st Tier | 7,500 |
| 12 U.S.C. 3349(b) | Appraisals Violation—2nd Tier | 37,500 |
| 12 U.S.C. 3349(b) | Appraisals Violation—3rd Tier | 1,375,000 |
| 42 U.S.C. 4012a(f) | Flood Insurance | [1] 385<br>[2] 135,000 |

[1] Per day.
[2] Per year.

**§ 390.75 Additional procedures.**

(a) *Replies to exceptions.* Replies to written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order pursuant to § 390.68 shall be filed within 10 days of the date such written exceptions were required to be filed.

(b) *Motions.* All motions shall be filed with the administrative law judge and an additional copy shall be filed with the Executive Secretary, who receives adjudicatory filings; provided, however, that once the administrative law judge has certified the record to the Executive Secretary pursuant to § 390.67, all motions must be filed with the Board of Directors, to the attention of the Executive Secretary, within the 10-day period following the filing of exceptions allowed for the filing of replies to exceptions. Responses to such motions filed in a timely manner with the Board of Directors, other than motions for oral argument before the Board of Directors, shall be allowed pursuant to the procedures at § 390.52(d). No response is required for the Board of Directors to make a determination on a motion for oral argument.

(c) *Authority of administrative law judge.* In addition to the powers listed in § 390.34, the administrative law judge shall have the authority to deny any dispositive motion and shall follow the procedures set forth for motions for summary disposition at § 390.58 and partial summary disposition at § 390.59 in making determinations on such motions.

(d) *Notification of submission of proceeding to the Board of Directors.* Upon the expiration of the time for filing any exceptions, any replies to such exceptions or any motions and any ruling thereon, and after receipt of certified record, the Executive Secretary shall notify the parties within ten days of the submission of the proceeding to the Board of Directors for final determination.

(e) *Extensions of time for final determination.* The Board of Directors may, *sua sponte,* extend the time for final determination by signing an order of extension of time within the 90 day time period and notifying the parties of such extension thereafter.

(f) *Service upon the FDIC.* Service of any document upon the FDIC shall be made by filing with the Executive Secretary, in addition to the individuals and/or offices designated by the FDIC in its Notice issued pursuant to § 390.47, or such other means reasonably suited to provide notice of the person and/or office designated to receive filings.

(g) *Filings with the Board of Directors.* An additional copy of all materials required or permitted to be filed with or referred to the administrative law judge pursuant to this subpart shall be filed with the Executive Secretary. This rule shall not apply to the transcript of testimony and exhibits adduced at the hearing or to proposed exhibits submitted in advance of the hearing pursuant to an order of the administrative law judge under § 390.61. Materials required or permitted to be filed with or referred to the Board of Directors pursuant to this part shall be filed with the Executive Secretary, to the attention of the Board of Directors.

(h) *Presence of cameras and other recording devices.* The use of cameras and other recording devices, other than those used by the court reporter, shall be prohibited and excluded from the proceedings.

## Subpart D—Rules for Investigative Proceedings and Formal Examination Proceedings

**§ 390.80 Scope of subpart.**

This subpart prescribes rules of practice and procedure applicable to the conduct of investigative proceedings under section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) (''FDIA''), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This subpart does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in subpart C.

**§ 390.81 Definitions.**

As used in this subpart:

*Board of Directors* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee;

*Designated representative* means the person or persons empowered by the Board of Directors to conduct an investigative proceeding or a formal examination proceeding;

*FDIC* means the Federal Deposit Insurance Corporation;

*Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of State savings associations and their affiliates conducted pursuant to section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA;

*General Counsel* means the General Counsel of the Federal Deposit Insurance Corporation; and

*Investigative proceeding* means an investigation conducted under section 10(c) of the FDIA.

**§ 390.82 Confidentiality of proceedings.**

All formal examination proceedings shall be private and, unless otherwise ordered by the FDIC, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the FDIC, or required by law, and except as provided in §§ 390.83 and 390.84, the entire record of any investigative proceeding or formal examination proceeding, including the order initiating the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

**§ 390.83 Transcripts.**

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *provided,* that a person seeking a transcript of his own testimony must file a written request with the designated representative stating the reason he desires to procure such transcript, and said persons may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

**§ 390.84 Rights of witnesses.**

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the order authorizing such proceeding. Copies of such resolution shall be furnished, for their retention, to such persons only with the written approval of the designated representative.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the FDIC in accordance with the provisions of subpart E and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The Board of Directors, for good cause, may exclude a particular attorney from further participation in any investigation in which the Board of Directors has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the Board of Directors instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney. After due notice to the attorney, the FDIC may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the Board of Directors may permit or direct.

**§ 390.85 Obstruction of the proceedings.**

The designated representative shall report to the Board of Directors any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the Board of Directors may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

**§ 390.86 Subpoenas.**

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the General Counsel or his designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefor. The General Counsel or his designee, as appropriate, may:

(1) Deny the application;

(2) Quash or revoke the subpoena;

(3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the General Counsel or his designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any State or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the FDIC by any of its designated representatives.

## Subpart E—Practice Before the FDIC

### § 390.90 Scope of subpart.

This subpart prescribes rules with regard to general practice before the FDIC on one's own behalf or in a representative capacity and prescribes rules describing the circumstances under which attorneys, accountants, appraisers, or other persons may be suspended or debarred, either temporarily or permanently, from practicing before the FDIC. In connection with any particular matter, reference also should be made to any special requirements of procedure and practice that may be contained in the particular statute involved or the rules and forms adopted by the FDIC thereunder, which special requirements are controlling. In addition to any suspension hereunder, a person may be excluded from further participation under parts 390 and 391 from an adjudicatory proceeding in accordance with § 390.35(a)(1), from a removal hearing in accordance with § 390.12, or from an investigatory proceeding in accordance with § 390.84(b)(2). Furthermore, no person who has been suspended or debarred from practice before the FDIC in accordance with the provisions of this subpart may submit to the FDIC, either directly or on behalf of an interested party, any written documents or petitions otherwise permitted under the Administrative Procedure Act.

### § 390.91 Definitions.

As used in this subpart:

*Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth or the District of Columbia;

*Executive Secretary* means the Executive Secretary of the FDIC;

*FDIC* means the Federal Deposit Insurance Corporation;

*OTS* means the Office of Thrift Supervision;

*Practice* means transacting any business with the FDIC, including:

(1) The representation of another person at any adjudicatory, investigatory, removal or rulemaking proceeding conducted before the FDIC, a presiding officer or the FDIC's staff, including those proceedings covered in subparts B, C, and D;

(2) The preparation of any statement, opinion, financial statement, appraisal report, audit report, or other document or report by any attorney, accountant, appraiser or other licensed expert which is filed with or submitted to the FDIC, with such expert's consent or knowledge in connection with any application or other filing with the FDIC;

(3) A presentation to the FDIC, a presiding officer or the FDIC's staff at a conference or meeting relating to an association's or other person's rights, privileges or liabilities under the laws administered by the FDIC and rules and regulations promulgated thereunder;

(4) Any business correspondence or communication with the FDIC, a presiding officer or the FDIC's staff;

(5) The transaction of any other formal business with the FDIC on behalf of another, in the capacity of an attorney, accountant, appraiser or other licensed expert; and

*Presiding officer* includes the Board of Directors or an administrative law judge appointed under section 3105 or detailed pursuant to section 3344 of title 5 of the U.S. Code and, as used in this subpart, the term shall be construed to refer to whichever of the above-identified individuals presides at a hearing or other proceeding, except as otherwise specified in the text.

### § 390.92 Who may practice.

(a) *By non-attorneys.* (1) An individual may appear on his own behalf (*pro se*); a member of a partnership may represent the partnership; a bona fide and duly authorized officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a commission, department or political subdivision may represent that commission, department or political subdivision before the FDIC.

(2) Any accountant, appraiser or other licensed expert may practice before the FDIC in a professional capacity.

(b) *By attorneys.* Any association or other person may be represented in any proceeding or other matter before the FDIC by an attorney.

(c) *Authority to act as representative.* Any licensed expert or professional transacting business with the FDIC in a representative capacity may be required to show his authority to act in such capacity.

### § 390.93 Suspension and debarment.

(a) The FDIC may censure any person practicing before it or may deny, temporarily or permanently, the privilege of any person to practice before it if such person is found by the FDIC, after notice of and opportunity for hearing in the matter,

(1) Not to possess the requisite qualifications to represent others,

(2) To be lacking in character or professional integrity,

(3) To have engaged in any dilatory, obstructionist, egregious, contemptuous, contumacious or other unethical or improper professional conduct before the OTS or FDIC, or

(4) To have willfully violated, or willfully aided and abetted the violation of, any provision of the laws administered by the OTS or FDIC or the rules and regulations promulgated thereunder.

(b) *Automatic suspension.* (1) Any person who, after being licensed as a professional or expert by any competent authority, has been convicted of a felony, or of a misdemeanor involving moral turpitude, personal dishonesty or breach of trust, shall be suspended forthwith from practicing before the FDIC.

(2) Any accountant, appraiser or other licensed expert whose license to practice has been revoked in any State, possession, territory, Commonwealth or the District of Columbia, shall be suspended forthwith from practice before the FDIC.

(3) Any attorney who has been suspended or disbarred by a court of the United States or in any State, possession, territory, Commonwealth or the District of Columbia, shall be suspended forthwith from practicing before the FDIC.

(4) A conviction (including a judgment or order on a plea of *nolo*

*contendere*), revocation, suspension or disbarment under paragraphs (b)(1), (b)(2) and (b)(3) of this section shall be deemed to have occurred when the convicting, revoking, suspending or disbarring agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken.

(5) For purposes of this part, it shall be irrelevant that any attorney, accountant, appraiser or other licensed expert who has been suspended, disbarred or otherwise disqualified from practice before a court or in a jurisdiction continues in professional good standing before other courts or in other jurisdictions.

(c) *Temporary suspension.* (1) The FDIC, with due regard to the public interest and without preliminary hearing, by order, may temporarily suspend any person from appearing or practicing before it who, by name, has been:

(i) Permanently enjoined (whether by consent, default or summary judgment or after trial) by any court of competent jurisdiction or by the OTS or FDIC itself in a final administrative order, by reason of his misconduct in any action brought by the OTS or FDIC based upon violations of, or aiding and abetting the violation of, the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1461 *et seq.,* the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1811 *et seq.* or any provision of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a, *et seq.,* which is administered by the FDIC, or of any rule or regulation promulgated thereunder; or

(ii) Found by any court of competent jurisdiction (whether by consent, default, or summary judgment, or after trial) in any action brought by the OTS or FDIC to which he is a party or found by the OTS or FDIC (whether by consent, default, upon summary judgment or after hearing) in any administrative proceeding in which the OTS or FDIC is a complainant and he is a party, to have willfully committed, caused or aided or abetted a violation of any provision of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1461 *et seq.,* the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1811 *et seq.* or any provision of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a, *et seq.,* which is administered by the OTS or FDIC, or of any rule or regulation promulgated thereunder.

(2) An order of temporary suspension shall become effective when served by certified or registered mail directed to the last known business or residential address of the person involved. No order of temporary suspension shall be entered by the FDIC pursuant to paragraph (c)(1) of this section more than three months after the final judgment or order entered in a judicial or administrative proceeding described in paragraphs (c)(1)(i) or (ii) of this section has become effective and all review or appeal procedures have been completed or are no longer available.

(3) Any person temporarily suspended from appearing and practicing before the OTS or FDIC in accordance with paragraph (c)(1) of this section may, within 30 days after service upon him of the order of temporary suspension, petition the FDIC to lift such suspension. If no petition is received by the FDIC within those 30 days, the suspension shall become permanent.

(4) Within 30 days after the filing of a petition in accordance with paragraph (c)(3) of this section, the FDIC shall either lift the temporary suspension or set the matter down for hearing at a time and place to be designated by the FDIC, or both. After opportunity for hearing, the FDIC may censure the petitioner or may suspend the petitioner from appearing or practicing before the FDIC temporarily or permanently. In every case in which the temporary suspension has not been lifted, the hearing and any other action taken pursuant to this paragraph (c)(4) shall be expedited by the FDIC in order to ensure the petitioner's right to address the allegations against him.

(5) In any hearing held on a petition filed in accordance with paragraph (c)(3) of this section, a showing that the petitioner has been enjoined or has been found to have committed, caused or aided or abetted violations as described in paragraph (c)(1) of this section, without more, may be a basis for suspension or debarment; that showing having been made, the burden shall then be on the petitioner to show why he should not be censured or be temporarily or permanently suspended or debarred. A petitioner will not be permitted to contest any findings against him or any admissions made by him in the judicial or administrative proceedings upon which the proposed censure, suspension or debarment is based. A petitioner who has consented to the entry of a permanent injunction or order as described in paragraph (c)(1)(i) of this section, without admitting the facts set forth in the complaint, shall nevertheless be presumed for all purposes under this section to have been enjoined or ordered by reason of the misconduct alleged in the complaint.

### § 390.94 Reinstatement.

(a) Any person who is suspended from practicing before the OTS or FDIC under § 390.93(a) or (c) of may file an application for reinstatement at any time. Denial of the privilege of practicing before the FDIC shall continue unless and until the applicant has been reinstated by order of the FDIC for good cause shown.

(b) Any person suspended under paragraph § 390.93(b) shall be reinstated by the FDIC, upon appropriate application, if all of the grounds for application of the provisions of § 390.93(b) subsequently are removed by a reversal of the conviction or termination of the suspension, disbarment or revocation. An application for reinstatement on any other grounds by any person suspended under § 390.93(b) may be filed at any time. Such application shall state with particularity the relief desired and the grounds therefor and shall include supporting evidence, when available. The applicant shall be accorded an opportunity for an informal hearing in the matter, unless the applicant has waived a hearing in the application and, instead, has elected to have the matter determined on the basis of written submissions. Such hearing shall utilize the procedures established in §§ 390.12 and 390.16(a). However, such suspension shall continue unless and until the applicant has been reinstated by order of the FDIC for good cause shown.

### § 390.95 Duty to file information concerning adverse judicial or administrative action.

Any person appearing or practicing before the FDIC who has been or is the subject of a conviction, suspension, debarment, license revocation, injunction or other finding of the kind described in § 390.93(b) or (c) in an action not instituted by the OTS or FDIC shall promptly file a copy of the relevant order, judgment or decree with the Executive Secretary together with any related opinion or statement of the agency or tribunal involved. Any person who fails to so file a copy of the order, judgment or decree within 30 days after the entry of the order, judgment or decree, or the date such person initiates practice before the FDIC, for that reason alone may be disqualified from practicing before the FDIC until such time as the appropriate filing shall be made, but neither the filing of these documents nor the failure of a person to file them shall in any way impair the operation of any other provision of this subpart.

**§ 390.96 Proceeding under this subpart.**

(a) All hearings required or permitted to be held under § 390.93(a) and (c) of this subpart shall be held before a presiding officer utilizing the procedures established in the rules of practice and procedure in adjudicatory proceedings under subpart C of this part.

(b) All hearings held under this subpart shall be closed to the public unless the FDIC on its own motion or upon the request of a party otherwise directs.

(c) Any proceeding brought under any section of this subpart shall not preclude a proceeding under any other section of this subpart or any other part of the FDIC's regulations.

**§ 390.97 Removal, suspension, or debarment of independent public accountants and accounting firms performing audit services.**

(a) *Scope.* This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA for insured State savings associations.

(b) *Definitions.* As used in this section, the following terms have the meaning given below unless the context requires otherwise:

*Accounting firm.* The term *accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

*Audit services.* The term *audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA and part 363, including attestation services. Audit services include any service performed with respect to a savings and loan holding company of a State savings association that is used to satisfy requirements imposed by section 36 of the FDIA or part 363 on that State savings association.

*Independent public accountant.* The term *independent public accountant* means any individual who performs or participates in providing audit services.

(c) *Removal, suspension, or debarment of independent public accountants.* The FDIC may remove, suspend, or debar an independent public accountant from performing audit services for State savings associations that are subject to section 36 of the FDIA if, after service of a notice of intention and opportunity for hearing in the matter, the FDIC finds that the independent public accountant:

(1) Lacks the requisite qualifications to perform audit services;

(2) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to independent public accountants through the Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(3) Has engaged in negligent conduct in the form of:

(i) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an independent public accountant knows, or should know, that heightened scrutiny is warranted; or

(ii) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(4) Has knowingly or recklessly given false or misleading information or knowingly or recklessly participated in any way in the giving of false or misleading information to the FDIC or any officer or employee of the FDIC;

(5) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(6) Has been removed, suspended, or debarred from practice before any federal or state agency regulating the banking, insurance, or securities industries, other than by action listed in paragraph (j) of this section, on grounds relevant to the provision of audit services; or

(7) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(d) *Removal, suspension or debarment of an accounting firm.* If the FDIC determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (c) of this section, the FDIC also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar an accounting firm or office thereof, and the term of any sanction against an accounting firm under this section, the FDIC may consider, for example:

(1) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(2) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(3) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(4) The extent to which managing partners or senior officers of the accounting firm have participated, directly or indirectly through oversight or review, in the act or failure to act; and

(5) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(e) *Remedies.* The remedies provided in this section are in addition to any other remedies the FDIC may have under any other applicable provisions of law, rule, or regulation.

(f) *Proceedings to remove, suspend, or debar.* (1) The FDIC may initiate a proceeding to remove, suspend, or debar an independent public accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) An independent public accountant or accounting firm named as a respondent in the notice issued under paragraph (f)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure contained in subpart C.

(g) *Immediate suspension from performing audit services.* (1) If the FDIC serves written notice of intention to remove, suspend, or debar an independent public accountant or accounting firm from performing audit services, the FDIC may, with due regard for the public interest and without preliminary hearing, immediately suspend an independent public accountant or accounting firm from performing audit services for savings associations, if the FDIC:

(i) Has a reasonable basis to believe that the independent public accountant or accounting firm engaged in conduct (specified in the notice served upon the independent public accountant or accounting firm under paragraph (f) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (c) or (d) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such independent public accountant or accounting firm with written notice of the immediate suspension.

(2) An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the FDIC dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the FDIC to the independent public accountant or accounting firm.

(h) *Petition to stay.* (1) Any independent public accountant or accounting firm immediately suspended from performing audit services in accordance with paragraph (g) of this section may, within 10 calendar days after service of the notice of immediate suspension, file a petition with the FDIC for a stay of such suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(2) Upon receipt of a stay petition, the FDIC will designate a presiding officer who shall fix a place and time (not more than 10 calendar days after receipt of such petition, unless extended at the request of the petitioner), at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any FDIC employee engaged in investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the FDIC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph, there will be no discovery and the provisions of §§ 390.35 through 390.41, 390.45, and 390.50 of the Uniform Rules will apply.

(3) Within 30 calendar days after the hearing, the presiding officer shall issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(4) The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer must promptly certify the entire record to the Board of Directors. Within 60 calendar days of the presiding officer's certification, the Board of Directors shall issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order shall state the basis of the Board of Director's decision.

(i) *Scope of any order of removal, suspension, or debarment.* (1) Except as provided in paragraph (i)(2) of this section, any independent public accountant or accounting firm that has been removed, suspended (including an immediate suspension), or debarred from performing audit services by the FDIC may not, while such order is in effect, perform audit services for any State savings association.

(2) An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the FDIC, be made applicable to a limited number of State savings associations. (limited scope order).

(j) *Automatic removal, suspension, and debarment.* (1) An independent public accountant or accounting firm may not perform audit services for a State savings association if the independent public accountant or accounting firm:

(i) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, or the FDIC under section 36 of the FDIA;

(ii) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(iii) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(2) Upon written request, the FDIC, for good cause shown, may grant written permission to an independent public accountant or accounting firm to perform audit services for State savings associations. The request must contain a concise statement of action requested. The FDIC may require the applicant to submit additional information.

(k) *Notice of removal, suspension, or debarment.* (1) Upon issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the FDIC shall make the order publicly available and provide notice of the order to the other Federal banking agencies.

(2) An independent public accountant or accounting firm that provides audit services to a State savings association must provide the FDIC with written notice of:

(i) Any currently effective order or other action described in paragraphs (c)(6) through (c)(7) or paragraphs (j)(1)(ii) through (iii) of this section; and

(ii) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(3) Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action or 15 calendar days before an independent public accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier.

(l) *Application for reinstatement.* (1) Unless otherwise ordered by the FDIC, an independent public accountant, accounting firm, or office of a firm that was removed, suspended or debarred under this section may apply for reinstatement in writing at any time. The request shall contain a concise statement of action requested. The FDIC may require the applicant to submit additional information.

(2) An applicant for reinstatement under paragraph (l)(1) of this section may, in the FDIC's sole discretion, be afforded a hearing. The independent public accountant or accounting firm shall bear the burden of going forward with an application and the burden of proving the grounds supporting the application. The FDIC may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension,

or debarment shall continue until the FDIC, for good cause shown, has reinstated the applicant or until, in the case of a suspension, the suspension period has expired. The filing of a petition for reinstatement shall not stay the effectiveness of the removal, suspension, or debarment of an independent public accountant or accounting firm.

## Subpart F—Application Processing Procedures

### § 390.100 What does this subpart do?

(a) This subpart explains the FDIC's procedures for processing applications, notices, or filings (applications) under parts 390 and 391 for State savings associations. Except as provided in paragraph (b) of this section, §§ 390.103 through 390.110 and §§ 390.126 through 390.135 apply whenever an FDIC regulation requires any person (you) to file an application with the FDIC. Sections 390.111 through 390.125, however, only apply when a FDIC regulation incorporates the procedures in those sections or where otherwise required by the FDIC.

(b) This subpart does not apply to any of the following:

(1) An application related to a transaction under section 13(c) or (k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(c) or (k).

(2) A request for reconsideration, modification, or appeal of a final FDIC action.

(3) A request related to litigation, an enforcement proceeding, a supervisory directive or supervisory agreement. Such requests include a request seeking approval under, modification of, or termination of an order issued under subparts C or D, a supervisory agreement, a supervisory directive, a consent merger agreement or a document negotiated in settlement of an enforcement matter or other litigation, unless an applicable FDIC regulation specifically requires an application under this subpart.

(4) An application filed under a FDIC regulation that prescribes other application processing procedures and time frames for the approval of applications.

(c) If a FDIC regulation for a specific type of application prescribes some application processing procedures, or time frames, the FDIC will apply this subpart to the extent necessary to process the application. For example, if a FDIC regulation for a specific type of application does not identify time periods for the processing of an application, the time periods in this subpart apply.

### § 390.101 Do the same procedures apply to all applications under this subpart?

The FDIC processes applications for State savings associations under this subpart using two procedures, expedited treatment and standard treatment. To determine which treatment applies, you may use the following chart:

| If . . . | Then the FDIC will process your application under . . . |
|---|---|
| (a) The applicable regulation does not specifically state that expedited treatment is available | Standard treatment. |
| (b) You are not a State savings association | Standard treatment. |
| (c) Your composite rating is 3, 4, or 5. The composite rating is the composite numeric rating that the FDIC or the other federal banking regulator assigned to you under the Uniform Financial Institutions Rating System or under a comparable rating system. The composite rating refers to the rating assigned and provided to you, in writing, as a result of the most recent examination. | Standard treatment. |
| (d) Your Community Reinvestment Act (CRA) rating is Needs to Improve or Substantial Noncompliance. The CRA rating is the Community Reinvestment Act performance rating that the FDIC or the other federal banking regulator assigned and provided to you, in writing, as a result of the most recent compliance examination. *See,* for example, 12 CFR 195.28. | Standard treatment. |
| (e) Your compliance rating is 3, 4, or 5. The compliance rating is the numeric rating that the FDIC or the other federal banking regulator assigned to you under the FDIC compliance rating system, or a comparable rating system used by the other federal banking regulator. The compliance rating refers to the rating assigned and provided to you, in writing, as a result of the most recent compliance examination. | Standard treatment. |
| (f) You fail any one of your capital requirements under subpart Z | Standard treatment. |
| (g) The FDIC has notified you that you are an association in troubled condition | Standard treatment. |
| (h) Neither the FDIC nor any other federal banking regulator has assigned you a composite rating, a CRA rating or a compliance rating. | Standard treatment. |
| (i) You do not meet any of the criteria listed in paragraphs (a) through (h) of this section | Expedited treatment. |

### § 390.102 How does the FDIC compute time periods under this subpart?

In computing time periods under this subpart, the FDIC does not include the day of the act or event that commences the time period. When the last day of a time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

### § 390.103 Must I meet with the FDIC before I file my application?

(a) *Chart.* To determine whether you must attend a pre-filing meeting before you file an application, please consult the following chart:

| If you file . . . | Then . . . |
|---|---|
| An application to acquire control of a State savings association. | The FDIC may require you to meet with the FDIC before filing your application and may require you to submit a draft business plan or other relevant information before this meeting. |

(b) *Contacting the appropriate FDIC region.* (1) You must contact the appropriate FDIC region a reasonable time before you file an application described in paragraph (a) of this section. Unless paragraph (a) already requires a pre-filing meeting or a draft business plan, the appropriate FDIC region will determine whether it will require a pre-filing meeting, and whether you must submit a business plan or other relevant information before the meeting. The appropriate FDIC region will also establish a schedule for any meeting and the submission of any information.

(2) All other applicants are encouraged to contact the appropriate FDIC region to determine whether a pre-filing meeting or the submission of a draft business plan or other relevant information would expedite the application review process.

**§ 390.104 What information must I include in my draft business plan?**

If you are required to submit a draft business plan under § 309.103, your plan must:

(a) Clearly and completely describe the State savings association's projected operations and activities;

(b) Describe the risks associated with the transaction and the impact of this transaction on any existing activities and operations of the State savings association, including financial projections for a minimum of three years;

(c) Identify the majority of the proposed board of directors and the key senior executive officers (as defined in § 390.361) of the State savings association and demonstrate that these individuals have the expertise to prudently manage the activities and operations described in the savings association's draft business plan; and

(d) Demonstrate how applicable requirements regarding serving the credit and lending needs in the market areas served by the State savings association will be met.

**§ 390.105 What type of application must I file?**

(a) *Expedited treatment.* If you are eligible for expedited treatment under § 390.101, you may file your application in the form of a notice that includes all information required by the applicable substantive regulation. If the FDIC has designated a form for your notice, you must file that form. Your notice is an application for the purposes of all statutory and regulatory references to ''applications.''

(b) *Standard treatment.* If you are subject to standard treatment under § 390.101, you must file your application following all applicable substantive regulations and guidelines governing the filing of applications. If the FDIC has a designated form for your application, you must file that form.

(c) *Waiver requests.* If you want the FDIC to waive a requirement that you provide certain information with the notice or application, you must include a written waiver request:

(1) Describing the requirement to be waived and

(2) Explaining why the information is not needed to enable the FDIC to evaluate your notice or application under applicable standards.

**§ 390.106 What information must I provide with my application?**

(a) *Required information.* You may obtain information about required certifications, other regulations and guidelines affecting particular notices and applications, appropriate forms, and instructions from the appropriate FDIC region.

(b) *Captions and exhibits.* You must caption the original application and required copies with the type of filing, and must include all exhibits and other pertinent documents with the original application and all required copies. You are not required to include original signatures on copies if you include a copy of the signed signature page or the copy otherwise indicates that the original was signed.

**§ 390.107 May I keep portions of my application confidential?**

(a) *Confidentiality.* The FDIC makes submissions under this subpart available to the public, but may keep portions of your application confidential based on the rules in this section.

(b) *Confidentiality request.* (1) You may request the FDIC to keep portions of your application confidential. You must submit your request in writing with your application and must explain in detail how your request is consistent with the standards under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. For example, you should explain how you will be substantially harmed by public disclosure of the information. You must separately bind and mark the portions of the application you consider confidential and the portions you consider non-confidential.

(2) The FDIC will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The FDIC will make information in your CRA plan, including any information incorporated by reference from other parts of your application, available to the public upon request.

(c) *FDIC determination on confidentiality.* The FDIC will determine whether information that you designate as confidential may be withheld from the public under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. The FDIC will advise you before it makes information you designate as confidential available to the public.

**§ 390.108 Where do I file my application?**

(a) *Appropriate FDIC region.* (1) You must file the original application and the number of copies indicated on the applicable form with the appropriate FDIC region. The appropriate FDIC region addresses are listed in paragraph (a)(2) of this section. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must file the original application and two copies.

(2) The addresses of appropriate FDIC region and the states covered by each office are:

| Region | Office address | States served |
|---|---|---|
| New York | 350 Fifth Avenue, Suite 1200, New York, NY 10118 | Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands. |
| Atlanta | 10 Tenth Street, NE., Suite 800, Atlanta, GA 30309–3906. | Alabama, Florida, Georgia, North Carolina, South Carolina, Virginia, West Virginia. |
| Chicago | 300 South Riverside Plaza, Suite 1700, Chicago, Illinois 60606. | Illinois, Indiana, Kentucky, Ohio, Michigan, Wisconsin. |
| Kansas | 1100 Walnut St., Suite 2100, Kansas City, MO 64106 | Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota. |
| Dallas | 1601 Bryan Street, Dallas, TX 75201 | Arkansas, Colorado, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, Texas. |
| San Francisco | 25 Jessie Street at Ecker Square, Suite 2300, San Francisco, CA 94105–2780. | Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Utah, Washington, Wyoming. |

(b) *Additional filings with FDIC headquarters.* (1) In addition to filing in the appropriate FDIC region, if your application involves a significant issue of law or policy or if an applicable regulation or form directs you to file with FDIC Headquarters, you must also file copies of your application with the Risk Management and Applications Section at FDIC headquarters, 550 17th Street, NW., Washington, DC 20429. You must file the number of copies indicated on the applicable form. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must file three copies.

(2)(i) You may request a list of applications involving significant issues of law or policy by contacting appropriate FDIC region.

(ii) The FDIC reserves the right to identify significant issues of law or policy in a particular application. The FDIC will advise you, in writing, if it makes this determination.

**§ 390.109 What is the filing date of my application?**

(a) Your application's filing date is the date that you complete all of the following requirements.

(1) You attend a pre-filing meeting and submit a draft business plan or relevant information, if the FDIC requires you to do so under § 390.103.

(2) You file your application and all required copies with the FDIC, as described under § 390.108.

(i) If you are required to file with an appropriate FDIC region and with the FDIC headquarters, you have not filed with the FDIC until you file with both offices.

(ii) You have not filed with the appropriate FDIC region or the FDIC headquarters until you file the application and the required number of copies with that office.

(iii) If you file after the close of business established by appropriate FDIC region or the FDIC headquarters, you have filed with that office on the next business day.

(3) [Reserved].

(b) The FDIC may notify you that it has adjusted your application filing date if you fail to meet any applicable publication requirements.

(c) If, after you properly file your application with the appropriate FDIC region, the FDIC determines that a significant issue of law or policy exists under § 390.108(b)(2)(ii), the filing date of your application is the day you filed with the appropriate FDIC region. The 30-day review period under § 390.126 or § 390.127 will restart in its entirety when the appropriate FDIC region forwards the appropriate number of copies of your application to the FDIC headquarters.

**§ 390.110 How do I amend or supplement my application?**

To amend or supplement your application, you must file the amendment or supplemental information at the appropriate FDIC region along with the number of copies required under § 390.108. Your amendment or supplemental information also must meet the caption and exhibit requirements at § 390.106(b).

**§ 390.111 Who must publish a public notice of an application?**

Sections 390.111 through 390.115 apply whenever a FDIC regulation requires an applicant (''you'') to follow the public notice procedures in this subpart.

**§ 390.112 What information must I include in my public notice?**

Your public notice must include the following:

(a) Your name and address.

(b) The type of application.

(c) The name of the depository institution(s) that is the subject matter of the application.

(d) A statement indicating that the public may submit comments to the appropriate FDIC region.

(e) The address of the appropriate FDIC region where the public may submit comments.

(f) The date that the comment period closes.

(g) A statement indicating that the nonconfidential portions of the application are on file in the appropriate FDIC region, and are available for public inspection during regular business hours.

(h) Any other information that the FDIC requires you to publish. You may find the format for various publication notices in the appendix to the FDIC application processing handbook.

**§ 390.113 When must I publish the public notice?**

You must publish a public notice of the application no earlier than seven days before and no later than the date of filing of the application.

**§ 390.114 Where must I publish the public notice?**

You must publish the notice in a newspaper having a general circulation in the communities indicated in the following chart:

| If you file . . . | You must publish in the following communities . . . |
|---|---|
| (a) Bank Merger Act application under 390.332(a), or an application for a mutual to stock conversion under 12 CFR part 192. | The community in which your home office is located. |
| (b) A change of control notice under part 391, subpart E. | The community in which the home office of the State savings association whose stock is to be acquired is located and, if applicable, the community in which the home office of the acquiror's largest subsidiary State savings association is located. |

**§ 390.115 What language must I use in my publication?**

(a) *English.* You must publish the notice in a newspaper printed in the English language.

(b) *Other than English.* If the FDIC determines that the primary language of a significant number of adult residents of the community is a language other than English, the FDIC may require that you simultaneously publish additional notice(s) in the community in the appropriate language(s).

**§ 390.116 Comment procedures.**

Sections 390.116 though 390.120 contain the procedures governing the submission of public comments on certain types of applications or notices (''applications'') pending before the FDIC. It applies whenever a regulation incorporates the procedures in §§ 390.116 through 390.120, or where otherwise required by the FDIC.

**§ 390.117 Who may submit a written comment?**

Any person may submit a written comment supporting or opposing an application.

**§ 390.118 What information should a comment include?**

(a) A comment should recite relevant facts, including any demographic, economic, or financial data, supporting the commenter's position. A comment opposing an application should also:

(1) Address at least one of the reasons why the FDIC may deny the application under the relevant statute or regulation;

(2) Recite any relevant facts and supporting data addressing these reasons; and

(3) Address how the approval of the application could harm the commenter or any community.

(b) A commenter must include any request for a meeting under § 390.122 in its comment. The commenter must describe the nature of the issues or facts to be discussed and the reasons why written submissions are insufficient to adequately address these facts or issues.

### § 390.119 Where are comments filed?

A commenter must file with the appropriate FDIC region (See table at § 390.108(a)(2)). The commenter must simultaneously send a copy of the comment to the applicant.

### § 390.120 How long is the comment period?

(a) *General.* Except as provided in paragraph (b) of this section, a commenter must file a written comment with the FDIC within 30 calendar days after the date of publication of the initial public notice.

(b) *Late-filed comments.* The FDIC may consider late-filed comments if the FDIC determines that the comment will assist in the disposition of the application.

### § 390.121 Meeting procedures.

Sections 390.121 through 390.125 contain meeting procedures. They apply whenever a regulation incorporates the procedures in §§ 390.121 through 390.125, or when otherwise required by the FDIC.

### § 390.122 When will the FDIC conduct a meeting on an application?

(a) The FDIC will grant a meeting request or conduct a meeting on its own initiative, if it finds that written submissions are insufficient to address facts or issues raised in an application, or otherwise determines that a meeting will benefit the decision-making process. The FDIC may limit the issues considered at the meeting to issues that the FDIC decides are relevant or material.

(b) The FDIC will inform the applicant and all commenters requesting a meeting of its decision to grant or deny a meeting request, or of its decision to conduct a meeting on its own initiative.

(c) If the FDIC decides to conduct a meeting, the FDIC will invite the applicant and any commenters requesting a meeting and raising an issue that FDIC intends to consider at the meeting. The FDIC may also invite other interested persons to attend. The FDIC will inform the participants of the date, time, location, issues to be considered, and format for the meeting a reasonable time before the meeting.

### § 390.123 What procedures govern the conduct of the meeting?

(a) The FDIC may conduct meetings in any format including, but not limited to, a telephone conference, a face-to-face meeting, or a more formal meeting.

(b) The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*) and the FDIC Rules of Practice and Procedure in Adjudicatory Proceedings (subpart C) do not apply to meetings under this section.

### § 390.124 Will FDIC approve or disapprove an application at a meeting?

The FDIC will not approve or deny an application at a meeting under §§ 390.121 through 390.125.

### § 390.125 Will a meeting affect application processing time frames?

If the FDIC decides to conduct a meeting, it may suspend applicable application processing time frames, including the time frames for deeming an application complete and the applicable approval time frames in §§ 390.126 through 390.135. If the FDIC suspends applicable application processing time frames, the time period will resume when the FDIC determines that a record has been developed that sufficiently supports a determination on the issues considered at the meeting.

### § 390.126 If I file a notice under expedited treatment, when may I engage in the proposed activities?

If you are eligible for expedited treatment and you have appropriately filed your notice with the FDIC, you may engage in the proposed activities upon the expiration of 30 days after the filing date of your notice, unless the FDIC takes one of the following actions before the expiration of that time period:

(a) The FDIC notifies you in writing that you must file additional information supplementing your notice. If you are required to file additional information, you may engage in the proposed activities upon the expiration of 30 calendar days after the date you file the additional information, unless the FDIC takes one of the actions described in paragraphs (b) through (d) of this section before the expiration of that time period;

(b) The FDIC notifies you in writing that your notice is subject to standard treatment under §§ 390.126 through 390.135. The FDIC will subject your notice to standard treatment if it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information;

(c) The FDIC notifies you in writing that it is suspending the applicable time frames under § 390.125; or

(d) The FDIC notifies you that it disapproves your notice.

### § 390.127 What will the FDIC do after I file my application?

(a) *FDIC action.* Within 30 calendar days after the filing date of your application, the FDIC will take one of the following actions:

| If the FDIC . . . | Then . . . |
|---|---|
| (1) Notifies you, in writing, that your application is complete * * * | The applicable review period will begin on the date that the FDIC deems your application complete. |
| (2) Notifies you, in writing, that you must submit addition information to complete your application * * *. | You must submit the required additional information under § 390.128. |
| (3) Notifies you, in writing, that your application is materially deficient * * *. | The FDIC will not process your application. |
| (4) Takes no action * * * | Your application is deemed complete. The applicable review period will begin on the day the 30-day time period expires. |

(b) *Waiver requests.* If your application includes a request for waiver of an information requirement under § 390.105(b), and the FDIC has not notified you that you must submit additional information under paragraph (a)(2) of this section, your request for waiver is granted.

**§ 390.128 If the FDIC requests additional information to complete my application, how will it process my application?**

(a) You may use the following chart to determine the procedure that applies to your submission of additional information under § 390.127(a)(1):

| If, within 30 calendar days after the date of FDIC's request for additional information . . . | Then, FDIC may . . . | And . . . |
|---|---|---|
| (1) You file a response to all information requests * * *. | (i) Notify you in writing within 15 days after the filing date of your response that your application is complete * * * applicable to all response that your application is complete * * *. | The applicable review period will begin on the date that the FDIC deems your application complete. |
| | (ii) Notify you in writing within 15 calendar days after the filing date of your response that you must submit additional information regarding matters derived from or prompted by information already furnished or any additional information necessary to resolve the issues presented in your application * * *. | You must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in this section. |
| | (iii) Notify you in writing within 15 calendar days after the filing date of your response that your application is materially deficient * * *. | The FDIC will not process your application. |
| | (iv) Take no action within 15 calendar days after the filing date of your response * * *. | Your application is deemed complete. The applicable review period will begin on the day that the 15-day time period expires. |
| (2) You request an extension of time to file additional information * * *. | (i) Grant an extension, in writing, specifying the number of days for the extension * * *. | You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section. |
| | (ii) Notify you in writing that your extension request is disapproved * * *. | The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation. |
| (3) You fail to respond completely * * * | (i) Notify you in writing that your application is deemed withdrawn * * *. | The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation. |
| | (ii) Notify you, in writing, that your response is incomplete and extend the response period, specifying the number of days for the respond extension * * *. | You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section. |

(b) The FDIC may extend the 15-day period referenced in paragraph (a)(1) of this section by up to 15 calendar days, if the FDIC requires the additional time to review your response. The FDIC will notify you that it has extended the period before the end of the initial 15-day period and will briefly explain why the extension is necessary.

(c) If your response filed under paragraph (a)(1) of this section includes a request for a waiver of an informational requirement, your request for a waiver is granted if the FDIC fails to act on it within 15 calendar days after the filing of your response, unless the FDIC extends the review period under paragraph (b) of this section. If the FDIC extends the review period under paragraph (b), your request is granted if the FDIC fails to act on it by the end of the extended review period.

**§ 390.129 Will the FDIC conduct an eligibility examination?**

(a) *Eligibility examination.* The FDIC may notify you at any time before it deems your application complete that it will conduct an eligibility examination. If the FDIC decides to conduct an eligibility examination, it will not deem your application complete until it concludes the examination.

(b) *Additional information.* The FDIC may, as a result of the eligibility examination, notify you that you must submit additional information to complete your application. If so, you must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in § 390.128.

**§ 390.130 What may the FDIC require me to do after my application is deemed complete?**

After your application is deemed complete, but before the end of the applicable review period,

(a) The FDIC may require you to provide additional information if the information is necessary to resolve or clarify the issues presented by your application.

(b) The FDIC may determine that a major issue of law or a change in circumstances arose after you filed your application, and that the issue or changed circumstances will substantially effect your application. If the FDIC identifies such an issue or changed circumstances, it may:

(1) Notify you, in writing, that your application is now incomplete and require you to submit additional information to complete the application under the procedures described at § 390.128; and

(2) Require you to publish a new public notice of your application under § 390.131.

**§ 390.131 Will the FDIC require me to publish a new public notice?**

(a) If your application was subject to a publication requirement, the FDIC may require you to publish a new public notice of your application if:

(1) You submitted a revision to the application, you submitted new or additional information, or a major issue of law or a change in circumstances arose after the filing of your application; and

(2) The FDIC determines that additional comment on these matters is appropriate because of the significance of the new information or circumstances.

(b) The FDIC will notify you in writing if you must publish a new public notice of your revised application.

(c) If you are required to publish a new public notice of your revised application, you must notify the FDIC after you publish the new public notice.

**§ 390.132 May the FDIC suspend processing of my application?**

(a) *Suspension.* The FDIC may, at any time, indefinitely suspend processing of your application if:

(1) The FDIC, another governmental entity, or a self-regulatory trade or professional organization initiates an investigation, examination, or administrative proceeding that is relevant to the FDIC's evaluation of your application;

(2) You request the suspension or there are other extraordinary circumstances that have a significant impact on the processing of your application.

(b) *Notice.* The FDIC will promptly notify you, in writing, if it suspends your application.

**§ 390.133 How long is the FDIC review period?**

(a) *General.* The applicable FDIC review period is 60 calendar days after the date that your application is deemed complete, unless an applicable FDIC regulation specifies a different review period.

(b) *Multiple applications.* If you submit more than one application in connection with a proposed action or if two or more applicants submit related applications, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review periods.

(c) *Extensions.* (1) The FDIC may extend the review period for up to 30 calendar days beyond the period described in paragraph (a) or (b) of this section. The FDIC must notify you in writing of the extension and the duration of the extension. The FDIC must issue the written extension before the end of the review period.

(2) The FDIC may also extend the review period as needed until it acts on the application, if the application presents a significant issue of law or policy that requires additional time to resolve. The FDIC must notify you in writing of the extension and the general reasons for the extension. The FDIC must issue the written extension before the end of the review period, including any extension of that period under paragraph (c)(1) of this section.

**§ 390.134 How will I know if my application has been approved?**

(a) *FDIC approval or denial.* (1) The FDIC will approve or deny your application before the expiration of the applicable review period, including any extensions of the review period.

(2) The FDIC will promptly notify you in writing of its decision to approve or deny your application.

(b) *No FDIC action.* If the FDIC fails to act under paragraph (a)(1) of this section, your application is approved.

**§ 390.135 What will happen if the FDIC does not approve or disapprove my application within two calendar years after the filing date?**

(a) *Withdrawal.* If the FDIC has not approved or denied your pending application within two calendar years after the filing date under § 390.109, the FDIC will notify you, in writing, that your application is deemed withdrawn unless the FDIC determines that you are actively pursuing a final FDIC determination on your application. You are not actively pursuing a final FDIC determination if you have failed to timely take an action required under this part, including filing required additional information, or the FDIC has suspended processing of your application under § 390.132 based on circumstances that are, in whole or in part, within your control and you have failed to take reasonable steps to resolve these circumstances.

(b) [Reserved].

## Subpart G—Nondiscrimination Requirements

**§ 390.140 Definitions.**

As used in this subpart—

*Application.* For purposes of this part, an application for a loan or other service is as defined in Regulation C, 12 CFR 203.2(b).

*Dwelling.* The term ''dwelling'' means a residential structure (whether or not it is attached to real property) located in a state of the United States of America, the District of Colombia, or the Commonwealth of Puerto Rico. The term includes an individual condominium unit, cooperative unit, or mobile or manufactured home.

*State savings association.* The term ''State savings association'' means any State savings association as defined in 12 U.S.C. 1813(b).

**§ 390.141 Supplementary guidelines.**

The FDIC's policy statement found at 12 CFR 390.150 supplements this subpart and should be read together with this subpart. Refer also to the HUD Fair Housing regulations at 24 CFR parts 100 *et seq.,* Federal Reserve Regulation B at 12 CFR part 202, and Federal Reserve Regulation C at 12 CFR part 203.

**§ 390.142 Nondiscrimination in lending and other services.**

(a) No State savings association may deny a loan or other service, or discriminate in the purchase of loans or securities or discriminate in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or other service on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract) or national origin of:

(1) An applicant or joint applicant;

(2) Any person associated with an applicant or joint applicant regarding such loan or other service, or with the purposes of such loan or other service;

(3) The present or prospective owners, lessees, tenants, or occupants of the dwelling(s) for which such loan or other service is to be made or given;

(4) The present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity of the dwelling(s) for which such loan or other service is to be made or given.

(b) A State savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.

(c) No State savings association may discriminate against an applicant for a loan or other service on any prohibited basis (as defined in 12 CFR 202.2(z) and 24 CFR part 100).

**§ 390.143 Nondiscriminatory appraisal and underwriting.**

(a) *Appraisal.* No State savings association may use or rely upon an appraisal of a dwelling which the State savings association knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect under the Fair Housing Act of 1968 or the Equal Credit Opportunity Act.

(b) *Underwriting.* Each State savings association shall have clearly written, non-discriminatory loan underwriting standards, available to the public upon request, at each of its offices. Each association shall, at least annually, review its standards, and business practices implementing them, to ensure equal opportunity in lending.

**§ 390.144 Nondiscrimination in applications.**

(a) No State savings association may discourage, or refuse to allow, receive, or consider, any application, request, or inquiry regarding a loan or other service, or discriminate in imposing conditions upon, or in processing, any such application, request, or inquiry on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), national origin, or other characteristics prohibited from consideration in § 390.142(c), of the prospective borrower or other person, who:

(1) Makes application for any such loan or other service;

(2) Requests forms or papers to be used to make application for any such loan or other service; or

(3) Inquires about the availability of such loan or other service.

(b) A State savings association shall inform each inquirer of his or her right to file a written loan application, and to receive a copy of the association's underwriting standards.

**§ 390.145 Nondiscriminatory advertising.**

No State savings association may directly or indirectly engage in any form of advertising that implies or suggests a policy of discrimination or exclusion in violation of title VIII of the Civil Rights Acts of 1968, the Equal Credit Opportunity Act, or this subpart. Advertisements for any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall include a facsimile of the following logotype and legend:

EQUAL HOUSING
LENDER

**§ 390.146 Equal Housing Lender Poster.**

(a) Each State savings association shall post and maintain one or more Equal Housing Lender Posters, the text of which is prescribed in paragraph (b) of this section, in the lobby of each of its offices in a prominent place or places readily apparent to all persons seeking loans. The poster shall be at least 11 by 14 inches in size, and the text shall be easily legible. It is recommended that savings associations post a Spanish language version of the poster in offices serving areas with a substantial Spanish-speaking population.

(b) The text of the Equal Housing Lender Poster shall be as follows:

EQUAL HOUSING
LENDER

We Do Business In Accordance With Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

[ ] Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or

[ ] Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD:

SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

For processing under FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

[ ] On the basis of race, color, national origin, religion, sex, marital status, or age;

[ ] Because income is from public assistance; or

[ ] Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

**§ 390.147 Loan application register.**

State savings associations and other lenders required to file Home Mortgage Disclosure Act Loan Application Registers with the FDIC in accordance with 12 CFR part 203 must enter the reason for denial, using the codes provided in 12 CFR part 203, with respect to all loan denials.

**§ 390.148 Nondiscrimination in employment.**

(a) No State savings association shall, because of an individual's race, color, religion, sex, or national origin:

(1) Fail or refuse to hire such individual;

(2) Discharge such individual;

(3) Otherwise discriminate against such individual with respect to such individual's compensation, promotion, or the terms, conditions, or privileges of such individual's employment; or

(4) Discriminate in admission to, or employment in, any program of apprenticeship, training, or retraining, including on-the-job training.

(b) No State savings association shall limit, segregate, or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of such individual's race, color, religion, sex, or national origin.

(c) No State savings association shall discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State, or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing of such practice by any lawfully constituted authority.

(d) No State savings association shall print or publish or cause to be printed or published any notice or advertisement relating to employment by such savings association indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin.

(e) This regulation shall not apply in any case in which the Federal Equal Employment Opportunities law is made inapplicable by the provisions of section 2000e–1 or sections 2000e–2 (e) through (j) of title 42, United States Code.

(f) Any violation of the following laws or regulations by a State savings association shall be deemed to be a violation of this subpart:

(1) The Equal Employment Opportunity Act, as amended, 42 U.S.C. 2000e–2000h–2, and Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR part 1600;

(2) The Age Discrimination in Employment Act, 29 U.S.C. 621–633, and EEOC and Department of Labor regulations;

(3) Department of the Treasury regulations at 31 CFR part 12 and Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60;

(4) The Veterans Employment and Readjustment Act of 1972, 38 U.S.C. 2011–2012, and the Vietnam Era Veterans Readjustment Adjustment Assistance Act of 1974, 38 U.S.C. 2021–2026;

(5) The Rehabilitation Act of 1973, 29 U.S.C. 701 *et al.;* and

(6) The Immigration and Nationality Act, 8 U.S.C. 1324b, and INS regulations at 8 CFR part 274a.

**§ 390.149 Complaints.**

Complaints regarding discrimination in lending by a State savings association shall be referred to the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Washington, DC 20410 for processing under the Fair Housing Act, and to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249 for processing under FDIC regulations. Complaints regarding discrimination in employment by a State savings association should be referred to the Equal Employment Opportunity Commission, Washington, DC 20506 and a copy, for information only, sent to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249.

**§ 390.150 Guidelines relating to nondiscrimination in lending.**

(a) *General.* Fair housing and equal opportunity in home financing is a policy of the United States established by Federal statutes and Presidential orders and proclamations. In furtherance of the Federal civil rights laws and the economical home financing purposes of the statutes administered by the FDIC, the FDIC has adopted, in this subpart, nondiscrimination regulations that, among other things, prohibit arbitrary refusals to consider loan applications on the basis of the age or location of a dwelling, and prohibit discrimination based on race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), or national origin in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing related loans. Such discrimination is also prohibited in the purchase of loans and securities. This section provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies. Each State savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity.

(b) *Loan underwriting standards.* The basic purpose of the FDIC's nondiscrimination regulations is to require that every applicant be given an equal opportunity to obtain a loan. Each loan applicant's creditworthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

(c) *Discriminatory practices*— (1) *Discrimination on the basis of sex or marital status.* The Civil Rights Act of 1968 and the National Housing Act prohibit discrimination in lending on the basis of sex. The Equal Credit Opportunity Act, in addition to this prohibition, forbids discrimination on the basis of marital status. Refusing to lend to, requiring higher standards of creditworthiness of, or imposing different requirements on, members of one sex or individuals of one marital status, is discrimination based on sex or marital status. Loan underwriting decisions must be based on an applicant's credit history and present and reasonably foreseeable economic prospects, rather than on the basis of assumptions regarding comparative differences in creditworthiness between married and unmarried individuals, or between men and women.

(2) *Discrimination on the basis of language.* Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.

(3) *Income of husbands and wives.* A practice of discounting all or part of either spouse's income where spouses apply jointly is a violation of section 527 of the National Housing Act. As with other income, when spouses apply jointly for a loan, the determination as to whether a spouse's income qualifies for credit purposes should depend upon a reasonable evaluation of his or her past, present, and reasonably foreseeable economic circumstances. Information relating to child-bearing intentions of a couple or an individual may not be requested.

(4) *Supplementary income.* Lending standards which consider as effective only the non-overtime income of the primary wage-earner may result in discrimination because they do not take account of variations in employment patterns among individuals and families. The FDIC favors loan underwriting which reasonably evaluates the credit worthiness of each applicant based on a realistic appraisal of his or her own past, present, and foreseeable economic circumstances. The determination as to whether primary income or additional income qualifies as effective for credit purposes should depend upon whether such income may reasonably be expected to continue through the early period of the mortgage risk. Automatically discounting other income from bonuses, overtime, or part-time employment, will cause some applicants to be denied financing without a realistic analysis of their credit worthiness. Since statistics show that minority group members and low- and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing.

(5) *Applicant's prior history.* Loan decisions should be based upon a realistic evaluation of all pertinent factors respecting an individual's creditworthiness, without giving undue weight to any one factor. The State savings association should, among other things, take into consideration that:

(i) In some instances, past credit difficulties may have resulted from discriminatory practices;

(ii) A policy favoring applicants who previously owned homes may perpetuate prior discrimination;

(iii) A current, stable earnings record may be the most reliable indicator of credit-worthiness, and entitled to more weight than factors such as educational level attained;

(iv) Job or residential changes may indicate upward mobility; and

(v) Preferring applicants who have done business with the lender can perpetuate previous discriminatory policies.

(6) *Income level or racial composition of area.* Refusing to lend or lending on less favorable terms in particular areas because of their racial composition is unlawful. Refusing to lend, or offering less favorable terms (such as interest rate, downpayment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons.

(7) *Age and location factors.* Sections 390.142–390.144 prohibit loan denials based upon the age or location of a dwelling. These restrictions are intended to prohibit use of unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of a dwelling or the physical or economic characteristics of an area. Loan decisions should be based on the present market value of the property offered as security (including consideration of specific improvements to be made by the borrower) and the likelihood that the property will retain an adequate value over the term of the loan. Specific factors which may negatively affect its short-range future value (up to 3–5 years) should be clearly documented. Factors which in some cases may cause the market value of a property to decline are recent zoning changes or a significant number of abandoned homes in the immediate vicinity of the property. However, not all zoning changes will cause a decline in property values, and proximity to abandoned buildings may not affect the market value of a property because of rehabilitation programs or affirmative lending programs, or because the cause of abandonment is unrelated to high risk. Proper underwriting considerations include the condition and utility of the improvements, and various physical factors such as street conditions, amenities such as parks and recreation areas, availability of public utilities and municipal services, and exposure to flooding and land faults. However, arbitrary decisions based on age or location are prohibited, since many older, soundly constructed homes provide housing opportunities which may be precluded by an arbitrary lending policy.

(8) *Fair Housing Act (title VIII, Civil Rights Act of 1968, as amended).* State savings associations, must comply with all regulations promulgated by the Department of Housing and Urban Development to implement the Fair Housing Act, found at 24 CFR part 100 *et seq.,* except that they shall use the Equal Housing Lender logo and poster prescribed by FDIC regulations at §§ 390.145 and 390.146 rather than the Equal Housing Opportunity logo and poster required by 24 CFR parts 109 and 110.

(d) *Marketing practices.* State savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a State savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The FDIC will systematically review marketing practices where evidence of discrimination in lending is discovered.

## Subpart H—Disclosure and Reporting of CRA-Related Agreements

### § 390.160 Purpose and scope of this subpart.

(a) *General.* This subpart implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person (NGEP), insured depository institution, or affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) *Scope of this subpart.* The provisions of this subpart apply to—

(1) State savings associations, as defined in section 3(b) of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1813(b)) and their subsidiaries;

(2) [Reserved]

(3) Affiliates of State savings associations and savings and loan holding companies, other than bank holding companies, banks, and subsidiaries of bank holding companies and banks; and

(4) NGEPs that enter into covered agreements with any company listed in paragraphs (b)(1) through (b)(3) of this section.

(c) *Relation to Community Reinvestment Act.* This subpart does not affect in any way the Community Reinvestment Act of 1977 (CRA) (12 U.S.C. 2901 *et seq.*), 12 CFR Part 345, 12 CFR part 195 issued by the Office of the Comptroller of the Currency and applicable to State savings associations, or FDIC's interpretations or administration of the CRA or Community Reinvestment rule.

(d) *Examples.* (1) The examples in this subpart are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this subpart.

(2) Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issues that may arise in this subpart.

### § 390.161 Definition of covered agreement.

(a) *General definition of covered agreement.* A covered agreement is any contract, arrangement, or understanding that meets all of the following criteria—

(1) The agreement is in writing.

(2) The parties to the agreement include—

(i) One or more insured depository institutions or affiliates of an insured depository institution; and

(ii) One or more NGEPs.

(3) The agreement provides for the insured depository institution or any affiliate to—

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than $10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than $50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the CRA, as defined in § 390.163.

(5) The agreement is with a NGEP that has had a CRA communication as described in § 390.162 prior to entering into the agreement.

(b) *Examples concerning written arrangements or understandings*—(1) *Example 1.* A NGEP meets with an insured depository institution and states that the institution needs to make more community development investments in the NGEP's community. The NGEP and insured depository institution do not reach an agreement concerning the community development investments the institution should make in the community, and the parties do not reach any mutual arrangement or understanding. Two weeks later, the institution unilaterally issues a press release announcing that it has established a general goal of making $100 million of community development grants in low- and moderate-income neighborhoods served by the insured depository institution over the next 5 years. The NGEP is not identified in the press release. The press release is not a written arrangement or understanding.

(2) *Example 2.* A NGEP meets with an insured depository institution and states that the institution needs to offer new loan programs in the NGEP's community. The NGEP and the insured depository institution reach a mutual arrangement or understanding that the institution will provide additional loans in the NGEP's community. The institution tells the NGEP that it will issue a press release announcing the program. Later, the insured depository institution issues a press release announcing the loan program. The press release incorporates the key terms of the understanding reached between the NGEP and the insured depository institution. The written press release reflects the mutual arrangement or understanding of the NGEP and the insured depository institution and is, therefore, a written arrangement or understanding.

(3) *Example 3.* An NGEP sends a letter to an insured depository institution requesting that the institution provide a $15,000 grant to the NGEP. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program. The exchange of letters constitutes a written arrangement or understanding.

(c) *Loan agreements that are not covered agreements.* A covered agreement does not include—

(1) Any individual loan that is secured by real estate; or

(2) Any specific contract or commitment for a loan or extension of credit to an individual, business, farm, or other entity, or group of such individuals or entities, if—

(i) The funds are loaned at rates that are not substantially below market rates; and

(ii) The loan application or other loan documentation does not indicate that the borrower intends or is authorized to use the borrowed funds to make a loan or extension of credit to one or more third parties.

(d) *Examples concerning loan agreements*—(1) *Example 1.* An insured depository institution provides an organization with a $1 million loan that is documented in writing and is secured by real estate owned or to-be-acquired by the organization. The agreement is an individual mortgage loan and is exempt from coverage under paragraph (c)(1) of this section, regardless of the interest rate on the loan or whether the organization intends or is authorized to re-loan the funds to a third party.

(2) *Example 2.* An insured depository institution commits to provide a $500,000 line of credit to a small business that is documented by a written agreement. The loan is made at rates that are within the range of rates offered by the institution to similarly situated small businesses in the market and the loan documentation does not indicate that the small business intends or is authorized to re-lend the borrowed funds. The agreement is exempt from coverage under paragraph (c)(2) of this section.

(3) *Example 3.* An insured depository institution offers small business loans that are guaranteed by the Small Business Administration (SBA). A small business obtains a $75,000 loan, documented in writing, from the institution under the institution's SBA loan program. The loan documentation does not indicate that the borrower intends or is authorized to re-lend the funds. Although the rate charged on the loan is well below that charged by the institution on commercial loans, the rate is within the range of rates that the institution would charge a similarly situated small business for a similar loan under the SBA loan program. Accordingly, the loan is not made at substantially below market rates and is exempt from coverage under paragraph (c)(2) of this section.

(4) *Example 4.* A bank holding company enters into a written agreement with a community development organization that provides that insured depository institutions owned by the bank holding company will make $250 million in small business loans in the community over the next 5 years. The written agreement is not a specific contract or commitment for a loan or an extension of credit and, thus, is not exempt from coverage under paragraph (c)(2) of this section. Each small business loan made by the insured depository institution pursuant to this general commitment would, however, be exempt from coverage if the loan is made at rates that are not substantially below market rates and the loan documentation does not indicate that the borrower intended or was authorized to re-lend the funds.

(e) *Agreements that include exempt loan agreements.* If an agreement includes a loan, extension of credit or loan commitment that, if documented separately, would be exempt under paragraph (c) of this section, the exempt loan, extension of credit or loan commitment may be excluded for purposes of determining whether the agreement is a covered agreement.

(f) *Determining annual value of agreements that lack schedule of disbursements.* For purposes of paragraph (a)(3) of this section, a multi-year agreement that does not include a schedule for the disbursement of payments, grants, loans or other consideration by the insured depository institution or affiliate, is considered to have a value in the first year of the agreement equal to all payments, grants, loans and other consideration to be provided at any time under the agreement.

**§ 390.162 CRA communications.**

(a) *Definition of CRA communication.* A CRA communication is any of the following—

(1) Any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(2) Any written comment submitted to the insured depository institution that discusses the adequacy of the performance under the CRA of the institution and must be included in the institution's CRA public file.

(3) Any discussion or other contact with the insured depository institution or any affiliate about—

(i) Providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate;

(ii) Providing (or refraining from providing) written comments to the insured depository institution that concern the adequacy of the institution's performance under the CRA and must be included in the institution's CRA public file; or

(iii) The adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(b) *Discussions or contacts that are not CRA communications.* (1) *Timing of contacts with a Federal banking agency.* An oral or written communication with a Federal banking agency is not a CRA communication if it occurred more than 3 years before the parties entered into the agreement.

(2) *Timing of contacts with insured depository institutions and affiliates.* A communication with an insured depository institution or affiliate is not a CRA communication if the communication occurred—

(i) More than 3 years before the parties entered into the agreement, in the case of any written communication;

(ii) More than 3 years before the parties entered into the agreement, in the case of any oral communication in which the NGEP discusses providing (or refraining from providing) comments or testimony to a Federal banking agency or written comments that must be included in the institution's CRA public file in connection with a request to, or agreement by, the institution or affiliate to take (or refrain from taking) any action that is in fulfillment of the CRA; or

(iii) More than 1 year before the parties entered into the agreement, in the case of any other oral communication not described in paragraph (b)(2)(ii) of this section.

(3) *Knowledge of communication by insured depository institution or affiliate.* (i) A communication is only a CRA communication under paragraph (a) of this section if the insured depository institution or its affiliate has knowledge of the communication under paragraph (b)(3)(ii) or (iii) of this section.

(ii) *Communication with insured depository institution or affiliate.* An insured depository institution or affiliate has knowledge of a communication by the NGEP to the institution or its affiliate under this paragraph only if one of the following representatives of the insured depository institution or any affiliate has knowledge of the communication—

(A) An employee who approves, directs, authorizes, or negotiates the agreement with the NGEP; or

(B) An employee designated with responsibility for compliance with the CRA or executive officer if the employee or executive officer knows that the institution or affiliate is negotiating, intends to negotiate, or has been informed by the NGEP that it expects to request that the institution or affiliate negotiate an agreement with the NGEP.

(iii) *Other communications.* An insured depository institution or affiliate is deemed to have knowledge of—

(A) Any testimony provided to a Federal banking agency at a public meeting or hearing;

(B) Any comment submitted to a Federal banking agency that is conveyed in writing by the agency to the insured depository institution or affiliate; and

(C) Any written comment submitted to the insured depository institution that must be and is included in the institution's CRA public file.

(4) *Communication where NGEP has knowledge.* A NGEP has a CRA communication with an insured depository institution or affiliate only if any of the following individuals has knowledge of the communication—

(i) A director, employee, or member of the NGEP who approves, directs, authorizes, or negotiates the agreement with the insured depository institution or affiliate;

(ii) A person who functions as an executive officer of the NGEP and who knows that the NGEP is negotiating or intends to negotiate an agreement with the insured depository institution or affiliate; or

(iii) Where the NGEP is an individual, the NGEP.

(c) *Examples of CRA communications.* (1) *Examples of actions that are CRA communications.* The following are examples of CRA communications. These examples are not exclusive and assume that the communication occurs within the relevant time period as described in paragraph (b)(1) or (2) of this section and the appropriate representatives have knowledge of the communication as specified in paragraphs (b)(3) and (4) of this section.

(i) *Example 1.* A NGEP files a written comment with a Federal banking agency that states than an insured depository institution successfully addresses the credit needs of its community. The written comment is in response to a general request from the agency for comments on an application of the insured depository institution to open a new branch and a copy of the comment is provided to the institution.

(ii) *Example 2.* A NGEP meets with an executive officer of an insured depository institution and states that the institution must improve its CRA performance.

(iii) *Example 3.* A NGEP meets with an executive officer of an insured depository institution and states that the institution needs to make more mortgage loans in low- and moderate-income neighborhoods in its community.

(iv) *Example 4.* A bank holding company files an application with a Federal banking agency to acquire an insured depository institution. Two weeks later, the NGEP meets with an executive officer of the bank holding company to discuss the adequacy of the performance under the CRA of the target insured depository institution. The insured depository institution was an affiliate of the bank holding company at the time the NGEP met with the target institution. (*See* § 390.170(a)) Accordingly, the NGEP had a CRA communication with an affiliate of the bank holding company.

(2) *Examples of actions that are not CRA communications.* The following are examples of actions that are not by themselves CRA communications. These examples are not exclusive.

(i) *Example 1.* A NGEP provides to a Federal banking agency comments or testimony concerning an insured depository institution or affiliate in response to a direct request by the agency for comments or testimony from that NGEP. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902(3)) by, an insured depository institution or an application by a company to acquire an insured depository institution.

(ii) *Example 2.* A NGEP makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions, affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(iii) *Example 3.* A NGEP, such as a civil rights group, community group providing housing and other services in low- and moderate-income neighborhoods, veterans organization, community theater group, or youth organization, sends a fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work by supporting the fundraising efforts of the NGEP.

(iv) *Example 4.* A NGEP discusses with an insured depository institution or affiliate whether particular loans, services, investments, community development activities, or other activities are generally eligible for consideration by a Federal banking agency under the CRA. The NGEP and insured depository institution or affiliate do not discuss the adequacy of the CRA performance of the insured depository institution or affiliate.

(v) *Example 5.* A NGEP engaged in the sale or purchase of loans in the secondary market sends a general offering circular to financial institutions offering to sell or purchase a portfolio of loans. An insured depository institution that receives the offering circular discusses with the NGEP the types of loans included in the loan pool, whether such loans are generally eligible for consideration under the CRA, and which loans are made to borrowers in the institution's local community. The NGEP and insured depository institution do not discuss the adequacy of the institution's CRA performance.

(d) *Multiparty covered agreements.* (1) A NGEP that is a party to a covered agreement that involves multiple NGEPs is not required to comply with the requirements of this part if—

(i) The NGEP has not had a CRA communication; and

(ii) No representative of the NGEP identified in paragraph (b)(4) of this section has knowledge at the time of the agreement that another NGEP that is a party to the agreement has had a CRA communication.

(2) An insured depository institution or affiliate that is a party to a covered agreement that involves multiple insured depository institutions or affiliates is not required to comply with the requirements in §§ 390.165 and 390.166 if—

(i) No NGEP that is a party to the agreement has had a CRA communication concerning the insured depository institution or any affiliate; and

(ii) No representative of the insured depository institution or any affiliate identified in paragraph (b)(3) of this section has knowledge at the time of the agreement that an NGEP that is a party to the agreement has had a CRA communication concerning any other insured depository institution or affiliate that is a party to the agreement.

**§ 390.163 Fulfillment of the CRA.**

(a) *List of factors that are in fulfillment of the CRA.* Fulfillment of the CRA, for purposes of this subpart, means the following list of factors—

(1) *Comments to a Federal banking agency or included in CRA public file.* Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution; or

(2) *Activities given favorable CRA consideration.* Performing any of the following activities if the activity is of the type that is likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of the insured depository institution that is a party to the agreement or an affiliate of a party to the agreement—

(i) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in 12 CFR 195.22, including loan purchases, loan commitments, and letters of credit;

(ii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in 12 CFR 195.23;

(iii) Delivering retail banking services, as described in 12 CFR 195.24(d);

(iv) Providing community development services, as described in 12 CFR 195.24(e);

(v) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in 12 CFR 195.25(c);

(vi) In the case of a small insured depository institution, any lending or other activity described in 12 CFR 195.26(a); or

(vii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in 12 CFR 195.27(f).

(b) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns any activity described in paragraph (a) of this section of a CRA affiliate must, prior to the time the agreement is entered into, notify each NGEP that is a party to the agreement that the agreement concerns a CRA affiliate.

**§ 390.164 Related agreements considered a single agreement.**

The following rules must be applied in determining whether an agreement is a covered agreement under § 390.161.

(a) *Agreements entered into by same parties.* All written agreements to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the agreements—

(1) Are entered into with the same NGEP;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.* All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a NGEP is a party to each contract.

**§ 390.165 Disclosure of covered agreements.**

(a) *Applicability date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public*—(1) *Disclosure required.* Each NGEP and each insured depository institution or affiliate that enters into a covered agreement must make a copy of the covered agreement available to any individual or entity upon request.

(2) *Nondisclosure of confidential and proprietary information permitted.* In responding to a request for a covered agreement from any individual or entity under paragraph (b)(1) of this section, a NGEP, insured depository institution, or affiliate may withhold from public disclosure confidential or proprietary information that the party believes the relevant supervisory agency could withhold from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) (FOIA).

(3) *Information that must be disclosed.* Notwithstanding paragraph (b)(2) of this section, a party must disclose any of the following information that is contained in a covered agreement—

(i) The names and addresses of the parties to the agreement;

(ii) The amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement;

(iii) Any description of how the funds or other resources provided under the agreement are to be used;

(iv) The term of the agreement (if the agreement establishes a term); and

(v) Any other information that the relevant supervisory agency determines is not properly exempt from public disclosure.

(4) *Request for review of withheld information.* Any individual or entity may request that the relevant supervisory agency review whether any information in a covered agreement withheld by a party must be disclosed. Any requests for agency review of withheld information must be filed, and will be processed in accordance with, the relevant supervisory agency's rules concerning the availability of information (*see* part 309).

(5) *Duration of obligation.* The obligation to disclose a covered agreement to the public terminates 12 months after the end of the term of the agreement.

(6) *Reasonable copy and mailing fees.* Each NGEP and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(7) *Use of CRA public file by insured depository institution or affiliate.* An insured depository institution and any affiliate of an insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file if the institution makes the agreement available in accordance with the procedures set forth in 12 CFR 195.43.

(c) *Disclosure by NGEPs of covered agreements to the relevant supervisory agency.* (1) Each NGEP that is a party to a covered agreement must provide the following within 30 days of receiving a request from the relevant supervisory agency—

(i) A complete copy of the agreement; and

(ii) In the event the NGEP proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information and an explanation justifying the exclusions. Any public version must include the information described in paragraph (b)(3) of this section.

(2) The obligation to provide a covered agreement to the relevant supervisory agency terminates 12 months after the end of the term of the covered agreement.

(d) *Disclosure by insured depository institution or affiliate of covered agreements to the relevant supervisory agency*—(1) *In general.* Within 60 days of the end of each calendar quarter, each insured depository institution and affiliate must provide each relevant supervisory agency with—

(i)(A) A complete copy of each covered agreement entered into by the insured depository institution or affiliate during the calendar quarter; and

(B) In the event the institution or affiliate proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information (other than any information described in paragraph (b)(3) of this section) and an explanation justifying the exclusions; or

(ii) A list of all covered agreements entered into by the insured depository institution or affiliate during the calendar quarter that contains—

(A) The name and address of each insured depository institution or affiliate that is a party to the agreement;

(B) The name and address of each NGEP that is a party to the agreement;

(C) The date the agreement was entered into;

(D) The estimated total value of all payments, fees, loans and other consideration to be provided by the institution or any affiliate of the institution under the agreement; and

(E) The date the agreement terminates.

(2) *Prompt filing of covered agreements contained in list required.* (i) If an insured depository institution or affiliate files a list of the covered agreements entered into by the institution or affiliate pursuant to paragraph (d)(1)(ii) of this section, the institution or affiliate must provide any relevant supervisory agency a complete copy and public version of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency for a copy of the agreement.

(ii) The obligation of an insured depository institution or affiliate to provide a covered agreement to the relevant supervisory agency under this paragraph (d)(2) terminates 36 months after the end of the term of the covered agreement.

(3) *Joint filings.* In the event that 2 or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file the documents required by this paragraph (d) of this section. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the filings are being made.

**§ 390.166 Annual reports.**

(a) *Applicability date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each NGEP and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement*—(1) *NGEPs.* A NGEP must file an annual report for a covered agreement for any fiscal year in which the NGEP receives or uses funds or other resources under the agreement.

(2) *Insured depository institutions and affiliates.* An insured depository institution or affiliate must file an annual report for a covered agreement for any fiscal year in which the institution or affiliate—

(i) Provides or receives any payments, fees, or loans under the covered agreement that must be reported under paragraphs (e)(1)(iii) and (iv) of this section; or

(ii) Has data to report on loans, investments, and services provided by a party to the covered agreement under the covered agreement under paragraph (e)(1)(vi) of this section.

(d) *Annual reports filed by NGEP*—(1) *Contents of report.* The annual report filed by a NGEP under this section must include the following—

(i) The name and mailing address of the NGEP filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) A detailed, itemized list of how the funds or resources received by the NGEP under the covered agreement were used during the fiscal year, including the total amount used for—

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses and uses (specify expense or use).

(2) *More detailed reporting of uses of funds or resources permitted*—(i) *In general.* If a NGEP allocated and used funds received under a covered agreement for a specific purpose, the

NGEP may fulfill the requirements of paragraph (d)(1)(iv) of this section with respect to such funds by providing—

(A) A brief description of each specific purpose for which the funds or other resources were used; and

(B) The amount of funds or resources used during the fiscal year for each specific purpose.

(ii) *Specific purpose defined.* A NGEP allocates and uses funds for a specific purpose if the NGEP receives and uses the funds for a purpose that is more specific and limited than the categories listed in paragraph (d)(1)(iv) of this section.

(3) *Use of other reports.* The annual report filed by a NGEP may consist of or incorporate a report prepared for any other purpose, such as the Internal Revenue Service Return of Organization Exempt From Income Tax on Form 990, or any other Internal Revenue Service form, state tax form, report to members or shareholders, audited or unaudited financial statements, audit report, or other report, so long as the annual report filed by the NGEP contains all of the information required by this paragraph (d).

(4) *Consolidated reports permitted.* A NGEP that is a party to 2 or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information reported under paragraphs (d)(1)(iv) and (d)(2) of this section may be reported on an aggregate basis for all covered agreements.

(5) *Examples of annual report requirements for NGEPs*—(i) *Example 1.* A NGEP receives an unrestricted grant of $15,000 under a covered agreement, includes the funds in its general operating budget and uses the funds during its fiscal year. The NGEP's annual report for the fiscal year must provide the name and mailing address of the NGEP, information sufficient to identify the covered agreement, and state that the NGEP received $15,000 during the fiscal year. The report must also indicate the total expenditures made by the NGEP during the fiscal year for compensation, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other expenses and uses. The NGEP's annual report may provide this information by submitting an Internal Revenue Service Form 990 that includes the required information. If the Internal Revenue Service Form does not include information for all of the required categories listed in this part, the NGEP must report the total expenditures in the remaining categories either by providing that information directly or by providing another form or report that includes the required information.

(ii) *Example 2.* An organization receives $15,000 from an insured depository institution under a covered agreement and allocates and uses the $15,000 during the fiscal year to purchase computer equipment to support its functions. The organization's annual report must include the name and address of the organization, information sufficient to identify the agreement, and a statement that the organization received $15,000 during the year. In addition, since the organization allocated and used the funds for a specific purpose that is more narrow and limited than the categories of expenses included in the detailed, itemized list of expenses, the organization would have the option of providing either the total amount it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section, or a statement that it used the $15,000 to purchase computer equipment and a brief description of the equipment purchased.

(iii) *Example 3.* A community group receives $50,000 from an insured depository institution under a covered agreement. During its fiscal year, the community group specifically allocates and uses $5,000 of the funds to pay for a particular business trip and uses the remaining $45,000 for general operating expenses. The group's annual report for the fiscal year must include the name and address of the group, information sufficient to identify the agreement, and a statement that the group received $50,000. Because the group did not allocate and use all of the funds for a specific purpose, the group's annual report must provide the total amount of funds it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section. The group's annual report also could state that it used $5,000 for a particular business trip and include a brief description of the trip.

(iv) *Example 4.* A community development organization is a party to two separate covered agreements with two unaffiliated insured depository institutions. Under each agreement, the organization receives $15,000 during its fiscal year and uses the funds to support its activities during that year. If the organization elects to file a consolidated annual report, the consolidated report must identify the organization and the two covered agreements, state that the organization received $15,000 during the fiscal year under each agreement, and provide the total amount that the organization used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section.

(e) *Annual report filed by insured depository institution or affiliate*—(1) *General.* The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement (or a list identifying the agreement) was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by another party under this section.

(2) *Consolidated reports permitted*—(i) *Party to multiple agreements.* An insured depository institution or

affiliate that is a party to 2 or more covered agreements may file a single consolidated annual report with each relevant supervisory agency concerning all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iv) and (vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing*—(1) *General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a NGEP.* (i) A NGEP may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than six months following the end of the NGEP's fiscal year—

(A) A copy of the NGEP's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the NGEP.

(ii) An insured depository institution or affiliate that receives an annual report from a NGEP pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the NGEP within 30 days.

**§ 390.167 Release of information under FOIA.**

FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*) and the FDIC's rules (part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

**§ 390.168 Compliance provisions.**

(a) *Willful failure to comply with disclosure and reporting obligations.* (1) If FDIC determines that a NGEP has willfully failed to comply in a material way with § 390.165 or § 390.166, FDIC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as FDIC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by FDIC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, FDIC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, FDIC will provide written notice and an opportunity to present information to FDIC concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or *de minimis* errors in annual reports or other documents filed with FDIC under §§ 390.165 or 390.166 will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this subpart shall be construed as authorizing FDIC to enforce the provisions of any covered agreement.

**§ 390.169 [Reserved].**

**§ 390.170 Other definitions and rules of construction used in this subpart.**

(a) *Affiliate. Affiliate* means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 390.161, an *affiliate* includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The NGEP that is a party to the agreement makes a CRA communication, as described in § 390.162.

(b) *Control. Control* is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A *CRA affiliate* of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination prior to the agreement. An insured depository institution or affiliate also may designate any company as a CRA affiliate at any time prior to the time a covered agreement is entered into by informing the NGEP that is a party to the agreement of such designation.

(d) *CRA public file. CRA public file* means the public file maintained by an insured depository institution and described in 12 CFR 195.43.

(e) *Executive officer.* The term *executive officer* has the same meaning as in § 215.2(e)(1) of the Board of Governors of the Federal Reserve's Regulation O (12 CFR 215.2(e)(1)). In applying this definition under this subpart, the term *State savings association* shall be used in place of the term *bank.*

(f) *Federal banking agency; appropriate Federal banking agency.* The terms *Federal banking agency* and *appropriate Federal banking agency* have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(g) *Fiscal year.* (1) The fiscal year for a NGEP that does not have a fiscal year shall be the calendar year.

(2) Any NGEP, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(h) *Insured depository institution. Insured depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(i) *Nongovernmental entity or person* or *NGEP*—(1) *General.* A *nongovernmental entity or person* or *NGEP* is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives Federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (i)(2)(i), (ii), or (iii) of this section.

(j) *Party.* The term *party* with respect to a covered agreement means each NGEP and each insured depository institution or affiliate that entered into the agreement.

(k) *Relevant supervisory agency.* The *relevant supervisory agency* for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

(l) *Term of agreement.* An agreement that does not have a fixed termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the relevant supervisory agency for the agreement otherwise notifies each party in writing.

## Subpart I—Consumer Protection in Sales of Insurance

### § 390.180 Purpose and scope.

(a) *General rule.* This subpart establishes consumer protections in connection with retail sales practices, solicitations, advertising, or offers of any insurance product or annuity to a consumer by:

(1) Any State savings association, as defined in section 3 of the Federal Deposit Insurance Act (FDIA), (12 U.S.C. 1813(b)); or

(2) Any other person that is engaged in such activities at an office of a State savings association or on behalf of a State savings association.

(b) *Application to subsidiaries.* A subsidiary is subject to this subpart only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a State savings association or on behalf of a State savings association.

### § 390.181 Definitions.

As used in this subpart:

*Affiliate* means a company that controls, is controlled by, or is under common control with another company.

*Company* means any corporation, partnership, business trust, association or similar organization, or any other trust (unless by its terms the trust must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust). It does not include any corporation the majority of the shares of which are owned by the United States or by any State, or a qualified family partnership, as defined in section 2(o)(10) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(o)(10)).

*Consumer* means an individual who purchases, applies to purchase, or is solicited to purchase from a covered person insurance products or annuities primarily for personal, family, or household purposes.

*Control* of a company has the same meaning as in section 3(w)(5) of the FDIA, (12 U.S.C. 1813(w)(5)).

*Domestic violence* means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(1) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault;

(2) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;

(3) Subjecting another person to false imprisonment; or

(4) Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

*Electronic media* includes any means for transmitting messages electronically between a covered person and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

*Office* means the premises of a State savings association where retail deposits are accepted from the public.

*Subsidiary* has the same meaning as in section 3(w)(4) of the FDIA, (12 U.S.C. 1813(w)(4)).

*You* means:

(1) A State savings association, as defined in § 390.308; or

(2) Any other person only when the person sells, solicits, advertises, or offers an insurance product or annuity to a consumer at an office of a State savings association, or on behalf of a State savings association. For purposes of this definition, activities on behalf of a State savings association include activities where a person, whether at an office of the State savings association or at another location, sells, solicits, advertises, or offers an insurance product or annuity and at least one of the following applies:

(i) The person represents to a consumer that the sale, solicitation, advertisement, or offer of any insurance product or annuity is by or on behalf of the State savings association;

(ii) The State savings association refers a consumer to a seller of insurance products and annuities and the State savings association has a contractual arrangement to receive commissions or fees derived from a sale of an insurance product or annuity resulting from that referral; or

(iii) Documents evidencing the sale, solicitation, advertising, or offer of an insurance product or annuity identify or refer to the State savings association.

### § 390.182 Prohibited practices.

(a) *Anti-coercion and anti-tying rules.* You may not engage in any practice that would lead a consumer to believe that an extension of credit, in violation of section 5(q) of the Home Owners' Loan Act (12 U.S.C. 1464(q)), is conditional upon either:

(1) The purchase of an insurance product or annuity from a State savings association or any of its affiliates; or

(2) An agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(b) *Prohibition on misrepresentations generally.* You may not engage in any practice or use any advertisement at any office of, or on behalf of, a State savings association or a subsidiary of a State savings association that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(1) The fact that an insurance product or annuity you or any subsidiary of a State savings association sell or offer for sale is not backed by the Federal government or a State savings association, or the fact that the insurance product or annuity is not insured by the Federal Deposit Insurance Corporation;

(2) In the case of an insurance product or annuity that involves investment risk, the fact that there is an investment risk, including the potential that principal may be lost and that the product may decline in value; or

(3) In the case of a State savings association or subsidiary of a State savings association at which insurance products or annuities are sold or offered for sale, the fact that:

(i) The approval of an extension of credit to a consumer by the State savings association or subsidiary may not be conditioned on the purchase of an insurance product or annuity by the consumer from the State savings association or a subsidiary of a State savings association; and

(ii) The consumer is free to purchase the insurance product or annuity from another source.

(c) *Prohibition on domestic violence discrimination.* You may not sell or offer for sale, as principal, agent, or broker, any life or health insurance product if the status of the applicant or insured as a victim of domestic violence or as a provider of services to victims of domestic violence is considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of such product, or with regard to the payment of insurance claims on such product, except as required or expressly permitted under State law.

### § 390.183 What you must disclose.

(a) *Insurance disclosures.* In connection with the initial purchase of an insurance product or annuity by a consumer from you, you must disclose to the consumer, except to the extent the disclosure would not be accurate, that:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, a State savings association or an affiliate of a State savings association;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation (FDIC) or any other agency of the United States, a State savings association, or (if applicable) an affiliate of a State savings association; and

(3) In the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

(b) *Credit disclosures.* In the case of an application for credit in connection with which an insurance product or annuity is solicited, offered, or sold, you must disclose that a State savings association may not condition an extension of credit on either:

(1) The consumer's purchase of an insurance product or annuity from the State savings association or any of its affiliates; or

(2) The consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(c) *Timing and method of disclosures*—(1) *In general.* The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure required by paragraph (b) of this section must be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold.

(2) *Exception for transactions by mail.* If you conduct an insurance product or annuity sale by mail, you are not required to make the oral disclosures required by paragraph (a) of this section. If you take an application for credit by mail, you are not required to make the oral disclosure required by paragraph (b) of this section.

(3) *Exception for transactions by telephone.* If a sale of an insurance product or annuity is conducted by telephone, you may provide the written disclosures required by paragraph (a) of this section by mail within 3 business days beginning on the first business day after the sale, solicitation, or offer, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a). If you take an application for credit by telephone, you may provide the written disclosure required by paragraph (b) of this section by mail, provided you mail it to the consumer within three days beginning the first business day after the application is taken, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(4) *Electronic form of disclosures.* (i) Subject to the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001(c)), you may provide the written disclosures required by paragraph (a) and (b) of this section through electronic media instead of on paper, if the consumer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the consumer may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(ii) You are not required to provide orally any disclosures required by paragraphs (a) or (b) of this section that you provide by electronic media.

(5) *Disclosures must be readily understandable.* The disclosures provided shall be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. For instance, you may use the following disclosures in visual media, such as television broadcasting, ATM screens, billboards, signs, posters and written advertisements and promotional materials, as appropriate and consistent with paragraphs (a) and (b) of this section:

- NOT A DEPOSIT
- NOT FDIC-INSURED
- NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY
- NOT GUARANTEED BY THE STATE SAVINGS ASSOCIATION
- MAY GO DOWN IN VALUE

(6) *Disclosures must be meaningful.* (i) You must provide the disclosures required by paragraphs (a) and (b) of this section in a meaningful form. Examples of the types of methods that could call attention to the nature and significance of the information provided include:

(A) A plain-language heading to call attention to the disclosures;

(B) A typeface and type size that are easy to read;

(C) Wide margins and ample line spacing;

(D) Boldface or italics for key words; and

(E) Distinctive type size, style, and graphic devices, such as shading or sidebars, when the disclosures are combined with other information.

(ii) You have not provided the disclosures in a meaningful form if you merely state to the consumer that the required disclosures are available in printed material, but do not provide the printed material when required and do not orally disclose the information to the consumer when required.

(iii) With respect to those disclosures made through electronic media for which paper or oral disclosures are not required, the disclosures are not meaningfully provided if the consumer may bypass the visual text of the disclosures before purchasing an insurance product or annuity.

(7) *Consumer acknowledgment.* You must obtain from the consumer, at the time a consumer receives the disclosures required under paragraphs (a) or (b) of this section, or at the time of the initial purchase by the consumer of an insurance product or annuity, a written acknowledgment by the consumer that the consumer received the disclosures. You may permit a consumer to acknowledge receipt of the disclosures electronically or in paper form. If the disclosures required under paragraphs (a) or (b) of this section are provided in connection with a transaction that is conducted by telephone, you must:

(i) Obtain an oral acknowledgment of receipt of the disclosures and maintain sufficient documentation to show that the acknowledgment was given; and

(ii) Make reasonable efforts to obtain a written acknowledgment from the consumer.

(d) *Advertisements and other promotional material for insurance products or annuities.* The disclosures described in paragraph (a) of this section are required in advertisements and promotional material for insurance products or annuities unless the advertisements and promotional material are of a general nature describing or listing the services or products offered by a State savings association.

#### § 390.184 Where insurance activities may take place.

(a) *General rule.* A State savings association must, to the extent practicable:

(1) Keep the area where the State savings association conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public;

(2) Identify the areas where insurance product or annuity sales activities occur; and

(3) Clearly delineate and distinguish those areas from the areas where the State savings association's retail deposit-taking activities occur.

(b) *Referrals.* Any person who accepts deposits from the public in an area where such transactions are routinely conducted in a State savings association may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

#### § 390.185 Qualification and licensing requirements for insurance sales personnel.

A State savings association may not permit any person to sell or offer for sale any insurance product or annuity in any part of the State savings association's office or on its behalf, unless the person is at all times appropriately qualified and licensed under applicable State insurance licensing standards with regard to the specific products being sold or recommended.

### Appendix A to Subpart I of Part 390—Consumer Grievance Process

Any consumer who believes that any State savings association or any other person selling, soliciting, advertising, or offering insurance products or annuities to the consumer at an office of the State savings association or on behalf of the State savings association has violated the requirements of this subpart should contact the FDIC at the following address: Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106, or telephone 1–877–275–3342 (1–877–ASK FDIC), or e-mail *http://www.fdic.gov/consumers/consumer/ccc/contact.html.*

## Subpart J—Fiduciary Powers of State Savings Associations

#### § 390.190 What regulations govern the fiduciary operations of State savings associations?

A State savings association must conduct its fiduciary operations in accordance with applicable State law, and must exercise its fiduciary powers in a safe and sound manner.

## Subpart K—Recordkeeping and Confirmation Requirements for Securities Transactions

#### § 390.200 What does this subpart do?

This subpart establishes recordkeeping and confirmation requirements that apply when a State savings association (''you'') effects certain securities transactions for customers.

#### § 390.201 Must I comply with this subpart?

(a) *General.* Except as provided under paragraph (b) of this section, you must comply with this subpart when:

(1) You effect a securities transaction for a customer.

(2) You effect a transaction in government securities.

(3) You effect a transaction in municipal securities and are not registered as a municipal securities dealer with the SEC.

(4) You effect a securities transaction as fiduciary. If you are a State savings association, you must comply with applicable law when you effect such a transaction.

(b) *Exceptions*—(1) *Small number of transactions.* You are not required to comply with § 390.204(b) through (d) (recordkeeping) and § 390.213(a) through (c) (policies and procedures), if you effected an average of fewer than 500 securities transactions per year for customers over the three prior calendar years. You may exclude transactions in government securities when you calculate this average.

(2) *Government securities.* If you effect fewer than 500 government securities brokerage transactions per year, you are not required to comply with § 390.204 (recordkeeping) for those transactions. This exception does not apply to government securities dealer transactions. *See* 17 CFR 404.4(a).

(3) *Municipal securities.* If you are registered with the SEC as a ''municipal securities dealer,'' as defined in 15 U.S.C. 78c(a)(30) (see 15 U.S.C. 78o–4), you are not required to comply with this subpart when you conduct municipal securities transactions.

(4) *Foreign branches.* You are not required to comply with this subpart when you conduct a transaction at your foreign branch.

(5) *Transactions by registered broker-dealers.* You are not required to comply with this subpart for securities transactions effected by a registered broker-dealer, if the registered broker-dealer directly provides the customer with a confirmation. These transactions include a transaction effected by your employee who also acts as an employee of a registered broker-dealer (''dual employee'').

#### § 390.202 What requirements apply to all transactions?

You must effect all transactions, including transactions excepted under § 390.201, in a safe and sound manner. You must maintain effective systems of records and controls regarding your customers' securities transactions. These systems must clearly and accurately reflect all appropriate information and provide an adequate basis for an audit.

#### § 390.203 What definitions apply to this subpart?

*Asset-backed security* means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period. *Asset-backed security* includes any rights or other assets designed to ensure the servicing or timely distribution of proceeds to the security holders.

*Common or collective investment fund* means with respect to a fiduciary account, a fund established and administered by you in compliance with 12 CFR 9.18 or any fund established under 12 CFR 9.18.

*Completion of the transaction* means:

(1) If the customer purchases a security through or from you, except as provided in paragraph (2) of this definition, the time the customer pays you any part of the purchase price. If payment is made by a bookkeeping entry, the time you make the bookkeeping entry for any part of the purchase price.

(2) If the customer purchases a security through or from you and pays for the security before you request payment or notify the customer that payment is due, the time you deliver the security to or into the account of the customer.

(3) If the customer sells a security through or to you, except as provided in paragraph (4) of this definition, the time the customer delivers the security to you. If you have custody of the security at the time of sale, the time you transfer the security from the customer's account.

(4) If the customer sells a security through or to you and delivers the security to you before you request delivery or notify the customer that delivery is due, the time you pay the customer or pay into the customer's account.

*Customer* means a person or account, including an agency, trust, estate, guardianship, or other fiduciary account for which you effect a securities transaction. *Customer* does not include a broker or dealer, or you when you: act as a broker or dealer; act as a fiduciary with investment discretion over an account; are a trustee that acts as the shareholder of record for the purchase or sale of securities; or are the issuer of securities that are the subject of the transaction.

*Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security). *Debt security* also includes a fractional or participation interest in these debt securities. *Debt security* does not include securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1, *et seq.*

*Government security* means:

(1) A security that is a direct obligation of, or an obligation that is guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest if the Secretary of the Treasury has designated the security for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by a corporation if a statute specifically designates, by name, the corporation's securities as exempt securities within the meaning of the laws administered by the SEC; or

(4) Any put, call, straddle, option, or privilege on a government security described in this definition, other than a put, call, straddle, option, or privilege:

(i) That is traded on one or more national securities exchanges; or

(ii) For which quotations are disseminated through an automated quotation system operated by a registered securities association.

*Investment discretion* means with respect to a fiduciary account, the sole or shared authority to determine what securities or other assets to purchase or sell on behalf of the account, regardless of whether this authority has been exercised.

*Investment company plan* means any plan under which:

(1) A customer purchases securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940, making the payments directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company; or

(2) A customer sells securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 under:

(i) An individual retirement or individual pension plan qualified under the Internal Revenue Code; or

(ii) A contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, securities in specified amounts (calculated in security units or dollars) at specified time intervals, and stating the commissions or charges (or the means of calculating them) that the customer will pay in connection with the purchase.

*Municipal security* means:

(1) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision.

(2) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, any municipal corporate instrumentality of one or more States; or

(3) A security that is an industrial development bond, the interest on which is excludable from gross income under section 103(a) of the Code (26 U.S.C. 103(a)).

*Periodic plan* means a written document that authorizes you to act as agent to purchase or sell for a customer a specific security or securities (other than securities issued by an open end investment company or unit investment trust registered under the Investment Company Act of 1940). The written document must authorize you to purchase or sell in specific amounts (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and must set forth the commission or charges to be paid by the customer or the manner of calculating them.

*SEC* means the Securities and Exchange Commission.

*Security* means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a ''security''; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. *Security* does not include currency; any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of less than nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited; a deposit or share account in a Federal or State chartered depository institution; a loan participation; a letter of credit or other form of bank indebtedness incurred in the ordinary course of business; units of a collective investment fund; interests in a variable amount (master) note of a borrower of prime credit; U.S. Savings Bonds; or any other instrument FDIC determines does not constitute a security for purposes of this subpart.

*Sweep account* means any prearranged, automatic transfer or sweep of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

**§ 390.204 What records must I maintain for securities transactions?**

If you effect securities transactions for customers, you must maintain all of the following records for at least three years:

(a) *Chronological records.* You must maintain an itemized daily record of each purchase and sale of securities in chronological order, including:

(1) The account or customer name for which you effected each transaction;

(2) The name and amount of the securities;

(3) The unit and aggregate purchase or sale price;

(4) The trade date; and

(5) The name or other designation of the registered broker-dealer or other person from whom you purchased the securities or to whom you sold the securities.

(b) *Account records.* You must maintain account records for each customer reflecting:

(1) Purchases and sales of securities;

(2) Receipts and deliveries of securities;

(3) Receipts and disbursements of cash; and

(4) Other debits and credits pertaining to transactions in securities.

(c) *Memorandum (order ticket).* You must make and keep current a memorandum (order ticket) of each order or any other instruction given or received for the purchase or sale of securities (whether executed or not), including:

(1) The account or customer name for which you effected each transaction;

(2) Whether the transaction was a market order, limit order, or subject to special instructions;

(3) The time the trader received the order;

(4) The time the trader placed the order with the registered broker-dealer, or if there was no registered broker-dealer, the time the trader executed or cancelled the order;

(5) The price at which the trader executed the order;

(6) The name of the registered broker-dealer you used.

(d) *Record of registered broker-dealers.* You must maintain a record of all registered broker-dealers that you selected to effect securities transactions and the amount of commissions that you paid or allocated to each registered broker-dealer during each calendar year.

(e) *Notices.* You must maintain a copy of the written notice required under sections 390.206–390.211.

**§ 390.205 How must I maintain my records?**

(a) You may maintain the records required under § 390.204 in any manner, form, or format that you deem appropriate. However, your records must clearly and accurately reflect the required information and provide an adequate basis for an audit of the information.

(b) You, or the person that maintains and preserves records on your behalf, must:

(1) Arrange and index the records in a way that permits easy location, access, and retrieval of a particular record;

(2) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section;

(3) Provide promptly any of the following that FDIC examiners or your directors may request:

(i) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(ii) A legible, true, and complete printout of the record; and

(iii) Means to access, view, and print the records.

(4) In the case of records on electronic storage media, you, or the person that maintains and preserves records for you, must establish procedures:

(i) To maintain, preserve, and reasonably safeguard the records from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel, your directors, and FDIC examiners; and

(iii) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

(c) You may contract with third party service providers to maintain the records.

**§ 390.206 What type of notice must I provide when I effect a securities transaction for a customer?**

If you effect a securities transaction for a customer, you must give or send the customer the registered broker-dealer confirmation described at § 390.207, or the written notice described at § 390.208. For certain types of transactions, you may elect to provide the alternate notices described in § 390.209.

**§ 390.207 How do I provide a registered broker-dealer confirmation?**

(a) If you elect to satisfy § 390.206 by providing the customer with a registered broker-dealer confirmation, you must provide the confirmation by having the registered broker-dealer send the confirmation directly to the customer or by sending a copy of the registered broker-dealer's confirmation to the customer within one business day after you receive it.

(b) If you have received or will receive remuneration from any source, including the customer, in connection with the transaction, you must provide a statement of the source and amount of the remuneration in addition to the registered broker-dealer confirmation described in paragraph (a) of this section.

**§ 390.208 How do I provide a written notice?**

If you elect to satisfy § 390.206 by providing the customer a written notice, you must give or send the written notice at or before the completion of the securities transaction. You must include all of the following information in a written notice:

(a) Your name and the customer's name.

(b) The capacity in which you acted (for example, as agent).

(c) The date and time of execution of the securities transaction (or a statement that you will furnish this information within a reasonable time after the customer's written request), and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security the customer purchased or sold.

(d) The name of the person from whom you purchased or to whom you sold the security, or a statement that you will furnish this information within a reasonable time after the customer's written request.

(e) The amount of any remuneration that you have received or will receive from the customer in connection with the transaction unless the remuneration paid by the customer is determined under a written agreement, other than on a transaction basis.

(f) The source and amount of any other remuneration you have received or will receive in connection with the transaction. If, in the case of a purchase, you were not participating in a distribution, or in the case of a sale, were not participating in a tender offer, the written notice may state whether you have or will receive any other remuneration and state that you will furnish the source and amount of the other remuneration within a reasonable time after the customer's written request.

(g) That you are not a member of the Securities Investor Protection Corporation, if that is the case. This does not apply to a transaction in shares of a registered open-end investment company or unit investment trust if the customer sends funds or securities directly to, or receives funds or securities directly from, the registered open-end investment company or unit investment trust, its transfer agent, its custodian, or a designated broker or dealer who sends the customer either a confirmation or the written notice in this section.

(h) Additional disclosures. You must provide all of the additional disclosures described in the following chart for transactions involving certain debt securities:

| If you effect a transaction involving . . . | You must provide the following additional information in your written notice . . . |
|---|---|
| (1) A debt security subject to redemption before maturity | A statement that the issuer may redeem the debt security in whole or in part before maturity, that the redemption could affect the represented yield, and that additional redemption information is available upon request. |
| (2) A debt security that you effected exclusively on the basis of a dollar price. | (i) The dollar price at which you effected the transaction; and<br>(ii) The yield to maturity calculated from the dollar price. You do not have to disclose the yield to maturity if:<br>(A) The issuer may extend the maturity date of the security with a variable interest rate; or<br>(B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment. |
| (3) A debt security that you effected on basis of yield | (i) The yield at which the transaction, including the percentage amount and its characterization (*e.g.*, current yield, yield to maturity, or yield to call). If you effected the transaction at yield to call, you must indicate the type of call, the call date, and the call price;<br>(ii) The dollar price calculated from that yield; and<br>(iii) The yield to maturity and the represented yield, if you effected the transaction on a basis other than yield to maturity and the yield to maturity is lower than the represented yield. You are not required to disclose this information if:<br>(A) The issuer may extend the maturity date of the security with a variable interest rate; or<br>(B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment. |
| (4) A debt security that is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment. | (i) A statement that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid; and<br>(ii) A statement that you will furnish information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) upon the customer's written request. |
| (5) A debt security, other than a government security | A statement that the security is unrated by a nationally recognized statistical rating organization, if that is the case. |

**§ 390.209 What are the alternate notice requirements?**

You may elect to satisfy § 390.206 by providing the alternate notices described in the following chart for certain types of transactions.

| If you effect a securities transaction . . . | Then you may elect to . . . |
|---|---|
| (a) For or with the account of a customer under a periodic plan, sweep account, or investment company plan. | Give or send to the customer within five business days after the end of each quarterly period a written statement disclosing:<br>(1) Each purchase and redemption that you effected for or with, and each dividend or distribution that you credited to or reinvested for, the customer's account during the period;<br>(2) The date of each transaction;<br>(3) The identity, number, and price of any securities that the customer purchased or redeemed in each transaction;<br>(4) The total number of shares of the securities in the customer's account;<br>(5) Any remuneration that you received or will receive in connection with the transaction; and<br>(6) That you will give or send the registered broker-dealer confirmation described in § 390.207 or the written notice described in § 390.208 within a reasonable time after the customer's written request. |

| If you effect a securities transaction . . . | Then you may elect to . . . |
| --- | --- |
| (b) For or with the account of a customer in shares of an open-ended management company registered under the Investment Company Act of 1940 that holds itself out as a money market fund and attempts to maintain a stable net asset value per share. | Give or send to the customer the written statement described at paragraph (a) of this section on a monthly basis. You may not use the alternate notice, however, if you deduct sales loads upon the purchase or redemption of shares in the money market fund. |
| (c) For an account for which you do not exercise investment discretion, and for which you and the customer have agreed in writing to an arrangement concerning the time and content of the written notice. | Give or send to the customer a written notice at the agreed-upon time and with the agreed-upon content, and include a statement that you will furnish the registered broker-dealer confirmation described in § 390.207 or the written notice described in § 390.208 within a reasonable time after the customer's written request. |
| (d) For an account for which you exercise investment discretion other than in an agency capacity, excluding common or collective investment funds. | Give or send the registered broker-dealer confirmation described in § 390.207 or the written notice described in § 390.208 within a reasonable time after a written request by the person with the power to terminate the account or, if there is no such person, any person holding a vested beneficial interest in the account. |
| (e) For an account in which you exercise investment discretion in an agency capacity. | Give or send each customer a written itemized statement specifying the funds and securities in your custody or possession and all debits, credits, and transactions in the customer's account. You must provide this information to the customer not less than once every three months. You must give or send the registered broker-dealer confirmation described in § 390.207 or the written notice described in § 390.208 within a reasonable time after a customer's written request. |
| (f) For a common or collective investment fund | (1) Give or send to a customer who invests in the fund a copy of the annual financial report of the fund, or<br>(2) Notify the customer that a copy of the report is available and that you will furnish the report within a reasonable time after a written request by a person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. |

**§ 390.210 May I provide a notice electronically?**

You may provide any written notice required under §§ 390.206 through 390.211 electronically. If a customer has a facsimile machine, you may send the notice by facsimile transmission. You may use other electronic communications if:

(a) The parties agree to use electronic instead of hard copy notices;

(b) The parties are able to print or download the notice;

(c) Your electronic communications system cannot automatically delete the electronic notice; and

(d) Both parties are able to receive electronic messages.

**§ 390.211 May I charge a fee for a notice?**

You may not charge a fee for providing a notice required under §§ 390.206 through 390.211, except that you may charge a reasonable fee for the notices provided under § 390.209(a), (d), and (e).

**§ 390.212 When must I settle a securities transaction?**

(a) You may not effect or enter into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the latest of:

(1) The third business day after the date of the contract. This deadline is no later than the fourth business day after the contract for contracts involving the sale for cash of securities that are priced after 4:30 p.m. Eastern Standard Time on the date the securities are priced and are sold by an issuer to an underwriter under a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a, *et seq.,* or are sold by you to an initial purchaser participating in the offering;

(2) Such other time as the SEC specifies by rule (*see* SEC Rule 15c6–1, 17 CFR 240.15c6–1); or

(3) Such time as the parties expressly agree at the time of the transaction. The parties to a contract are deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities under a firm commitment offering, if the managing underwriter and the issuer have agreed to the date for all securities sold under the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

(b) The deadlines in paragraph (a) of this section do not apply to the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association.

**§ 390.213 What policies and procedures must I maintain and follow for securities transactions?**

If you effect securities transactions for customers, you must maintain and follow policies and procedures that meet all of the following requirements:

(a) Your policies and procedures must assign responsibility for the supervision of all officers or employees who:

(1) Transmit orders to, or place orders with, registered broker-dealers;

(2) Execute transactions in securities for customers; or

(3) Process orders for notice or settlement purposes, or perform other back office functions for securities transactions that you effect for customers. Policies and procedures for personnel described in this paragraph (a)(3) must provide supervision and reporting lines that are separate from supervision and reporting lines for personnel described in paragraphs (a)(1) and (2) of this section.

(b) Your policies and procedures must provide for the fair and equitable allocation of securities and prices to accounts when you receive orders for the same security at approximately the same time and you place the orders for execution either individually or in combination.

(c) Your policies and procedures must provide for securities transactions in which you act as agent for the buyer and seller (crossing of buy and sell orders) on a fair and equitable basis to the parties to the transaction, where permissible under applicable law.

(d) Your policies and procedures must require your officers and employees to file the personal securities trading reports described at § 390.214, if the officer or employee:

(1) Makes investment recommendations or decisions for the accounts of customers;

(2) Participates in the determination of these recommendations or decisions; or

(3) In connection with their duties, obtains information concerning which securities you intend to purchase, sell, or recommend for purchase or sale.

**§ 390.214 How do my officers and employees file reports of personal securities trading transactions?**

An officer or employee described in § 390.213(d) must report all personal transactions in securities made by or on behalf of the officer or employee if he or she has a beneficial interest in the security.

(a) *Contents and filing of report.* The officer or employee must file the report with you no later than 30 calendar days after the end of each calendar quarter. The report must include the following information:

(1) The date of each transaction, the title and number of shares, the interest rate and maturity date (if applicable), and the principal amount of each security involved.

(2) The nature of each transaction (*i.e.,* purchase, sale, or other type of acquisition or disposition).

(3) The price at which each transaction was effected.

(4) The name of the broker, dealer, or other intermediary effecting the transaction.

(5) The date the officer or employee submitted the report.

(b) *Report not required for certain transactions.* Your officer or employee is not required to report a transaction if:

(1) He or she has no direct or indirect influence or control over the account for which the transaction was effected or over the securities held in that account;

(2) The transaction was in shares issued by an open-end investment company registered under the Investment Company Act of 1940;

(3) The transaction was in direct obligations of the government of the United States;

(4) The transaction was in bankers' acceptances, bank certificates of deposit, commercial paper or high quality short term debt instruments, including repurchase agreements; or

(5) The officer or employee had an aggregate amount of purchases and sales of $10,000 or less during the calendar quarter.

(c) *Alternate report.* When you act as an investment adviser to an investment company registered under the Investment Company Act of 1940, an officer or employee that is an ''access person'' may fulfill his or her reporting requirements under this section by filing with you the ''access person'' personal securities trading report required by SEC Rule 17j–1(d), 17 CFR 270.17j–1(d).

## Subpart L—Electronic Operations

**§ 390.220 What does this subpart do?**

This subpart addresses notification of the FDIC by State savings associations who intend to establish a transactional Web site.

**§ 390.221 Must I inform FDIC before I use electronic means or facilities?**

(a) *General.* A State savings association (''you'') are not required to inform FDIC before you use electronic means or facilities, except as provided in paragraphs (b) and (c) of this section. However, FDIC encourages you to consult with your appropriate FDIC region before you engage in any activities using electronic means or facilities.

(b) *Activities requiring advance notice.* You must file a written notice as described in § 390.222 before you establish a transactional Web site. A transactional Web site is an Internet site that enables users to conduct financial transactions such as accessing an account, obtaining an account balance, transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other authorized products or services.

(c) *Other procedures.* If the appropriate FDIC region informs you of any supervisory or compliance concerns that may affect your use of electronic means or facilities, you must follow any procedures it imposes in writing.

**§ 390.222 How do I notify FDIC?**

(a) *Notice requirement.* You must file a written notice with the appropriate FDIC region at least 30 days before you establish a transactional Web site. The notice must do three things:

(1) Describe the transactional Web site.

(2) Indicate the date the transactional Web site will become operational.

(3) List a contact familiar with the deployment, operation, and security of the transactional Web site.

(b) [Reserved].

## Subpart M—Deposits

**§ 390.230 What does this subpart do?**

This subpart applies to the deposit activities of State savings associations.

**§ 390.231 What records should I maintain on deposit activities?**

All State savings associations (''you'') should establish and maintain deposit documentation practices and records that demonstrate that you appropriately administer and monitor deposit-related activities. Your records should adequately evidence ownership, balances, and all transactions involving each account. You may maintain records on deposit activities in any format that is consistent with standard business practices.

## Subpart N—Possession by Conservators and Receivers for Federal and State Savings Associations

**§ 390.240 Procedure upon taking possession.**

(a) The conservator or receiver for a Federal or State savings association shall take possession of the savings association by taking possession of the principal office of the Federal or State savings association in accordance with the terms of the OCC's or State bank supervisor's, as appropriate, appointment.

(b) Upon taking possession, the conservator or receiver shall immediately:

(1) Take possession of the savings association's books, records and assets.

(2) Notify in writing, served personally or by registered mail or telegraph, all persons and entities that the conservator or receiver knows to be holding or in possession of assets of the savings association, that the conservator or receiver has succeeded to all rights, titles, powers and privileges of the savings associations.

(3) File with the Executive Secretary a statement that possession was taken, including the time of the taking, which statement shall be conclusive evidence thereof.

(4) Post a notice on the door of the principal and other offices of the savings association in the form, if any, prescribed by the OCC or State bank supervisor, as appropriate.

(5) By operation of law and without any conveyance or other instrument, act or deed, succeed to the rights, titles, powers and privileges of the savings association, and to the rights, powers, and privileges of its stockholders, members, accountholders, depositors, officers, and directors. No stockholder, member, accountholder, depositor, officer or director shall thereafter have or exercise any right, power, or privilege, or act in connection with any of the savings association's assets or property.

### § 390.241 Notice of appointment.

(a) When the OCC or State bank supervisor, as appropriate, issues an order for the appointment of a conservator or receiver, the FDIC will designate the persons or entities whose employees or agents must, before the conservator or receiver takes possession of the savings association:

(1) Give notice of the appointment to any officer or employee who is present in and appears to be in charge at the principal office of the savings association as determined by the FDIC.

(2) Serve a copy of the order for the appointment upon the savings association or upon the conservator by:

(i) Leaving a certified copy of the order of appointment at the principal office of the savings association as determined by the FDIC; or

(ii) Handing a certified copy of the order of appointment to the previous conservator of the savings association, or to the officer or employee of the savings association, or to the previous conservator who is present in and appears to be in charge at the principal office of the savings association as determined by the FDIC.

(3) File with the Executive Secretary of the FDIC a statement that includes the date and time that notice of the appointment was given and service of the order of appointment was made.

(b) If the OCC or State bank supervisor, as appropriate, appoints a conservator or receiver under this subpart, the FDIC will immediately file a notice of the appointment for publication in the **Federal Register**.

## Subpart O—Subordinate Organizations

### § 390.250 What does this subpart cover?

(a) The FDIC is issuing this subpart O pursuant to its general rulemaking and supervisory authority under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.,* and its specific authority under section 18(m) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(m). This subpart applies to subordinate organizations of State savings associations. The FDIC may, at any time, limit a State savings association's investment in any of these entities, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons.

(b) Notices under this subpart are applications for purposes of statutory and regulatory references to ''applications.'' Any conditions that the FDIC imposes in approving any application are enforceable as a condition imposed in writing by the FDIC in connection with the granting of a request by a State savings association within the meaning of 12 U.S.C. 1818(b) or 1818(i).

### § 390.251 Definitions.

For purposes of this subpart:

*Control* has the same meaning as in part 391, subpart E.

*GAAP-consolidated subsidiary* means an entity in which a State savings association has a direct or indirect ownership interest and whose assets are consolidated with those of the savings association for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, these are entities in which a State savings association has a majority ownership interest.

*Lower-tier entity* includes any company in which a subsidiary has a direct or indirect ownership interest.

*Ownership interest* means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.

*Subordinate organization* means any corporation, partnership, business trust, association, joint venture, pool, syndicate, or other similar business organization in which a State savings association has a direct or indirect ownership interest, unless that ownership interest qualifies as a pass-through investment and is so designated by the investing State savings association.

*Subsidiary* means any subordinate organization directly or indirectly controlled by a State savings association.

### § 390.252 How must separate corporate identities be maintained?

(a) Each State savings association and subordinate organization thereof must be operated in a manner that demonstrates to the public that each maintains a separate corporate existence. Each must operate so that:

(1) Their respective business transactions, accounts, and records are not intermingled;

(2) Each observes the formalities of their separate corporate procedures;

(3) Each is adequately financed as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) Each is held out to the public as a separate enterprise; and

(5) Unless the parent State savings association has guaranteed a loan to the subordinate organization, all borrowings by the subordinate organization indicate that the parent is not liable.

(b) The FDIC regulations that apply both to State savings associations and subordinate organizations shall not be construed as requiring a State savings association and its subordinate organizations to operate as a single entity.

### § 390.253 What notices are required to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary?

When required by section 18(m) of the Federal Deposit Insurance Act, a State savings association (''you'') must file a notice (''Notice'') with the FDIC before establishing or acquiring a subsidiary or engaging in new activities in a subsidiary. The Notice must contain all of the information the required under 12 CFR 362.15. If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the FDIC's prior written approval before establishing or acquiring the subsidiary or engaging in new activities in the subsidiary.

### § 390.254 How may a subsidiary of a State savings association issue securities?

(a) A subsidiary may issue, either directly or through a third party intermediary, any securities that its parent State savings association (''you'') may issue. The subsidiary must not state or imply that the securities it issues are covered by federal deposit insurance. A subsidiary may not issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that you are insolvent or have been placed into receivership.

(b) You must file a notice with the FDIC in accordance with § 390.253 at least 30 days before your first issuance of any securities through an existing subsidiary or in conjunction with establishing or acquiring a new subsidiary. If the FDIC notifies you within 30 days that the notice presents supervisory concerns or raises significant issues of law or policy, you must receive the FDIC's prior written approval before issuing securities through your subsidiary.

(c) For as long as any securities are outstanding, you must maintain all records generated through each securities issuance in the ordinary course of business, including a copy of any prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the FDIC. Such records must include, but are not limited to:

(1) The amount of your assets or liabilities (including any guarantees you make with respect to the securities

issuance) that have been transferred or made available to the subsidiary; the percentage that such amount represents of the current book value of your assets on an unconsolidated basis; and the current book value of all such assets of the subsidiary;

(2) The terms of any guarantee(s) issued by you or any third party;

(3) A description of the securities the subsidiary issued;

(4) The net proceeds from the issuance of securities (or the pro rata portion of the net proceeds from securities issued through a jointly owned subsidiary); the gross proceeds of the securities issuance; and the market value of assets collateralizing the securities issuance (any assets of the subsidiary, including any guarantees of its securities issuance you have made);

(5) The interest or dividend rates and yields, or the range thereof, and the frequency of payments on the subsidiary's securities;

(6) The minimum denomination of the subsidiary's securities; and

(7) Where the subsidiary marketed or intends to market the securities.

#### § 390.255 How may a State savings association exercise its salvage power in connection with a service corporation or lower-tier entities?

(a) In accordance with this section, a State savings association (''you'') may exercise your salvage power to make a contribution or a loan (including a guarantee of a loan made by any other person) to a lower-tier entity (''salvage investment'') that exceeds the maximum amount otherwise permitted under law or regulation. You must notify the FDIC at least 30 days before making such a salvage investment. This notice must demonstrate that:

(1) The salvage investment protects your interest in the lower-tier entity;

(2) The salvage investment is consistent with safety and soundness; and

(3) You considered alternatives to the salvage investment and determined that such alternatives would not adequately satisfy paragraphs (a)(1) and (2) of this section.

(b) If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the FDIC's prior written approval before making a salvage investment.

(c) If your lower-tier entity is a GAAP-consolidated subsidiary, your salvage investment under this section will be considered an investment in a subsidiary for purposes of subpart Z.

## Subpart P—Lending and Investment

#### § 390.260 General.

(a) *Authority and scope.* This subpart is being issued by the FDIC under its general rulemaking and supervisory authority under the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1811 *et seq.* Sections 390.264, 390.265, and 390.267 through 390.272 contain safety-and-soundness based lending and investment provisions applicable to State savings associations.

(b) *General lending standards.* Each State savings association is expected to conduct its lending and investment activities prudently. Each State savings association should use lending and investment standards that are consistent with safety and soundness, ensure adequate portfolio diversification and are appropriate for the size and condition of the institution, the nature and scope of its operations, and conditions in its lending market. Each State savings association should adequately monitor the condition of its portfolio and the adequacy of any collateral securing its loans.

#### § 390.261 [Reserved].

#### § 390.262 Definitions.

For purposes of this subpart:

*Consumer loans* include loans for personal, family, or household purposes and loans reasonably incident thereto, and may be made as either open-end or closed-end consumer credit (as defined at 12 CFR 226.2(a)(10) and (20)). Consumer loans do not include credit extended in connection with credit card loans, bona fide overdraft loans, and other loans that the State savings association has designated as made under investment or lending authority other than section 5(c)(2)(D) of the HOLA.

*Credit card* is any card, plate, coupon book, or other single credit device that may be used from time to time to obtain credit.

*Credit card account* is a credit account established in conjunction with the issuance of, or the extension of credit through, a credit card. This term includes loans made to consolidate credit card debt, including credit card debt held by other lenders, and participation certificates, securities and similar instruments secured by credit card receivables.

*Home loans* include any loans made on the security of a home (including a dwelling unit in a multi-family residential property such as a condominium or a cooperative), combinations of homes and business property (*i.e.,* a home used in part for business), farm residences, and combinations of farm residences and commercial farm real estate.

*Loan commitment* includes a loan in process, a letter of credit, or any other commitment to extend credit.

*Real estate loan* is a loan for which the State savings association substantially relies upon a security interest in real estate given by the borrower as a condition of making the loan. A loan is made on the security of real estate if:

(1) The security property is real estate pursuant to the law of the state in which the property is located;

(2) The security interest of the State savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located;

(3) The security property is capable of separate appraisal; and

(4) With regard to a security property that is a leasehold or other interest for a period of years, the term of the interest extends, or is subject to extension or renewal at the option of the State savings association for a term of at least five years following the maturity of the loan.

*Small business* includes a small business concern or entity as defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a), and implemented by the regulations of the Small Business Administration at 13 CFR part 121.

*Small business loans* and *loans to small businesses* include any loan to a small business as defined in this section; or a loan that does not exceed $2 million (including a group of loans to one borrower) and is for commercial, corporate, business, or agricultural purposes.

#### § 390.263 [Reserved].

#### § 390.264 Real estate lending standards; purpose and scope.

This section, and § 390.265, issued pursuant to section 18(o) of the Federal Deposit Insurance Act, (12 U.S.C. 1828(o)), prescribe standards for real estate lending to be used by State savings associations and all their includable subsidiaries, as defined in § 390.461, over which the State savings associations exercise control, in adopting internal real estate lending policies.

#### § 390.265 Real estate lending standards.

(a) Each State savings association shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) Real estate lending policies adopted pursuant to this section must:

(i) Be consistent with safe and sound banking practices;

(ii) Be appropriate to the size of the institution and the nature and scope of its operations; and

(iii) Be reviewed and approved by the State savings association's board of directors at least annually.

(2) The lending policies must establish:

(i) Loan portfolio diversification standards;

(ii) Prudent underwriting standards, including loan-to-value limits, that are clear and measurable;

(iii) Loan administration procedures for the State savings association's real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the State savings association's real estate lending policies.

(c) Each State savings association must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.

(d) The real estate lending policies adopted pursuant to this section should reflect consideration of the Interagency Guidelines for Real Estate Lending Policies established by the Federal banking agencies.

## Appendix to § 390.265—Interagency Guidelines for Real Estate Lending Policies

The agencies' regulations require that each insured depository institution adopt and maintain a written policy that establishes appropriate limits and standards for all extensions of credit that are secured by liens on or interests in real estate or made for the purpose of financing the construction of a building or other improvements.[1] These guidelines are intended to assist institutions in the formulation and maintenance of a real estate lending policy that is appropriate to the size of the institution and the nature and scope of its individual operations, as well as satisfies the requirements of the regulation.

Each institution's policies must be comprehensive, and consistent with safe and sound lending practices, and must ensure that the institution operates within limits and according to standards that are reviewed and approved at least annually by the board of directors. Real estate lending is an integral part of many institutions' business plans and, when undertaken in a prudent manner, will not be subject to examiner criticism.

[1] The agencies have adopted a uniform rule on real estate lending. See 12 CFR part 365 and §§ 390.264–390.265 (FDIC); 12 CFR part 208, subpart C (FRB); and 12 CFR part 34, subpart D (OCC).

### Loan Portfolio Management Considerations

The lending policy should contain a general outline of the scope and distribution of the institution's credit facilities and the manner in which real estate loans are made, serviced, and collected. In particular, the institution's policies on real estate lending should:

- Identify the geographic areas in which the institution will consider lending.
- Establish a loan portfolio diversification policy and set limits for real estate loans by type and geographic market (*e.g.,* limits on higher risk loans).
- Identify appropriate terms and conditions by type of real estate loan.
- Establish loan origination and approval procedures, both generally and by size and type of loan.
- Establish prudent underwriting standards that are clear and measurable, including loan-to-value limits, that are consistent with these supervisory guidelines.
- Establish review and approval procedures for exception loans, including loans with loan-to-value percentages in excess of supervisory limits.
- Establish loan administration procedures, including documentation, disbursement, collateral inspection, collection, and loan review.
- Establish real estate appraisal and evaluation programs.
- Require that management monitor the loan portfolio and provide timely and adequate reports to the board of directors.

The institution should consider both internal and external factors in the formulation of its loan policies and strategic plan. Factors that should be considered include:

- The size and financial condition of the institution.
- The expertise and size of the lending staff.
- The need to avoid undue concentrations of risk.
- Compliance with all real estate related laws and regulations, including the Community Reinvestment Act, anti-discrimination laws, and for State savings associations, the Qualified Thrift Lender test.
- Market conditions.

The institution should monitor conditions in the real estate markets in its lending area so that it can react quickly to changes in market conditions that are relevant to its lending decisions. Market supply and demand factors that should be considered include:

- Demographic indicators, including population and employment trends.
- Zoning requirements.
- Current and projected vacancy, construction, and absorption rates.
- Current and projected lease terms, rental rates, and sales prices, including concessions.
- Current and projected operating expenses for different types of projects.
- Economic indicators, including trends and diversification of the lending area.
- Valuation trends, including discount and direct capitalization rates.

### Underwriting Standards

Prudently underwritten real estate loans should reflect all relevant credit factors, including:

- The capacity of the borrower, or income from the underlying property, to adequately service the debt.
- The value of the mortgaged property.
- The overall creditworthiness of the borrower.
- The level of equity invested in the property.
- Any secondary sources of repayment.
- Any additional collateral or credit enhancements (such as guarantees, mortgage insurance or takeout commitments).

The lending policies should reflect the level of risk that is acceptable to the board of directors and provide clear and measurable underwriting standards that enable the institution's lending staff to evaluate these credit factors. The underwriting standards should address:

- The maximum loan amount by type of property.
- Maximum loan maturities by type of property.
- Amortization schedules.
- Pricing structure for different types of real estate loans.
- Loan-to-value limits by type of property.

For development and construction projects, and completed commercial properties, the policy should also establish, commensurate with the size and type of the project or property:

- Requirements for feasibility studies and sensitivity and risk analyses (*e.g.,* sensitivity of income projections to changes in economic variables such as interest rates, vacancy rates, or operating expenses).
- Minimum requirements for initial investment and maintenance of hard equity by the borrower (*e.g.,* cash or unencumbered investment in the underlying property).
- Minimum standards for net worth, cash flow, and debt service coverage of the borrower or underlying property.
- Standards for the acceptability of and limits on non-amortizing loans.
- Standards for the acceptability of and limits on the use of interest reserves.
- Pre-leasing and pre-sale requirements for income-producing property.
- Pre-sale and minimum unit release requirements for non-income-producing property loans.
- Limits on partial recourse or nonrecourse loans and requirements for guarantor support.
- Requirements for takeout commitments.
- Minimum covenants for loan agreements.

### Loan Administration

The institution should also establish loan administration procedures for its real estate portfolio that address:

- Documentation, including:

Type and frequency of financial statements, including requirements for verification of information provided by the borrower;

Type and frequency of collateral evaluations (appraisals and other estimates of value).

- Loan closing and disbursement.
- Payment processing.
- Escrow administration.
- Collateral administration.
- Loan payoffs.
- Collections and foreclosure, including:
  Delinquency follow-up procedures;
  Foreclosure timing;
  Extensions and other forms of forbearance;
  Acceptance of deeds in lieu of foreclosure.
- Claims processing (*e.g.,* seeking recovery on a defaulted loan covered by a government guaranty or insurance program).
- Servicing and participation agreements.

**Supervisory Loan-to-Value Limits**

Institutions should establish their own internal loan-to-value limits for real estate loans. These internal limits should not exceed the following supervisory limits:

| Loan category | Loan-to-value limit (percent) |
|---|---|
| Raw land | 65 |
| Land development | 75 |
| Construction: | |
| Commercial, multifamily,[2] and other nonresidential | 80 |
| 1- to 4-family residential | 85 |
| Improved property | 85 |
| Owner-occupied 1- to 4-family and home equity | ([3]) |

The supervisory loan-to-value limits should be applied to the underlying property that collateralizes the loan. For loans that fund multiple phases of the same real estate project (*e.g.,* a loan for both land development and construction of an office building), the appropriate loan-to-value limit is the limit applicable to the final phase of the project funded by the loan; however, loan disbursements should not exceed actual development or construction outlays. In situations where a loan is fully cross-collateralized by two or more properties or is secured by a collateral pool of two or more properties, the appropriate maximum loan amount under supervisory loan-to-value limits is the sum of the value of each property, less senior liens, multiplied by the appropriate loan-to-value limit for each property. To ensure that collateral margins remain within the supervisory limits, lenders should redetermine conformity whenever collateral substitutions are made to the collateral pool.

In establishing internal loan-to-value limits, each lender is expected to carefully consider the institution-specific and market factors listed under ''Loan Portfolio Management Considerations,'' as well as any other relevant factors, such as the particular subcategory or type of loan. For any subcategory of loans that exhibits greater credit risk than the overall category, a lender should consider the establishment of an internal loan-to-value limit for that subcategory that is lower than the limit for the overall category.

The loan-to-value ratio is only one of several pertinent credit factors to be considered when underwriting a real estate loan. Other credit factors to be taken into account are highlighted in the ''Underwriting Standards'' section above. Because of these other factors, the establishment of these supervisory limits should not be interpreted to mean that loans at these levels will automatically be considered sound.

**Loans in Excess of the Supervisory Loan-to-Value Limits**

The agencies recognize that appropriate loan-to-value limits vary not only among categories of real estate loans but also among individual loans. Therefore, it may be appropriate in individual cases to originate or purchase loans with loan-to-value ratios in excess of the supervisory loan-to-value limits, based on the support provided by other credit factors. Such loans should be identified in the institutions' records, and their aggregate amount reported at least quarterly to the institution's board of directors. (*See* additional reporting requirements described under ''Exceptions to the General Policy.'') The aggregate amount of all loans in excess of the supervisory loan-to-value limits should not exceed 100 percent of total capital.[4] Moreover, within the aggregate limit, total loans for all commercial, agricultural, multifamily or other non-1- to 4-family residential properties should not exceed 30 percent of total capital. An institution will come under increased supervisory scrutiny as the total of such loans approaches these levels.

In determining the aggregate amount of such loans, institutions should: (a) Include all loans secured by the same property if any one of those loans exceeds the supervisory loan-to-value limits; and (b) include the recourse obligation of any such loan sold with recourse. Conversely, a loan should no longer be reported to the directors as part of aggregate totals when reduction in principal or senior liens, or additional contribution of collateral or equity (*e.g.,* improvements to the real property securing the loan), bring the loan-to-value ratio into compliance with supervisory limits.

**Excluded Transactions**

The agencies also recognize that there are a number of lending situations in which other factors significantly outweigh the need to apply the supervisory loan-to-value limits. These include:

- Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
- Loans backed by the full faith and credit of a state government, provided that the amount of the assurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
- Loans guaranteed or insured by a state, municipal or local government, or an agency thereof, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit, and provided that the lender has determined that the guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.
- Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.
- Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs), or loans that are renewed, refinanced, or restructured in connection with a workout situation, either with or without the advancement of new funds, where consistent with safe and sound banking practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.
- Loans that facilitate the sale of real estate acquired by the lender in the ordinary course of collecting a debt previously contracted in good faith.
- Loans for which a lien on or interest in real property is taken as additional collateral through an abundance of caution by the lender (*e.g.,* the institution takes a blanket lien on all or substantially all of the assets of the borrower, and the value of the real property is low relative to the aggregate value of all other collateral).
- Loans, such as working capital loans, where the lender does not rely principally on real estate as security and the extension of credit is not used to acquire, develop, or construct permanent improvements on real property.
- Loans for the purpose of financing permanent improvements to real property, but not secured by the property, if such security interest is not required by prudent underwriting practice.

**Exceptions to the General Lending Policy**

Some provision should be made for the consideration of loan requests from creditworthy borrowers whose credit needs do not fit within the institution's general lending policy. An institution may provide for prudently underwritten exceptions to its lending policies, including loan-to-value limits, on a loan-by-loan basis. However, any exceptions from the supervisory loan-to-value limits should conform to the aggregate limits on such loans discussed above.

The board of directors is responsible for establishing standards for the review and approval of exception loans. Each institution

[2] Multifamily construction includes condominiums and cooperatives.

[3] A loan-to-value limit has not been established for permanent mortgage or home equity loans on owner-occupied, 1- to 4-family residential property. However, for any such loan with a loan-to-value ratio that equals or exceeds 90 percent at origination, an institution should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral.

[4] For the state member banks, the term ''total capital'' means ''total risk-based capital'' as defined in Appendix A to 12 CFR part 208. For insured state non-member banks, ''total capital'' refers to that term described in table I of Appendix A to 12 CFR part 325. For national banks, the term ''total capital'' is defined at 12 CFR 3.2(e). For State savings associations, the term ''total capital'' refers to the term as described in subpart Z.

should establish an appropriate internal process for the review and approval of loans that do not conform to its own internal policy standards. The approval of any such loan should be supported by a written justification that clearly sets forth all of the relevant credit factors that support the underwriting decision. The justification and approval documents for such loans should be maintained as a part of the permanent loan file. Each institution should monitor compliance with its real estate lending policy and individually report exception loans of a significant size to its board of directors.

**Supervisory Review of Real Estate Lending Policies and Practices**

The real estate lending policies of institutions will be evaluated by examiners during the course of their examinations to determine if the policies are consistent with safe and sound lending practices, these guidelines, and the requirements of the regulation. In evaluating the adequacy of the institution's real estate lending policies and practices, examiners will take into consideration the following factors:

- The nature and scope of the institution's real estate lending activities.
- The size and financial condition of the institution.
- The quality of the institution's management and internal controls.
- The expertise and size of the lending and loan administration staff.
- Market conditions.

Lending policy exception reports will also be reviewed by examiners during the course of their examinations to determine whether the institutions' exceptions are adequately documented and appropriate in light of all of the relevant credit considerations. An excessive volume of exceptions to an institution's real estate lending policy may signal a weakening of its underwriting practices, or may suggest a need to revise the loan policy.

**Definitions**

For the purposes of these Guidelines:

*Construction loan* means an extension of credit for the purpose of erecting or rehabilitating buildings or other structures, including any infrastructure necessary for development.

Extension of credit or loan means:

(1) The total amount of any loan, line of credit, or other legally binding lending commitment with respect to real property; and

(2) The total amount, based on the amount of consideration paid, of any loan, line of credit, or other legally binding lending commitment acquired by a lender by purchase, assignment, or otherwise.

*Improved property loan* means an extension of credit secured by one of the following types of real property:

(1) Farmland, ranchland or timberland committed to ongoing management and agricultural production;

(2) 1- to 4-family residential property that is not owner-occupied;

(3) Residential property containing five or more individual dwelling units;

(4) Completed commercial property; or

(5) Other income-producing property that has been completed and is available for occupancy and use, except income-producing owner-occupied 1- to 4-family residential property.

*Land development loan* means an extension of credit for the purpose of improving unimproved real property prior to the erection of structures. The improvement of unimproved real property may include the laying or placement of sewers, water pipes, utility cables, streets, and other infrastructure necessary for future development.

*Loan origination* means the time of inception of the obligation to extend credit (*i.e.,* when the last event or prerequisite, controllable by the lender, occurs causing the lender to become legally bound to fund an extension of credit).

*Loan-to-value* or *loan-to-value ratio* means the percentage or ratio that is derived at the time of loan origination by dividing an extension of credit by the total value of the property(ies) securing or being improved by the extension of credit plus the amount of any readily marketable collateral and other acceptable collateral that secures the extension of credit. The total amount of all senior liens on or interests in such property(ies) should be included in determining the loan-to-value ratio. When mortgage insurance or collateral is used in the calculation of the loan-to-value ratio, and such credit enhancement is later released or replaced, the loan-to-value ratio should be recalculated.

*Other acceptable collateral* means any collateral in which the lender has a perfected security interest, that has a quantifiable value, and is accepted by the lender in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes, among other items, unconditional irrevocable standby letters of credit for the benefit of the lender.

*Owner-occupied,* when used in conjunction with the term *1- to 4-family residential property* means that the owner of the underlying real property occupies at least one unit of the real property as a principal residence of the owner.

*Readily marketable collateral* means insured deposits, financial instruments, and bullion in which the lender has a perfected interest. Financial instruments and bullion must be salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market. Readily marketable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral.

*Value* means an opinion or estimate, set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property, prepared in accordance with the agency's appraisal regulations and guidance. For loans to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value.

*1- to 4-family residential property* means property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property (when deemed to be real property under state law).

**§ 390.266 [Reserved].**

**§ 390.267 Letters of credit and other independent undertakings to pay against documents.**

(a) *General authority.* A State savings association may issue and commit to issue letters of credit within the scope of applicable laws or rules of practice recognized by law. It may also issue other independent undertakings within the scope of such laws or rules of practice recognized by law, that have been approved by the FDIC (approved undertaking).[1] Under such letters of credit and approved undertakings, the State savings association's obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the account party and the beneficiary. A State savings association may also confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person's independent undertaking within the scope of such laws or rules.

(b) *Safety and soundness considerations*—(1) *Terms.* As a matter of safe and sound banking practice, State savings associations that issue letters of credit or approved undertakings should not be exposed to undue risk. At a minimum, State savings associations should consider the following:

(i) The independent character of the letter of credit or approved undertaking should be apparent from its terms (such as terms that subject it to laws or rules providing for its independent character);

(ii) The letter of credit or approved undertaking should be limited in amount;

[1] Samples of laws or rules of practice applicable to letters of credit and other independent undertakings include, but are not limited to: the applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co., 1/800/328–4880); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 500) (available from ICC Publishing, Inc., 212/206–1150; the United Nations Convention on Independent Guarantees and Standby Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law, 212/963–5353); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 525) (available from ICC Publishing, Inc., 212/206–1150).

(iii) The letter of credit or approved undertaking should:

(A) Be limited in duration; or

(B) Permit the State savings association to terminate the letter of credit or approved undertaking, either on a periodic basis (consistent with the State savings association's ability to make any necessary credit assessments) or at will upon either notice or payment to the beneficiary; or

(C) Entitle the State savings association to cash collateral from the account party on demand (with a right to accelerate the customer's obligations, as appropriate); and

(iv) The State savings association either should be fully collateralized or have a post-honor right of reimbursement from its customer or from another issuer of a letter of credit or an independent undertaking. Alternatively, if the State savings association's undertaking is to purchase documents of title, securities, or other valuable documents, it should obtain a first priority right to realize on the documents if the State savings association is not otherwise to be reimbursed.

(2) *Additional considerations in special circumstances.* Certain letters of credit and approved undertakings require particular protections against credit, operational, and market risk:

(i) In the event that the undertaking is to honor by delivery of an item of value other than money, the State savings association should ensure that market fluctuations that affect the value of the item will not cause the State savings association to assume undue market risk;

(ii) In the event that the undertaking provides for automatic renewal, the terms for renewal should allow the State savings association to make any necessary credit assessment prior to renewal;

(iii) In the event that a State savings association issues an undertaking for its own account, the underlying transaction for which it is issued must be within the State savings association's authority and comply with any safety and soundness requirements applicable to that transaction.

(3) *Operational expertise.* The State savings association should possess operational expertise that is commensurate with the sophistication of its letter of credit or independent undertaking activities.

(4) *Documentation.* The State savings association must accurately reflect its letters of credit or approved undertakings in its records, including any acceptance or deferred payment or other absolute obligation arising out of its contingent undertaking.

### § 390.268 Investment in State housing corporations.

(a) Any State savings association to the extent it has legal authority to do so, may make investments in, commitments to invest in, loans to, or commitments to lend to any state housing corporation; provided, that such obligations or loans are secured directly, or indirectly through a fiduciary, by a first lien on improved real estate which is insured under the National Housing Act, as amended, and that in the event of default, the holder of such obligations or loans has the right directly, or indirectly through a fiduciary, to subject to the satisfaction of such obligations or loans the real estate described in the first lien, or the insurance proceeds.

(b) Any State savings association that is adequately capitalized may, to the extent it has legal authority to do so, invest in obligations (including loans) of, or issued by, any state housing corporation incorporated in the state in which such State savings association has its home or a branch office; provided (except with respect to loans), that:

(1) The obligations are rated in one of the four highest grades as shown by the most recently published rating made of such obligations by a nationally recognized rating service; or

(2) The obligations, if not rated, are approved by the FDIC. The aggregate outstanding direct investment in obligations under paragraph (b) of this section shall not exceed the amount of the State savings association's total capital.

(c) Each state housing corporation in which a State savings association invests under the authority of paragraph (b) of this section shall agree, before accepting any such investment (including any loan or loan commitment), to make available at any time to the FDIC such information as the FDIC may consider to be necessary to ensure that investments are properly made under this section.

### § 390.269 Prohibition on loan procurement fees.

If you are a director, officer, or other natural person having the power to direct the management or policies of a State savings association, you must not receive, directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the State savings association or a subsidiary of the State savings association.

### § 390.270 Asset classification.

(a)(1) Each State savings association must evaluate and classify its assets on a regular basis in a manner consistent with, or reconcilable to, the asset classification system used by the FDIC.

(2) In connection with the examination of a State savings association or its affiliates, the FDIC examiners may identify problem assets and classify them, if appropriate. The association must recognize such examiner classifications in its subsequent reports to the FDIC.

(b) Based on the evaluation and classification of its assets, each State savings association shall establish adequate valuation allowances or charge-offs, as appropriate, consistent with generally accepted accounting principles and the practices of the federal banking agencies.

### § 390.271 Records for lending transactions.

In establishing and maintaining its records pursuant to § 390.350, each State savings association should establish and maintain loan documentation practices that:

(a) Ensure that the institution can make an informed lending decision and can assess risk on an ongoing basis;

(b) Identify the purpose and all sources of repayment for each loan, and assess the ability of the borrower(s) and any guarantor(s) to repay the indebtedness in a timely manner;

(c) Ensure that any claims against a borrower, guarantor, security holders, and collateral are legally enforceable;

(d) Demonstrate appropriate administration and monitoring of its loans; and

(e) Take into account the size and complexity of its loans.

### § 390.272 Re-evaluation of real estate owned.

A State savings association shall appraise each parcel of real estate owned at the earlier of in-substance foreclosure or at the time of the State savings association's acquisition of such property, and at such times thereafter as dictated by prudent management policy; such appraisals shall be consistent with the requirements of subpart X of this part. The appropriate regional director or his or her designee may require subsequent appraisals if, in his or her discretion, such subsequent appraisal is necessary under the particular circumstances. The foregoing requirement shall not apply to any parcel of real estate that is sold and reacquired less than 12 months subsequent to the most recent appraisal made pursuant to this subpart. A dated, signed copy of each report of appraisal made pursuant to any provisions of this subpart shall be retained in the State savings association's records.

## Subpart Q—Definitions for Regulations Affecting All State Savings Associations

### § 390.280 When do the definitions in this subpart apply?

The definitions in this subpart apply throughout parts 390 and 391, unless another definition is specifically provided.

### § 390.281 Account.

The term *account* means any savings account, demand account, certificate account, tax and loan account, note account, United States Treasury general account or United States Treasury time deposit-open account, whether in the form of a deposit or a share, held by an accountholder in a State savings association.

### § 390.282 Accountholder.

The term *accountholder* means the holder of an account or accounts in a State savings association insured by the Deposit Insurance Fund. The term does not include the holder of any subordinated debt security or any mortgage-backed bond issued by the State savings association.

### § 390.283 Affiliate.

The term *affiliate* of a State savings association, unless otherwise defined, means any corporation, business trust, association, or other similar organization:

(a) Of which a State savings association, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(b) Of which control is held, directly or indirectly through stock ownership or in any other manner, by the shareholders of a State savings association who own or control either a majority of the shares of such State savings association or more than 50 per centum of the number of shares voted for the election of directors of such State savings association at the preceding election, or by trustees for the benefit of the shareholders of any such State savings association; or

(c) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one State savings association.

### § 390.284 Affiliated person.

The term *affiliated person* of a State savings association means the following:

(a) A director, officer, or controlling person of such association;

(b) A spouse of a director, officer, or controlling person of such association;

(c) A member of the immediate family of a director, officer, or controlling person of such association, who has the same home as such person or who is a director or officer of any subsidiary of such association or of any holding company affiliate of such association;

(d) Any corporation or organization (other than the State savings association or a corporation or organization through which the State savings association operates) of which a director, officer or the controlling person of such association:

(1) Is chief executive officer, chief financial officer, or a person performing similar functions;

(2) Is a general partner;

(3) Is a limited partner who, directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns an interest of 10 percent or more in the partnership (based on the value of his or her contribution) or who, directly or indirectly with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, owns an interest of 25 percent or more in the partnership; or

(4) Directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns or controls 10 percent or more of any class of equity securities or owns or controls, with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, 25 percent or more of any class of equity securities; and

(5) Any trust or other estate in which a director, officer, or controlling person of such association or the spouse of such person has a substantial beneficial interest or as to which such person or his or her spouse serves as trustee or in a similar fiduciary capacity.

### § 390.285 Audit period.

The *audit period* of a State savings association means the twelve month period (or other period in the case of a change in audit period) covered by the annual audit conducted to satisfy § 390.350.

### § 390.286 Certificate account.

The term *certificate account* means a savings account evidenced by a certificate that must be held for a fixed or minimum term.

### § 390.287 Consumer credit.

The term *consumer credit* means credit extended to a natural person for personal, family, or household purposes, including loans secured by liens on real estate and chattel liens secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security: *Provided,* the State savings association relies substantially upon other factors, such as the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. Appropriate evidence to demonstrate justification for such reliance should be retained in a State savings association's files. Among the types of credit included within this term are consumer loans; educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping of real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards.

### § 390.288 Controlling person.

The term *controlling person* of a State savings association means any person or entity which, either directly or indirectly, or acting in concert with one or more other persons or entities, owns, controls, or holds with power to vote, or holds proxies representing, ten percent or more of the voting shares or rights of such State savings association; or controls in any manner the election or appointment of a majority of the directors of such State savings association. However, a director of a State savings association will not be deemed to be a controlling person of such State savings association based upon his or her voting, or acting in concert with other directors in voting, proxies:

(a) Obtained in connection with an annual solicitation of proxies, or

(b) Obtained from savings account holders and borrowers if such proxies are voted as directed by a majority vote of the entire board of directors of such association, or of a committee of such directors if such committee's composition and authority are controlled by a majority vote of the entire board and if its authority is revocable by such a majority.

**§ 390.289 Corporation.**

The terms *Corporation* and *FDIC* mean the Federal Deposit Insurance Corporation.

**§ 390.290 Demand accounts.**

The term *demand accounts* means non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the State savings association and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

**§ 390.291 Director.**

The term *director* means any director, trustee, or other person performing similar functions with respect to any organization whether incorporated or unincorporated. Such term does not include an advisory director, honorary director, director emeritus, or similar person, unless the person is otherwise performing functions similar to those of a director.

**§ 390.292 Financial institution.**

The term *financial institution* has the same meaning as the term *depository institution* set forth in 12 U.S.C. 1813(c)(1).

**§ 390.293 Immediate family.**

The term *immediate family* of any natural person means the following (whether by the full or half blood or by adoption):

(a) Such person's spouse, father, mother, children, brothers, sisters, and grandchildren;

(b) The father, mother, brothers, and sisters of such person's spouse; and

(c) The spouse of a child, brother, or sister of such person.

**§ 390.294 Land loan.**

The term *land loan* means a loan:

(a) Secured by real estate upon which all facilities and improvements have been completely installed, as required by local regulations and practices, so that it is entirely prepared for the erection of structures;

(b) To finance the purchase of land and the accomplishment of all improvements required to convert it to developed building lots; or

(c) Secured by land upon which there is no structure.

**§ 390.295 Low-rent housing.**

The term *low-rent housing* means real estate which is, or which is being constructed, remodeled, rehabilitated, modernized, or renovated to be, the subject of an annual contributions contract for low-rent housing under the provisions of the United States Housing Act of 1937, as amended.

**§ 390.296 Money Market Deposit Accounts.**

(a) *Money Market Deposit Accounts* (*MMDAs*) offered by State savings associations in accordance with applicable state law are savings accounts on which interest may be paid if issued subject to the following limitations:

(1) The State savings association shall reserve the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account; and

(2)(i) The depositor is authorized by the State savings association to make no more than six transfers per calendar month or statement cycle (or similar period) of at least four weeks by means of preauthorized, automatic, telephonic, or data transmission agreement, order, or instruction to another account of the depositor at the same State savings association to the State savings association itself, or to a third party.

(ii) State savings associations may permit holders of MMDAs to make unlimited transfers for the purpose of repaying loans (except overdraft loans on the depositor's demand account) and associated expenses at the same State savings association (as originator or servicer), to make unlimited transfers of funds from this account to another account of the same depositor at the same State savings association or to make unlimited payments directly to the depositor from the account when such transfers or payments are made by mail, messenger, automated teller machine, or in person, or when such payments are made by telephone (via check mailed to the depositor).

(3) In order to ensure that no more than the number of transfers specified in paragraph (a)(2)(i) of this section are made, a State savings association must either:

(i) Prevent transfers of funds in excess of the limitations; or

(ii) Adopt procedures to monitor those transfers on an after-the-fact basis and contact customers who exceed the limits on more than an occasional basis. For customers who continue to violate those limits after being contacted by the depository State savings association the depository State savings association must either place funds in another account that the depositor is eligible to maintain or take away the account's transfer and draft capacities.

(iii) Insured State savings associations at their option, may use on a consistent basis either the date on a check or the date it is paid in determining whether the transfer limitations within the specified interval are exceeded.

(b) State savings associations may offer MMDAs to any depositor not inconsistent with applicable state law.

**§ 390.297 Negotiable Order of Withdrawal Accounts.**

(a) *Negotiable Order of Withdrawal (NOW)* accounts are savings accounts authorized by 12 U.S.C. 1832 on which the State savings association reserves the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account.

(b) For purposes of 12 U.S.C. 1832:

(1) An organization shall be deemed ''operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and * * * not * * * for profit'' if it is described in sections 501(c)(3) through (13), 501(c)(19), or 528 of the Internal Revenue Code; and

(2) The funds of a sole proprietorship or unincorporated business owned by a husband and wife shall be deemed beneficially owned by ''one or more individuals.''

**§ 390.298 Nonresidential construction loan.**

The term *nonresidential construction loan* means a loan for construction of other than one or more dwelling units.

**§ 390.299 Nonwithdrawable account.**

The term *nonwithdrawable account* means an account which by the terms of the contract of the accountholder with the State savings association or by provisions of state law cannot be paid to the accountholder until all liabilities, including other classes of share liability of the State savings association have been fully liquidated and paid upon the winding up of the State savings association is referred to as a *nonwithdrawable account.*

**§ 390.300 Note account.**

The term *note account* means a note, subject to the right of immediate call, evidencing funds held by depositories electing the note option under applicable United States Treasury Department regulations. Note accounts are not savings accounts or savings deposits.

**§ 390.301 [Reserved]**

**§ 390.302 Officer.**

The term *Officer* means the president, any vice-president (but not an assistant vice-president, second vice-president, or other vice president having authority similar to an assistant or second vice-president), the secretary, the treasurer, the comptroller, and any other person performing similar functions with respect to any organization whether incorporated or unincorporated. The term *officer* also includes the chairman of the board of directors if the chairman is authorized by the charter or by-laws of the organization to participate in its operating management or if the chairman in fact participates in such management.

### § 390.303 Parent company; subsidiary.

The term *parent company* means any company which directly or indirectly controls any other company or companies. The term *subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes a subsidiary owned in whole or in part by a State savings association, or a subsidiary of that subsidiary.

### § 390.304 Political subdivision.

The term *political subdivision* includes any subdivision of a public unit, any principal department of such public unit:

(a) The creation of which subdivision or department has been expressly authorized by state statute,

(b) To which some functions of government have been delegated by state statute, and

(c) To which funds have been allocated by statute or ordinance for its exclusive use and control. It also includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts and bridge or port authorities and other special districts created by state statute or compacts between the states. Excluded from the term are subordinate or nonautonomous divisions, agencies or boards within principal departments.

### § 390.305 Principal office.

The term *principal office* means the home office of a State savings association established as such in conformity with the laws under which the State savings association is organized.

### § 390.306 Public unit.

The term *public unit* means the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, the Virgin Islands, any county, any municipality or any political subdivision thereof.

### § 390.307 Savings account.

The term *savings account* means any withdrawable account, except a demand account as defined in § 390.290, a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

### § 390.308 State savings association.

The term *State savings association* means a State savings association as defined in section 3 of the Federal Deposit Insurance Act, the deposits of which are insured by the Corporation. It includes a building and loan, savings and loan, or homestead association, or a cooperative bank (other than a cooperative bank which is a State bank as defined in section 3(a)(2) of the Federal Deposit Insurance Act) organized and operating according to the laws of the State in which it is chartered or organized, or a corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act) that the Board of Directors of the Federal Deposit Insurance Corporation determine to be operating substantially in the same manner as a State savings association.

### § 390.309 Security.

The term *security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing, except that a *security* shall not include an account or deposit insured by the Federal Deposit Insurance Corporation.

### § 390.310 Service corporation.

The term *service corporation* means any corporation, the majority of the capital stock of which is owned by one or more savings associations and which engages, directly or indirectly, in any activities similar to activities which may be engaged in by a service corporation in which a Federal savings association may invest.

### § 390.311 State.

The term *State* means a State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands of the United States.

### § 390.312 Subordinated debt security.

The term *subordinated debt security* means any unsecured note, debenture, or other debt security issued by a State savings association and subordinated on liquidation to all claims having the same priority as account holders or any higher priority.

### § 390.313 Tax and loan account.

The term *tax and loan account* means an account, the balance of which is subject to the right of immediate withdrawal, established for receipt of payments of Federal taxes and certain United States obligations. Such accounts are not savings accounts or savings deposits.

### § 390.314 United States Treasury General Account.

The term *United States Treasury General Account* means an account maintained in the name of the United States Treasury the balance of which is subject to the right of immediate withdrawal, except in the case of the closure of the member, and in which a zero balance may be maintained. Such accounts are not savings accounts or savings deposits.

### § 390.315 United States Treasury Time Deposit Open Account.

The term *United States Treasury Time Deposit Open Account* means a non-interest-bearing account maintained in the name of the United States Treasury which may not be withdrawn prior to the expiration of 30 days' written notice from the United States Treasury, or such other period of notice as the Treasury may require. Such accounts are not savings accounts or savings deposits.

### § 390.316 With recourse.

(a) The term *with recourse* means, in connection with the sale of a loan or a participation interest in a loan, an agreement or arrangement under which the purchaser is to be entitled to receive from the seller a sum of money or thing of value, whether tangible or intangible (including any substitution), upon default in payment of any loan involved or any part thereof or to withhold or to have withheld from the seller a sum of money or anything of value by way of security against default. The recourse liability resulting from a sale with recourse shall be the total book value of any loan sold with recourse less:

(1) The amount of any insurance or guarantee against loss in the event of default provided by a third party,

(2) The amount of any loss to be borne by the purchaser in the event of default, and

(3) The amount of any loss resulting from a recourse obligation entered on the books and records of the State savings association.

(b) The term *with recourse* does not include loans or interests therein where the agreement of sale provides for the

State savings association directly or indirectly

(1) To hold or retain a subordinate interest in a specified percentage of the loans or interests; or

(2) To guarantee against loss up to a specified percentage of the loans or interests, which specified percentage shall not exceed ten percent of the outstanding balance of the loans or interests at the time of sale: *Provided,* that the State savings association designates adequate reserves for the subordinate interest or guarantee.

(c) This definition does not apply for purposes of determining the capital adequacy requirements under subpart Z.

## Subpart R—Regulatory Reporting Standards

### § 390.320 Regulatory reporting requirements.

(a) *Authority and scope.* This subpart is issued by the FDIC pursuant to 12 U.S.C. sections 1831m; 1831n(a)(2); 1831p–1;1464(v)(1). It applies to all State savings associations regulated by the FDIC.

(b) *Records and reports—general*—(1) *Records.* Each State savings association and its affiliates shall maintain accurate and complete records of all business transactions. Such records shall support and be readily reconcilable to any regulatory reports submitted to the FDIC and financial reports prepared in accordance with GAAP. The records shall be maintained in the United States and be readily accessible for examination and other supervisory purposes within 5 business days upon request by the FDIC, at a location acceptable to the FDIC.

(2) *Reports.* For purposes of examination by and regulatory reports to the FDIC and compliance with this section, all State savings associations shall use such forms and follow such regulatory reporting requirements as the FDIC may require by regulation or otherwise.

### § 390.321 Regulatory reports.

(a) *Definition and scope.* This section applies to all regulatory reports, as defined herein. A regulatory report is any report that the FDIC prepares, or is submitted to, or is used by the FDIC, to determine compliance with its rules and regulations, and to evaluate the safe and sound condition and operation of State savings associations. Regulatory reports are regulatory documents, not accounting documents.

(b) *Regulatory reporting requirements*—(1) *General.* The instructions to regulatory reports are referred to as ''regulatory reporting requirements.'' Regulatory reporting requirements include, but are not limited to, the accounting instructions, guidance contained in FDIC regulations, financial institution letters, manuals, bulletins, examination handbooks, and safe and sound practices. Regulatory reporting requirements are not limited to the minimum requirements under generally accepted accounting principles (GAAP) because of the special supervisory, regulatory, and economic policy needs served by such reports. Regulatory reporting by State savings associations that purports to comply with GAAP shall incorporate the GAAP that best reflects the underlying economic substance of the transaction at issue. Regulatory reporting requirements shall, at a minimum:

(i) Incorporate GAAP whenever GAAP is the referenced accounting instruction for regulatory reports to the Federal banking agencies;

(ii) Incorporate safe and sound practices contained in FDIC regulations, financial institution letters, bulletins, examination handbooks, manuals, and instructions to regulatory reports; and

(iii) Incorporate additional safety and soundness requirements more stringent than GAAP, as the FDIC may prescribe.

(2) *Exceptions.* Regulatory reporting requirements that are not consistent with GAAP, if any, are not required to be reflected in audited financial statements, including financial statements contained in securities filings submitted to the FDIC pursuant to the Securities and Exchange Act of 1934 or subparts U and W and 12 CFR part 192.

(3) *Compliance.* When the FDIC determines that a State savings association's regulatory reports did not conform to regulatory reporting requirements in previous reporting periods, the association shall correct its regulatory reports in accordance with the directions of the FDIC.

### § 390.322 Audit of State savings associations.

(a) *General.* The FDIC may require, at any time, an independent audit of the financial statements of, or the application of procedures agreed upon by the FDIC to a State savings association, by qualified independent public accountants when needed for any safety and soundness reason identified by the FDIC.

(b) *Audits required for safety and soundness purposes.* The FDIC requires an independent audit for safety and soundness purposes:

(1) If a State savings association has received a composite rating of 3, 4 or 5, as defined at § 390.101(c).

(2) [Reserved]

(c) *Procedures.* (1) When the FDIC requires an independent audit because such an audit is needed for safety and soundness purposes, the FDIC shall determine whether the audit was conducted and filed in a manner satisfactory to the FDIC.

(2) The FDIC may waive the independent audit requirement described at paragraph (b)(1) of this section, if the FDIC determines that an audit would not provide further information on safety and soundness issues relevant to the examination rating.

(3) When the FDIC requires the application of procedures agreed upon by the FDIC for safety and soundness purposes, the FDIC shall identify the procedures to be performed. The FDIC shall also determine whether the agreed upon procedures were conducted and filed in a manner satisfactory to the FDIC.

(d) *Qualifications for independent public accountants.* The audit shall be conducted by an independent public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the State savings association's or holding company's principal office is located;

(2) Agrees in the engagement letter to provide the FDIC with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff; and

(4) Has received, or is enrolled in, a peer review program that meets guidelines acceptable to the FDIC.

(e) *Voluntary audits.* When a State savings association obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (2), and (3)(i) of this section.

## Subpart S—State Savings Associations—Operations

### § 390.330 Chartering documents.

(a) *Submission for approval.* Any *de novo* State savings association prior to commencing operations shall file its charter and bylaws with the FDIC for approval, together with a certification that such charter and bylaws are permissible under all applicable laws, rules and regulations.

(b) *Availability of chartering documents.* Each State savings association shall cause a true copy of its charter and bylaws and all amendments thereto to be available to accountholders at all times in each office of the State savings association, and shall upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

**§ 390.331 Securities: Statement of non-insurance.**

Every security issued by a State savings association must include in its provisions a clear statement that the security is not insured by the Federal Deposit Insurance Corporation.

**§ 390.332 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.**

(a) No State savings association may, without application to and approval by the FDIC:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a State savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No State savings association may, without notifying the FDIC, as provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a State savings association is not the resulting institution; or

(ii) In the case of a State savings association that meets the conditions for expedited treatment under § 390.101, convert, directly or indirectly, to a national or state bank.

(2) A State savings association that does not meet the conditions for expedited treatment under § 390.101 may not, directly or indirectly, convert to a national or state bank without prior application to and approval of FDIC, as provided in paragraph (h)(2)(ii) of this section.

(c) No State savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the FDIC, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term ''transfer'' means purchases or sales of assets or liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the FDIC shall take into account the following:

(i) The capital level of any resulting State savings association;

(ii) The financial and managerial resources of the constituent institutions;

(iii) The future prospects of the constituent institutions;

(iv) The convenience and needs of the communities to be served;

(v) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if any) of each State savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the result of arms' length bargaining or, in the case of a stock State savings association, where controlling stockholders are receiving different consideration from other stockholders. No finder's or similar fee should be paid to any officer, director, or controlling person of a State savings association which is a party to the transaction.

(B) *Full disclosure.* The filing should make full disclosure of all written or oral agreements or understandings by which any person or company will receive, directly or indirectly, any money, property, service, release of pledges made, or other thing of value, whether tangible or intangible, in connection with the transaction.

(C) *Compensation to officers.* Compensation, including deferred compensation, to officers, directors and controlling persons of the disappearing State savings association by the resulting institution or an affiliate thereof should not be in excess of a reasonable amount, and should be commensurate with their duties and responsibilities. The filing should fully justify the compensation to be paid to such persons. The transaction will be particularly scrutinized where any of such persons is to receive a material increase in compensation above that paid by the disappearing State savings association prior to the commencement of negotiations regarding the proposed transaction. An increase in compensation in excess of the greater of 15% or $10,000 gives rise to presumptions of unreasonableness and sale of control. In the case of such an increase, evidence sufficient to rebut such presumptions should be submitted.

(D) *Advisory boards.* Advisory board members should be elected for a term not exceeding one year. No advisory board fees should be paid to salaried officers or employees of the resulting State savings association. The filing should describe and justify the duties and responsibilities and any compensation paid to any advisory board of the resulting State savings association that consists of officers, directors or controlling persons of the disappearing institution, particularly if the disappearing institution experienced significant supervisory problems prior to the transaction. No advisory board fees should exceed the director fees paid by the resulting State savings association. Advisory board fees that are in excess of 115 percent of the director fees paid by the disappearing State savings association prior to commencement of negotiations regarding the transaction give rise to presumptions of unreasonableness and sale of control unless sufficient evidence to rebut such presumptions is submitted. Rebuttal evidence is not required if:

(*1*) The advisory board fees do not exceed the fee that advisory board members of the resulting institution receive for each monthly meeting attended or $150, whichever is greater; or

(*2*) The advisory board fees do not exceed $100 per meeting attended for disappearing State savings associations with assets greater than $10,000,000 or $50 per meeting attended for disappearing State savings associations with assets of $10,000,000 or less, based on a schedule of 12 meetings per year.

(E) The accounting and tax treatment of the transaction; and

(F) Fees paid and professional services rendered in connection with the transaction.

(2) In conferring approval of a transaction under paragraph (a) of this section, the FDIC also will consider the competitive impact of the transaction, including whether:

(i) The transaction would result in a monopoly, or would be in furtherance of any monopoly or conspiracy to monopolize or to attempt to monopolize the State savings association business in any part of the United States; or

(ii) The effect of the transaction on any section of the country may be substantially to lessen competition, or tend to create a monopoly, or in any other manner would be in restraint of trade, unless the FDIC finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the communities to be served.

(3) Applications and notices filed under this section shall be upon forms prescribed by the FDIC.

(4) Applications filed under paragraph (a) of this section must be processed in accordance with the time frames set forth in §§ 390.127 through 390.135, provided that the period for review may be extended only if the FDIC determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

(e)(1) The following procedures apply to applications described in paragraph (a) of this section, unless the FDIC finds that it must act immediately to prevent the probable default of one of the depository institutions involved:

(i) The applicant must publish a public notice of the application in accordance with the procedures in §§ 390.111 through 390.115. In addition to the initial publication, the applicant must also publish on a weekly basis during the public comment period.

(ii) Commenters may submit comments on an application in accordance with the procedures in §§ 390.116 through 390.120. The public comment period is 30 calendar days after the date of publication of the initial public notice. However, if the FDIC has advised the Attorney General that an emergency exists requiring expeditious action, the public comment period is 10 calendar days after the date of publication of the initial public notice.

(iii) The FDIC may arrange a meeting in accordance with the procedures in §§ 390.121 through 390.125.

(iv) The FDIC will request the Attorney General, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System to provide reports on the competitive impacts involved in the transaction.

(v) The FDIC will immediately notify the Attorney General of the approval of the transaction. The applicant may not consummate the transaction before the date established under 12 U.S.C. 1828(c)(6).

(2) For applications described in § 390.332, certain State savings associations described below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring State savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring State savings association. The following State savings associations must provide the notices:

(i) A State savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(ii) Any mutual State savings association transferring account liabilities to a stock form depository institution.

(f) *Automatic approvals by the FDIC.* Applications filed pursuant to paragraph (a) of this section shall be deemed to be approved automatically by the FDIC 30 calendar days after the FDIC sends written notice to the applicant that the application is complete, unless:

(1) The acquiring State savings association does not meet the criteria for expedited treatment under § 390.101;

(2) The FDIC recommends the imposition of non-standard conditions prior to approving the application;

(3) The FDIC suspends the applicable processing time frames under § 390.125;

(4) The FDIC raises objections to the transaction;

(5) The resulting State savings association would be one of the 3 largest depository institutions competing in the relevant geographic area where before the transaction there were 5 or fewer depository institutions, the resulting State savings association would have 25 percent or more of the total deposits held by depository institutions in the relevant geographic area, and the share of total deposits would have increased by 5 percent or more;

(6) The resulting State savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 6 to 11 depository institutions the resulting State savings association would have 30 percent or more of the total deposits held by depositing institutions in the relevant geographic area, and the share of total deposits would have increased by 10 percent or more;

(7) The resulting State savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 12 or more depository institutions, the resulting State savings association would have 35 percent or more of the total deposits held by the depository institutions in the relevant geographic area, and the share of total deposits would have increased by 15 percent or more;

(8) The Herfindahl-Hirschman Index (HHI) in the relevant geographic area was more than 1800 before the transaction, and the increase in the HHI used by the transaction would be 50 or more;

(9) In a transaction involving potential competition, the FDIC determines that the acquiring State savings association is one of three or fewer potential entrants into the relevant geographic area;

(10) The acquiring State savings association has assets of $1 billion or more and proposes to acquire assets of $1 billion or more;

(11) The State savings association that will be the resulting State savings association in the transaction has a composite Community Reinvestment Act rating of less than satisfactory, or is otherwise seriously deficient with respect to the FDIC's nondiscrimination regulations and the deficiencies have not been resolved to the satisfaction of the FDIC;

(12) The transaction involves any supervisory or assistance agreement with the FDIC;

(13) The transaction is part of a conversion under 12 CFR part 192;

(14) The transaction raises a significant issue of law or policy; or

(15) The transaction is opposed by any constituent institution or contested by a competing acquiror.

(g) *Definitions.* (1) The terms used in this subpart shall have the same meaning as set forth in 12 CFR 152.13(b).

(2) *Insured depository institution. Insured depository institution* has the same meaning as defined in section 3(c)(2) of the Federal Deposit Insurance Act.

(3) With regard to paragraph (f) of this section, the term *relevant geographic area* is used as a substitute for *relevant geographic market,* which means the area within which the competitive effects of a merger or other combination may be evaluated. The relevant geographic area shall be delineated as a county or similar political subdivision, an area smaller than a county, or an aggregation of counties within which the merging or combining insured depository institutions compete. In addition, the FDIC may consider commuting patterns, newspaper and

other advertising activities, or other factors as the FDIC deems relevant.

(h) *Special requirements and procedures for transactions under paragraphs (b) and (c) of this section*—(1)(i) *Certain transactions with no surviving State savings association.* The FDIC must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the FDIC may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the State savings association submitting the notification maintains a liquidation account established pursuant to 12 CFR part 192, the notification must state that the resulting institution will assume such liquidation account.

(ii) The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the FDIC's receipt of the notification, a new notification must be submitted to the FDIC.

(2) *Other transfer transactions*—(i) *Expedited treatment.* A notice in conformity with § 390.105(a) may be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, under § 390.108 for any transaction under paragraph (c) of this section, provided all constituent State savings associations meet the conditions for expedited treatment under § 390.101. Notices submitted under this paragraph must be deemed approved automatically by the FDIC 30 days after receipt, unless the FDIC advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without the FDIC's approval of an application under paragraphs (h)(2)(ii) or (h)(2)(iii) of this section.

(ii) *Standard treatment.* An application in conformity with § 390.105(b) and paragraph (d) of this section must be submitted to the appropriate FDIC region, as defined in § 303.2 of this chapter, under § 390.108 by each State savings association participating in a transaction under paragraph (b)(2) or (c) of this section, where any constituent State savings association does not meet the conditions for expedited treatment under § 390.101. Applications under this paragraph must be processed in accordance with §§ 390.103 through 390.110 and §§ 390.126 through 390.135.

**§ 390.333 Advertising.**

No State savings association shall use advertising (which includes print or broadcast media, displays or signs, stationery, and all other promotional materials), or make any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments, or financial condition.

**§ 390.334 Directors, officers, and employees.**

(a) *Directors*—(1) *Requirements.* The composition of the board of directors of a State savings association must be in accordance with the following requirements:

(i) A majority of the directors must not be salaried officers or employees of the State savings association or of any subsidiary or (except in the case of a State savings association having 80% or more of any class of voting shares owned by a holding company) any holding company affiliate thereof.

(ii) Not more than two of the directors may be members of the same immediate family.

(iii) Not more than one director may be an attorney with a particular law firm.

(2) *Prospective application.* In the case of an association whose board of directors does not conform with any requirement set forth in paragraph (a)(1) of this section as of October 5, 1983, this paragraph (a) shall not prohibit the uninterrupted service, including re-election and re-appointment, of any person serving on the board of directors at that date.

(b) [Reserved]

**§ 390.335 Tying restriction exception.**

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

**§ 390.336 Employment contracts.**

(a) *General.* A State savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by a State savings association's board of directors. A State savings association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the State savings association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the State savings association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The State savings association's board of directors may terminate the officer or employee's employment at any time, but any termination by the State savings association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the State savings association's affairs by a notice served under section 8(e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818(e)(3) and (g)(1)), the State savings association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the State savings association may in its discretion:

(i) Pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended; and

(ii) Reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the State savings association's affairs by an order issued under section 8 (e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(4) or (g)(1)), all obligations of the State savings association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the State savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: *Provided,* that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the FDIC.

(5)(i) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the State savings association

(A) By the FDIC, at the time the FDIC enters into an agreement to provide assistance to or on behalf of the State savings association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(B) By the FDIC, at the time the FDIC approves a supervisory merger to resolve problems related to operation of the State savings association or when the State savings association is determined by the FDIC to be in an unsafe or unsound condition.

(ii) Any rights of the parties that have already vested, however, shall not be affected by such action.

### § 390.337 Transactions with affiliates.

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

### § 390.338 Loans by State savings associations to their executive officers, directors, and principal shareholders.

For applicable rules, see the regulations issued by the Board of Governors of the Federal Reserve System.

### § 390.339 Pension plans.

(a) *General.* No State savings association shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor. For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability of a plan sponsor to each plan participant shall be stated in or determinable from the plan, and, for a defined benefit plan, shall also be based upon an actuarial estimate of future experience under the plan.

(b) *Funding.* Actuarial cost methods permitted under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, shall be used to determine plan funding.

(c) *Plan amendment.* A plan may be amended to provide reasonable annual cost-of-living increases to retired participants: *Provided,* That

(1) Any such increase shall be for a period and amount determined by the sponsor's board of directors, but in no event shall it exceed the annual increase in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless:

(i) Anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and

(ii) The increase will not reduce the State savings association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the FDIC at least 60 days prior to the proposed termination date.

(e) *Records.* Each State savings association maintaining a plan not subject to recordkeeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

(1) Plan description;

(2) Schedule of participants and beneficiaries;

(3) Schedule of participants and beneficiaries' rights and obligations;

(4) Plan's financial statements; and

(5) Except for defined contribution plans, an opinion signed by an enrolled actuary (as defined by the Employee Retirement Income Security Act of 1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

### § 390.340 Offers and sales of securities at an office of a State savings association.

(a) A State saving association may not offer or sell debt or equity securities issued by the State savings association or an affiliate of the State savings association at an office of the State savings association; except that equity securities issued by the State savings association or an affiliate in connection with the State savings association's conversion from the mutual to stock form of organization in a conversion approved pursuant to 12 CFR part 192 may be offered and sold at the State savings association's offices: *Provided,* That:

(1) The FDIC does not object on supervisory grounds that the offer and sale of the securities at the offices of the State savings association;

(2) No commissions, bonuses, or comparable payments are paid to any employee of the State savings association or its affiliates or to any other person in connection with the sale of securities at an office of a State savings association; except that compensation and commissions consistent with industry norms may be paid to securities personnel of registered broker-dealers;

(3) No offers or sales are made by tellers or at the teller counter, or by comparable persons at comparable locations;

(4) Sales activity is conducted in a segregated or separately identifiable area of the State savings association's offices apart from the area accessible to the general public for the purposes of making or withdrawing deposits;

(5) Offers and sales are made only by regular, full-time employees of the State savings association or by securities personnel who are subject to supervision by a registered broker-dealer;

(6) An acknowledgment, in the form set forth in paragraph (c) of this section, is signed by any customer to whom the security is sold in the State savings association's offices prior to the sale of any such securities;

(7) A legend that the security is not a deposit or account and is not federally insured or guaranteed appears conspicuously on the security and in all offering documents and advertisements for the securities; the legend must state in bold or other prominent type at least as large as other textual type in the document that "This security is not a deposit or account and is not federally insured or guaranteed"; and

(8) The State savings association will be in compliance with its current capital requirements upon completion of the conversion stock offering.

(b) Securities sales practices, advertisements, and other sales literature used in connection with offers and sales of securities by State savings associations shall be subject to § 390.419.

(c) Offers and sales of securities of a State savings association or its affiliates in any office of the State savings association must use a one-page, unambiguous, certification in substantially the following form:

FORM OF CERTIFICATION

I ACKNOWLEDGE THAT THIS SECURITY IS NOT A DEPOSIT OR ACCOUNT AND IS NOT FEDERALLY INSURED, AND IS NOT GUARANTEED BY [*insert name of State savings association*] OR BY THE FEDERAL GOVERNMENT.

If anyone asserts that this security is federally insured or guaranteed, or is as safe as an insured deposit, I should call the FDIC's appropriate regional director [*insert name and telephone number with area code of the appropriate regional director, as defined in section 303.2 of this chapter*].

I further certify that, before purchasing the [*description of security being offered*] of [*name of issuer, name of State savings association and affiliation to issuer (if different)*], I received an offering circular.

The offering circular that I received contains disclosure concerning the nature of the security being offered and describes the risks involved in the investment, including:

[*List briefly the principal risks involved and cross reference certain specified pages of the offering circular where a more complete description of the risks is made.*]

Signature: ____________________

Date: ____________________

(d) For purposes of this section, an ''office'' of a State savings association means any premises used by the State savings association that are identified to the public through advertising or signage using the State savings association's name, trade name, or logo.

**§ 390.341 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital.**

(a) *Scope.* A State savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (''covered securities'') in supplementary capital (tier 2 capital) under subpart Z. If a State savings association does not include covered securities in supplementary capital, it is not required to comply with this section.

(b) *Application and notice procedures.* (1) A State savings association must file an application or notice under §§ 390.103 through 390.110 seeking FDIC approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The State savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the FDIC approves the application or does not object to the notice.

(2) A State savings association must also comply with the securities offering rules at subpart W by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that subpart.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: ''This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;''

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the State savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the State savings association's assets or the assets of any affiliate of the State savings association. For purposes of this subpart, the term *affiliate* means any person or company which controls, is controlled by, or is under common control with such State savings association.

(D) State that the security is not eligible collateral for a loan by the State savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h);

(F) For subordinated debt securities, state or refer to a document stating the terms under which the State savings association may prepay the obligation; and

(G) State or refer to a document stating that the State savings association must obtain FDIC approval before the voluntarily prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntarily redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the State savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in § 390.453(4)(b), fails to meet the regulatory capital requirements at subpart Z, or would fail to meet any of these standards following the payment.

(ii) A State savings association must include such additional statements as the FDIC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Maturity requirements.* Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) *Mandatory prepayment.* Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the State savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a State savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in § 390.413 and sold in any consecutive 12-month or 36-month period exceeds $5,000,000 or $10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the State savings association or an affiliate of the State savings association (as defined at § 390.283) and for collective enforcement of the security holders' rights and remedies.

(ii) A State savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A State savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a State savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) *FDIC review.* (1) The FDIC will review notices and applications under §§ 390.126 through 390.135.

(2) In reviewing notices and applications under this section, the FDIC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the State savings association's charter and bylaws.

(ii) The State savings association is at least adequately capitalized under § 390.453(4)(b) and meets the regulatory capital requirements at subpart Z.

(iii) The State savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) The FDIC has no objection to the issuance based on the State savings association's overall policies, condition, and operations.

(3) The FDIC approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the FDIC. The FDIC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the State savings association, or the Deposit Insurance Fund.

(e) *Amendments.* If a State savings association amends the covered securities or related documents following the completion of the FDIC's review, it must obtain the FDIC's approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) *Sale of covered securities.* The State savings association must complete the sale of covered securities within one year after the FDIC's approval or non-objection under this section. A State savings association may request an extension of the offering period by filing a written request with the FDIC. The State savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) *Reports.* A State savings association must file the following information with the FDIC within 30 days after the State savings association completes the sale of covered securities includable as supplementary capital. If the State savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the State savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the State savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

### § 390.342 Capital distributions by State savings associations.

Sections 390.342 through 390.348 apply to all capital distributions by a State savings association (''you'').

### § 390.343 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a mutual State savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the FDIC determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under subpart Z, and any extension of credit to finance an affiliate's acquisition of your shares or interests;

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes your payment of cash or property to shareholders of another savings association or to shareholders of its holding company to acquire ownership in that savings association, other than by a distribution of shares;

(d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in § 390.453(b)(1), following the distribution; and

(e) Any transaction that the FDIC determines, by order or regulation, to be in substance a distribution of capital.

### § 390.344 Definitions applicable to capital distributions.

The following definitions apply to sections 390.342 through 390.348:

*Affiliate* means an affiliate, as defined in regulations governing transactions with affiliates as issued by the Board of Governors of the Federal Reserve System.

*Capital* means total capital, as computed under subpart Z.

*Net income* means your net income computed in accordance with generally accepted accounting principles.

*Retained net income* means your net income for a specified period less total capital distributions declared in that period.

*Shares* means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term ''share'' also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution.

### § 390.345 Must I file with the FDIC?

Whether and what you must file with the FDIC depends on whether you and your proposed capital distribution fall within certain criteria.

(a) *Application required.*

| If: | Then you: |
|---|---|
| (1) You are not eligible for expedited treatment under § 390.101 | Must file an application with the FDIC. |
| (2) The total amount of all of your capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds your net income for that year to date plus your retained net income for the preceding two years. | Must file an application with the FDIC. |
| (3) You would not be at least adequately capitalized, as set forth in § 390.453(b)(2), following the distribution. | Must file an application with the FDIC. |
| (4) Your proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between you and the FDIC, or violate a condition imposed on you in an FDIC-approved application or notice. | Must file an application with the FDIC. |

(b) *Notice required.*

| If you are not required to file an application under paragraph (a) of this section, but: | Then you: |
|---|---|
| (1) You would not be well capitalized, as set forth under § 390.453(b)(1), following the distribution. | Must file a notice with the FDIC. |
| (2) Your proposed capital distribution would reduce the amount of or retire any part of your common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under subpart Z (other than regular payments required under a debt instrument approved under § 390.341). | Must file a notice with the FDIC. |

(c) *No prior notice required.*

| | |
|---|---|
| If neither you nor your proposed capital distribution meet any of the criteria listed in paragraphs (a) and (b) of this section. | Then you do not need to file a notice or an application with the FDIC before making a capital distribution. |

**§ 390.346 How do I file with the FDIC?**

(a) *Contents.* Your notice or application must:

(1) Be in narrative form.

(2) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution.

(3) Demonstrate compliance with § 390.348.

(b) *Schedules.* Your notice or application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months.

(c) *Timing.* You must file your notice or application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by your board of directors.

**§ 390.347 May I combine my notice or application with other notices or applications?**

You may combine the notice or application required under § 390.345 with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under Parts 390 and 391. If you submit a combined filing, you must:

(a) State that the related notice or application is intended to serve as a notice or application under §§ 390.342 through 390.348; and

(b) Submit the notice or application in a timely manner.

**§ 390.348 Will the FDIC permit my capital distribution?**

The FDIC will review your notice or application under the review procedures in §§ 390.126 through 390.135. The FDIC may disapprove your notice or deny your application filed under § 390.345 in whole or in part, if the FDIC makes any of the following determinations.

(a) You will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in § 390.453(b), following the capital distribution. If so, the FDIC will determine if your capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

(b) Your proposed capital distribution raises safety or soundness concerns.

(c) Your proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between you and the FDIC or a condition imposed on you in an FDIC-approved application or notice. If so, the FDIC will determine whether it may permit your capital distribution notwithstanding the prohibition or condition.

**§ 390.349 Management and financial policies.**

(a)(1) For the protection of depositors and other State savings associations, each State savings association must be well managed and operate safely and soundly. Each also must pursue financial policies that are safe and consistent with economical home financing and the purposes of State savings associations.

(2) As part of meeting its requirements under paragraph (a)(1) of this section, each State savings association must maintain sufficient liquidity to ensure its safe and sound operation.

(b) Compensation to officers, directors, and employees of each State savings association shall not be in excess of that which is reasonable and commensurate with their duties and responsibilities. Former officers, directors, and employees of State savings association who regularly perform services therefor under consulting contracts are employees thereof for purposes of this paragraph (b).

**§ 390.350 Examinations and audits; appraisals; establishment and maintenance of records.**

(a) *Examinations and audits.* Each State savings association and affiliate thereof shall be examined periodically, and may be examined at any time, by the FDIC, with appraisals when deemed advisable, in accordance with general policies from time to time established by the FDIC.

(b) *Appraisals.* (1) Unless otherwise ordered by the FDIC, appraisal of real estate by the FDIC in connection with any examination or audit of a State savings association or its affiliate shall be made by an appraiser, or by appraisers, selected by the appropriate FDIC region, as that term is defined in § 303.2 of this chapter, in which such State savings association is located. The cost of such appraisal shall promptly be paid by such State savings association or its affiliate direct to such appraiser or appraisers upon receipt by the State savings association or its affiliate of a statement of such cost as approved by the appropriate regional director. A copy of the report of each appraisal made by the FDIC pursuant to any of the foregoing provisions of this section shall be furnished to the State savings association or its affiliate, as appropriate within a reasonable time, not to exceed 90 days, following the completion of such appraisals and the filing of a report thereof by the appraiser, or appraisers, with the appropriate FDIC office.

(2) The FDIC may obtain at any time, at its expense, such appraisals of any of the assets, including the security therefor, of a State savings association or its affiliate as the FDIC deems appropriate.

(c) *Establishment and maintenance of records.* To enable the FDIC to examine State savings associations and affiliates and audit State savings associations and its affiliates, pursuant to the provisions of paragraph (a) of this section, each State savings association, and its affiliate shall establish and maintain such accounting and other records as will provide an accurate and complete record of all business it transacts. This includes, without limitation, establishing and maintaining such other records as are required by statute or any other regulation to which the State savings association and its affiliate is subject. The documents, files, and other material or property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be.

(d) *Change in location of records.* A State savings association shall not transfer the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has:

(1) By resolution authorized the transfer or maintenance and;

(2) Sent a certified copy of the resolution to the appropriate regional director for the region in which the principal office of the State savings association is located.

(e) *Use of data processing services for maintenance of records.* A State savings association which determines to maintain any of its records by means of data processing services shall so notify the appropriate regional director for the region in which the principal office of such State savings association is located, in writing, at least 90 days prior to the date on which such maintenance of records will begin. Such notification shall include identification of the records to be maintained by data processing services and a statement as to the location at which such records will be maintained. Any contract, agreement, or arrangement made by a State savings association pursuant to which data processing services are to be performed for such State savings association shall be in writing and shall expressly provide that the records to be maintained by such services shall at all times be available for examination and audit.

### § 390.351 Frequency of safety and soundness examination.

(a) *General.* The FDIC examines State savings associations pursuant to authority conferred by 12 U.S.C. 1463 and the requirements of 12 U.S.C. 1820(d). The FDIC is required to conduct a full-scope, on-site examination of every State savings association at least once during each 12-month period.

(b) *18-month rule for certain small institutions.* The FDIC may conduct a full-scope, on-site examination of a State savings association at least once during each 18-month period, rather than each 12-month period as provided in paragraph (a) of this section, if the following conditions are satisfied:

(1) The State savings association has total assets of less than $500 million;

(2) The State savings association is well capitalized as defined in § 390.453;

(3) At its most recent examination, the FDIC—

(i) Assigned the State savings association a rating of 1 or 2 for management as part of the State savings association's composite rating under the Uniform Financial Institutions Rating System (commonly referred to as CAMELS), and

(ii) Determined that the State savings association was in outstanding or good condition, that is, it received a composite rating, as defined in § 390.101(c), of 1 or 2;

(4) The State savings association currently is not subject to a formal enforcement proceeding or order by the FDIC; and

(5) No person acquired control of the State savings association during the preceding 12-month period in which a full-scope, on-site examination would have been required but for this section.

(c) *Authority to conduct more frequent examinations.* This section does not limit the authority of the FDIC to examine any State savings association as frequently as the agency deems necessary.

### § 390.352 Financial derivatives.

(a) *What is a financial derivative?* A financial derivative is a financial contract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this section.

(b) *May I engage in transactions involving financial derivatives?* (1) [Reserved]

(2) If you are a State savings association, you may engage in a transaction involving a financial derivative if your charter or applicable State law authorizes you to engage in such transactions, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(3) In general, if you engage in a transaction involving a financial derivative, you should do so to reduce your risk exposure.

(c) *What are my board of directors' responsibilities with respect to financial derivatives?* (1) Your board of directors is responsible for effective oversight of financial derivatives activities.

(2) Before you may engage in any transaction involving a financial derivative, your board of directors must establish written policies and procedures governing authorized financial derivatives. Your board of directors should review Thrift Bulletin 13a, ''Management of Interest Rate Risk, Investment Securities, and Derivatives Activities,'' and other applicable agency guidance on establishing a sound risk management program.

(3) Your board of directors must periodically review:

(i) Compliance with the policies and procedures established under paragraph (c)(2) of this section; and

(ii) The adequacy of these policies and procedures to ensure that they continue to be appropriate to the nature and scope of your operations and existing market conditions.

(4) Your board of directors must ensure that management establishes an adequate system of internal controls for

transactions involving financial derivatives.

(d) *What are management's responsibilities with respect to financial derivatives?* (1) Management is responsible for daily oversight and management of financial derivatives activities. Management must implement the policies and procedures established by the board of directors and must establish a system of internal controls. This system of internal controls should, at a minimum, provide for periodic reporting to the board of directors and management, segregation of duties, and internal review procedures.

(2) Management must ensure that financial derivatives activities are conducted in a safe and sound manner and should review Thrift Bulletin 13a, ''Management of Interest Rate Risk, Investment Securities, and Derivatives Activities,'' and other applicable agency guidance on implementing a sound risk management program.

(e) *What records must I keep on financial derivative transactions?* You must maintain records adequate to demonstrate compliance with this section and with your board of directors' policies and procedures on financial derivatives.

**§ 390.353 Interest-rate-risk-management procedures.**

State savings associations shall take the following actions:

(a) The board of directors or a committee thereof shall review the State savings association's interest-rate-risk exposure and devise a policy for the State savings association's management of that risk.

(b) The board of directors shall formerly adopt a policy for the management of interest-rate risk. The management of the State savings association shall establish guidelines and procedures to ensure that the board's policy is successfully implemented.

(c) The management of the State savings association shall periodically report to the board of directors regarding implementation of the State savings association's policy for interest-rate-risk management and shall make that information available upon request to the FDIC.

(d) The State savings association's board of directors shall review the results of operations at least quarterly and shall make such adjustments as it considers necessary and appropriate to the policy for interest-rate-risk management, including adjustments to the authorized acceptable level of interest-rate risk.

**§ 390.354 Procedures for monitoring Bank Secrecy Act (BSA) compliance.**

(a) *Purpose.* The purpose of this regulation is to require State savings associations (as defined by § 390.308 to establish and maintain procedures reasonably designed to assure and monitor compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the U.S. Department of Treasury, 31 CFR part 103.

(b) *Establishment of a BSA compliance program*—(1) *Program requirement.* Each State savings association shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR part 103. The compliance program must be written, approved by the State savings association's board of directors, and reflected in the minutes of the State savings association.

(2) *Customer identification program.* Each State savings association is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation promulgated at 31 CFR 103.121, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.

(c) *Contents of compliance program.* The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by a savings association's in-house personnel or by an outside party;

(3) Designate individual(s) responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

**§ 390.355 Suspicious Activity Reports and other reports and statements.**

(a) *Periodic reports.* Each State savings association shall make such periodic or other reports of its affairs in such manner and on such forms as the FDIC may prescribe. The FDIC may provide that reports filed by State savings associations to meet the requirements of other regulations also satisfy requirements imposed under this section.

(b) *False or misleading statements or omissions.* No State savings association or director, officer, agent, employee, affiliated person, or other person participating in the conduct of the affairs of such State savings association nor any person filing or seeking approval of any application shall knowingly:

(1) Make any written or oral statement to the FDIC or to an agent, representative or employee of the FDIC that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the FDIC; or

(2) Make any such statement or omission to a person or organization auditing a State savings association or otherwise preparing or reviewing its financial statements concerning the accounts, assets, management condition, ownership, safety, or soundness, or other affairs of the State savings association.

(c) *Notifications of loss and reports of increase in deductible amount of bond.* A State savings association maintaining bond coverage as required by § 390.356 shall promptly notify its bond company and file a proof of loss under the procedures provided by its bond, concerning any covered losses greater than twice the deductible amount.

(d) *Suspicious Activity Reports*—(1) *Purpose and scope.* This paragraph (d) ensures that State savings associations and service corporations file a Suspicious Activity Report when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act.

(2) *Definitions.* For the purposes of this paragraph (d):

(i) *FinCEN* means the Financial Crimes Enforcement Network of the Department of the Treasury.

(ii) *Institution-affiliated party* means any institution-affiliated party as that term is defined in sections 3(u) and 8(b)(9) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u) and 1818(b)(9)).

(iii) *SAR* means a Suspicious Activity Report on the form prescribed by the FDIC.

(3) *SARs required.* A State savings association shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

(i) *Insider abuse involving any amount.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association or involving a transaction or transactions conducted through the State savings association where the State savings association believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act, regardless of the amount involved in the violation.

(ii) *Violations aggregating $5,000 or more where a suspect can be identified.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association involving a transaction or transactions conducted through the State savings association and involving or aggregating $5,000 or more in funds or other assets, where the State savings association believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an alias, then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as drivers' license or social security numbers, addresses and telephone numbers, must be reported.

(iii) *Violations aggregating $25,000 or more regardless of potential suspects.* Whenever the State savings association detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the State savings association involving a transaction or transactions conducted through the State savings association and involving or aggregating $25,000 or more in funds or other assets, where the State savings association believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.

(iv) *Transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.* Any transaction (which for purposes of this paragraph (d)(3)(iv) means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at or through the State savings association involving or aggregating $5,000 or more in funds or other assets, if the State savings association knows, suspects, or has reason to suspect that:

(A) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;

(B) The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or

(C) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

(4) [Reserved].

(5) *Time for reporting.* A State savings association is required to file a SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR. If no suspect was identified on the date of detection of the incident requiring the filing, a State savings association may delay filing a SAR for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction. In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the State savings association shall immediately notify, by telephone, an appropriate law enforcement authority and the FDIC in addition to filing a timely SAR.

(6) *Reports to state and local authorities.* A State savings association is encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate.

(7) *Exception.* A State savings association need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

(8) *Retention of records.* A State savings association shall maintain a copy of any SAR filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of the filing of the SAR. Supporting documentation shall be identified and maintained by the State savings association as such, and shall be deemed to have been filed with the SAR. A State savings association shall make all supporting documentation available to appropriate law enforcement agencies upon request.

(9) *Notification to board of directors*—(i) *Generally.* Whenever a State savings association files a SAR pursuant to this paragraph (d), the management of the State savings association shall promptly notify its board of directors, or a committee of directors or executive officers designated by the board of directors to receive notice.

(ii) *Suspect is a director or executive officer.* If the State savings association files a SAR pursuant to this paragraph (d) and the suspect is a director or executive officer, the State savings association may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but shall notify all directors who are not suspects.

(10) *Compliance.* Failure to file a SAR in accordance with this section and the instructions may subject the State savings association, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action.

(11) *Obtaining SARs.* A State savings association may obtain SARs and the instructions from the appropriate FDIC region as defined in § 303.2 of this chapter.

(12) *Confidentiality of SARs.* SARs are confidential. Any institution or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, citing this paragraph (d), applicable law (*e.g.,* 31 U.S.C. 5318(g)), or both, and shall notify the FDIC.

(13) *Safe harbor.* The safe harbor provision of 31 U.S.C. 5318(g), which exempts any financial institution that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, covers all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of

whether such reports are filed pursuant to this paragraph (d), or are filed on a voluntary basis.

(e) *Adjustable-rate mortgage indices*—(1) *Reporting obligation.* Upon the request of a Federal Home Loan Bank, all State savings associations within the jurisdiction of that Federal Home Loan Bank shall report the data items set forth in paragraph (e)(2) of this section for the Federal Home Loan Bank to use in calculating and publishing an adjustable-rate mortgage index.

(2) *Data to be reported.* For purposes of paragraph (e)(1) of this section, the term ''data items'' means the data items previously collected from the monthly Thrift Financial Report or Consolidated Reports of Condition or Income (''Call Report''), as applicable, and such data items as may be altered, amended, or substituted by the requesting Federal Home Loan Bank.

(3) *Applicable indices.* For the purpose of this reporting requirement, the term ''adjustable-rate mortgage index'' means any of the adjustable-rate mortgage indices calculated and published by a Federal Home Loan Bank or the Federal Home Loan Bank Board on or before August 9, 1989.

**§ 390.356 Bonds for directors, officers, employees, and agents; form of and amount of bonds.**

(a) Each State savings association shall maintain fidelity bond coverage. The bond shall cover each director, officer, employee, and agent who has control over or access to cash, securities, or other property of the State savings association.

(b) The amount of coverage to be required for each State savings association shall be determined by the association's management, based on its assessment of the level that would be safe and sound in view of the association's potential exposure to risk; provided, such determination shall be subject to approval by the association's board of directors.

(c) Each State savings association may maintain bond coverage in addition to that provided by the insurance underwriter industry's standard forms, through the use of endorsements, riders, or other forms of supplemental coverage, if, in the judgment of the State savings association's board of directors, additional coverage is warranted.

(d) The board of directors of each State savings association shall formally approve the State savings association's bond coverage. In deciding whether to approve the bond coverage, the board shall review the adequacy of the standard coverage and the need for supplemental coverage. Documentation of the board's approval shall be included as a part of the minutes of the meeting at which the board approves coverage. Additionally, the board of directors shall review the State savings association's bond coverage at least annually to assess the continuing adequacy of coverage.

**§ 390.357 Bonds for agents.**

In lieu of the bond provided in § 390.356 in the case of agents appointed by a State savings association, a fidelity bond may be provided in an amount at least twice the average monthly collections of such agents, provided such agents shall be required to make settlement with the State savings association at least monthly, and provided such bond is approved by the board of directors of the State savings association. No bond need be obtained for any agent that is a financial institution insured by the FDIC.

**§ 390.358 Conflicts of interest.**

If you are a director, officer, or employee of a State savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a State savings association:

(a) You must not advance your own personal or business interests, or those of others with whom you have a personal or business relationship, at the expense of the State savings association; and

(b) You must, if you have an interest in a matter or transaction before the board of directors:

(1) Disclose to the board all material nonprivileged information relevant to the board's decision on the matter or transaction, including:

(i) The existence, nature and extent of your interests; and

(ii) The facts known to you as to the matter or transaction under consideration;

(2) Refrain from participating in the board's discussion of the matter or transaction; and

(3) Recuse yourself from voting on the matter or transaction (if you are a director).

**§ 390.359 Corporate opportunity.**

(a) If you are a director or officer of a State savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a State savings association, you must not take advantage of corporate opportunities belonging to the State savings association.

(b) A corporate opportunity belongs to a State savings association if:

(1) The opportunity is within the corporate powers of the State savings association or a subsidiary of the State savings association; and

(2) The opportunity is of present or potential practical advantage to the State savings association, either directly or through its subsidiary.

(c) The FDIC will not deem you to have taken advantage of a corporate opportunity belonging to the State savings association if a disinterested and independent majority of the State savings association's board of directors, after receiving a full and fair presentation of the matter, rejected the opportunity as a matter of sound business judgment.

**§ 390.360 Change of director or senior executive officer.**

Sections 390.360 through 390.368 implement 12 U.S.C. 1831i, which requires certain State savings associations to notify the FDIC before appointing or employing directors and senior executive officers.

**§ 390.361 Applicable definitions.**

The following definitions apply to §§ 390.360 through 390.368:

*Director* means an individual who serves on the board of directors of a State savings association. This term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;

(3) Provides only general policy advice to the board of directors or any committee of the board of directors; and

(4) Has not been identified by the FDIC in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policymaking decisions of the board of directors.

*Senior executive officer* means an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the FDIC in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

*Troubled condition* means:

(1) A State savings association that has a composite rating of 4 or 5, as composite rating is defined in § 390.101(c).

(2) [Reserved].

(3) A State savings association that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt corrective action directive relating to the safety and soundness or financial viability of the State savings association, unless otherwise informed in writing by the FDIC; or

(4) A State savings association that is informed in writing by the FDIC that it is in troubled condition based on information available to the FDIC.

### § 390.362 Who must give prior notice?

(a) *State savings association.* Except as provided under § 390.368, you must notify the FDIC at least 30 days before adding or replacing any member of your board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position if:

(1) You are a State savings association and at least one of the following circumstances apply:

(i) You do not comply with all minimum capital requirements under subpart Z;

(ii) You are in troubled condition; or

(iii) The FDIC has notified you, in connection with its review of a capital restoration plan required under section 38 of the Federal Deposit Insurance Act or subpart Y or otherwise, that a notice is required under §§ 390.360 through 390.368; or

(2) [Reserved].

(b) *Notice by individual.* If you are an individual seeking election to the board of directors of a State savings association described in paragraph (a) of this section, and have not been nominated by management, you must either provide the prior notice required under paragraph (a) of this section or follow the process under § 390.368(b).

### § 390.363 What procedures govern the filing of my notice?

The procedures found in §§ 390.103 through 390.110 govern the filing of your notice under § 390.362.

### § 390.364 What information must I include in my notice?

(a) *Content requirements.* Your notice must include:

(1) The information required under 12 U.S.C. 1817(j)(6)(A), and the information prescribed in the Interagency Notice of Change in Director or Senior Executive Officer and the Interagency Biographical and Financial Report which are available from the appropriate FDIC regions as defined in § 303.2 of this chapter;

(2) Legible fingerprints of the proposed director or senior executive officer. You are not required to file fingerprints if, within three years prior to the date of submission of the notice, the proposed director or senior executive officer provided legible fingerprints as part of a notice filed with the FDIC under 12 U.S.C. 1831i; and

(3) Such other information required by the FDIC.

(b) *Modification of content requirements.* The FDIC may require or accept other information in place of the content requirements in paragraph (a) of this section.

### § 390.365 What procedures govern the FDIC's review of my notice for completeness?

The FDIC will first review your notice to determine whether it is complete.

(a) If your notice is complete, the FDIC will notify you in writing of the date that the FDIC received the complete notice.

(b) If your notice is not complete, the FDIC will notify you in writing what additional information you need to submit, why we need the information, and when you must submit it. You must, within the specified time period, provide additional information or request that the FDIC suspend processing of the notice. If you fail to act within the specified time period, the FDIC may treat the notice as withdrawn or may review the application based on the information provided.

### § 390.366 What standards and procedures will govern the FDIC review of the substance of my notice?

The FDIC will disapprove a notice if, pursuant to the standard set forth in 12 U.S.C. 1831i(e), the FDIC finds that the competence, experience, character, or integrity of the proposed FDIC or senior executive officer indicates that it would not be in the best interests of the depositors of the State savings association or of the public to permit the individual to be employed by, or associated with, the State savings association. If the FDIC disapproves a notice, it will issue a written notice that explains why the FDIC disapproved the notice. The FDIC will send the notice to the State savings association and the individual.

### § 390.367 When may a proposed director or senior executive officer begin service?

(a) A proposed director or senior executive officer may begin service 30 days after the date the FDIC receives all required information, unless:

(1) The FDIC notifies you that it has disapproved the notice; or

(2) The FDIC extends the 30-day period for an additional period not to exceed 60 days. If the FDIC extends the 30-day period, it will notify you in writing that the period has been extended, and will state the reason for the extension. The proposed director or senior executive officer may begin service upon expiration of the extended period, unless the FDIC notifies you that it has disapproved the notice during the extended period.

(b) Notwithstanding paragraph (a) of this section, a proposed or senior executive officer may begin service after the FDIC notifies you, in writing, of its intention not to disapprove the notice.

### § 390.368 When will the FDIC waive the prior notice requirement?

(a) *Waiver request.* (1) An individual may serve as a director or senior executive officer before filing a notice as described in §§ 390.360 through 390.368 if the FDIC issues a written finding that:

(i) Delay would threaten the safety or soundness of the State savings association;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) If the FDIC grants a waiver, you must file a notice as described in §§ 390.360–390.368 within the time period specified by the FDIC.

(b) *Automatic waiver.* An individual may serve as a director before filing a notice as described in §§ 390.360 through 390.368, if the individual was not nominated by management and the individual submits a notice as described in §§ 390.360 through 390.368 within seven days after election as a director.

(c) *Subsequent FDIC action.* The FDIC may disapprove a notice within 30 days after the FDIC issues a waiver under paragraph (a) of this section or within 30 days after the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (b) of this section.

## Subpart T—Accounting Requirements

### § 390.380 Form and content of financial statements.

(a) This section states the requirements as to form and content of financial statements included by a State savings association in the following documents. However, the FDIC's regulations governing the applicable documents specify the actual financial statements that are to be included in that document.

(1) Any proxy statement or offering circular required to be used in

connection with a conversion under 12 CFR part 192.

(2) Any offering circular or nonpublic offering materials required to be used in connection with an offer or sale of securities under subpart W.

(3) Any filing under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* made pursuant to the requirements of subpart U.

(b) Except as otherwise provided by the FDIC by rule, regulation, or order made specifically applicable to financial statements governed by this section, financial statements shall:

(1) Be prepared and presented in accordance with generally accepted accounting principles;

(2) Comply with § 390.384;

(3) Consistent with the provisions of this subpart, comply with articles 1, 2, 3, 4, 10, and 11 of Regulation S–X adopted by the Securities and Exchange Commission (17 CFR 210.l through 210.4, 210.10, and 210.11).

(4) Be audited, when required, by an independent auditor in accordance with the standards imposed by the American Institute of Certified Public Accountants.

(c) The term ''financial statements'' includes all notes to the statements and related schedules.

**§ 390.381 Definitions.**

(See also 17 CFR 210.1–02.)

(a) *Registrant.* The term ''registrant'' means an applicant, a State savings association, or any other person required to prepare financial statements in accordance with this subpart.

(b) *Significant subsidiary.* The term ''significant subsidiary'' means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The State savings association's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the association and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for purposes of determining whether financial statements of a business acquired or to be acquired in a business combination accounted for as a pooling of interests are required pursuant to 17 CFR 210.3–05, this condition is also met when the number of common shares exchanged by the State savings association exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The State savings association's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the State savings association and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The State savings association's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the State savings association and its subsidiaries consolidated for the most recently completed fiscal year.

(4) Computational note: For purposes of making the prescribed income test the following guidance should be applied:

(i) When a loss has been incurred by either the parent or its consolidated subsidiaries or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the State savings association and its subsidiaries consolidated for purposes of the computation.

(ii) If income of the State savings association and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

**§ 390.382 Qualification of public accountant.**

(See also 17 CFR 210.2–01.)

The term ''qualified public accountant'' means a certified public accountant or licensed public accountant certified or licensed by a regulatory authority of a State or other political subdivision of the United States who is in good standing as such under the laws of the jurisdiction where the home office of the registrant to be audited is located. Any person or firm who is suspended from practice before the Securities and Exchange Commission or other governmental agency is not a ''qualified public accountant'' for purposes of this section.

**§ 390.383 Condensed financial information [Parent only].**

(a) The information prescribed by Schedule III required by section IV of the appendix to § 390.384 shall be presented in a note to the financial statements when the restricted net assets (17 CFR 210.4–08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. The investment in and indebtedness of and to State savings association subsidiaries shall be stated separately in the condensed balance sheet from amounts for other subsidiaries; and the amount of cash dividends paid to the parent State savings association for each of the last three years by the State savings association subsidiaries shall be stated separately in the condensed income statement from amounts for other subsidiaries.

(b) For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the State savings association's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent year may not be transferred to the parent company by subsidiaries in the form of loans, advances, or cash dividends without the consent of a third party (*i.e.,* lender, regulatory agency, foreign government, *etc.*).

(c) Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (See item I (22) in the appendix to § 390.384) and minority interest (See item I (21) in the appendix to § 390.384) shall be deducted in computing net assets for purposes of this test.

**§ 390.384 Financial statements for conversions, SEC filings, and offering circulars.**

This section and its appendix pertain to the form and content of financial statements included as part of:

(a) A conversion application under 12 CFR part 192 including financial statements in proxy statements and offering circulars,

(b) A filing under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* and

(c) Any offering circular required to be used in connection with the issuance of mutual capital certificates under 12 CFR 163.74 and debt securities under § 390.341.

## Appendix to § 390.384—Financial Statement Presentation.

This appendix specifies the various line items which should appear on the face of the financial statements governed by § 390.384 and additional disclosures which should be included with the financial statements in related notes.

**I. Balance Sheet**

Balance sheets shall comply with the following provisions:

*Assets*

1. *Cash and amounts due from depository institutions.* (a) The amounts in this caption should include noninterest-bearing deposits with depository institutions.

(b) State in a note the amount and terms of any deposits in depository institutions held as compensating balances against long- or short-term borrowing arrangements. This disclosure should include the provisions of any restrictions as to withdrawal or usage. Restrictions may include legally restricted deposits held as compensating balances against short-term borrowing arrangements, contracts entered into with others, or company statements of intention with regard to particular deposits; however, time deposits and short-term certificates of deposits are not generally included in legally restricted deposits. In cases where compensating balance arrangements exist but are not agreements which legally restrict the use of cash amounts shown on the balance sheet, describe in the notes to the financial statements these arrangements and the amount involved, if determinable, for the most recent audited balance sheet required and for any subsequent unaudited balance sheet required. Compensating balances that are maintained under an agreement to ensure future credit availability shall be disclosed in the notes to the financial statements along with the amount and terms of the agreement.

(c) Checks outstanding in excess of an applicant's book balance in a demand deposit account shall be shown as a liability.

2. *Interest-bearing deposits in other banks.*

3. *Federal funds sold and securities purchased under resale agreements or similar arrangements.* These amounts should be presented, *i.e.,* gross and not netted against Federal funds purchased and securities sold under agreement to repurchase, as reported in caption 15.

4. *Trading account assets.* Include securities considered to be held for trading purposes.

5. *Other short-term investments.*

6. *Investment securities.* (a) Include securities considered to be held for investment purposes. Disclose the aggregate book value of investment securities as the line item on the balance sheet; and also show on the face of the balance sheet the aggregate market value at the balance sheet date. The aggregate amounts should include securities pledged, loaned, or sold under repurchase agreements and similar arrangements. Borrowed securities and securities purchased under resale agreements or similar arrangements should be excluded.

(b) Disclose in a note the carrying value and market value of securities of (i) the U.S. Treasury and other U.S. Government agencies and corporations; (ii) states of the U.S. and political subdivisions thereof; and (iii) other securities.

7. *Assets held for sale.* Investments in assets considered to be held for sale purposes should be reported separately in the statement of financial condition.

8. *Loans.* (a) Disclose separately: (i) Total loans (including financing type leases), (ii) allowance for loan losses, (iii) unearned income on installment loans, (iv) discount on loans purchased, and (v) loans in process.

(b) State on the balance sheet or in a note the amount of loans in each of the following categories: (i) Real estate mortgage; (ii) real estate construction; (iii) installment; and (iv) commercial, financial, and agricultural.

(c)(i) Include under the real estate mortgage category loans payable in monthly, quarterly, or other periodic installments and secured by developed income property and/or personal residences.

(ii) Include under the real estate construction category loans secured by real estate which are made for the purpose of financing construction of real estate and land development projects.

(iii) Include under the installment category loans to individuals generally repayable in monthly installments. This category shall include, but not be limited to, credit card and related activities, individual automobile loans, other installment loans, mobile home loans, and residential repair and modernization loans.

(iv) Include under the commercial, financial, and agricultural category all loans not included in another category. This category shall include, but not be limited to, loans to real estate investment trusts, mortgage companies, banks, and other financial institutions; loans for carrying securities; and loans for agricultural purposes. Do not include loans secured primarily by developed real estate.

(d) State separately any other loan category regardless of relative size if necessary to reflect any unusual risk concentration.

(e) Unearned income on installment loans shall be shown and deducted separately from total loans.

(f) Unamortized discounts on purchased loans shall be deducted separately from total loans.

(g) Loans in process shall be deducted separately from total loans.

(h) A series of categories other than those specified in item (b) of paragraph 8. may be used to present details of loans if considered a more appropriate presentation. The categories specified in item (b) of paragraph 8. should be considered the minimum categories that may be presented.

(i) For each period for which an income statement is presented, disclose in a note the total dollar amount of loans being serviced by the State savings association for the benefit of others.

(j)(i)(A) As of each balance sheet date, disclose in a note the aggregate dollar amount of loans (exclusive of loans to any such persons which in the aggregate do not exceed $60,000 during the last year) made by the State savings association or any of its subsidiaries to directors, executive officers, or principal holders of equity securities (17 CFR 210.1–02) of the State savings association or any of its significant subsidiaries (17 CFR 210.1–02) or to any associate of such persons. For the latest fiscal year, an analysis of activity with respect to such aggregate loans to related parties should be provided. The analysis should include at the beginning of the period new loans, repayments, and other changes. (Other changes, if significant, should be explained.)

(B) This disclosure need not be furnished when the aggregate amount of such loans at the balance sheet date (or with respect to the latest fiscal year, the maximum amount outstanding during the period) does not exceed 5 percent of stockholders' equity at the balance sheet date.

(ii) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to item (i)(A) of this paragraph (j) relates to nonaccrual, past due, restructured, and potential problem loans (*see* Securities and Exchange Commission's Securities Act Industry Guide 3, section III.C.), so state and disclose the aggregate amount of such loans along with such other information necessary to an understanding of the effects of the transactions on the financial statements.

(iii) Notwithstanding the aggregate disclosure called for by paragraph (j)(i) of this balance sheet caption 8, if any loans were not made in the ordinary course of business during any period for which an income statement is required to be filed, provide an appropriate description of each such loan (see 17 CFR 210.9–03.7(e)(3)).

(iv) For purposes only of Balance Sheet item 8(j), the following definitions shall apply:

(A) *Associate* used to indicate a relationship with any person means (1) any corporation, venture, or organization of which such person is a general partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (2) any trust or other estate in which such person has a substantial beneficial interest or for which such person serves as trustee or in a similar capacity; and (3) any member of the immediate family of any of the foregoing persons.

(B) *Executive officer* means the president, any vice president in charge of a principal business unit, division, or function (such as loans, investments, operations, administration, or finance), and any other officer or person who performs similar policy-making functions.

(C) *Immediate family* with regard to a person means such person's spouse, parents, children, siblings, mother- and father-in-law, sons- and daughters-in-law, and brothers- and sisters-in-law.

(D) *Ordinary course of business* with regard to loans means those loans which were made on substantially the same terms, including interest rate and collateral, as those prevailing at the same time for comparable transactions with unrelated persons and did not involve more than the normal risk of collectibility or present other unfavorable features.

(k) For each period for which an income statement is presented, furnish in a note a statement of changes in the allowance for loan losses, showing balances at beginning and end of the period, provision charged to income, recoveries of amounts previously charged off, and losses charged to the allowance.

9. *Premises and equipment.*

10. *Real estate owned.* State, parenthetically or otherwise:

(a) The amount of real estate owned by class as described in item (b) of paragraph 10. and the basis for determining that amount; and

(b) A description of each class of real estate owned (i) acquired by foreclosure or by deed in lieu of foreclosure, (ii) in judgment and subject to redemption, or (iii) acquired for development or resale. Show separately any accumulated depreciation or valuation allowances. Disclose the policies regarding, and amounts of, capitalized costs, including interest.

11. *Investment in joint ventures.* In a note, present summarized aggregate financial statements for investments in real estate or other joint ventures which individually (a) are 20 percent or more owned by the State savings association or any of its subsidiaries, or (b) have liabilities (including contingent liabilities) to the parent exceeding 10 percent of the parent's regulatory capital. If an allowance for real estate losses subsequent to acquisition is maintained, the amount shall be disclosed, deducted from the other real estate owned, and a statement of changes in the allowance showing balances at beginning and end of period should be included. Provision charged to income and losses charged to the allowance account shall be furnished for each period for which an income statement is filed.

12. *Other assets.* (a) Disclose separately on the balance sheet or in a note thereto any of the following assets or any other asset the amount of which exceeds 30 percent of stockholders' equity. The remaining assets may be shown as one amount.

(i) *Accrued interest receivable.* State separately those amounts relating to loans and those amounts relating to investments.

(ii) Excess of cost over assets acquired (net of amortization).

(b) State in a note (i) amounts representing investments in affiliates and investments in other persons which are accounted for by the equity method, and (ii) indebtedness of affiliates and other persons, the investments in which are accounted for by the equity method. State the basis of determining the amounts reported under paragraph (b)(i).

13. *Total assets.*

*Liabilities, and Stockholders' Equity*

14. *Deposits.* (a) Disclose separately on the balance sheet or in a note the amounts in the following categories of interest-bearing and noninterest-bearing deposits: (i) NOW account and MMDA deposits, (ii) savings deposits, and (iii) time deposits.

(b) Include under the savings-deposits category interest-bearing deposits without specified maturity or contractual provisions requiring advance notice of intention to withdraw funds. Include deposits for which a State savings association may require at its option written notice of intended withdrawal not less than 14 days in advance.

(c) Include under the time-deposits category deposits subject to provisions specifying maturity or other withdrawal conditions such as time certificates of deposits, open account time deposits, and deposits accumulated for the payment of personal loans.

(d) Include accrued interest or dividends, if appropriate.

15. *Short-term borrowings.* (a) State separately, here or in a note, the amounts payable for (i) Federal funds purchased and securities sold under agreements to repurchase, (ii) commercial paper, and (iii) other short-term borrowings.

(b) Federal funds purchased and sales of securities under repurchase agreements shall be reported gross and not netted against sales of Federal funds and purchase of securities under resale agreements.

(c) Include as securities sold under agreements to repurchase all transactions of this type regardless of (i) whether they are called simultaneous purchases and sales, buy-backs, turnarounds, overnight transactions, delayed deliveries, or other terms signifying the same substantive transaction, and (ii) whether the transactions are with the same or different institutions, if the purpose of the transactions is to repurchase identical or similar securities.

(d) The amount and terms (including commitment fees and the conditions under which lines may be withdrawn) of unused lines of credit for short-term financing shall be disclosed, if significant, in the notes to the financial statements. The amount of these lines of credit which support a commercial paper borrowing arrangement or similar arrangements shall be separately identified.

16. *Advance payments by borrowers for taxes and insurance.*

17. *Other liabilities.* Disclose separately on the balance sheet or in a note any of the following liabilities or any other items which are individually in excess of 30 percent of stockholders' equity (except that amounts in excess of 5 percent of stockholders' equity should be disclosed with respect to item (d)). The remaining items may be shown as one amount.

(a) Income taxes payable.

(b) Deferred income taxes.

(c) Indebtedness to affiliate and other persons the investment in which is accounted for by the equity method.

(d) Indebtedness to directors, executive officers, and principal holders of equity securities of the registrant or any of its significant subsidiaries. (The guidance in balance sheet caption ''8(j)'' shall be used to identify related parties for purposes of this disclosure.)

18. *Bonds, mortgages, and similar debt.* (a) Include bonds, Federal Home Loan Bank advances, capital notes, debentures, mortgages, and similar debt.

(b) For each issue or type of obligation state in a note:

(i) The general character of each type of debt, including: (A) The rate of interest, (B) the date of maturity, or, if maturing serially, a brief indication of the serial maturities, such as ''maturing serially from 1980 to 1990,'' (C) if the payment of principal or interest is contingent, an appropriate indication of such contingency, (D) a brief indication of priority, and (E) if convertible, the basis. For amounts owed to related parties see 17 CFR 210.4–08(k).

(ii) The amount and terms (including commitment fees and the conditions under which commitments may be withdrawn) of unused commitments for long-term financing arrangements that, if used, would be disclosed under this caption shall be disclosed in the notes to the financial statements, if significant.

(c) State in the notes with appropriate explanations (i) the title and amount of each issue of debt of a subsidiary included in item (a) of paragraph 18 which has not been assumed or guaranteed by the State savings association, and (ii) any liens on premises of a subsidiary or its consolidated subsidiaries which have not been assumed by the subsidiary or its consolidated subsidiaries.

19. *Deferred credits.* State separately those items which exceed 30 percent of stockholders' equity.

20. *Commitments and contingent liabilities.* Total commitments to fund loans should be disclosed. The dollar amounts and terms of other than floating market-rate commitments should also be disclosed.

21. *Minority interest in consolidated subsidiaries.*

22. *Preferred stock subject to mandatory redemption requirements or the redemption of which is outside the control of the issuer.* (a) Include under this caption amounts applicable to any class of stock which has any of the following characteristics: (i) It is redeemable at a fixed or determinable price on a fixed or determinable date or dates, whether by operation of a sinking fund or otherwise; (ii) it is redeemable at the option of the holder; or (iii) it has conditions for redemption which are not solely within the control of the issuer, such as stock which must be redeemed out of future earnings. Amounts attributable to preferred stock which is not redeemable or is redeemable solely at the option of the issuer shall be included under caption 23 unless it meets one or more of the above criteria.

(b) State on the face of the balance sheet the title, carrying amount, and redemption amount of each issue. (If there is more than one issue, these amounts may be aggregated on the face of the balance sheet and details concerning each issue may be presented in the note required by item (c) of paragraph 22.) Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable therefrom. If the carrying value is different from the redemption amount, describe the accounting treatment for such difference in the note required by item (c) of paragraph 22. Also state in this note or on the face of the balance sheet, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (See 17 CFR 210.4–07.)

(c) State in a separate note captioned ''Redeemable Preferred Stock'' (i) a general description of each issue, including its redemption features (*e.g.*, sinking fund, at option of holders, out of future earnings) and the rights, if any, of holders in the event of default, including the effect, if any, on junior securities in the event a required dividend, sinking fund, or other redemption payment(s) is not made, (ii) the combined aggregate amount of redemption requirements for all issues each year for the five years following the date of the latest balance sheet, and (iii) the changes in each issue for each period for which an income statement is required to be presented. (See also 17 CFR 210.4–08(d).)

(d) Securities reported under this caption are not to be included under a general heading ''stockholders' equity'' or combined in a total with items described in captions 23, 24 or 25, which follow.

23. *Preferred stock which is not redeemable or is redeemed solely at the option of the issuer.* State on the face of the balance sheet, or, if more than one issue is outstanding, state in a note, the title of each issue and the dollar amount thereof. Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable. State on the face of the balance sheet or in a note, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (See 17 CFR 210.4–07.) Show in a note or separate statement the changes in each class of preferred shares reported under this caption for each period for which an income statement is required to be presented. (See also 17 CFR 210.4–08(d).)

24. *Common stock.* For each class of common shares state, on the face of the balance sheet, the number of shares issued or outstanding, as appropriate (see 17 CFR 210.4–07), and the dollar amount thereof. If convertible, this fact should be indicated on the face of the balance sheet. For each class of common stock state, on the face of the balance sheet or in a note, the title of the issue, the number of shares authorized, and, if convertible, the basis for conversion (see also 17 CFR 210.4–08(d).) Show also the dollar amount of any common stock subscribed for but unissued, and show the deduction of subscriptions receivable. Show in a note or statement the changes in each class of common stock for each period for which an income statement is required to be presented.

25. *Other stockholders' equity.* (a) Separate captions shall be shown on the face of the balance sheet for (i) additional paid-in capital, (ii) other additional capital, and (iii) retained earnings, both (A) restricted and (B) unrestricted. (See 17 CFR 210.4–08(e).) Additional paid-in capital and other additional capital may be combined with the stock caption to which it applies, if appropriate. State whether or not the State savings association is in compliance with the Federal regulatory capital requirements (and state requirements where applicable). Also include the dollar amount of those regulatory capital requirements and the amount by which the State savings association exceeds or fails to meet those requirements.

(b) For a period of at least 10 years subsequent to the effective date of a quasi-reorganization, any description of retained earnings shall indicate the point in time from which the new retained earnings dates, and for a period of at least three years shall indicate, on the face of the balance sheet, the total amount of the deficit eliminated.

(c) Changes in stockholders' equity shall be disclosed in accordance with the requirements of 17 CFR 210.3–04.

26. *Total liabilities and stockholders' equity.*

**II. Income Statement**

Income statements shall comply with the following provisions:

1. *Interest and fees on loans.* (a) Include interest, service charges, and fees which are related to or are an adjustment of the loan interest yield.

(b) Current amortization of premiums on mortgages or other loans shall be deducted from interest on loans, and current accretion of discount on such items shall be added to interest on loans.

(c) Discounts and other deferred amounts which are related to or are an adjustment of the loan interest yield shall be amortized into income using the interest (level yield) method.

2. *Interest and dividends on investment securities.* Include accretion of discount on securities and deduct amortization of premiums on securities.

3. *Trading account interest.* Include interest from securities carried in a dealer trading account or accounts that are held principally for resale to customers.

4. *Other interest income.* Include interest on short-term investments (Federal funds sold and securities purchased under agreements to resell) and interest on bank deposits.

5. *Total interest income.*

6. *Interest on deposits.* Include interest on all deposits. On the income statement or in a note, state separately, in the same categories as those specified for deposits at balance sheet caption 14(a), the interest on those deposits. Early withdrawal penalties should be netted against interest on deposits and, if material, disclosed on the income statement.

7. *Interest on short-term borrowings.* Include interest on borrowed funds, including Federal funds purchased, securities sold under agreements to repurchase, commercial paper, and other short-term borrowings.

8. *Interest on long-term borrowings.* Include interest on bonds, capital notes, debentures, mortgages on State savings association premises, capitalized leases, and similar debt.

9. *Total interest expense.*

10. *Net interest income.*

11. *Provision for loan losses.*

12. *Net interest income after provision for loan losses.*

13. *Other income.* Disclose separately any of the following amounts, or any other item of other income, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amount may be shown as one amount, except for investment securities gains or losses which shall be shown separately regardless of size.

(a) Commissions and fees from fiduciary activities.

(b) Fees for other services to customers.

(c) Commissions, fees, and markups on securities underwriting and other securities activities.

(d) Profit or loss on transactions in investment securities.

(e) Equity in earnings of unconsolidated subsidiaries and 50-percent- or less-owned persons.

(f) Gains or losses on disposition of investments in securities of subsidiaries and 50-percent- or less-owned persons.

(g) Profit or loss from real estate operations.

(h) Other fees related to loan originations or commitments not included in income statement caption 1.

The remaining other income may be shown in one amount.

(i) Investment securities gains or losses. The method followed in determining the cost of investments sold (*e.g.,* ''average cost,'' ''first-in, first-out,'' or ''identified certificate'') and related income taxes shall be disclosed.

14. *Other expenses.* Disclose separately any of the following amounts, or any other item of other expense, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amounts may be shown as one amount.

(a) Salaries and employee benefits.

(b) Net occupancy expense of premises.

(c) Net cost of operations of other real estate (including provisions for real estate losses, rental income, and gains and losses on sales of real estate).

(d) Minority interest in income of consolidated subsidiaries.

(e) Goodwill amortization.

15. *Other income and expenses.* State separately material events or transactions that are unusual in nature or occur infrequently, but not both, and therefore do not meet both criteria for classification as an extraordinary item. Examples of items which would be reported separately are gain or loss from the sale of premises and equipment, provision for loss on real estate owned, or provision for gain or loss on the sale of loans.

16. *Income or losses before income tax expense.*

17. *Income tax expense.* The information required by 17 CFR 210.4–08(h) should be disclosed.

18. *Income or loss before extraordinary items effects of changes in accounting principles.*

19. *Extraordinary items, less applicable tax.*

20. *Cumulative effects of changes in accounting principles.*

21. *Net income or loss.*

22. *Earnings-per-share data.*

23. *Conversion footnote.* If the State savings association is an applicant for conversion from a mutual to a stock association or has converted within the last three years, describe in a note the general terms of the conversion and restrictions on the operations of the State savings association imposed by the conversion. Also, state the amount of net proceeds received from the conversion and costs associated with the conversion.

24. *Mergers and acquisitions.* For the period in which a business combination occurs and is accounted for by the purchase method of accounting, in addition to those disclosures required by Accounting Principles Board Opinion No. 16, the State savings association shall make those disclosures as noted below for all combinations involving significant acquisitions. (A significant acquisition is defined for this purpose to be one in which the assets of the acquired State savings association, or group of State savings associations, exceed 10 percent of the assets of the consolidated State savings association at the end of the most recent period being reported upon).

(a) Amounts and descriptions of discounts and premiums related to recording the aggregate interest-bearing assets and liabilities at their fair market value. The disclosure should also include the methods of amortization or accretion and the estimated remaining lives.

(b) The net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to the purchase accounting transaction(s). For subsequent periods, the State savings association shall disclose the remaining total unamortized or unaccreted amounts of discounts, premiums, and intangible assets as of the date of the most recent balance sheet presented. In addition, the State savings association shall disclose the net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to prior business combinations accounted for by the purchase method of accounting. Such disclosures need not be made if the total amounts of discounts, premiums, or intangible assets do not exceed 30 percent of stockholders' equity as of the date of the most recent balance sheet presented.

**III. Statement of Cash Flows**

The amounts shown in this statement should be those items which materially enhance the reader's understanding of the State savings association's business. For example, gains from sales of loans should be segregated from sales of mortgage-backed securities and other securities, if material, proceeds from principal repayments and maturities from loans and mortgage-backed securities should be segregated from proceeds from sales of loans and mortgage-backed securities, purchases of loans, mortgage-backed securities and other securities should be segregated, if material. Additional guidance may be found in the FASB's Statement of Financial Accounting Standards No. 95 Statement of Cash Flows.

**IV. Schedules Required To Be Filed**

The following schedules, which should be examined by an independent accountant, shall be filed unless the required information is not applicable or is presented in the related financial statements:

(1) *Schedule I—Indebtedness of and to related parties—Not Current.* For each period for which an income statement is required, the following schedule should be filed in support of the amounts required to be reported by balance sheet items 8(j) and 17(c) unless such aggregate amount does not exceed 5 percent of stockholders' equity at either the beginning or the end of the period:

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

| | Indebtedness of— | | | |
|---|---|---|---|---|
| Name of person [1] | Balance at beginning | Additions [2] | Deductions [3] | Balance at end |
| A | B | C | D | E |

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

| | Indebtedness to— | | | |
|---|---|---|---|---|
| Name of person [1] | Balance at beginning | Additions [2] | Deductions [3] | Balance at end |
| A | F | G | H | I |

[1] The persons named shall be grouped as in the related schedule required for investments in related parties. The information called for shall be shown separately for any persons whose investments were shown separately in such related schedule.

[2] For each person named in column A, explain in a note the nature and purpose of any increase during the period that is in excess of 10 percent of the related balance at either the beginning or end of the period.

[3] If deduction was other than a receipt or disbursement of cash, explain.

(2) *Schedule II—Guarantees of securities of other issuers.* The following schedule should be filed as of the date of the most recently audited balance sheet with respect to any guarantees of securities of other issuers by the person for which the statements are being filed:

GUARANTEES OF SECURITIES OF OTHER ISSUERS [4]

| Col. A. Name of issuer of securities guaranteed by person for which statement is filed | Col. B. Title of issue of each class of securities guaranteed | Col. C. Total amount guaranteed and outstanding [5] | Col. D. Amount owned by person or persons for which statement is filed |
|---|---|---|---|
| | | | |

GUARANTEES OF SECURITIES OF OTHER ISSUERS [4]

| Col. A. Name of issuer of securities guaranteed by person for which statement is filed | Col. E. Amount in treasury of issuer of securities guaranteed | Col. F. Nature of guarantee [6] | Col. G. Nature of any default by issue of securities guaranteed in principal, interest, sinking fund or redemption provisions, or payment of dividends [7] |
|---|---|---|---|
| | | | |

(3) *Schedule III—Condensed financial information.* The following schedule shall be filed as of the dates and for the periods specified in the schedule.

*Condensed Financial Information*

[Parent only]

[The State savings association may determine disclosure based on information provided in footnotes below]

(a) Provide condensed financial information as to financial position, changes in financial position, and results of operations of the State savings association as of the same dates and for the same periods for which audited consolidated financial statements are required. The financial information required need not be presented in greater detail than is required for condensed statement by 17 CFR 210.10–01(a) (2), (3), (4). Detailed footnote disclosure which would normally be included with complete financial statements may be omitted with the exception of disclosure regarding material contingencies, long-term obligations, and guarantees. Description of significant provisions of the state savings association's long-term obligations, mandatory dividend, or redemption requirements of redeemable stocks, and guarantees of the State savings association shall be provided along with a 5-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the State savings association have been separately disclosed in the consolidated statements, they need not be repeated in this schedule.

(b) Disclose separately the amount of cash dividends paid to the State savings association for each of the last three fiscal years by consolidated subsidiaries, unconsolidated subsidiaries, and 50-percent- or less-owned persons accounted for by the equity method, respectively.

## Subpart U—Securities of State Savings Associations

### § 390.390 Requirements under certain sections of the Securities Exchange Act of 1934.

In respect to any securities issued by State savings associations, the powers, functions, and duties vested in the Securities and Exchange Commission (the ''Commission'') to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Securities Exchange Act of 1934, as amended (the ''Act'') (15 U.S.C. 78*l,* 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) are vested in the FDIC. The rules, regulations and forms prescribed by the Commission pursuant to those sections or applicable in connection with obligations imposed by those sections, shall apply to securities issued by State savings associations, except as otherwise provided. The term ''Commission'' as used in those rules and regulations shall, with respect to securities issued by State savings associations, be deemed to refer to the FDIC unless the context otherwise requires. All filings with respect to securities issued by State savings associations required by those rules and regulations to be made with the Commission shall be made with the FDIC, ATTN: Accounting and Securities Disclosure Section, 550 17th Street, NW, Washington, DC 20429, by submitting such filings to the above address, except as noted in § 390.391.

### § 390.391 [Reserved].

### § 390.392 Liability for certain statements by State savings associations.

This section replaces adherence to 17 CFR 240.3b–6 and applies as follows:

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This section applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a proxy statement or offering circular filed with the OCC under 12 CFR part 192; in a registration statement filed with the FDIC under the Act on Form 10 (17 CFR 249.210); in part I of a quarterly report filed with the FDIC on Form 10–Q (17 CFR 249.308a); in an annual report to shareholders meeting the requirements of § 390.390, particularly 17 CFR 240.14a–3(b) and (c) or 17 CFR 240.14c–3(a) and (b) under the Act; in a statement reaffirming such forward-looking statement subsequent to the date the document was filed or the annual report was made publicly available; or a forward-looking statement made prior to the date the document was filed or the date the annual report was made publicly available if such statement is reaffirmed in a filed document or annual report made publicly available within a reasonable time after the making of such forward-looking statement: *Provided,* that

(i) At the time such statements are made or reaffirmed, either:

[4] Indicate in a note to the most recent schedule being filed for a particular person or group any significant changes since the date of the related balance sheet. If this schedule is filed in support of consolidated or combined statements, there shall be set forth guarantees by any person included in the consolidation or combination, except that such guarantees of securities which are included in the consolidated or combined balance sheet need not be set forth.

[5] Indicate any amounts included in column C which are included also in column D or E.

[6] There need be made only a brief statement of the nature of the guarantee, such as ''Guarantee of principal and interest,'' or ''Guarantee of dividends.'' If the guarantee is of interest or dividends, state the annual aggregate amount of interest or dividends so guaranteed.

[7] Only a brief statement as to any such defaults need be made.

(A) The issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Act and has complied with the requirements of 17 CFR 240.13a–1 or 240.15d–1 thereunder, if applicable, to file its most recent annual report on Form 10–K; or

(B) If the issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Act, the statements are made either in a registration statement filed under the Securities Act of 1933 or pursuant to section 12(b) or (g) of the Act, or in a proxy statement or offering circular filed with the OCC under 12 CFR Part 192 if such statements are reaffirmed in a registration statement under the Act on Form 10, filed with the FDIC within 180 days of the State savings association's conversion, and

(ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940;

(2) Information—

(i) Relating to the effects of changing prices on the business enterprise presented voluntarily or pursuant to item 303 of Regulation S–K (17 CFR 229.303), management's discussion and analysis of financial condition and results of operations, or item 302 of Regulation S–K (17 CFR 229.302), supplementary financial information; and

(ii) Disclosed in a document filed with the FDIC or in an annual report to shareholders meeting the requirements of 17 CFR 240.14a–3(b) and (c) or 17 CFR 240.14c–3(a) and (b) under the Act: *Provided,* that such information included in a proxy statement or offering circular filed pursuant to 12 CFR Part 192 shall be reaffirmed in a registration statement under the Act on Form 10 filed with the OCC within 180 days of the association's conversion.

(c) For purposes of this section, the term ''forward-looking statement'' shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations pursuant to item 303 of Regulation S–K; or

(4) A statement of the assumptions underlying or relating to any of the statements described in paragraph (c)(1), (2), or (3) of this section.

(d) For purposes of this section, the term ''fraudulent statement'' shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933 or the rules or regulations promulgated thereunder.

### § 390.393 Form and content of financial statements.

The financial statements required to be contained in filings with the FDIC under the Act are as set out in the applicable form and Regulation S–X, 17 CFR part 210. Those financial statements, however, shall conform as to form and content to the requirements of § 390.380.

### § 390.394 Interpretations related to SEC filings.

Sections 390.394 and 390.395 contain interpretations pertaining to the requirements of the Act and the rules and regulations thereunder as applied to State savings associations by the FDIC.

### § 390.395 Description of business.

(a) This section applies to the description-of-business portion of:

(1) Registration statements filed on Form 10 (item 1) (17 CFR 249.210),

(2) Proxy and information statements relating to mergers, consolidations, acquisitions, and similar matters (item 14 of Schedule 14A and item 1 of Schedule 14C) (17 CFR 240.14a–101 and 240.14c–101), and

(3) Annual reports filed on Form 10–K (item 7) (17 CFR 249.310).

(b) The description of business should conform to the description of business required by item 7 of Form PS under 12 CFR part 192.

(c) No repetitive disclosure is required by virtue of similar requirements in item 7 of Form PS and items 301 and 303 of Regulation S–K (17 CFR 229.301, 303). However, there should be included appropriate disclosure which arises by virtue of the registrant being a State savings association that is organized in stock form. For example, the table regarding return on equity and assets, item 7(d)(5), should include a line item for ''dividend payout ratio (dividends declared per share divided by net income per share).''

## Subpart V—Management Official Interlocks

### § 390.400 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued under the provisions of the Federal Deposit Insurance Act, 12 U.S.C. 1819 (Tenth) and the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this subpart is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of State savings associations and their affiliates.

### § 390.401 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section 202, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' means spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a State savings association based on common ownership does not exist if the FDIC determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the FDIC considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate to that person's ownership of shares in the other organization.

(b) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(c) *Community* means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(d) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(e) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(f) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a State savings association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(g) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(h) *Depository organization* means a depository institution or a depository holding company.

(i) *Low- and moderate-income areas* means census tracts (or, if an area is not in a census tract, block numbering areas delineated by the United States Bureau of the Census) where the median family income is less than 100 percent of the area median income.

(j) *Management official.* (1) The term *management official* means:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in § 390.361;

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (j)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(k) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(l) *Person* means a natural person, corporation, or other business entity.

(m) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(n) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The FDIC will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The FDIC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(o) *State savings association* means:

(1) [Reserved]

(2) Any State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)) the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(3) Any corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(1)) the deposits of which are insured by the Federal Deposit Insurance Corporation, that the Board of Directors of the Federal Deposit Insurance Corporation determines to be operating in substantially the same manner as a State savings association.

(p) *Total assets.* (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(q) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

**§ 390.402 Prohibitions.**

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. The FDIC will adjust these thresholds, as necessary, based on the year-to-year change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers, not seasonally adjusted, with rounding to the nearest $100 million. The FDIC will announce the revised thresholds by publishing a final rule without notice and comment in the **Federal Register.**

**§ 390.403 Interlocking relationships permitted by statute.**

The prohibitions of § 390.402 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.,* respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired;

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The FDIC may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the FDIC.

(3) The FDIC may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period; and

(i) Any State savings association which has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of the Home Owners' Loan Act, except that this paragraph (i) shall apply only with regard to service as a single management official of such State savings association or any subsidiary of such State savings association by a single management official of a savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the FDIC has determined that such service is consistent with the purposes of the Interlocks Act and the Home Owners' Loan Act.

**§ 390.404 Small market share exemption.**

(a) *Exemption.* A management interlock that is prohibited by § 390.402 is permissible, if:

(1) The interlock is not prohibited by § 390.402(c); and

(2) The depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC for the RMSA or community.

(b) *Confirmation and records.* Each depository organization must maintain records sufficient to support its determination of eligibility for the exemption under paragraph (a) of this section, and must reconfirm that determination on an annual basis.

**§ 390.405 General exemption.**

(a) *Exemption.* The FDIC may exempt an interlock from the prohibitions in § 390.402 if the FDIC finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns. A depository organization may apply to FDIC for an exemption under §§ 390.126 through 390.135.

(b) *Presumptions.* In reviewing an application for an exemption under this section, the FDIC will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition if the depository organization seeking to add a management official:

(1) Primarily serves low- and moderate-income areas;

(2) Is controlled or managed by persons who are members of a minority group, or women;

(3) Is a depository institution that or has been chartered for less than two years; or

(4) Is deemed to be in ''troubled condition'' as defined in § 390.361.

(c) *Duration.* Unless a shorter expiration period is provided in the FDIC approval, an exemption permitted by paragraph (a) of this section may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound. If the FDIC grants an interlock exemption in reliance upon a presumption under paragraph (b) of this section, the interlock may continue for three years, unless otherwise provided by the FDIC in writing.

**§ 390.406 Change in circumstances.**

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an increase in the aggregate deposits of the depository organization, or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository organization involved in the interlock for 15 months following the date of the change in circumstances. The FDIC may shorten this period under appropriate circumstances.

**§ 390.407 Enforcement.**

Except as provided in this section, the FDIC administers and enforces the Interlocks Act with respect to State savings associations and its affiliates, and may refer any case of a prohibited interlocking relationship involving these entities to the Attorney General of the United States to enforce compliance with the Interlocks Act and this subpart. If an affiliate of a State savings association is subject to the primary regulation of another Federal depository organization supervisory agency, then the FDIC does not administer and enforce the Interlocks Act with respect to that affiliate.

**§ 390.408 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.**

A management official or prospective management official of a depository organization may enter into an otherwise prohibited interlocking relationship with another depository organization for a period of up to 10 years if such relationship is approved by the Federal Deposit Insurance Corporation pursuant to section 13(k)(1)(A)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(k)(1)(A)(v)).

## Subpart W—Securities Offerings

**§ 390.410 Definitions.**

(a) For purposes of this subpart, the following definitions apply:

(1) *Accredited investor* means the same as in Commission Rule 501(a) (17 CFR 230.501(a)) under the Securities Act, and includes any State savings association.

(2) *Commission* means the Securities and Exchange Commission.

(3) *Dividend or interest reinvestment plan* means a plan which is offered solely to existing security holders of the State savings association which allows such persons to reinvest dividends or interest paid to them on securities issued by the State savings association, and which also may allow additional cash amounts to be contributed by the participants in the plan, provided that the securities to be issued are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

(4) *Employee benefit plan* means any purchase, savings, option, rights, bonus, ownership, appreciation, profit sharing, thrift, incentive, pension or similar plan solely for officers, directors or employees.

(5) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj).

(6) *Filing date* means the date on which a document is actually received during business hours, 9 a.m. to 5 p.m. Eastern Standard Time, by the FDIC, 550 17th Street, NW., Washington, DC 20429. However if the last date on which a document can be accepted falls on a Saturday, Sunday, or holiday, such document may be filed on the next business day.

(7) *Issuer* means a State savings association which issues or proposes to issue any security.

(8) *Offer; Sale* or *sell.* For purposes of this subpart, the term *offer, offer to sell,* or *offer for sale* shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. However, these terms shall not include preliminary negotiations or agreements between an issuer and any underwriter or among underwriters who are or are to be in privity of contract with the issuer. *Sale* and *sell* includes every contract to sell or otherwise dispose of a security or interest in a security for value. Every offer or sale of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

(9) *Person* means the same as in 12 CFR 192.25, and includes a State savings association.

(10) *Purchase* and *buy* mean the same as in 12 CFR 192.25.

(11) *State savings association* means the same as in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)), and includes a state-chartered savings association in organization which is granted conditional approval of insurance of accounts by the Federal Deposit Insurance Corporation. In addition, for purposes of § 390.411, *State savings association* includes any underwriter participating in the distribution of securities of a State savings association.

(12) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a–77aa).

(13) *Security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization or subscription, transferable share, investment contract, voting trust certificate or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing, except that a *security* shall not include an account insured, in whole or in part, by the Federal Deposit Insurance Corporation.

(14) *Underwriter* means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission and such term shall also not include any person who has continually held the securities being transferred for a period of two (2) consecutive years provided that the securities sold in any one (1) transaction shall be less than ten percent (10%) of the issued and outstanding securities of the same class. The following shall apply for the purpose of determining the period securities have been held:

(i) *Stock dividends, splits and recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) *Conversions.* If the securities sold were acquired from the issuer for consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion.

(iii) *Contingent issuance of securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(iv) *Pledged securities.* Securities which are *bona fide* pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of securities.* Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts.* Securities acquired from the settler of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settler.

(vii) *Estates.* Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

(viii) *Exchange transactions.* A person receiving securities in a transaction involving an exchange of the securities of one issuer for securities of another issuer shall be deemed to have acquired the securities received when such person acquired the securities exchanged.

(b) A term not defined in this subpart but defined elsewhere in this part, when used in subpart, shall have the meanings given elsewhere in this part, unless the context otherwise requires.

(c) When used in the rules, regulations, or forms of the Commission referred to in this subpart, the term *Commission* shall be deemed to refer to the FDIC, the term *registrant* shall be deemed to refer to an issuer defined in this subpart, and the term *registration statement* or *prospectus* shall be deemed to refer to an offering circular filed under this subpart, unless the context otherwise requires.

**§ 390.411 Offering circular requirement.**

(a) *General.* No State savings association shall offer or sell, directly or indirectly, any security issued by it unless:

(1) The offer or sale is accompanied or preceded by an offering circular which includes the information required by this subpart and which has been filed and declared effective pursuant to this subpart; or

(2) An exemption is available under this subpart.

(b) *Communications not deemed an offer.* The following communications shall not be deemed an offer under this subpart:

(1) Prior to filing an offering circular, any notice of a proposed offering which satisfies the requirements of Commission Rule 135 (17 CFR 230.135) under the Securities Act;

(2) Subsequent to filing an offering circular, any notice circular, advertisement, letter, or other communication published or transmitted to any person which satisfies the requirements of Commission Rule 134 (17 CFR 230.134) under the Securities Act; and

(3) Oral offers of securities covered by an offering circular made after filing the offering circular with the FDIC.

(c) *Preliminary offering circular.* Notwithstanding paragraph (a) of this section, a preliminary offering circular may be used for an offer of any security prior to the effective date of the offering circular if:

(1) The preliminary offering circular has been filed pursuant to this subpart;

(2) The preliminary offering circular includes the information required by this subpart, except for the omission of information relating to offering price, discounts or commissions, amount of proceeds, conversion rates, call prices, or other matters dependent on the offering price; and

(3) The offering circular declared effective by the FDIC is furnished to the purchaser prior to, or simultaneously with, the sale of any such security.

**§ 390.412 Exemptions.**

The offering circular requirement of § 390.411 shall not apply to an issuer's offer or sale of securities:

(a) [Reserved]

(b) Exempt from registration under either section 3(a) or section 4 of the Securities Act, but only by reason of an exemption other than section 3(a)(5) (for regulated State savings associations), and section 3(a)(11) (for intrastate offerings) of the Securities Act;

(c) In a conversion from the mutual to the stock form of organization pursuant to12 CFR part 192, except for a supervisory conversion undertaken pursuant to subpart C of 12 CFR part 192;

(d) In a non-public offering which satisfies the requirements of § 390.413;

(e) That are debt securities issued in denominations of $100,000 or more, which are fully collateralized by cash, any security issued, or guaranteed as to principal and interest, by the United States, the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Government National Mortgage Association or by interests in mortgage notes secured by real property;

(f) Distributed exclusively abroad to foreign nationals: *Provided,* That—

(1) The offering is made subject to safeguards reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States; and

(2) Such safeguards include, without limitation, measures that would be sufficient to ensure that registration of the securities would not be required if the securities were not exempt under the Securities Act; or

(g) To its officers, directors or employees pursuant to an employee benefit plan or a dividend or interest reinvestment plan, and provided that any such plan has been approved by the majority of shareholders present in person or by proxy at an annual or special meeting of the shareholders of the State savings association.

**§ 390.413 Non-public offering.**

Offers and sales of securities by an issuer that satisfy the conditions of paragraph (a) or (b) of this section and the requirements of paragraphs (c) and (d) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Securities Act and §§ 390.412(b) and 390.412(d). However, an issuer shall not be deemed to be not in compliance with the provisions of this subpart solely by reason of making an untimely filing of the notice required to be filed by paragraph (c) of this section so long as the notice is actually filed and all other conditions and requirements of this subpart are satisfied.

(a) *Regulation D.* The offer and sale of all securities in the transaction satisfies the Commission's Regulation D (17 CFR 230.501–230.506), except for the notice requirements of Commission Rule 503 (17 CFR 230.503) and the limitations on resale in Commission Rule 502(d) (17 CFR 230.502(d)).

(b) *Sales to 35 persons.* The offer and sale of all securities in the transaction satisfies each of the following conditions:

(1) Sales of the security are not made to more than 35 persons during the offering period, as determined under the integration provisions of Commission Rule 502(a) (17 CFR 230.502(a)). The number of purchasers referred to above is exclusive of any accredited investor, officer, director or affiliate of the issuer. For purposes of paragraph (b) of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a

partnership, corporation or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person.

(2) All purchasers either have a preexisting personal or business relationship with the issuer or any of its officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

(4) The offer and sale of the security is not accomplished by the publication of any advertisement.

(c) *Filing of notice of sales.* Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to this subpart, the issuer, shall file with the FDIC a report describing the results of the sale of securities as required by § 390.421(b).

(d) *Limitation on resale.* The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of § 390.410(a)(14), which reasonable care shall include, but not be limited to, the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for the purchaser or for other persons;

(2) Written disclosure to each purchaser prior to the sale that the securities are not offered by an offering circular filed with, and declared effective by, the FDIC pursuant to § 390.411, but instead are being sold in reliance upon the exemption from the offering circular requirement provided for by this subpart; and

(3) Placement of a legend on the certificate, or other document evidencing the securities, indicating that the securities have not been offered by an offering circular filed with, and declared effective by, the FDIC and that due care should be taken to ensure that the seller of the securities is not an underwriter within the meaning of § 390.410(a)(14).

### § 390.414 Filing and signature requirements.

(a) *Procedures.* An offering circular, amendment, notice, report, or other document required by this subpart shall, unless otherwise indicated, be filed in accordance with the requirements of 12 CFR 192.115(a), 192.150(a)(6), 192.155, 192.180(b), and Form AC, General Instruction B, of this subpart.

(b) *Number of copies.* (1) Unless otherwise required, any filing under this subpart shall include nine copies of the document to be filed with the FDIC, as follows:

(i) Seven copies, which shall include one manually signed copy with exhibits, three conformed copies with exhibits, and three conformed copies without exhibits, to the FDIC, ATTN: Accounting and Securities Disclosure Section, 550 17th Street NW, Washington, DC 20429; and

(ii) Two copies, which shall include one manually signed copy with exhibits and one conformed copy, without exhibits, to the appropriate regional director.

(2) Within five days after the effective date of an offering circular or the commencement of a public offering after the effective date, whichever occurs later, nine copies of the offering circular used shall be filed with the FDIC as follows: Seven copies to the FDIC, 550 17th Street NW., ATTN: Accounting and Securities Disclosure Section, Washington, DC, and two copies to the appropriate Regional Director.

(3) After the effective date of an offering circular, an offering circular which varies from the form previously filed shall not be used, unless it includes only non-material supplemental or additional information and until 10 copies have been filed with the FDIC in the manner required.

(c) *Signature.* (1) Any offering circular, amendment, or consent filed with the FDIC pursuant to this subpart shall include an attached manually signed signature page which authorizes the filing and has been signed by:

(i) The issuer, by its duly authorized representative;

(ii) The issuer's principal executive officer;

(iii) The issuer's principal financial officer;

(iv) The issuer's principal accounting officer; and

(v) At least a majority of the issuer's directors.

(2) Any other document filed pursuant to this subpart shall be signed by a person authorized to do so.

(3) At least *one copy* of every document filed pursuant to this subpart shall be manually signed, and every copy of a document filed shall:

(i) Have the name of each person who signs typed or printed beneath the signature;

(ii) State the capacity or capacities in which the signature is provided;

(iii) Provide the name of each director of the issuer, if a majority of directors is required to sign the document; and

(iv) With regard to any copies not manually signed, bear typed or printed signatures.

### § 390.415 Effective date.

(a) Except as provided for in paragraph (d) of this section, an offering circular filed by a State savings association shall be deemed to be automatically declared effective by the FDIC on the twentieth day after filing or on such earlier date as the FDIC may determine for good cause shown.

(b) If any amendment is filed prior to the effective date, the offering circular shall be deemed to have been filed when such amendment was filed.

(c) The period until automatic effectiveness under this subpart shall be stated at the bottom of the facing page of the Form OC or any amendment.

(d) The effectiveness will be delayed if a duly authorized amendment, telegram confirmed in writing, or letter states that the effective date is delayed until a further amendment is filed specifically stating that the offering circular will become effective in accordance with this subpart.

(e) An amendment filed after the effective date of the offering circular shall become effective on such date as the FDIC may determine.

(f) If it appears to the FDIC at any time that the offering circular includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, then the FDIC may pursue any remedy it is authorized to pursue under section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818), including, but not limited to, institution of cease-and-desist proceedings.

### § 390.416 Form, content, and accounting.

(a) *Form and content.* Any offering circular or amendment filed pursuant to this subpart shall:

(1) Be filed under cover of Form OC, which is under 12 CFR part 192;

(2) Comply with the requirements of Items 3 and 4 of Form OC and the requirements of all items of the form for registration (17 CFR part 239) that the issuer would be eligible to use were it required to register the securities under the Securities Act;

(3) Comply with all item requirements of the Form S–1 (17 CFR part 239) for registration under the Securities Act, if the association issuing the securities is not in compliance with the FDIC's regulatory capital requirements during the time the offering is made;

(4) Where a form specifies that the information required by an item in the Commission's Regulation S–K (17 CFR part 229) should be furnished, include such information and all of the information required by Item 7 of Form PS, which is under 12 CFR part 192;

(5) Include after the facing page of the Form OC a cross-reference sheet listing each item requirement of the form for registration under the Securities Act and indicate for each item the applicable heading or subheading in the offering circular under which the required information is disclosed;

(6) Include in part II of the Form OC the applicable undertakings required by the form for registration under the Securities Act;

(7) If the issuer has not previously been required to file reports pursuant to section 13(a) of the Exchange Act or § 390.427, include in part II of Form OC the following undertaking: ''The issuer hereby undertakes, in connection with any distribution of the offering circular, to have a preliminary or effective offering circular including the information required by this subpart distributed to all persons expected to be mailed confirmations of sale not less than 48 hours prior to the time such confirmations are expected to be mailed;''

(8) In offerings involving the issuance of options, warrants, subscription rights or conversion rights within the meaning of § 390.410(a)(8), include in part II of Form OC an undertaking to provide a copy of the issuer's most recent audited financial statements to persons exercising such options, warrants or rights promptly upon receiving written notification of the exercise thereof;

(9) Include as supplemental information and not as part of the Form OC and only with respect to *de novo* offerings, a copy of the application for insurance of accounts as submitted to the Federal Deposit Insurance Corporation for state-chartered savings associations; and

(10) In addition to the information expressly required to be included by this subpart, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(b) *Accounting requirements.* To be declared effective an offering circular or amendment shall satisfy the accounting requirements in subpart T.

### § 390.417 Use of the offering circular.

(a) An offering circular or amendment declared effective by the FDIC shall not be used more than nine months after the effective date, unless the information contained therein is as of a date not more than 16 months prior to such use.

(b) An offering circular filed under § 390.414(b)(3) shall not extend the period for which an effective offering circular or amendment may be used under paragraph (c) of this section.

(c) If any event arises, or change in fact occurs, after the effective date and such event or change in fact, individually or in the aggregate, results in the offering circular containing any untrue statement of material fact, or omitting to state a material fact necessary in order to make statements made in the offering circular not misleading under the circumstances, then no offering circular, which has been declared effective under this subpart, shall be used until an amendment reflecting such event or change in fact has been filed with, and declared effective by, the FDIC.

### § 390.418 Escrow requirement.

(a) Any funds received in an offering which is offered and sold on a best efforts all-or-none condition or with a minimum-maximum amount to be sold shall be held in an escrow or similar separate account until such time as all of the securities are sold with respect to a best efforts all-or-none offering or the stated minimum amount of securities are sold in a minimum-maximum offering.

(b) If the amount of securities required to be sold under escrow conditions in paragraph (a) of this section are not sold within the time period for the offering as disclosed in the offering circular, all funds in the escrow account shall be promptly refunded unless the FDIC otherwise approves an extension of the offering period upon a showing of good cause and provided that the extension is consistent with the public interest and the protection of investors.

### § 390.419 Unsafe or unsound practices.

(a) No person shall directly or indirectly,

(1) Employ any device, scheme or artifice to defraud,

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(3) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security of a State savings association.

(b) Violations of this subpart shall constitute an unsafe or unsound practice within the meaning of section 8 of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818.

(c) Nothing in this subpart shall be construed as a limitation on the applicability of section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) or Rule 10b–5 promulgated thereunder (17 CFR 240.10b–5).

### § 390.420 Withdrawal or abandonment.

(a) Any offering circular, amendment, or exhibit may be withdrawn prior to the effective date. A withdrawal shall be signed and state the grounds upon which it is made. Any document withdrawn will not be removed from the files of the FDIC, but will be marked ''Withdrawn upon the request of the issuer on (date).''

(b) When an offering circular or amendment has been on file with the FDIC for a period of nine months and has not become effective, the FDIC may, in its discretion, determine whether the filing has been abandoned, after notifying the issuer that the filing is out of date and must either be amended to comply with the applicable requirements of this subpart or be withdrawn within 30 days after the date of such notice. When a filing is abandoned, the filing will not be removed from the files of the FDIC, but will be marked ''Declared abandoned by the FDIC on (date).''

### § 390.421 Securities sale report.

(a) Within 30 days after the first sale of the securities, every six months after such 30 day period and not later than 30 days after the later of the last sale of securities in an offering pursuant to § 390.411 or the application of the proceeds therefrom, the issuer shall file with the FDIC a report describing the results of the sale of the securities and the application of the proceeds, which shall include all of the information required by Form G–12 set forth at § 390.429 and shall also include the following:

(1) The name, address, and docket number of the issuer;

(2) The title, number, aggregate and per-unit offering price of the securities sold;

(3) The aggregate and per-unit dollar amounts of actual itemized expenses, discounts or commissions, and other fees;

(4) The aggregate and per-unit dollar amounts of the net proceeds raised, and the use of proceeds therefrom; and

(5) The number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities after the issuance of the securities or termination of the offer.

(b) Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to § 390.413, the issuer shall file with the FDIC a report describing the results of the sale of securities, which shall include all of the information required by Form G–12 set forth at § 390.429, and shall also include the following:

(1) All of the information required by paragraph (a) of this section; and

(2) A detailed statement of the factual and legal grounds for the exemption claimed.

**§ 390.422 Public disclosure and confidential treatment.**

(a) Any offering circular, amendment, exhibit, notice, or report filed pursuant to this subpart will be publicly available. Any other related documents will be treated in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), and parts 309 and 310 of this chapter.

(b) Any requests for confidential treatment of information in a document required to be filed under this subpart shall be made as required under Commission Rule 24b–2 (17 CFR 240.24b–2) under the Exchange Act.

**§ 390.423 Waiver.**

(a) The FDIC may waive any requirement of this subpart, or any required information:

(1) Determined to be unnecessary by the FDIC;

(2) In connection with a transaction approved by the FDIC for supervisory reasons, or

(3) Where a provision of this subpart conflicts with a requirement of applicable state law.

(b) Any condition, stipulation or provision binding any person acquiring a security issued by a State savings association which seeks to waive compliance with any provision of this subpart shall be void, unless approved by the FDIC.

**§ 390.424 Requests for interpretive advice or waiver.**

Any requests to the FDIC for interpretive advice or a waiver with respect to any provision of this subpart shall satisfy the following requirements:

(a) A copy of the request, including any attachments, shall be filed with the FDIC;

(b) The provisions of this subpart to which the request relates, the participants in the proposed transaction, and the reasons for the request, shall be specifically identified or described; and

(c) The request shall include a legal opinion as to each legal issue raised and an accounting opinion as to each accounting issue raised.

**§ 390.425 Delayed or continuous offering and sale of securities.**

Any offer or sale of securities under § 390.411 may be made on a continuous or delayed basis in the future, if:

(a) The securities would satisfy all of the eligibility requirements of the Commission's Rule 415, 17 CFR 230.415; and

(b) The association issuing the securities is in compliance with the FDIC's regulatory capital requirements during the time the offering is made.

**§ 390.426 Sales of securities at an office of a State savings association.**

Sales of securities of a State savings association or its affiliates at an office of a State savings association may only be made in accordance with the provisions of § 390.340.

**§ 390.427 Current and periodic reports.**

(a) Each State savings association which files an offering circular which becomes effective pursuant to this subpart, after such effective date, shall file with the FDIC periodic and current reports on Forms 8–K, 10–Q and 10–K as may be required by section 13 of the Exchange Act (15 U.S.C. 78m) as if the securities sold by such offering circular were securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file periodic and current reports under this subpart shall be automatically suspended if and so long as any issue of securities of the State savings association is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file under this subpart shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such offering circular became effective, if, at the beginning of such fiscal year, the securities of each class to which the offering circular relates are held of record by less than three hundred persons and upon the filing of a Form 15.

(b) For purposes of registering securities under section 12(b) or 12(g) of the Exchange Act, an issuer subject to the reporting requirements of paragraph (a) of this section may use the Commission's registration statement on Form 10 or Form 8–A or 8–B as applicable.

**§ 390.428 Approval of the security.**

Any securities of a State savings association which are not exempt under this subpart and are offered or sold pursuant to an offering circular which becomes effective under this subpart, are deemed to be approved as to form and terms for purposes of this subpart.

**§ 390.429 Form for securities sale report.**

FDIC, 550 17th Street, NW., Washington, DC 20429

[Form G–12]

*Securities Sale Report Pursuant to § 390.12*

FDIC No. ________

Issuer's Name: ________

Address: ________

If in organization, state the date of FDIC certification of insurance of accounts: ____

State the title, number, aggregate and per-unit offering price of the securities sold: ________

State the aggregate and per-unit dollar amounts of actual itemized offering expenses, discounts, commissions, and other fees: ________

State the aggregate and per-unit dollar amounts of the net proceeds raised:

________

Describe the use of proceeds. If unknown, provide reasonable estimates of the dollar amount allocated to each purpose for which the proceeds will be used: ________

State the number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities at the close or termination of the offering:

________

For a non-public offering, also state the factual and legal grounds for the exemption claimed (attach additional pages if necessary): ________

For a non-public offering, all offering materials used should be listed:

________

Person to Contact: ________

Telephone No.: ________

This issuer has duly caused this securities sale report to be signed on its behalf by the undersigned person.

Date of securities sale report ________

Issuer: ________

Signature: ________

Name: ________

Title: ________

Instruction: Print the name and title of the signing representative under his or her signature. Ten copies of the securities sale report should be filed, including one copy manually signed, as required under 12 CFR 390.414.

Attention

Intentional misstatements or omissions of fact constitute violations of Federal law (See 18 U.S.C. 1001 and § 390.355(b)).

**§ 390.430 Filing of copies of offering circulars in certain exempt offerings.**

A copy of the offering circular, or similar document, if any, used in connection with an offering exempt from the offering circular requirement of § 390.411 by reason of § 390.412(e) or § 390.413 shall be mailed to the FDIC within 30 days after the first sale of such securities. Such copy of the offering circular, or similar document, is solely for the information of the FDIC and shall not be deemed to be ''filed'' with the FDIC pursuant to § 390.411. The mailing to the FDIC of such offering circular, or similar document, shall not be a pre-condition of the applicable exemption from the offering circular requirements of § 390.411.

## Subpart X—Appraisals

**§ 390.440 Authority, purpose, and scope.**

(a) *Authority.* This subpart is issued by the FDIC under title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (Pub. L. 101–73, 103 Stat. 183, 511 (1989)), 12 U.S.C. 3301 *et seq.,* and portions of the Home Owners' Loan Act (''HOLA''), 12 U.S.C. 1461 *et seq.,* as amended by FIRREA.

(b) *Purpose and scope.* (1) Title XI provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This subpart implements the requirements of title XI and applies to all federally related transactions entered into by the FDIC or by institutions regulated by the FDIC (''regulated institutions'').

(2) This subpart:

(i) Identifies which real estate related financial transactions require the services of an appraiser;

(ii) Prescribes which categories of federally related transactions shall be appraised by a State certified appraiser and which by a State licensed appraiser; and

(iii) Prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the FDIC.

**§ 390.441 Definitions.**

*Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

*Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

*Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institution Examination Council.

*Business loan* means a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, pool, syndicate, sole proprietorship, or other business entity.

*Complex 1-to-4 family residential property appraisal* means one in which the property to be appraised, the form of ownership, or market conditions are atypical.

*Federally related transaction* means any real estate-related financial transaction entered into on or after August 9, 1990, that:

(1) The FDIC or any regulated institution engages in or contracts for; and

(2) Requires the services of an appraiser.

*Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and acting in what they consider their own best interests;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

*Real estate* or *real property* means an identified parcel or tract of land, with improvements, and includes easements, rights of way, undivided or future interests, or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights, or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

*Real estate-related financial transaction* means any transaction involving:

(1) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or

(2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

*State certified appraiser* means any individual who has satisfied the requirements for certification in a State or territory whose criteria for certification as a real estate appraiser currently meet the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a State certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board of the National Foundation. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of the State or territory are inconsistent with title XI of FIRREA. The FDIC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

*State licensed appraiser* means any individual who has satisfied the requirements for licensing in a State or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the State or territory are inconsistent with title XI. The FDIC may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

*Tract development* means a project of five units or more that is constructed or is to be constructed as a single development.

*Transaction value* means:

(1) For loans or other extensions of credit, the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

(3) For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

**§ 390.442 Appraisals required; transactions requiring a State certified or licensed appraiser.**

(a) *Appraisals required.* An appraisal performed by a State certified or licensed appraiser is required for all real estate-related financial transactions except those in which:

(1) The transaction value is $250,000 or less;

(2) A lien on real estate has been taken as collateral in an abundance of caution;

(3) The transaction is not secured by real estate;

(4) A lien on real estate has been taken for purposes other than the real estate's value;

(5) The transaction is a business loan that:

(i) Has a transaction value of $1 million or less; and

(ii) Is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment;

(6) A lease of real estate is entered into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate;

(7) The transaction involves an existing extension of credit at the lending institution, provided that:

(i) There has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) There is no advancement of new monies, other than funds necessary to cover reasonable closing costs;

(8) The transaction involves the purchase, sale, investment in, exchange of, or extension of credit secured by, a loan or interest in a loan, pooled loans, or interests in real property, including mortgaged-backed securities, and each loan or interest in a loan, pooled loan, or real property interest met the FDIC's regulatory requirements for appraisals at the time of origination;

(9) The transaction is wholly or partially insured or guaranteed by a United States government agency or United States government sponsored agency;

(10) The transaction either:

(i) Qualifies for sale to a United States government agency or United States government sponsored agency; or

(ii) Involves a residential real estate transaction in which the appraisal conforms to the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation appraisal standards applicable to that category of real estate;

(11) The regulated institution is acting in a fiduciary capacity and is not required to obtain an appraisal under other law; or

(12) The FDIC determines that the services of an appraiser are not necessary in order to protect Federal financial and public policy interests in real estate-related financial transactions or to protect the safety and soundness of the institution.

(b) *Evaluations required.* For a transaction that does not require the services of a State certified or licensed appraiser under paragraph (a)(1), (5), or (7) of this section, the institution shall obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.

(c) *Appraisals to address safety and soundness concerns.* The FDIC reserves the right to require an appraisal under this subpart whenever the agency believes it is necessary to address safety and soundness concerns.

(d) *Transactions requiring a State certified appraiser*—(1) *All transactions of $1,000,000 or more.* All federally related transactions having a transaction value of $1,000,000 or more shall require an appraisal prepared by a State certified appraiser.

(2) *Nonresidential and residential (other than 1-to-4 family) transactions of $250,000 or more.* All federally related transactions having a transaction value of $250,000 or more, other than those involving appraisals of 1-to-4 family residential properties, shall require an appraisal prepared by a State certified appraiser.

(3) *Complex residential transactions of $250,000 or more.* All complex 1-to-4 family residential property appraisals rendered in connection with federally related transactions shall require a State certified appraiser if the transaction value is $250,000 or more. A regulated institution may presume that appraisals of 1-to-4 family residential properties are not complex, unless the institution has readily available information that a given appraisal will be complex. The regulated institution shall be responsible for making the final determination of whether the appraisal is complex. If during the course of the appraisal a licensed appraiser identifies factors that would result in the property, form of ownership, or market conditions being considered atypical, then either:

(i) The regulated institution may ask the licensed appraiser to complete the appraisal and have a certified appraiser approve and co-sign the appraisal; or

(ii) The institution may engage a certified appraiser to complete the appraisal.

(e) *Transactions requiring either a State certified or licensed appraiser.* All appraisals for federally related transactions not requiring the services of a State certified appraiser shall be prepared by either a State certified appraiser or a State licensed appraiser.

(f) *Effective date.* State savings associations are required to use State certified or licensed appraisers as set forth in this subpart no later than December 31, 1992.

**§ 390.443 Minimum appraisal standards.**

For federally related transactions, all appraisals shall, at a minimum:

(a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Ave., NW., Washington, DC 20005, unless principles of safe and sound banking require compliance with stricter standards;

(b) Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction;

(c) Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units;

(d) Be based upon the definition of market value as set forth in this subpart; and

(e) Be performed by State licensed or certified appraisers in accordance with requirements set forth in this subpart.

**§ 390.444 Appraiser independence.**

(a) *Staff appraisers.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the regulated institution, the regulated institution shall take appropriate steps to ensure that the appraisers exercise independent judgment and that the appraisal is adequate. Such steps include, but are not limited to, prohibiting an individual from performing an appraisal in connection with federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.* (1) If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction.

(2) A regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial services institution, if:

(i) The appraiser has no direct or indirect interest, financial or otherwise, in the property or the transaction; and

(ii) The regulated institution determines that the appraisal conforms to the requirements of this subpart and is otherwise acceptable.

**§ 390.445 Professional association membership; competency.**

(a) *Membership in appraisal organizations.* A State certified appraiser or a State licensed appraiser may not be excluded from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with federally related transactions must be State certified or licensed, as appropriate. However, a State certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

**§ 390.446 Enforcement.**

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, who violate this subpart may be subject to removal and/or prohibition orders, cease and desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.,* as amended, or other applicable law.

**§ 390.447 Appraisal policies and practices of State savings associations and subsidiaries.**

(a) *Introduction.* The soundness of a State savings association's mortgage loans and real estate investments, and those of its subsidiary(ies), depends to a great extent upon the adequacy of the loan underwriting used to support these transactions. An appraisal standard is one of several critical components of a sound underwriting policy because appraisal reports contain estimates of the value of collateral held or assets owned. This section sets forth the responsibilities of management to develop, implement, and maintain appraisal standards in determining compliance with the appraisal requirements of § 390.350.

(b) *Definition.* For purposes of this section, management means: the directors and officers of a State savings association or subsidiary(ies) of such State savings association as those terms are defined in §§ 390.291 and 390.302, respectively.

(c) *Responsibilities of management.* An appraisal is a critical component of the loan underwriting or real estate investment decision. Therefore, management shall develop, implement, and maintain appraisal policies to ensure that appraisals reflect professional competence and to facilitate the reporting of estimates of market value upon which State savings associations may rely to make lending decisions. To achieve these results:

(1) Management shall develop written appraisal policies, subject to formal adoption by the State savings association's board of directors, that it shall implement in consultation with other appropriate personnel. These policies shall ensure that adequate appraisals are obtained and proper appraisal procedures are followed consistent with the requirements of this subpart.

(2) Management shall develop and adopt guidelines and institute procedures pertaining to the hiring of appraisers to perform appraisal services for the State savings association consistent with the requirements of this subpart. These guidelines shall set forth specific factors to be considered by management including, but not limited to, an appraiser's State certification or licensing, professional education, and type of experience. An appraiser's membership in professional appraisal organizations may be considered consistent with the requirements of subpart X.

(3) Management shall review on an annual basis the performance of all approved appraisers used within the preceding 12-month period for compliance with:

(i) The State savings association's appraisal policies and procedures; and

(ii) The reasonableness of the value estimates reported.

(d) *Exemptions.* The requirements of § 390.443(b) through (d) shall not apply with respect to appraisals on nonresidential properties prepared on form reports approved by the FDIC and completed in accordance with the applicable instructional booklet.

## Subpart Y—Prompt Corrective Action

**§ 390.450 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.**

(a) *Authority.* This subpart is issued by the FDIC pursuant to section 38 of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for State savings associations, the capital measures and capital levels that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to State savings associations. Certain of these provisions also apply to officers, directors and employees of State savings associations.

(d) *Other supervisory authority.* Neither section 38 nor this subpart in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a State savings association under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the FDIC or otherwise required by law, no State savings association may state in any advertisement or promotional material its capital category under this subpart or that the FDIC or any other federal banking agency has assigned the State savings association to a particular category.

**§ 390.451 Definitions.**

For purposes of this subpart, except as modified in this section or unless the context otherwise requires, the terms used in this subpart have the same meanings as set forth in sections 38 and 3 of the FDI Act.

(a)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term ''controlled'' shall be construed consistently with the term ''control.''

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with subpart Z.

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the State savings association or related overhead expenses, including payments related to supervisory, executive, managerial or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the State savings association.

(e) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with subpart Z.

(f) *Tangible equity* means the amount of a State savings association's core capital as computed in subpart Z plus the amount of its outstanding cumulative perpetual preferred stock (including related surplus), minus intangible assets as defined in § 390.461, except mortgage servicing assets to the extent they are includable under § 390.471. Non-mortgage servicing assets that have not been previously deducted in calculating core capital are deducted.

(g) *Tier 1 capital* means the amount of core capital as defined in subpart Z.

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with subpart Z.

(i) *Total assets,* for purposes of § 390.453(b)(5), means adjusted total assets as calculated in accordance with subpart Z, minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of total capital to risk-weighted assets, as calculated in accordance with subpart Z.

**§ 390.452 Notice of capital category.**

(a) *Effective date of determination of capital category.* A State savings association shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart as of the date the State savings association is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A State savings association shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Thrift Financial Report (TFR) or Consolidated Reports of Condition or Income (''Call Report''), as applicable, is required to be filed with the FDIC;

(2) A final report of examination is delivered to the State savings association; or

(3) Written notice is provided by the FDIC to the State savings association of its capital category for purposes of section 38 of the FDI Act and this subpart or that the State savings association's capital category has changed as provided in paragraph (c) of this section or § 390.453(c).

(c) *Adjustments to reported capital levels and category* —(1) *Notice of adjustment by State savings association.* A State savings association shall provide the FDIC with written notice that an adjustment to the State savings association's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the State savings association to be placed in a lower capital category from the category assigned to the State savings association for purposes of section 38 and this section on the basis of the State savings association's most recent report of examination.

(2) *Determination by the FDIC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the FDIC shall determine whether to change the capital category of the State savings association and shall notify the State savings association of the FDIC's determination.

**§ 390.453 Capital measures and capital category definitions.**

(a) *Capital measures.* For purposes of section 38 and this subpart, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this subpart, a State savings association shall be deemed to be:

(1) *Well capitalized* if the State savings association:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by FDIC under section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 U.S.C. 3907), the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the State savings association:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the State savings association is assigned a composite rating of 1, as composite rating is defined in § 390.101(c); and

(iv) Does not meet the definition of a *well capitalized* State savings association.

(3) *Undercapitalized* if the State savings association:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) (A) Except as provided in paragraph (b)(3)(iii)(B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the State savings association is assigned a composite rating of 1, as composite rating is defined in § 390.101(c).

(4) *Significantly undercapitalized* if the State savings association has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the State savings association has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Reclassification based on supervisory criteria other than capital.* The FDIC may reclassify a well capitalized State savings association as adequately capitalized and may require an adequately capitalized or undercapitalized State savings association to comply with certain mandatory or discretionary supervisory actions as if the State savings association were in the next lower capital category (except that the FDIC may not reclassify a significantly undercapitalized State savings association as critically undercapitalized) (each of these actions are hereinafter referred to generally as ''reclassifications'') in the following circumstances:

(1) *Unsafe or unsound condition.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 390.457(a), that the State savings association is in an unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The FDIC has determined, after notice and an opportunity for hearing pursuant to § 390.457(a) that the State savings association received a less-than-satisfactory rating for any rating category (other than in a rating category specifically addressing capital adequacy) under the Uniform Financial Institutions Rating System,[1] or an equivalent rating under a comparable rating system adopted by the FDIC; and has not corrected the conditions that served as the basis for the less than satisfactory rating. Ratings under this paragraph (c)(2) refer to the most recent ratings (as determined either on-site or off-site by the most recent examination) of which the State savings association has been notified in writing.

[1] Copies are available at the address specified in § 390.108.

**§ 390.454 Capital restoration plans.**

(a) *Schedule for filing plan*—(1) *In general.* A State savings association shall file a written capital restoration plan with the appropriate Regional Office within 45 days of the date that the State savings association receives notice or is deemed to have notice that the State savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the State savings association in writing that the plan is to be filed within a different period. An adequately capitalized State savings association that has been required pursuant to § 390.453(c) to comply with supervisory actions as if the State savings association were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a State savings association that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 390.453(c) unless the FDIC notifies the State savings association that it must submit a new or revised capital plan. A State savings association that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate Regional Office within 45 days of receiving such notice, unless the FDIC notifies the State savings association in writing that the plan is to be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the TFR, or Consolidated Reports of Condition or Income (''Call Report''), as applicable, unless the FDIC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A State savings association that is required to submit a capital restoration plan as the result of a reclassification of the State savings association pursuant to § 390.453(c) shall include a description of the steps the State savings association will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the State savings association.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the FDIC shall provide written notice to the State savings association of whether the plan has been approved. The FDIC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the FDIC, the State savings association shall submit a revised capital restoration plan, when directed to do so, within the time specified by the FDIC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized State savings association (as defined in § 390.453(b)(3)) shall be subject to all of the provisions of section 38 and this section applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the State savings association has been approved by the FDIC.

(e) *Failure to submit a capital restoration plan.* A State savings association that is undercapitalized (as defined in § 390.453(b)(3)) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) *Failure to implement a capital restoration plan.* Any undercapitalized State savings association that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(g) *Amendment of capital plan.* A State savings association that has filed an approved capital restoration plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the State savings association shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) [Reserved]

(i) *Performance guarantee by companies that control a State savings association*—(1) *Limitation on liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific State savings association that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the State savings association's total assets at the time the State savings association was notified or deemed to have notice that the State savings association was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the State savings association to the levels required for the State savings association to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the State savings association initially fails to comply with a capital restoration plan under this subpart.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this subpart shall expire after the FDIC notifies the State savings association that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same State savings association after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given State savings association shall be jointly and severally liable for the guarantee for such State savings association as required under section 38 and this subpart, and the FDIC may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a State savings association that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the State savings association shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart are applicable to State savings associations that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a State savings association to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the State savings association shall be subject to the provisions of section 38 and this subpart that are applicable to State savings associations that have failed in a material respect to implement a capital restoration plan.

**§ 390.455 Mandatory and discretionary supervisory actions under section 38.**

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all State savings associations.* All State savings associations are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized State savings associations.* Immediately upon receiving notice or being deemed to have notice, as provided in § 390.452 or § 390.454, that the State savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, the State savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the FDIC monitor the condition of the State savings association (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the State savings association's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized State savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 390.452 or § 390.454, that the State savings association is significantly undercapitalized, or critically undercapitalized, or that the State savings association is subject to the provisions applicable to institutions that are significantly undercapitalized because the State savings association failed to submit or implement in any material respect an acceptable capital restoration plan, the State savings association shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized State savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 390.452 that the State savings association is critically undercapitalized, the State savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting the activities of the State savings association (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the State savings association (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the FDIC's discretion to take in connection with: A State savings association that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such State savings association; or a company that controls such State savings association, the FDIC shall follow the procedures for issuing directives under §§ 390.456 and 390.458 unless otherwise provided in section 38 or this subpart.

**§ 390.456 Directives to take prompt corrective action.**

(a) *Notice of intent to issue a directive*—(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized State savings association or, where appropriate, any company that controls the State savings association, prior written notice of the FDIC's intention to issue a directive requiring such State savings association or company to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The State savings association shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed

in paragraph (a)(1) of this section, issue a directive requiring a State savings association or any company that controls a State savings association immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A State savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the State savings association's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the State savings association or company subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A State savings association or company may file a written response to a notice of intent to issue a directive within the time period set by the FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the State savings association or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the State savings association or company regarding the proposed directive.

(d) *FDIC consideration of response.* After considering the response, the FDIC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the State savings association or company; or

(3) Seek additional information or clarification of the response from the State savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a State savings association or company to file with the FDIC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any State savings association or company that is subject to a directive under this subpart, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

**§ 390.457 Procedures for reclassifying a State savings association based on criteria other than capital.**

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.* (A) Pursuant to § 390.453(c), the FDIC may reclassify a well capitalized State savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The FDIC determines that the State savings association is in unsafe or unsound condition; or

(*2*) The FDIC deems the State savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as ''reclassification.''

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 390.453(c)(1), the FDIC shall issue and serve on the State savings association a written notice of the FDIC's intention to reclassify the State savings association.

(2) *Contents of notice.* A notice of intention to reclassify a State savings association based on unsafe or unsound condition shall include:

(i) A statement of the State savings association's capital measures and capital levels and the category to which the State savings association would be reclassified;

(ii) The reasons for reclassification of the State savings association;

(iii) The date by which the State savings association subject to the notice of reclassification may file with the FDIC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the State savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A State savings association may file a written response to a notice of proposed reclassification within the time period set by the FDIC. The response should include:

(i) An explanation of why the State savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the State savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a State savings association to file, within the specified time period, a written response with the FDIC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the FDIC or its designee under this section. If the State savings association desires to present oral testimony or witnesses at the hearing, the State savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the FDIC allows further time at

the request of the State savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(7) *Hearing procedures.* (i) The State savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The State savings association may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor subpart C apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the State savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC will decide whether to reclassify the State savings association and notify the State savings association of the FDIC's decision.

(b) *Request for rescission of reclassification.* Any State savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the FDIC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the FDIC, the State savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the FDIC.

**§ 390.458 Order to dismiss a director or senior executive officer.**

(a) *Service of notice.* When the FDIC issues and serves a directive on a State savings association pursuant to § 390.456 requiring the State savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the FDIC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the FDIC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the FDIC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the FDIC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a State savings association to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor subpart C apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(2) The informal hearing shall be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the State savings association would materially strengthen the State savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the State savings association's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the State savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC concerning the Respondent's request for reinstatement with the State savings association.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing has been requested, the FDIC shall grant or deny the request for reinstatement and notify the Respondent of the FDIC's decision. If the FDIC denies the request for reinstatement, the FDIC shall set forth in the notification the reasons for the FDIC's action.

**§ 390.459 Enforcement of directives.**

(a) *Judicial remedies.* Whenever a State savings association or company that controls a State savings association fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any State savings association or company that controls a State savings association that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of a State savings association to implement a capital restoration plan required under section 38, or this subpart, or the failure of a company having control of a State savings association to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the State savings association or company to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or this subpart through any other judicial or administrative proceeding authorized by law.

## Subpart Z—Capital

**§ 390.460 Scope.**

(a) This subpart prescribes the minimum regulatory capital requirements for State savings associations. The subpart applies to State savings associations, except as described in paragraph (b) of this section.

(b)(1) A State savings association that uses Appendix A must comply with the minimum qualifying criteria for internal risk measurement and management processes for calculating risk-based capital requirements, utilize the methodologies for calculating risk-based capital requirements, and make the required disclosures described in that appendix.

(2) Sections 390.461 through 390.471 do not apply to the computation of risk-based capital requirements by a State savings association that uses Appendix A of this subpart. However, these State savings associations:

(i) Must compute the components of capital under § 390.465, subject to the modifications in sections 11 and 12 of Appendix A of this subpart.

(ii) Must meet the leverage ratio requirement at §§ 390.462(a)(2) and 390.467 with tier 1 capital, as computed under sections 11 and 12 of Appendix A of this subpart.

(iii) Must meet the tangible capital requirement described at §§ 390.462(a)(3) and 390.468.

(iv) Are subject to §§ 390.463 (individual minimum capital requirement), 390.464 (capital directives); and 390.469 (consequences of failure to meet capital requirements).

(v) Are subject to the reservations of authority at § 390.470, which supplement the reservations of authority at section 1 of Appendix A of this subpart.

**§ 390.461 Definitions.**

For the purposes of this subpart:

*Adjusted total assets.* The term *adjusted total assets* means:

(1) A State savings association's total assets as that term is defined in this section;

(2) Plus

(i) The prorated assets of any includable subsidiary in which the State savings association has a minority ownership interest that is not consolidated under generally accepted accounting principles; and

(ii) The remaining goodwill (FSLIC Capital Contributions) resulting from prior regulatory accounting practices as provided in the definition of *qualifying supervisory goodwill* in this section;

(3) Minus

(i) Assets not included in the applicable capital standard except for those subject to paragraphs (3)(ii) and (3)(iii) of this definition;

(ii) Investments in any includable subsidiary in which a State savings association has a minority interest;

(iii) Investments in any subsidiary subject to consolidation under paragraph (2)(ii) of this definition; and

(iv) For purposes of determining core capital, qualifying supervisory goodwill.

*Asset-backed commercial paper program.* The term *asset-backed commercial paper program* (ABCP program) means a program that primarily issues commercial paper that has received a credit rating from an NRSRO and that is backed by assets or other exposures held in a bankruptcy-remote special purpose entity. The term *sponsor* of an ABCP program means a State savings association that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the asset pools to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

*Cash items in the process of collection.* The term *cash items in the process of collection* means checks or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation; U.S. Government checks that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation; and unposted debits.

*Commitment.* The term commitment means any arrangement that obligates a State savings association to:

(1) Purchase loans or securities;

(2) Extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, home equity lines of credit, eligible ABCP liquidity facilities, or similar transactions.

*Common stockholders' equity.* The term *common stockholders' equity* means common stock, common stock surplus, retained earnings, and adjustments for the cumulative effect of foreign currency translation, less net unrealized losses on available-for-sale equity securities with readily determinable fair values.

*Conditional guarantee.* The term *conditional guarantee* means a contingent obligation of the United States Government or its agencies, the validity of which to the beneficiary is dependent upon some affirmative action—*e.g.,* servicing requirements—on the part of the beneficiary of the guarantee or a third party.

*Credit derivative.* The term *credit derivative* means a contract that allows one party (the protection purchaser) to transfer the credit risk of an asset or off-balance sheet credit exposure to another party (the protection provider). The value of a credit derivative is dependent, at least in part, on the credit performance of a ''referenced asset.''

*Credit-enhancing interest-only strip.* (1) The term *credit-enhancing interest-*

*only strip* means an on-balance sheet asset that, in form or in substance:

(i) Represents the contractual right to receive some or all of the interest due on transferred assets; and

(ii) Exposes the State savings association to credit risk directly or indirectly associated with the transferred assets that exceeds its *pro rata* share of the State savings association's claim on the assets whether through subordination provisions or other credit enhancement techniques.

(2) The FDIC reserves the right to identify other cash flows or related interests as a credit-enhancing interest-only strip. In determining whether a particular interest cash flow functions as a credit-enhancing interest-only strip, the FDIC will consider the economic substance of the transaction.

*Credit-enhancing representations and warranties.* (1) The term *credit-enhancing representations and warranties* means representations and warranties that are made or assumed in connection with a transfer of assets (including loan servicing assets) and that obligate a State savings association to protect investors from losses arising from credit risk in the assets transferred or loans serviced.

(2) Credit-enhancing representations and warranties include promises to protect a party from losses resulting from the default or nonperformance of another party or from an insufficiency in the value of the collateral.

(3) Credit-enhancing representations and warranties do not include:

(i) Early-default clauses and similar warranties that permit the return of, or premium refund clauses covering, qualifying mortgage loans for a period not to exceed 120 days from the date of transfer. These warranties may cover only those loans that were originated within one year of the date of the transfer;

(ii) Premium refund clauses covering assets guaranteed, in whole or in part, by the United States government, a United States government agency, or a United States government-sponsored enterprise, provided the premium refund clause is for a period not to exceed 120 days from the date of transfer; or

(iii) Warranties that permit the return of assets in instances of fraud, misrepresentation or incomplete documentation.

*Depository institution.* The term *domestic depository institution* means a financial institution that engages in the business of banking; that is recognized as a bank by the bank supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the United States, this definition encompasses all federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institutions. Bank holding companies and savings and loan holding companies are excluded from this definition. For the purposes of assigning risk weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

*Direct credit substitute.* The term *direct credit substitute* means an arrangement in which a State savings association assumes, in form or in substance, credit risk associated with an on- or off-balance sheet asset or exposure that was not previously owned by the State savings association (third-party asset) and the risk assumed by the State savings association exceeds the *pro rata* share of the State savings association's interest in the third-party asset. If a State savings association has no claim on the third-party asset, then the State savings association's assumption of any credit risk is a direct credit substitute. Direct credit substitutes include:

(1) Financial standby letters of credit that support financial claims on a third party that exceed a State savings association's *pro rata* share in the financial claim;

(2) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims that exceed a State savings association's *pro rata* share in the financial claim;

(3) Purchased subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Credit derivative contracts under which the State savings association assumes more than its *pro rata* share of credit risk on a third-party asset or exposure;

(5) Loans or lines of credit that provide credit enhancement for the financial obligations of a third party;

(6) Purchased loan servicing assets if the servicer is responsible for credit losses or if the servicer makes or assumes credit-enhancing representations and warranties with respect to the loans serviced. Servicer cash advances as defined in this section are not direct credit substitutes;

(7) Clean-up calls on third party assets. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the State savings association are not direct credit substitutes; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

*Eligible ABCP liquidity facility.* The term *eligible ABCP liquidity facility* means a liquidity facility that supports asset-backed commercial paper, in form or in substance, and that meets the following criteria:

(1)(i) At the time of the draw, the liquidity facility must be subject to an asset quality test that precludes funding against assets that are 90 days or more past due or in default; and

(ii) If the assets that the liquidity facility is required to fund against are assets or exposures that have received a credit rating by a NRSRO at the time the inception of the facility, the facility can be used to fund only those assets or exposures that are rated investment grade by an NRSRO at the time of funding; or

(2) If the assets that are funded under the liquidity facility do not meet the criteria described in paragraph (1) of this definition, the assets must be guaranteed, conditionally or unconditionally, by the United States Government, its agencies, or the central government of an OECD country.

*Eligible State savings association.* (1) The term *eligible State savings association* means a State savings association with respect to which the FDIC has determined, on the basis of information available at the time, that:

(i) The State savings association's management appears to be competent;

(ii) The State savings association, as certified by its Board of Directors, is in substantial compliance with all applicable statutes, regulations, orders and written agreements and directives; and

(iii) The State savings association's management, as certified by its Board of Directors, has not engaged in insider dealing, speculative practices, or any other activities that have or may jeopardize the association's safety and soundness or contributed to impairing the association's capital.

(2) State savings associations, for purposes of this paragraph, will be deemed to be eligible unless the FDIC makes a determination otherwise or notifies the State savings association of

its intent to conduct either an informal or formal examination to determine eligibility and provides written notification thereof to the State savings association.

*Equity investments.* (1) The term *equity investments* includes investments in equity securities and real property that would be considered an equity investment under generally accepted accounting principles.

(2)(i) The term *equity securities* means any:

(A) Stock, certificate of interest of participation in any profit-sharing agreement, collateral trust certificate or subscription, preorganization certificate or subscription, transferable share, investment contract, or voting trust certificate; or

(B) In general, any interest or instrument commonly known as an equity security; or

(C) Loans having profit sharing features which generally accepted accounting principles would reclassify as equity securities; or

(D) Any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; or

(E) Any security carrying any warrant or right to subscribe to or purchase such a security; or

(F) Any certificate of interest or participation in, temporary or Interim certificate for, or receipt for any of the foregoing or any partnership interest; or

(G) Investments in equity securities and loans or advances to and guarantees issued on behalf of partnerships or joint ventures in which a State savings association holds an interest in real property under generally accepted accounting principles.

(ii) The term *equity securities* does not include investments in a subsidiary as that term is defined in this section, equity investments that are permissible for national banks, ownership interests in pools of assets that are risk-weighted in accordance with § 390.466(a)(1)(vi), or the stock of Federal Home Loan Banks or Federal Reserve Banks.

(3) For purposes of this subpart, the term *equity investments in real property* does not include interests in real property that are primarily used or intended to be used by the State savings association, its subsidiaries, or its affiliates as offices or related facilities for the conduct of its business.

(4) In addition, for purposes of this part, the term *equity investments in real property* does not include interests in real property that are acquired in satisfaction of a debt previously contracted in good faith or acquired in sales under judgments, decrees, or mortgages held by the State savings association, provided that the property is not intended to be held for real estate investment purposes but is expected to be disposed of within five years or a longer period approved by the FDIC.

*Exchange rate contracts.* The term *exchange rate contracts* includes cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the FDIC, may give rise to similar risks.

*Face amount.* The term *face amount* means the notational principal, or face value, amount of an off-balance sheet item or the amortized cost of an on-balance sheet asset.

*Financial asset.* The term *financial asset* means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

*Financial standby letter of credit.* The term *financial standby letter of credit* means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(1) To repay money borrowed by, or advanced to, or for the account of, a second party (the account party); or

(2) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

*Includable subsidiary.* The term *includable subsidiary* means a subsidiary of a State savings association that is:

(1) Engaged solely in activities not impermissible for a national bank;

(2) Engaged in activities not permissible for a national bank, but only if acting solely as agent for its customers and such agency position is clearly documented in the State savings association's files;

(3) Engaged solely in mortgage-banking activities;

(4)(i) Itself an insured depository institution or a company the sole investment of which is an insured depository institution, and

(ii) Was acquired by the parent State savings association prior to May 1, 1989; or

(5) A subsidiary of any Federal savings association existing as a Federal savings association on August 9, 1989 that

(i) Was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under State law, or

(ii) Acquired its principal assets from an association that was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under State law.

*Intangible assets.* The term *intangible assets* means assets considered to be intangible assets under generally accepted accounting principles. These assets include, but are not limited to, goodwill, core deposit premiums, purchased credit card relationships, favorable leaseholds, and servicing assets (mortgage and non-mortgage). Interest-only strips receivable and other nonsecurity financial instruments are not intangible assets under this definition.

*Interest-rate contracts.* The term *interest-rate contracts* includes single currency interest-rate swaps; basis swaps; forward rate agreements; interest-rate options purchased; forward deposits accepted; and any other instrument that, in the opinion of the FDIC, may give rise to similar risks, including when-issued securities.

*Liquidity facility.* The term *liquidity facility* means a legally binding commitment to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper.

*Mortgage-related securities.* The term *mortgage-related securities* means any mortgage-related qualifying securities under section 3(a)(41) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(41), *Provided,* That the rating requirements of that section shall not be considered for purposes of this definition.

*Nationally recognized statistical rating organization (NRSRO).* The term *nationally recognized statistical rating organization* means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers.

*OECD-based country.* The term *OECD-based country* means a member of that grouping of countries that are full members of the Organization for Economic Cooperation and Development (OECD) plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. This term excludes any country that has rescheduled its external sovereign debt within the previous five years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

*Original maturity.* The term *original maturity* means, with respect to a commitment, the earliest date after a commitment is made on which the commitment is scheduled to expire (*i.e.,* it will reach its stated maturity and cease to be binding on either party), *Provided,* That either:

(i) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(ii) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the customer at the time of the extension or renewal and upon a new, *bona fide* credit analysis utilizing current information on financial condition and trends.

*Performance-based standby letter of credit.* The term *performance-based standby letter of credit* means any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by a third party in the performance of a nonfinancial or commercial obligation. Such letters of credit include arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

*Perpetual preferred stock.* The term *perpetual preferred stock* means preferred stock without a fixed maturity date that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. For purposes of these instruments, preferred stock that can be redeemed at the option of the holder is deemed to have an ''original maturity'' of the earliest possible date on which it may be so redeemed. Cumulative perpetual preferred stock is preferred stock where the dividends accumulate from one period to the next. Noncumulative perpetual preferred stock is preferred stock where the unpaid dividends are not carried over to subsequent dividend periods.

*Problem institution.* The term *problem institution* means a State savings association that, at the time of its acquisition, merger, purchase of assets or other business combination with or by another State savings association:

(1) Was subject to special regulatory controls by its primary Federal or state regulatory authority;

(2) Posed particular supervisory concerns to its primary Federal or state regulatory authority; or

(3) Failed to meet its regulatory capital requirement immediately before the transaction.

*Prorated assets.* The term *prorated assets* means the total assets (as determined in the most recently available GAAP report but in no event more than one year old) of a subsidiary (including those subsidiaries where the State savings association has a minority interest) multiplied by the State savings association's percentage of ownership of that subsidiary.

*Qualifying mortgage loan.* (1) The term *qualifying mortgage loan* means a loan that:

(i) Is fully secured by a first lien on a one-to four-family residential property;

(ii) Is underwritten in accordance with prudent underwriting standards, including standards relating the ratio of the loan amount to the value of the property (LTV ratio). See Appendix to 12 CFR 390.265. A nonqualifying mortgage loan that is paid down to an appropriate LTV ratio (calculated using value at origination) may become a qualifying loan if it meets all other requirements of this definition;

(iii) Maintains an appropriate LTV ratio based on the amortized principal balance of the loan; and

(iv) Is performing and is not more than 90 days past due.

(2) If a State savings association holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the LTV ratio and the appropriate risk weight under § 390.466(a).

(3) A loan to an individual borrower for the construction of the borrower's home may be included as a qualifying mortgage loan.

(4) A loan that meets the requirements of this section prior to modification on a permanent or trial basis under the U.S. Department of Treasury's Home Affordable Mortgage Program may be included as a *qualifying mortgage loan,* so long as the loan is not 90 days or more past due.

*Qualifying multifamily mortgage loan.* (1) The term *qualifying multifamily mortgage loan* means a loan secured by a first lien on multifamily residential properties consisting of 5 or more dwelling units, provided that:

(i) The amortization of principal and interest occurs over a period of not more than 30 years;

(ii) The original minimum maturity for repayment of principal on the loan is not less than seven years;

(iii) When considering the loan for placement in a lower risk-weight category, all principal and interest payments have been made on a timely basis in accordance with its terms for the preceding year;

(iv) The loan is performing and not 90 days or more past due;

(v) The loan is made by the State savings association in accordance with prudent underwriting standards; and

(vi) If the interest rate on the loan does not change over the term of the loan:

(A) The current loan balance amount does not exceed 80 percent of the value of the property securing the loan; and

(B) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution; or

(vii) If the interest rate on the loan changes over the term of the loan:

(A) The current loan balance amount does not exceed 75 percent of the value of the property securing the loan; and

(B) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution.

(2) The term *qualifying multifamily mortgage loan* also includes a multifamily mortgage loan that on March 18, 1994 was a first mortgage loan on an existing property consisting of 5–36 dwelling units with an initial loan-to-value ratio of not more than 80% where an average annual occupancy rate of 80% or more of total units had existed for at least one year, and continues to meet these criteria.

(3) For purposes of paragraphs (1)(vi) and (vii) of this definition, the term

*value of the property* means, at origination of a loan to purchase a multifamily property: the lower of the purchase price or the amount of the initial appraisal, or if appropriate, the initial evaluation. In cases not involving the purchase of a multifamily loan, the *value of the property* is determined by the most current appraisal, or if appropriate, the most current evaluation.

(4) In cases where a borrower refinances a loan on an existing property, as an alternative to paragraphs (1)(iii), (vi), and (vii) of this definition:

(i) All principal and interest payments on the loan being refinanced have been made on a timely basis in accordance with the terms of that loan for the preceding year; and

(ii) The net income on the property for the preceding year would support timely principal and interest payments on the new loan in accordance with the applicable debt service requirement.

*Qualifying residential construction loan.* (1) The term *qualifying residential construction loan,* also referred to as a residential bridge loan, means a loan made in accordance with sound lending principles satisfying the following criteria:

(i) The builder must have substantial project equity in the home construction project;

(ii) The residence being constructed must be a 1–4 family residence sold to a home purchaser;

(iii) The lending State savings association must obtain sufficient documentation from a permanent lender (which may be the construction lender) demonstrating that:

(A) The home buyer intends to purchase the residence; and

(B) Has the ability to obtain a permanent qualifying mortgage loan sufficient to purchase the residence;

(iv) The home purchaser must have made a substantial earnest money deposit;

(v) The construction loan must not exceed 80 percent of the sales price of the residence;

(vi) The construction loan must be secured by a first lien on the lot, residence under construction, and other improvements;

(vii) The lending State savings association must retain sufficient undisbursed loan funds throughout the construction period to ensure project completion;

(viii) The builder must incur a significant percentage of direct costs (*i.e.,* the actual costs of land, labor, and material) before any drawdown on the loan;

(ix) If at any time during the life of the construction loan any of the criteria of this rule are no longer satisfied, the State savings association must immediately recategorize the loan at a 100 percent risk-weight and must accurately report the loan in the State savings association's next quarterly Thrift Financial Report or Consolidated Reports of Condition or Income (''Call Report''), as applicable;

(x) The home purchaser must intend that the home will be owner-occupied;

(xi) The home purchaser(s) must be an individual(s), not a partnership, joint venture, trust corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing the home(s) for speculative purposes; and

(xii) The loan must be performing and not more than 90 days past due.

(2) The documentation for each loan and home sale must be sufficient to demonstrate compliance with the criteria in paragraph (1) of this definition. The FDIC retains the discretion to determine that any loans not meeting sound lending principles must be placed in a higher risk-weight category. The FDIC also reserves the discretion to modify these criteria on a case-by-case basis provided that any such modifications are not inconsistent with the safety and soundness objectives of this definition.

*Qualifying securities firm.* The term *qualifying securities firm* means:

(1) A securities firm incorporated in the United States that is a broker-dealer that is registered with the Securities and Exchange Commission (SEC) and that complies with the SEC's net capital regulations (17 CFR 240.15c3(1)); and

(2) A securities firm incorporated in any other OECD-based country, if the State savings association is able to demonstrate that the securities firm is subject to consolidated supervision and regulation (covering its subsidiaries, but not necessarily its parent organizations) comparable to that imposed on depository institutions in OECD countries. Such regulation must include risk-based capital requirements comparable to those imposed on depository institutions under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998).

*Reciprocal holdings of depository institution instruments.* The term *reciprocal holdings of depository institution instruments* means cross-holdings or other formal or informal arrangements in which two or more depository institutions swap, exchange, or otherwise agree to hold each other's capital instruments. This definition does not include holdings of capital instruments issued by other depository institutions that were taken in satisfaction of debts previously contracted, provided that the reporting State savings association has not held such instruments for more than five years or a longer period approved by the FDIC.

*Recourse.* The term *recourse* means a State savings association's retention, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with generally accepted accounting principles) that exceeds a *pro rata* share of that State savings association's claim on the asset. If a State savings association has no claim on an asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when a State savings association transfers assets in a sale and retains an explicit obligation to repurchase assets or to absorb losses due to a default on the payment of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may also exist implicitly if a State savings association provides credit enhancement beyond any contractual obligation to support assets it has sold. Recourse obligations include:

(1) Credit-enhancing representations and warranties made on transferred assets;

(2) Loan servicing assets retained pursuant to an agreement under which the State savings association will be responsible for losses associated with the loans serviced. Servicer cash advances as defined in this section are not recourse obligations;

(3) Retained subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(5) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(6) Credit derivatives that absorb more than the State savings association's pro rata share of losses from the transferred assets;

(7) Clean-up calls on assets the State savings association has sold. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the State savings association are not recourse arrangements; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

*Replacement cost.* The term *replacement cost* means, with respect to interest rate and exchange-rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. This mark-to-market process must incorporate changes in both interest rates and counterparty credit quality.

*Residential properties.* The term *residential properties* means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

*Residual characteristics.* The term *residual characteristics* means interests similar to a multi-class pay-through obligation representing the excess cash flow generated from mortgage collateral over the amount required for the issue's debt service and ongoing administrative expenses or interests presenting similar degrees of interest-rate/prepayment risk and principal loss risks.

*Residual interest.* (1) The term *residual interest* means any on-balance sheet asset that:

(i) Represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with generally accepted accounting principles) of financial assets, whether through a securitization or otherwise; and

(ii) Exposes a State savings association to credit risk directly or indirectly associated with the transferred asset that exceeds a *pro rata* share of that State savings association's claim on the asset, whether through subordination provisions or other credit enhancement techniques.

(2) Residual interests generally include credit-enhancing interest-only strips, spread accounts, cash collateral accounts, retained subordinated interests (and other forms of overcollateralization), and similar assets that function as a credit enhancement.

(3) Residual interests further include those exposures that, in substance, cause the State savings association to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold.

(4) Residual interests generally do not include assets purchased from a third party. However, a credit-enhancing interest-only strip that is acquired in any asset transfer is a residual interest.

*Risk participation.* The term *risk participation* means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (*e.g.,* a direct credit substitute), notwithstanding that another party has acquired a participation in that obligation.

*Risk-weighted assets.* The term *risk-weighted assets* means the sum total of risk-weighted on-balance sheet assets and the total of risk-weighted off-balance sheet credit equivalent amounts. These assets are calculated in accordance with § 390.466.

*Securitization.* The term *securitization* means the pooling and repackaging by a special purpose entity of assets or other credit exposures that can be sold to investors. *Securitization* includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

*Servicer cash advance.* The term *servicer cash advance* means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A servicer cash advance is not a recourse obligation or a direct credit substitute if:

(1) The servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(2) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal amount on that loan.

*State.* The term *State* means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

*Structured financing program.* The term *structured financing program* means a program where receivable interests and asset- or mortgage-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured financing programs allocate credit risk, generally, between the participants and credit enhancement provided to the program.

*Subsidiary.* The term *subsidiary* means any corporation, partnership, business trust, joint venture, association or similar organization in which a State savings association directly or indirectly holds an ownership interest and the assets of which are consolidated with those of the State savings association for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, these are majority-owned subsidiaries.[1] This definition does not include ownership interests that were taken in satisfaction of debts previously contracted, provided that the reporting State savings association has not held the interest for more than five years or a longer period approved by the FDIC.

*Tier 1 capital.* The term *Tier 1 capital* means core capital as computed in accordance with § 390.465(a).

*Tier 2 capital.* The term *Tier 2 capital* means supplementary capital as computed in accordance with § 390.465.

*Total assets.* The term *total assets* means total assets as would be required to be reported for consolidated entities on period-end reports filed with the FDIC in accordance with generally accepted accounting principles.

*Traded position.* The term *traded position* means a position retained, assumed, or issued in connection with a securitization that is rated by a NRSRO, where there is a reasonable expectation that, in the near future, the rating will be relied upon by:

(1) Unaffiliated investors to purchase the security; or

(2) An unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

*Unconditionally cancelable.* The term *unconditionally cancelable* means, with respect to a commitment-type lending arrangement, that the State savings association may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit, the State savings association is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

*United States Government or its agencies.* The term *United States Government or its agencies* means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

[1] The FDIC reserves the right to review a State savings association's investment in a subsidiary on a case-by-case basis. If the FDIC determines that such investment is more appropriately treated as an equity security or an ownership interest in a subsidiary, it will make such determination regardless of the percentage of ownership held by the State savings association.

*United States Government-sponsored agency or corporation.* The term *United States Government-sponsored agency or corporation* means an agency or corporation originally established or chartered to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

**§ 390.462 Minimum regulatory capital requirement.**

(a) To meet its regulatory capital requirement a State savings association must satisfy each of the following capital standards:

(1) *Risk-based capital requirement.* (i) A State savings association's minimum risk-based capital requirement shall be an amount equal to 8% of its risk-weighted assets as measured under § 390.466.

(ii) A State savings association may not use supplementary capital to satisfy this requirement in an amount greater than 100% of its core capital as defined in § 390.465.

(2) *Leverage ratio requirement.* (i) A State savings association's minimum leverage ratio requirement shall be the amount set forth in § 390.467.

(ii) A State savings association must satisfy this requirement with core capital as defined in § 390.465(a).

(3) *Tangible capital requirement.* (i) A State savings association's minimum tangible capital requirement shall be the amount set forth in § 390.468.

(ii) A State savings association must satisfy this requirement with tangible capital as defined in § 390.468 in an amount not less than 1.5% of its adjusted total assets.

(b) [Reserved]

(c) State savings associations are expected to maintain compliance with all of these standards at all times.

**§ 390.463 Individual minimum capital requirements.**

(a) *Purpose and scope.* The rules and procedures specified in this section apply to the establishment of an individual minimum capital requirement for a State savings association that varies from the risk-based capital requirement, the leverage ratio requirement or the tangible capital requirement that would otherwise apply to the State savings association under this subpart.

(b) *Appropriate considerations for establishing individual minimum capital requirements.* Minimum capital levels higher than the risk-based capital requirement, the leverage ratio requirement or the tangible capital requirement required under this subpart may be appropriate for individual State savings associations. Increased individual minimum capital requirements may be established upon a determination that the State savings association's capital is or may become inadequate in view of its circumstances. For example, higher capital levels may be appropriate for:

(1) A State savings association receiving special supervisory attention;

(2) A State savings association that has or is expected to have losses resulting in capital inadequacy;

(3) A State savings association that has a high degree of exposure to interest rate risk, prepayment risk, credit risk, concentration of credit risk, certain risks arising from nontraditional activities, or similar risks; or a high proportion of off-balance sheet risk, especially standby letters of credit;

(4) A State savings association that has poor liquidity or cash flow;

(5) A State savings association growing, either internally or through acquisitions, at such a rate that supervisory problems are presented that are not dealt with adequately by other FDIC regulations or other guidance;

(6) A State savings association that may be adversely affected by the activities or condition of its holding company, affiliate(s), subsidiaries, or other persons or State savings associations with which it has significant business relationships, including concentrations of credit;

(7) A State savings association with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or that has loans in nonperforming status or on which borrowers fail to comply with repayment terms;

(8) A State savings association that has inadequate underwriting policies, standards, or procedures for its loans and investments; or

(9) A State savings association that has a record of operational losses that exceeds the average of other, similarly situated State savings associations; has management deficiencies, including failure to adequately monitor and control financial and operating risks, particularly the risks presented by concentrations of credit and nontraditional activities; or has a poor record of supervisory compliance.

(c) *Standards for determination of appropriate individual minimum capital requirements.* The appropriate minimum capital level for an individual State savings association cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based, in part, on subjective judgment grounded in agency expertise. The factors to be considered in the determination will vary in each case and may include, for example:

(1) The conditions or circumstances leading to the determination that a higher minimum capital requirement is appropriate or necessary for the State savings association;

(2) The exigency of those circumstances or potential problems;

(3) The overall condition, management strength, and future prospects of the State savings association and, if applicable, its holding company, subsidiaries, and affiliates;

(4) The State savings association's liquidity, capital and other indicators of financial stability, particularly as compared with those of similarly situated State savings associations; and

(5) The policies and practices of the State savings association's directors, officers, and senior management as well as the internal control and internal audit systems for implementation of such adopted policies and practices.

(d) *Procedures*—(1) *Notification.* When the FDIC determines that a minimum capital requirement is necessary or appropriate for a particular State savings association, it shall notify the State savings association in writing of its proposed individual minimum capital requirement; the schedule for compliance with the new requirement; and the specific causes for determining that the higher individual minimum capital requirement is necessary or appropriate for the State savings association. The FDIC shall forward the notifying letter to the appropriate state supervisor if a state-chartered savings association would be subject to an individual minimum capital requirement.

(2) *Response.* (i) The response shall include any information that the State savings association wants the FDIC to consider in deciding whether to establish or to amend an individual minimum capital requirement for the State savings association, what the individual capital requirement should be, and, if applicable, what compliance schedule is appropriate for achieving the required capital level. The responses of the State savings association and appropriate state supervisor must be in writing and must be delivered to the FDIC within 30 days after the date on which the notification was received. Such response must be filed in accordance with §§ 390.106 and 390.108. The FDIC may extend the time period for good cause. The time period for response by the insured State savings association may be shortened for good cause:

(A) When, in the opinion of the FDIC, the condition of the State savings association so requires, and the FDIC informs the State savings association of the shortened response period in the notice;

(B) With the consent of the State savings association; or

(C) When the State savings association already has advised the FDIC that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days, or such other time period as may be specified by the FDIC, may constitute a waiver of any objections to the proposed individual minimum capital requirement or to the schedule for complying with it, unless the FDIC has provided an extension of the response period for good cause.

(3) *Decision.* After expiration of the response period, the FDIC shall decide whether or not it believes the proposed individual minimum capital requirement should be established for the State savings association, or whether that proposed requirement should be adopted in modified form, based on a review of the State savings association's response and other relevant information. The FDIC's decision shall address comments received within the response period from the State savings association and the appropriate state supervisor and shall state the level of capital required, the schedule for compliance with this requirement, and any specific remedial action the State savings association could take to eliminate the need for continued applicability of the individual minimum capital requirement. The FDIC shall provide the State savings association and the appropriate state supervisor with a written decision on the individual minimum capital requirement, addressing the substantive comments made by the State savings association and setting forth the decision and the basis for that decision. Upon receipt of this decision by the State savings association, the individual minimum capital requirement becomes effective and binding upon the State savings association. This decision represents final agency action.

(4) *Failure to comply.* Failure to satisfy an individual minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individual minimum capital requirement, shall constitute a legal basis for issuing a capital directive pursuant to § 390.464.

(5) *Change in circumstances.* If, after a decision is made under paragraph (d)(3) of this section, there is a change in the circumstances affecting the State savings association's capital adequacy or its ability to reach its required minimum capital level by the specified date, FDIC may amend the individual minimum capital requirement or the State savings association's schedule for such compliance. The FDIC may decline to consider a State savings association's request for such changes that are not based on a significant change in circumstances or that are repetitive or frivolous. Pending the FDIC's reexamination of the original decision, that original decision and any compliance schedule established thereunder shall continue in full force and effect.

**§ 390.464 Capital directives.**

(a) *Issuance of a Capital Directive*—(1) *Purpose.* In addition to any other action authorized by law, the FDIC, may issue a capital directive to a State savings association that does not have an amount of capital satisfying its minimum capital requirement. Issuance of such a capital directive may be based on a State savings association's noncompliance with the risk-based capital requirement, the leverage ratio requirement, the tangible capital requirement, or individual minimum capital requirement established under this subpart, by a written agreement under 12 U.S.C. 1464(s), or as a condition for approval of an application. A capital directive may order a State savings association to:

(i) Achieve its minimum capital requirement by a specified date;

(ii) Adhere to the compliance schedule for achieving its individual minimum capital requirement;

(iii) Submit and adhere to a capital plan acceptable to the FDIC describing the means and a time schedule by which the State savings association shall reach its required capital level;

(iv) Take other action, including but not limited to, reducing the State savings association's assets or its rate of liability growth, or imposing restrictions on the State savings association's payment of dividends, in order to cause the State savings association to reach its required capital level;

(v) Take any action authorized under § 390.469(e); or

(vi) Take a combination of any of these actions.

(2) *Enforcement of capital directive.* A capital directive issued under this section, including a plan submitted pursuant to a capital directive, is enforceable under 12 U.S.C. 1818 in the same manner and to the same extent as an effective and outstanding cease and desist order which has become final under 12 U.S.C. 1818.

(3) *Notice of intent to issue capital directive.* The FDIC will determine whether to initiate the process of issuing a capital directive. The FDIC will notify a State savings association in writing by registered mail of its intention to issue a capital directive. Since a state-chartered savings association is involved, the FDIC will also notify and solicit comment from the appropriate state supervisor. The notice will state:

(i) The reasons for issuance of the capital directive and

(ii) The proposed contents of the capital directive.

(3) *Response to notice of intent.* (i) A State savings association may respond to the notice of intent by submitting its own compliance plan, or may propose an alternative plan. The response should also include any information that the State savings association wishes the FDIC to consider in deciding whether to issue a capital directive. The appropriate state supervisor may also submit a response. These responses must be in writing and be delivered within 30 days after the receipt of the notices. Such responses must be filed in accordance with §§ 390.106 and 390.108. In its discretion, the FDIC may extend the time period for the response for good cause. The FDIC may, for good cause, shorten the 30-day time period for response by the insured State savings association:

(A) When, in the opinion of the FDIC, the condition of the State savings association so requires, and the FDIC informs the State savings association of the shortened response period in the notice;

(B) With the consent of the State savings association; or

(C) When the State savings association already has advised the FDIC that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days of receipt, or such other time period as may be specified by the FDIC, may constitute a waiver of any objections to the capital directive unless the FDIC grants an extension of the time period for good cause.

(4) *Decision.* After the closing date of the State savings association's response period, or upon receipt of the State savings association's response, if earlier, the FDIC shall consider the State savings association's response and may seek additional information or clarification of the response. Thereafter, the FDIC will determine whether or not to issue a capital directive and, if one is to be issued, whether it should be as originally proposed or in modified form.

(5) *Service and effectiveness.* (i) Upon issuance, a capital directive will be served upon the State savings association. It will include or be accompanied by a statement of reasons for its issuance and shall address the responses received during the response period.

(ii) A capital directive shall become effective upon the expiration of 30 days after service upon the State savings association, unless the FDIC determines that a shorter effective period is necessary either on account of the public interest or in order to achieve the capital directive's purpose. If the State savings association has consented to issuance of the capital directive, it may become effective immediately. A capital directive shall remain in effect and enforceable unless, and then only to the extent that, it is stayed, modified, or terminated by the FDIC.

(6) *Change in circumstances.* Upon a change in circumstances, a State savings association may submit a request to the FDIC to reconsider the terms of the capital directive or consider changes in the State savings association's capital plan issued under a directive for the State savings association to achieve its minimum capital requirement. If the FDIC believes such a change is warranted, the FDIC may modify the State savings association's capital requirement or may refuse to make such modification if it determines that there are not significant changes in circumstances. Pending a decision on reconsideration, the capital directive and capital plan shall continue in full force and effect.

(b) *Relation to other administrative actions.* The FDIC—

(1) May consider a State savings association's progress in adhering to any capital plan required under this section whenever such State savings association or any affiliate of such State savings association seeks approval for any proposal that would have the effect of diverting earnings, diminishing capital, or otherwise impeding such State savings association's progress in meeting its minimum capital requirement; and

(2) May disapprove any proposal referred to in paragraph (b)(1) of this section if the FDIC determines that the proposal would adversely affect the ability of the State savings association on a current or pro forma basis to satisfy its capital requirement.

**§ 390.465 Components of capital.**

(a) *Core Capital.* (1) The following elements,[1] less the amount of any deductions pursuant to paragraph (a)(2) of this section, comprise a State savings association' s core capital:

(i) Common stockholders' equity (including retained earnings);

(ii) Noncumulative perpetual preferred stock and related surplus; [2]

(iii) Minority interests in the equity accounts of the subsidiaries that are fully consolidated.

(iv) Nonwithdrawable accounts and pledged deposits of mutual State savings associations (excluding any treasury shares held by the State savings association) meeting the criteria of regulations and memoranda of the FDIC to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods;

(2) *Deductions from core capital.* (i) Intangible assets, as defined in § 390.461, are deducted from assets and capital in computing core capital, except as otherwise provided by § 390.471.

(ii) Servicing assets that are not includable in core capital pursuant to § 390.471 are deducted from assets and capital in computing core capital.

(iii) Credit-enhancing interest-only strips that are not includable in core capital under § 390.471 are deducted from assets and capital in computing core capital.

(iv) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the State savings association has a minority ownership interest) are deducted from assets and, thus core capital except as provided in paragraphs (a)(2)(v) and (vi) of this section.

(v) If a State savings association has any investments (both debt and equity) in one or more subsidiaries engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with this paragraph (a)(2)(v). The State savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the State savings association as of April 12, 1989. Next the State savings association must deduct from assets and, thus, core capital, the State savings association's investments in and extensions of credit to the subsidiary on the date as of which the State savings association's capital is being determined.

(vi) If a State savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the FDIC may, in its sole discretion upon determining that the amount of core capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent State savings association than the amount that would be required if the parent State savings association's investment were deducted pursuant to paragraphs (a)(2)(iv) and (v) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent State savings association in calculating the capital adequacy of the parent State savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in § 390.461.

(vii) Deferred tax assets that are not includable in core capital pursuant to § 390.471 are deducted from assets and capital in computing core capital.

(b) *Supplementary Capital.* Supplementary capital counts towards a State savings association's total capital up to a maximum of 100% of the State savings association's core capital. The following elements comprise a State savings association's supplementary capital:

(1) *Permanent Capital Instruments.* (i) Cumulative perpetual preferred stock and other perpetual preferred stock [3]

[1] Stock issues where the dividend is reset periodically based on current market conditions and the State savings association's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics.

[2] Stock issued by subsidiaries that may not be counted by the parent State savings association on the Thrift Financial Report or Consolidated Reports of Condition or Income (''Call Report''), as applicable, likewise shall not be considered in calculating capital. For example, preferred stock issued by a State savings association or a subsidiary that is, in effect, collateralized by assets of the State savings association or one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital.

[3] Preferred stock issued by subsidiaries that may not be counted by the parent State savings association on the Thrift Financial Report or Consolidated Reports of Condition or Income (''Call Report''), as applicable, likewise may not be considered in calculating capital. Preferred stock issued by a State savings association or a subsidiary that is, in effect, collateralized by assets of the State savings association or one of its subsidiaries may not be included in capital.

issued pursuant to regulations and memoranda of the FDIC;

(ii) [Reserved]

(iii) Nonwithdrawable accounts and pledged deposits (excluding any treasury shares held by the State savings association) meeting the criteria of 12 CFR 390.307 to the extent that such instruments are not included in core capital under paragraph (a) of this section;

(iv) Perpetual subordinated debt issued pursuant to regulations and memoranda of the FDIC; and

(v) Mandatory convertible subordinated debt (capital notes) issued pursuant to regulations and memoranda of the FDIC.

(2) *Maturing Capital Instruments.* (i) Subordinated debt issued pursuant to regulations and memoranda of the FDIC;

(ii) Intermediate-term preferred stock issued pursuant to regulations and memoranda of the FDIC and any related surplus:

(iii) Mandatory convertible subordinated debt (commitment notes) issued pursuant to regulations and memoranda of the FDIC; and

(iv) Mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Office of Thrift Supervision and approved in writing by the FSLIC for inclusion as regulatory capital before or after issuance.

(3) *Transition rules for maturing capital instruments*—A State savings association may include maturing capital instruments issued on or before November 7, 1989, in supplementary capital in accordance with the treatment set forth in paragraph (b)(3)(ii) of this section.

(A) At the beginning of each of the last five years of the life of the maturing capital instrument, the amount that is eligible to be included as supplementary capital is reduced by 20% of the original amount of that instrument (net of redemptions).[4]

(B) Only the aggregate amount of maturing capital instruments that mature in any one year during the seven years immediately prior to an instrument's maturity that does not exceed 20% of an institution's capital will qualify as supplementary capital.

(C) Once a State savings association selects either paragraph (b)(3)(ii)(A) or (B) of this section for the issuance of a maturing capital instrument, it must continue to elect that option for all subsequent issuances of maturing capital instruments for as long as there is a balance outstanding of such post-November 7, 1989, issuances. Only when such issuances have all been repaid and the State savings association has no balance of such issuances outstanding may the State savings association elect the other option.

(4) *Allowance for loan and lease losses.* Allowance for loan and lease losses established under FDIC regulations and memoranda to a maximum of 1.25 percent of risk-weighted assets.[5]

(5) *Unrealized gains on equity securities.* Up to 45 percent of unrealized gains on available-for-sale equity securities with readily determinable fair values may be included in supplementary capital. Unrealized gains are unrealized holding gains, net of unrealized holding losses, before income taxes, calculated as the amount, if any, by which fair value exceeds historical cost. The FDIC may disallow such inclusion in the calculation of supplementary capital if the FDIC determines that the equity securities are not prudently valued.

(c) *Total capital.* (1) A State savings association's total capital equals the sum of its core capital and supplementary capital (to the extent that such supplementary capital does not exceed 100% of its core capital).

(2) The following assets, in addition to assets required to be deducted elsewhere in calculating core capital, are deducted from assets for purposes of determining total capital:

(i) Reciprocal holdings of depository institution capital instruments; and

(ii) All equity investments.

### § 390.466 Risk-based capital credit risk-weight categories.

(a) *Risk-weighted assets.* Risk-weighted assets equal risk-weighted on-balance sheet assets (computed under paragraph (a)(1) of this section), plus risk-weighted off-balance sheet activities (computed under paragraph (a)(2) of this section), plus risk-weighted recourse obligations, direct credit substitutes, and certain other positions (computed under paragraph (b) of this section). Assets not included (*i.e.,* deducted from capital) for purposes of calculating capital under § 390.465 are not included in calculating risk-weighted assets.

(1) *On-balance sheet assets.* Except as provided in paragraph (b) of this section, risk-weighted on-balance sheet assets are computed by multiplying the on-balance sheet asset amounts times the appropriate risk-weight categories. The risk-weight categories are:

(i) *Zero percent Risk Weight (Category 1).* (A) Cash, including domestic and foreign currency owned and held in all offices of a State savings association or in transit. Any foreign currency held by a State savings association must be converted into U.S. dollar equivalents;

(B) Securities issued by and other direct claims on the U.S. Government or its agencies (to the extent such securities or claims are unconditionally backed by the full faith and credit of the United States Government) or the central government of an OECD country;

(C) Notes and obligations issued by either the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation and backed by the full faith and credit of the United States Government;

(D) Deposit reserves at, claims on, and balances due from Federal Reserve Banks;

(E) The book value of paid-in Federal Reserve Bank stock;

(F) That portion of assets that is fully covered against capital loss and/or yield maintenance agreements by the Federal Savings and Loan Insurance Corporation or any successor agency;

(G) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country;

(H) Claims on, and claims guaranteed by, a qualifying securities firm that are collateralized by cash on deposit in the State savings association or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country. To be eligible for this risk weight, the State savings association must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a State savings association's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

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[4] Capital instruments may be redeemed prior to maturity and without the prior approval of the FDIC, as long as the instruments are redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument. However, the FDIC must be notified in writing at least 30 days in advance of such redemption.

[5] The amount of the allowance for loan and lease losses that may be included in capital is based on a percentage of risk-weighted assets. The gross sum of risk-weighted assets used in this calculation includes all risk-weighted assets, with the exception of assets required to be deducted under § 390.466 in establishing risk-weighted assets. "Excess reserves for loan and lease losses" is defined as assets required to be deducted from capital under § 390.465(a)(2). A State savings association may deduct excess reserves for loan and lease losses from the gross sum of risk-weighted assets (*i.e.,* risk-weighted assets including allowance for loan and lease losses) in computing the denominator of the risk-based capital standard. Thus, a State savings association will exclude the same amount of excess allowance for loan and lease losses from both the numerator and the denominator of the risk-based capital ratio.

(ii) *20 percent Risk Weight (Category 2).* (A) Cash items in the process of collection;

(B) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States government or its agencies, or the central government of an OECD country;

(C) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country;

(D) Securities (not including equity securities) issued by and other claims on the U.S. Government or its agencies which are not backed by the full faith and credit of the United States Government;

(E) Securities (not including equity securities) issued by, or other direct claims on, United States Government-sponsored agencies;

(F) That portion of assets guaranteed by United States Government-sponsored agencies;

(G) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(H) Claims on, and claims guaranteed by, a qualifying securities firm, subject to the following conditions:

(*1*) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the State savings association must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(*2*) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (a)(1)(ii)(H)(*1*) of this section if the claim arises under a contract that:

(*i*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*ii*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*iii*) Is marked-to-market daily;

(*iv*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*v*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(*3*) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk weight under this paragraph (a)(1)(ii)(H);

(I) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;

(J) Bonds issued by the Financing Corporation or the Resolution Funding Corporation;

(K) Balances due from and all claims on domestic depository institutions. This includes demand deposits and other transaction accounts, savings deposits and time certificates of deposit, federal funds sold, loans to other depository institutions, including overdrafts and term federal funds, holdings of the State savings association's own discounted acceptances for which the account party is a depository institution, holdings of bankers acceptances of other institutions and securities issued by depository institutions, except those that qualify as capital;

(L) The book value of paid-in Federal Home Loan Bank stock;

(M) Deposit reserves at, claims on and balances due from the Federal Home Loan Banks;

(N) Assets collateralized by cash held in a segregated deposit account by the reporting State savings association;

(O) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member; [1]

[1] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

(P) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member;

(Q) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category;

(R) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less;

(S) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the State savings association has local currency liabilities in that country.

(iii) *50 percent Risk Weight (Category 3).* (A) Revenue bonds issued by any public-sector entity in an OECD country for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;

(B) Qualifying mortgage loans and qualifying multifamily mortgage loans;

(C) Privately-issued mortgage-backed securities (*i.e.,* those that do not carry the guarantee of a government or government sponsored entity) representing an interest in qualifying mortgage loans or qualifying multifamily mortgage loans. If the security is backed by qualifying multifamily mortgage loans, the State savings association must receive timely payments of principal and interest in accordance with the terms of the security. Payments will generally be considered timely if they are not 30 days past due;

(D) Qualifying residential construction loans as defined in § 390.461.

(iv) *100 percent Risk Weight (Category 4).* All assets not specified above or deducted from calculations of capital pursuant to § 390.465, including, but not limited to:

(A) Consumer loans;

(B) Commercial loans;

(C) Home equity loans;

(D) Non-qualifying mortgage loans;

(E) Non-qualifying multifamily mortgage loans;

(F) Residential construction loans;

(G) Land loans;

(H) Nonresidential construction loans;

(I) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligations, *e.g.,* industrial development bonds;

(J) Debt securities not otherwise described in this section;

(K) Investments in fixed assets and premises;

(L) Certain nonsecurity financial instruments including servicing assets and intangible assets includable in core capital under § 390.471;

(M) Interest-only strips receivable, other than credit-enhancing interest-only strips;

(N)–(O) [Reserved]

(P) That portion of equity investments not deducted pursuant to § 390.465;

(Q) The prorated assets of subsidiaries (except for the assets of includable, fully consolidated subsidiaries) to the extent such assets are included in adjusted total assets;

(R) All repossessed assets or assets that are more than 90 days past due; and

(S) Equity investments that the FDIC determines have the same risk characteristics as foreclosed real estate by the State savings association;

(T) Equity investments permissible for a national bank.

(v) [Reserved]

(vi) *Indirect ownership interests in pools of assets.* Assets representing an indirect holding of a pool of assets, *e.g.,* mutual funds, are assigned to risk-weight categories under this section based upon the risk weight that would be assigned to the assets in the portfolio of the pool. An investment in shares of a mutual fund whose portfolio consists primarily of various securities or money market instruments that, if held separately, would be assigned to different risk-weight categories, generally is assigned to the risk-weight category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the investment objectives set forth in its prospectus. The State savings association may, at its option, assign the investment on a pro rata basis to different risk-weight categories according to the investment limits in its prospectus. In no case will an investment in shares in any such fund be assigned to a total risk weight less than 20 percent. If the State savings association chooses to assign investments on a pro rata basis, and the sum of the investment limits of assets in the fund's prospectus exceeds 100 percent, the State savings association must assign the highest pro rata amounts of its total investment to the higher risk categories. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally be disregarded in determining the risk-weight category into which the State savings association's holding in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk-weight category.

(2) *Off-balance sheet items.* Except as provided in paragraph (b) of this section, risk-weighted off-balance sheet items are determined by the following two-step process. First, the face amount of the off-balance sheet item must be multiplied by the appropriate credit conversion factor listed in this paragraph (a)(2). This calculation translates the face amount of an off-balance sheet exposure into an on-balance sheet credit-equivalent amount. Second, the credit-equivalent amount must be assigned to the appropriate risk-weight category using the criteria regarding obligors, guarantors, and collateral listed in paragraph (a)(1) of this section, *provided* that the maximum risk weight assigned to the credit-equivalent amount of an interest-rate or exchange-rate contract is 50 percent. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(i) *100 percent credit conversion factor (Group A).*

(A) [Reserved]

(B) Risk participations purchased in bankers' acceptances;

(C) [Reserved]

(D) Forward agreements and other contingent obligations with a certain draw down, *e.g.,* legally binding agreements to purchase assets at a specified future date. On the date an institution enters into a forward agreement or similar obligation, it should convert the principal amount of the assets to be purchased at 100 percent as of that date and then assign this amount to the risk-weight category appropriate to the obligor or guarantor of the item, or the nature of the collateral;

(E) Indemnification of customers whose securities the State savings association has lent as agent. If the customer is not indemnified against loss by the State savings association, the transaction is excluded from the risk-based capital calculation. When a State savings association lends its own securities, the transaction is treated as a loan. When a State savings association lends its own securities or is acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf.

(ii) *50 percent credit conversion factor (Group B).* (A) Transaction-related contingencies, including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction;

(B) Unused portions of commitments (including home equity lines of credit and eligible ABCP liquidity facilities) with an original maturity exceeding one year except those listed in paragraph (a)(2)(v) of this section. For eligible ABCP liquidity facilities, the resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph (b)(3) of this section, if applicable; and

(C) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the State savings association's customer can issue short-term debt obligations in its own name, but for which the State savings association has a legally binding commitment to either:

(*1*) Purchase the obligations the customer is unable to sell by a stated date; or

(*2*) Advance funds to its customer, if the obligations cannot be sold.

(iii) *20 percent credit conversion factor (Group C).* Trade-related contingencies, *i.e.,* short-term, self-liquidating instruments used to finance the movement of goods and collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(iv) *10 percent credit conversion factor (Group D).* Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph (b)(3) of this section, if applicable;

(v) *Zero percent credit conversion factor (Group E).* (A) Unused portions of commitments with an original maturity of one year or less, except for eligible ABCP liquidity facilities;

(B) Unused commitments with an original maturity greater than one year, if they are unconditionally cancelable at any time at the option of the State savings association and the State savings association has the contractual right to make, and in fact does make, either:

(*1*) A separate credit decision based upon the borrower's current financial condition before each drawing under the lending facility; or

(*2*) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(C) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the State savings association in accordance with applicable law.

(vi) *Off-balance sheet contracts; interest-rate and foreign exchange rate contracts (Group F)*—(A) *Calculation of credit equivalent amounts.* The credit equivalent amount of an off-balance sheet interest rate or foreign exchange rate contract that is not subject to a qualifying bilateral netting contract in accordance with paragraph (a)(2)(vi)(B) of this section is equal to the sum of the current credit exposure, *i.e.,* the replacement cost of the contract, and the potential future credit exposure of the off-balance sheet rate contract. The calculation of credit equivalent amounts is measured in U.S. dollars, regardless of the currency or currencies specified in the off-balance sheet rate contract.

(*1*) *Current credit exposure.* The current credit exposure of an off-balance sheet rate contract is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a State savings association may net positive and negative mark-to-market values of off-balance sheet rate contracts if subject to a bilateral netting contract as provided in paragraph (a)(2)(vi)(B) of this section.

(*2*) *Potential future credit exposure.* The potential future credit exposure of an off-balance sheet rate contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal [2] by a credit conversion factor. State savings associations, subject to examiner review, should use the effective rather than the apparent or stated notional amount in this calculation. The conversion factors are: [3]

| Remaining maturity | Interest rate contracts (percents) | Foreign exchange rate contracts (percents) |
|---|---|---|
| One year or less | 0.0 | 1.0 |
| Over one year ... | 0.5 | 5.0 |

(B) *Off-balance sheet rate contracts subject to bilateral netting contracts.* In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a State savings association may net off-balance sheet rate contracts subject to a bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(*1*) The bilateral netting contract is in writing;

(*2*) The bilateral netting contract creates a single legal obligation for all individual off-balance sheet rate contracts covered by the bilateral netting contract. In effect, the bilateral netting contract provides that the State savings association has a single claim or obligation either to receive or pay only the net amount of the sum of the positive and negative mark-to-market values on the individual off-balance sheet rate contracts covered by the bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the bilateral netting contract has been validly assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances;

(*3*) The State savings association obtains a written and reasoned legal opinion(s) representing, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the State savings association's exposure to be the net amount under:

(*i*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*ii*) The law that governs the individual off-balance sheet rate contracts covered by the bilateral netting contract; and

(*iii*) The law that governs the bilateral netting contract;

(*4*) The State savings association establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the bilateral netting contract continues to satisfy the requirements of this section; and

(*5*) The State savings association maintains in its files documentation adequate to support the netting of an off-balance sheet rate contract.[4]

(C) *Walkaway clause.* A bilateral netting contract that contains a walkaway clause is not eligible for netting for purposes of calculating the current credit exposure amount. The term ''walkaway clause'' means a provision in a bilateral netting contract

[2] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts, in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

[3] No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

[4] By netting individual off-balance sheet rate contracts for the purpose of calculating its credit equivalent amount, a State savings association represents that documentation adequate to support the netting of an off-balance sheet rate contract is in the State savings association's files and available for inspection by the FDIC. Upon determination by the FDIC that a State savings association's files are inadequate or that a bilateral netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (a)(2)(vi)(B)(3) (i) through (iii) of this section, the underlying individual off-balance sheet rate contracts may not be netted for the purposes of this section.

that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

(D) *Risk weighting.* Once the State savings association determines the credit equivalent amount for an off-balance sheet rate contract, that amount is assigned to the risk-weight category appropriate to the counterparty, or, if relevant, to the nature of any collateral or guarantee. Collateral held against a netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the netting contract. However, the maximum risk weight for the credit equivalent amount of such off-balance sheet rate contracts is 50 percent.

(E) *Exceptions.* The following off-balance sheet rate contracts are not subject to the above calculation, and therefore, are not part of the denominator of a State savings association's risk-based capital ratio:

(*1*) A foreign exchange rate contract with an original maturity of 14 calendar days or less; and

(*2*) Any interest rate or foreign exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(*3*) If a State savings association has multiple overlapping exposures (such as a program-wide credit enhancement and a liquidity facility) to an ABCP program that is not consolidated for risk-based capital purposes, the State savings association is not required to hold duplicative risk-based capital under this subpart against the overlapping position. Instead, the State savings association should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

(b) *Recourse obligations, direct credit substitutes, and certain other positions*—(1) *In general.* Except as otherwise permitted in this paragraph (b), to determine the risk-weighted asset amount for a recourse obligation or a direct credit substitute (but not a residual interest):

(i) Multiply the full amount of the credit-enhanced assets for which the State savings association directly or indirectly retains or assumes credit risk by a 100 percent conversion factor. (For a direct credit substitute that is an on-balance sheet asset (*e.g.,* a purchased subordinated security), a State savings association must use the amount of the direct credit substitute and the full amount of the asset its supports, *i.e.,* all the more senior positions in the structure); and

(ii) Assign this credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. Paragraph (a)(1) of this section lists the risk-weight categories.

(2) *Residual interests.* Except as otherwise permitted under this paragraph (b), a State savings association must maintain risk-based capital for residual interests as follows:

(i) *Credit-enhancing interest-only strips.* After applying the concentration limit under § 390.471(e)(2), a state saving association must maintain risk-based capital for a credit-enhancing interest-only strip equal to the remaining amount of the strip (net of any existing associated deferred tax liability), even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred credit-enhancing interest-only strip are treated as if the strip was retained by the State savings association and was not transferred.

(ii) *Other residual interests.* A state saving association must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest (net of any existing associated deferred tax liability), even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred residual interest are treated as if the residual interest was retained by the State savings association and was not transferred.

(iii) *Residual interests and other recourse obligations.* Where a State savings association holds a residual interest (including a credit-enhancing interest-only strip) and another recourse obligation in connection with the same transfer of assets, the State savings association must maintain risk-based capital equal to the greater of:

(A) The risk-based capital requirement for the residual interest as calculated under paragraph (b)(2)(i) and (ii) of this section; or

(B) The full risk-based capital requirement for the assets transferred, subject to the low-level recourse rules under paragraph (b)(7) of this section.

(3) *Ratings-based approach*—(i) *Calculation.* A State savings association may calculate the risk-weighted asset amount for an eligible position described in paragraph (b)(3)(ii) of this section by multiplying the face amount of the position by the appropriate risk weight determined in accordance with Table A or B of this section.

**Note:** Stripped mortgage-backed securities or other similar instruments, such as interest-only and principal-only strips, that are not credit enhancing must be assigned to the 100% risk-weight category.

TABLE A TO § 390.466

| Long term rating category | Risk weight (in percent) |
|---|---|
| Highest or second highest investment grade | 20 |
| Third highest investment grade | 50 |
| Lowest investment grade | 100 |
| One category below investment grade | 200 |

TABLE B TO § 390.466

| Short term rating category | Risk weight (in percent) |
|---|---|
| Highest investment grade | 20 |
| Second highest investment grade | 50 |
| Lowest investment grade | 100 |

(ii) *Eligibility*—(A) *Traded positions.* A position is eligible for the treatment described in paragraph (b)(3)(i) of this section, if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security and is not a credit-enhancing interest-only strip;

(*2*) The position is a traded position; and

(*3*) The NRSRO has rated a long term position as one grade below investment grade or better or a short term position as investment grade. If two or more NRSROs assign ratings to a traded position, the State savings association must use the lowest rating to determine the appropriate risk-weight category under paragraph (b)(3)(i) of this section.

(B) *Non-traded positions.* A position that is not traded is eligible for the treatment described in paragraph (b)(3)(i) of this section if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security extended in connection with a securitization and is not a credit-enhancing interest-only strip;

(*2*) More than one NRSRO rate the position;

(*3*) All of the NRSROs that provide a rating rate a long term position as one grade below investment grade or better or a short term position as investment grade. If the NRSROs assign different ratings to the position, the State savings association must use the lowest rating to determine the appropriate risk-weight category under paragraph (b)(3)(i) of this section;

(*4*) The NRSROs base their ratings on the same criteria that they use to rate securities that are traded positions; and

(*5*) The ratings are publicly available.

(C) *Unrated senior positions.* If a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security is not rated by an NRSRO, but is senior or preferred in all features to a traded position (including collateralization and maturity), the State savings association may risk-weight the face amount of the senior position under paragraph (b)(3)(i) of this section, based on the rating of the traded position, subject to supervisory guidance. The State savings association must satisfy FDIC that this treatment is appropriate. This paragraph (b)(3)(i)(C) applies only if the traded position provides substantive credit support to the unrated position until the unrated position matures.

(4) *Certain positions that are not rated by NRSROs*—(i) *Calculation.* A State savings association may calculate the risk-weighted asset amount for eligible position described in paragraph (b)(4)(ii) of this section based on the State savings association's determination of the credit rating of the position. To risk-weight the asset, the State savings association must multiply the face amount of the position by the appropriate risk weight determined in accordance with Table C of this section.

TABLE C TO § 390.466

| Rating category | Risk weight (in percent) |
|---|---|
| Investment grade | 100 |
| One category below investment grade | 200 |

(ii) *Eligibility.* A position extended in connection with a securitization is eligible for the treatment described in paragraph (b)(4)(i) of this section if it is not rated by an NRSRO, is not a residual interest, and meets one of the three alternative standards described in paragraph (b)(4)(ii)(A), (B), or (C) of this section:

(A) *Position rated internally.* A direct credit substitute, but not a purchased credit-enhancing interest-only strip, is eligible for the treatment described under paragraph (b)(4)(i) of this section, if the position is assumed in connection with an asset-backed commercial paper program sponsored by the State savings association. Before it may rely on an internal credit risk rating system, the state saving association must demonstrate to FDIC's satisfaction that the system is adequate. Adequate internal credit risk rating systems typically:

(*1*) Are an integral part of the State savings association's risk management system that explicitly incorporates the full range of risks arising from the State savings association's participation in securitization activities;

(*2*) Link internal credit ratings to measurable outcomes, such as the probability that the position will experience any loss, the expected loss on the position in the event of default, and the degree of variance in losses in the event of default on that position;

(*3*) Separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of the particular securitization transaction;

(*4*) Identify gradations of risk among ''pass'' assets and other risk positions;

(*5*) Use clear, explicit criteria to classify assets into each internal rating grade, including subjective factors;

(*6*) Employ independent credit risk management or loan review personnel to assign or review the credit risk ratings;

(*7*) Include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the State savings association's established criteria;

(*8*) Monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and

(*9*) Make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(B) *Program ratings.* (*1*) A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph (b)(4)(i) of this section, if the position is retained or assumed in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal or external credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the State savings association may apply the rating category applicable to the option that corresponds to the State savings association's position.

(*2*) To rely on a program rating, the State savings association must demonstrate to FDIC's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The State savings association must also demonstrate to FDIC's satisfaction that the criteria underlying the assignments for the program are satisfied by the particular position.

(*3*) If a State savings association participates in a securitization sponsored by another party, FDIC may authorize the State savings association to use this approach based on a program rating obtained by the sponsor of the program.

(C) *Computer program.* A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph (b)(4)(i) of this section, if the position is extended in connection with a structured financing program and the State savings association uses an acceptable credit assessment computer program to determine the rating of the position. An NRSRO must have developed the computer program and the State savings association must demonstrate to FDIC's satisfaction that the ratings under the program correspond credibly and reliably with the rating of traded positions.

(5) *Alternative capital computation for small business obligations*—(i) *Definitions.* For the purposes of this paragraph (b)(5):

(A) *Qualified State savings association* means a State savings association that:

(*1*) Is well capitalized as defined in § 390.453 without applying the capital treatment described in this paragraph (b)(5); or

(*2*) Is adequately capitalized as defined in § 390.453 without applying the capital treatment described in this paragraph (b)(5) and has received written permission from the FDIC to apply that capital treatment.

(B) *Small business* means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR 121 pursuant to 15 U.S.C. 632.

(ii) *Capital requirement.* Notwithstanding any other provision of this paragraph (b), with respect to a transfer of a small business loan or lease of personal property with recourse that is a sale under generally accepted accounting principles, a qualified State savings association may elect to include only the amount of its recourse in its risk-weighted assets. To qualify for this election, the State savings association must establish and maintain a reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the State savings association under the recourse obligation.

(iii) *Aggregate amount of recourse.* The total outstanding amount of recourse retained by a qualified State savings association with respect to transfers of small business loans and leases of personal property and included in the risk-weighted assets of the State savings association as described in paragraph (b)(5)(ii) of this section, may not exceed 15 percent of the association's total capital computed under § 390.465(c).

(iv) *State savings association that ceases to be a qualified State savings association or that exceeds aggregate limits.* If a State savings association ceases to be a qualified State savings association or exceeds the aggregate limit described in paragraph (b)(5)(iii) of this section, the State savings association may continue to apply the capital treatment described in paragraph (b)(5)(ii) of this section to transfers of small business loans and leases of personal property that occurred when the association was a qualified State savings association and did not exceed the limit.

(v) *Prompt corrective action not affected.* (A) A State savings association shall compute its capital without regard to this paragraph (b)(5) of this section for purposes of prompt corrective action (12 U.S.C. 1831o), unless the State savings association is adequately or well capitalized without applying the capital treatment described in this paragraph (b)(5) and would be well capitalized after applying that capital treatment.

(B) A State savings association shall compute its capital requirement without regard to this paragraph (b)(5) for the purposes of applying 12 U.S.C. 1831o(g), regardless of the association's capital level.

(6) *Risk participations and syndications of direct credit substitutes.* A State savings association must calculate the risk-weighted asset amount for a risk participation in, or syndication of, a direct credit substitute as follows:

(i) If a State savings association conveys a risk participation in a direct credit substitute, the State savings association must convert the full amount of the assets that are supported by the direct credit substitute to a credit equivalent amount using a 100 percent conversion factor. The State savings association must assign the *pro rata* share of the credit equivalent amount that was conveyed through the risk participation to the lower of: The risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral; or the risk-weight category appropriate to the party acquiring the participation. The State savings association must assign the *pro rata* share of the credit equivalent amount that was not participated out to the risk-weight category appropriate to the obligor, after considering any associated guarantees or collateral.

(ii) If a State savings association acquires a risk participation in a direct credit substitute, the State savings association must multiply its *pro rata* share of the direct credit substitute by the full amount of the assets that are supported by the direct credit substitute, and convert this amount to a credit equivalent amount using a 100 percent conversion factor. The State savings association must assign the resulting credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(iii) If the State savings association holds a direct credit substitute in the form of a syndication where each State savings association or other participant is obligated only for its *pro rata* share of the risk and there is no recourse to the originating party, the State savings association must calculate the credit equivalent amount by multiplying only its *pro rata* share of the assets supported by the direct credit substitute by a 100 percent conversion factor. The State savings association must assign the resulting credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction after considering any associated guarantees or collateral.

(7) *Limitations on risk-based capital requirements*—(i) *Low-level exposure rule.* If the maximum contractual exposure to loss retained or assumed by a State savings association is less than the effective risk-based capital requirement, as determined in accordance with this paragraph (b), for the assets supported by the State savings association's position, the risk-based capital requirement is limited to the State savings association's contractual exposure less any recourse liability account established in accordance with generally accepted accounting principles. This limitation does not apply when a State savings association provides credit enhancement beyond any contractual obligation to support assets it has sold.

(ii) *Mortgage-related securities or participation certificates retained in a mortgage loan swap.* If a State savings association holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, it must hold risk-based capital to support the recourse obligation and that percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of risk-based capital required for the security (or certificate) and the recourse obligation is limited to the risk-based capital requirement for the underlying loans, calculated as if the State savings association continued to hold these loans as an on-balance sheet asset.

(iii) *Related on-balance sheet assets.* If an asset is included in the calculation of the risk-based capital requirement under this paragraph (b) and also appears as an asset on the State savings association's balance sheet, the State savings association must risk-weight the asset only under this paragraph (b), except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the State savings association must separately risk-weight the on-balance sheet servicing asset and the related recourse obligations and direct credit substitutes under this section, and incorporate these amounts into the risk-based capital calculation.

(8) *Obligations of subsidiaries.* If a State savings association retains a recourse obligation or assumes a direct credit substitute on the obligation of a subsidiary that is not an includable subsidiary, and the recourse obligation or direct credit substitute is an equity or debt investment in that subsidiary under generally accepted accounting principles, the face amount of the recourse obligation or direct credit substitute is deducted for capital under §§ 390.465(a)(2) and 390.468(c). All other recourse obligations and direct credit substitutes retained or assumed by a State savings association on the obligations of an entity in which the State savings association has an equity investment are risk-weighted in accordance with this paragraph (b).

**§ 390.467 Leverage ratio.**

(a) The minimum leverage capital requirement for a State savings association assigned a composite rating of 1, as defined in this subpart, shall consist of a ratio of core capital to adjusted total assets of 3 percent. These generally are strong State savings associations that are not anticipating or experiencing significant growth and have well-diversified risks, including no undue interest rate risk exposure, excellent asset quality, high liquidity, and good earnings.

(b) For all State savings associations not meeting the conditions set forth in paragraph (a) of this section, the minimum leverage capital requirement shall consist of a ratio of core capital to adjusted total assets of 4 percent. Higher capital ratios may be required if warranted by the particular circumstances or risk profiles of an individual State savings association. In all cases, State savings associations should hold capital commensurate with the level and nature of all risks, including the volume and severity of problem loans, to which they are exposed.

**§ 390.468 Tangible capital requirement.**

(a) State savings associations shall have and maintain tangible capital in an amount equal to at least 1.5% of adjusted total assets.

(b) The following elements, less the amount of any deductions pursuant to paragraph (c) of this section, comprise a State savings association's tangible capital:

(1) Common stockholders' equity (including retained earnings);

(2) Noncumulative perpetual preferred stock and related earnings;

(3) Nonwithdrawable accounts and pledged deposits that would qualify as core capital under § 390.465; and

(4) Minority interests in the equity accounts of fully consolidated subsidiaries.

(c) *Deductions from tangible capital.* In calculating tangible capital, a State savings association must deduct from assets, and, thus, from capital:

(1) Intangible assets (as defined in § 390.461) except for mortgage servicing assets to the extent they are includable in tangible capital under § 390.471, and credit enhancing interest-only strips and deferred tax assets not includable in tangible capital under § 390.471.

(2) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the State savings association has a minority ownership interest), except as provided in paragraphs (c)(3) and (4) of this section.

(3) If a State savings association has any investments (both debt and equity) in one or more subsidiary(ies) engaged as of April 12, 1989, and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, tangible capital in accordance with this paragraph (c)(3). The State savings association must first deduct from assets and, thus, capital the amount by which any investments in such a subsidiary(ies) exceed the amount of such investments held by the State savings association as of April 12, 1989. Next, the State savings association must deduct from assets and, thus, tangible capital the lesser of:

(i) The State savings association's investments in and extensions of credit to the subsidiary as of April 12, 1989; or

(ii) The State savings association's investments in and extensions of credit to the subsidiary on the date as of which the State savings association's capital is being determined.

(4) If a State savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution the FDIC may, in its sole discretion upon determining that the amount of tangible capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent State savings association than the amount that would be required if the parent State savings association's investment were deducted pursuant to paragraphs (c)(2) and (3) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent State savings association in calculating the capital adequacy of the parent State savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in § 390.461.

**§ 390.469 Consequences of failure to meet capital requirements.**

(a) *Capital plans.* (1) [Reserved]

(2) The FDIC shall require any State savings association not in compliance with capital standards to submit a capital plan that:

(i) Addresses the State savings association's need for increased capital;

(ii) Describes the manner in which the State savings association will increase capital so as to achieve compliance with capital standards;

(iii) Specifies types and levels of activities in which the State savings association will engage;

(iv) Requires any increase in assets to be accompanied by increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(v) Requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(vi) Is acceptable to the FDIC.

(3) To be acceptable to the FDIC under this section, a plan must, in addition to satisfying all of the requirements set forth in paragraphs (a)(2)(i) through (v) of this section, contain a certification that while the plan is under review by the FDIC, the State savings association will not, without the prior written approval of the appropriate Regional Director:

(i) Grow beyond net interest credited;

(ii) Make any capital distributions; or

(iii) Act inconsistently with any other limitations on activities established by statute, regulation or by the FDIC in supervisory guidance for State savings associations not meeting capital standards.

(4) If the plan submitted to the FDIC under paragraph (a)(2) of this section is not approved by the FDIC, the State savings association shall immediately and without any further action, be subject to the following restrictions:

(i) It may not increase its assets beyond the amount held on the day it receives written notice of the FDIC's disapproval of the plan; and

(ii) It must comply with any other restrictions or limitations set forth in the written notice of the FDIC's disapproval of the plan.

(b) On or after January 1, 1991, the FDIC shall:

(1) Prohibit any asset growth by any State savings association not in compliance with capital standards, *except* as provided in paragraph (d) of this section; and

(2) Require any State savings association not in compliance with capital standards to comply with a capital directive issued by the FDIC which may include the restrictions contained in paragraph (e) of this section and any other restrictions the FDIC determines appropriate.

(c) A State savings association that wishes to obtain an exemption from the sanctions provided in paragraph (b)(2) of this section must file a request for exemption with the appropriate Regional Director. Such request must include a capital plan that satisfies the requirements of paragraph (a)(2) of this section.

(d) The FDIC may permit any State savings association that is subject to paragraph (b) of this section to increase its assets in an amount not exceeding the amount of net interest credited to the State savings association's deposit liabilities, if:

(1) The State savings association obtains the FDIC's prior approval;

(2) Any increase in assets is accompanied by an increase in tangible capital in an amount not less than 3% of the increase in assets;

(3) Any increase in assets is accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standards then applicable;

(4) Any increase in assets is invested in low-risk assets; and

(5) The State savings association's ratio of core capital to total assets is not less than the ratio existing on January 1, 1991.

(e) If a State savings association fails to meet the risk-based capital requirement, the leverage ratio requirement, or the tangible capital requirement established under this subpart, the FDIC may, through enforcement proceedings or otherwise, require such State savings association to take one or more of the following corrective actions:

(1) Increase the amount of its regulatory capital to a specified level or levels;

(2) Convene a meeting or meetings with the FDIC for the purpose of accomplishing the objectives of this section;

(3) Reduce the rate of earnings that may be paid on savings accounts;

(4) Limit the receipt of deposits to those made to existing accounts;

(5) Cease or limit the issuance of new accounts of any or all classes or categories, except in exchange for existing accounts;

(6) Cease or limit lending or the making of a particular type or category of loan;

(7) Cease or limit the purchase of loans or the making of specified other investments;

(8) Limit operational expenditures to specified levels;

(9) Increase liquid assets and maintain such increased liquidity at specified levels; or

(10) Take such other action or actions as the FDIC may deem necessary or appropriate for the safety and soundness of the State savings association, or depositors or investors in the State savings association.

(f) The FDIC shall treat as an unsafe and unsound practice any material failure by a State savings association to comply with any plan, regulation, written agreement undertaken under this section or order or directive issued to comply with the requirements of this subpart.

**§ 390.470 Reservation of authority.**

(a) *Transactions for purposes of evasion.* The FDIC may disregard any transaction entered into primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this subpart.

(b) *Average versus period-end figures.* The FDIC reserves the right to require a State savings association to compute its capital ratios on the basis of average, rather than period-end, assets when the FDIC determines appropriate to carry out the purposes of this subpart.

(c)(1) *Reservation of authority.* Notwithstanding the definitions of core and supplementary capital in § 390.465, the FDIC may find that a particular type of purchased intangible asset or capital instrument constitutes or may constitute core or supplementary capital, and may permit one or more State savings associations to include all or a portion of such intangible asset or funds obtained through such capital instrument as core or supplementary capital, permanently or on a temporary basis, for the purposes of compliance with this subpart or for any other purposes. Similarly, the FDIC may find that a particular asset or core or supplementary capital component has characteristics or terms that diminish its contribution to a State savings association's ability to absorb losses, and the FDIC may require the discounting or deduction of such asset or component from the computation of core, supplementary, or total capital.

(2) Notwithstanding § 390.466, the FDIC will look to the substance of a transaction and may find that the assigned risk weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the State savings association. The FDIC may require the State savings association to apply another risk-weight, credit equivalent amount, or credit conversion factor that the FDIC deems appropriate.

(3) The FDIC may find that the capital treatment for an exposure to a transaction not subject to consolidation on the State savings association's balance sheet does not appropriately reflect the risks imposed on the State savings association. Accordingly, the FDIC may require the State savings association to treat the transaction as if it were consolidated on the State savings association's balance sheet. The FDIC will look to the substance of and risk associated with the transaction as well as other relevant factors in determining whether to require such treatment and in calculating risk based capital as the FDIC deems appropriate.

(4) If this subpart does not specifically assign a risk weight, credit equivalent amount, or credit conversion factor, the FDIC may assign any risk weight, credit equivalent amount, or credit conversion factor that it deems appropriate. In making this determination, the FDIC will consider the risks associated with the asset or off-balance sheet item as well as other relevant factors.

(d) In making a determination under this paragraph (c) of this section, the FDIC will notify the State savings association of the determination and solicit a response from the State savings association. After review of the response by the State savings association, the FDIC shall issue a final supervisory decision regarding the determination made under paragraph (c) of this section.

**§ 390.471 Purchased credit card relationships, servicing assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets.**

(a) *Scope.* This section prescribes the maximum amount of purchased credit card relationships, serving assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets that State savings associations may include in calculating tangible and core capital.

(b) *Computation of core and tangible capital.* (1) Purchased credit card relationships may be included (that is, not deducted) in computing core capital in accordance with the restrictions in this section, but must be deducted in computing tangible capital.

(2) In accordance with the restrictions in this section, mortgage servicing assets may be included in computing core and tangible capital and nonmortgage servicing assets may be included in core capital.

(3) Intangible assets, as defined in § 390.461, other than purchased credit card relationships described in paragraph (b)(1) of this section, servicing assets described in paragraph (b)(2) of this section, and core deposit intangibles described in paragraph (g)(3) of this section, are deducted in computing tangible and core capital, subject to paragraph (e)(3)(ii) of this section.

(4) Credit-enhancing interest-only strips may be included (that is not deducted) in computing core capital subject to the restrictions of this section, and may be included in tangible capital in the same amount.

(5) Deferred tax assets may be included (that is not deducted) in computing core capital subject to the restrictions of paragraph (h) of this section, and may be included in tangible capital in the same amount.

(c) *Market valuations.* The FDIC reserves the authority to require any State savings association to perform an independent market valuation of assets subject to this section on a case-by-case basis or through the issuance of policy guidance. An independent market valuation, if required, shall be conducted in accordance with any policy guidance issued by the FDIC. A required valuation shall include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates or attrition rates. The valuation shall determine the current fair value of assets subject to this section. This independent market valuation may be conducted by an independent valuation expert evaluating the reasonableness of the internal calculations and assumptions used by the State savings association in conducting its internal analysis. The State savings association shall calculate an estimated fair value for assets subject to this section at least quarterly regardless of whether an independent valuation expert is required to perform an independent market valuation.

(d) *Value limitation.* For purposes of calculating core capital under this subpart (but not for financial statement purposes), purchased credit card relationships and servicing assets must be valued at the lesser of:

(1) Ninety (90) percent of their fair value determined in accordance with paragraph (c) of this section; or

(2) One hundred (100) percent of their remaining unamortized book value determined in accordance with the instructions for the Thrift Financial Report or Consolidated Reports of Condition or Income (''Call Report.''), as applicable.

(e) *Core capital limitations* —(1) *Servicing assets and purchased credit card relationships.* (i) The maximum aggregate amount of servicing assets and purchased credit card relationships that may be included in core capital is limited to the lesser of:

(A) 100 percent of the amount of core capital; or

(B) The amount of servicing assets and purchased credit card relationships determined in accordance with paragraph (d) of this section.

(ii) In addition to the aggregate limitation in paragraph (e)(1)(i) of this section, a sublimit applies to purchased credit card relationships and non mortgage-related serving assets. The maximum allowable amount of these two types of assets combined is limited to the lesser of:

(A) 25 percent the amount of core capital; and

(B) The amount of purchased credit card relationships and non mortgage-related servicing assets determined in accordance with paragraph (d) of this section.

(2) *Credit-enhancing interest-only strips.* The maximum aggregate amount of credit-enhancing interest-only strips that may be included in core capital is limited to 25 percent of the amount of core capital. Purchased and retained credit-enhancing interest-only strips, on a non-tax adjusted basis, are included in the total amount that is used for purposes of determining whether a State savings association exceeds the core capital limit.

(3) *Computation.* (i) For purposes of computing the limits and sublimits in paragraphs (e) and (h) of this section, core capital is computed before the deduction of disallowed servicing assets, disallowed purchased credit card relationships, disallowed credit-enhancing interest-only strips (purchased and retained), and disallowed deferred tax assets.

(ii) A State savings association may elect to deduct the following items on a basis net of deferred tax liabilities:

(A) Disallowed servicing assets;

(B) Goodwill such that only the net amount must be deducted from Tier 1 capital;

(C) Disallowed credit-enhancing interest-only strips (both purchased and retained); and

(D) Other intangible assets arising from non-taxable business combinations. A deferred tax liability that is specifically related to an intangible asset (other than purchased credit card relationships) arising from a nontaxable business combination may be netted against this intangible asset. The net amount of the intangible asset must be deducted from Tier 1 capital.

(iii) Deferred tax liabilities that are netted in accordance with paragraph (e)(3)(ii) of this section cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income.

(f) *Tangible capital limitation.* The maximum amount of mortgage servicing assets that may be included in tangible capital shall be the same amount includable in core capital in accordance with the limitations set by paragraph (e) of this section. All nonmortgage servicing assets are deducted in computing tangible capital.

(g) *Exemption for certain subsidiaries*—(1) *Exemption standard.* A State savings association holding purchased mortgage servicing rights in separately capitalized, non-includable subsidiaries may submit an application for approval by the FDIC for an exemption from the deductions and limitations set forth in this section. The deductions and limitations will apply to such purchased mortgage servicing rights, however, if the FDIC determines that:

(i) The State savings association and subsidiary are not conducting activities on an arm's length basis; or

(ii) The exemption is not consistent with the State savings association's safe and sound operation.

(2) *Applicable requirements.* If the FDIC determines to grant or to permit the continuation of an exemption under paragraph (h)(1) of this section, the State savings association receiving the exemption must ensure the following:

(i) The State savings association's investments in, and extensions of credit to, the subsidiary are deducted from capital when calculating capital under this subpart;

(ii) Extensions of credit and other transactions with the subsidiary are conducted in compliance with the rules for covered transactions with affiliates set forth in sections 23A and 23B of the Federal Reserve Act, as applied to State savings associations; and

(iii) Any contracts entered into by the subsidiary include a written disclosure indicating that the subsidiary is not a bank or State savings association; the subsidiary is an organization separate and apart from any bank or State savings association; and the obligations of the subsidiary are not backed or guaranteed by any bank or State savings association and are not insured by the FDIC.

(h) *Treatment of deferred tax assets.* For purposes of calculating Tier 1 capital under this subpart (but not for financial statement purposes) deferred tax assets are subject to the conditions, limitations, and restrictions described in this section.

(1) *Tier 1 capital limitations.* (i) The maximum allowable amount of deferred tax assets net of any valuation allowance that are dependent upon future taxable income will be limited to the lesser of:

(A) The amount of deferred tax assets that are dependent upon future taxable income that is expected to be realized within one year of the calendar quarter-end date, based on a projected future taxable income for that year; or

(B) Ten percent of the amount of Tier 1 capital that exists before the deduction of any disallowed servicing assets, any disallowed purchased credit card relationships, any disallowed credit-enhancing interest-only strips, and any disallowed deferred tax assets.

(ii) For purposes of this limitation, all existing temporary differences should be assumed to fully reverse at the calendar quarter-end date. The recorded amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, in excess of this limitation will be deducted from assets and from equity capital for purposes of determining Tier 1 capital under this subpart. The amount of deferred tax assets that can be realized from taxes paid in prior carryback years and from the reversal of existing taxable temporary differences generally would not be deducted from assets and from equity capital.

(iii) Notwithstanding paragraph (h)(1)(B)(ii) of this section, the amount of carryback potential that may be considered in calculating the amount of deferred tax assets that a State savings association that is part of a consolidated group (for tax purposes) may include in Tier 1 capital may not exceed the amount which the association could reasonably expect to have refunded by its parent.

(2) *Projected future taxable income.* Projected future taxable income should not include net operating loss carryforwards to be used within one year of the most recent calendar quarter-end date or the amount of existing temporary differences expected to reverse within that year. Projected future taxable income should include the estimated effect of tax planning strategies that are expected to be implemented to realize tax carryforwards that will otherwise expire during that year. Future taxable income projections for the current fiscal year (adjusted for any significant changes that have occurred or are expected to occur) may be used when applying the capital limit at an interim calendar quarter-end date rather than preparing a new projection each quarter.

(3) *Unrealized holding gains and losses on available-for-sale debt securities.* The deferred tax effects of any unrealized holding gains and losses on available-for-sale debt securities may be excluded from the determination of the amount of deferred tax assets that are dependent upon future taxable income and the calculation of the maximum allowable amount of such assets. If these deferred tax effects are excluded, this treatment must be followed consistently over time.

## Appendix A to Subpart Z of Part 390—Risk-Based Capital Requirements—Internal-Ratings-Based and Advanced Measurement Approaches



### Part I. General Provisions

*Section 1. Purpose, Applicability, Reservation of Authority, and Principle of Conservatism*

(a) *Purpose.* This appendix establishes:

(1) Minimum qualifying criteria for State savings associations using State savings association-specific internal risk measurement and management processes for calculating risk-based capital requirements;

(2) Methodologies for such State savings associations to calculate their risk-based capital requirements; and

(3) Public disclosure requirements for such State savings associations.

(b) *Applicability.* (1) This appendix applies to a State savings association that:

(i) Has consolidated assets, as reported on the most recent year-end Thrift Financial Report (TFR) or Consolidated Reports of Condition or Income (''Call Report''), as applicable, equal to $250 billion or more;

(ii) Has consolidated total on-balance sheet foreign exposure at the most recent year-end equal to $10 billion or more (where total on-balance sheet foreign exposure equals total cross-border claims less claims with head office or guarantor located in another country plus redistributed guaranteed amounts to the country of head office or guarantor plus local country claims on local residents plus revaluation gains on foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report);

(iii) Is a subsidiary of a depository institution that uses 12 CFR part 3, appendix C, 12 CFR part 208, appendix F, 12 CFR part 325, appendix D, or 12 CFR subpart Z of part 390, appendix A, to calculate its risk-based capital requirements; or

(iv) Is a subsidiary of a bank holding company that uses 12 CFR part 225, appendix G, to calculate its risk-based capital requirements.

(2) Any State savings association may elect to use this appendix to calculate its risk-based capital requirements.

(3) A State savings association that is subject to this appendix must use this appendix unless the FDIC determines in writing that application of this appendix is not appropriate in light of the State savings association's asset size, level of complexity, risk profile, or scope of operations. In making a determination under this paragraph, the FDIC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 390.463(d).

(c) *Reservation of authority*—(1) *Additional capital in the aggregate.* The FDIC may require a State savings association to hold an amount of capital greater than otherwise required under this appendix if the FDIC determines that the State savings association's risk-based capital requirement under this appendix is not commensurate with the State savings association's credit, market, operational, or other risks. In making a determination under this paragraph, the FDIC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 390.463(d).

(2) *Specific risk-weighted asset amounts.* (i) If the FDIC determines that the risk-weighted asset amount calculated under this appendix by the State savings association for one or more exposures is not commensurate with the risks associated with those exposures, the FDIC may require the State savings association to assign a different risk-weighted

asset amount to the exposures, to assign different risk parameters to the exposures (if the exposures are wholesale or retail exposures), or to use different model assumptions for the exposures (if relevant), all as specified by the FDIC.

(ii) If the FDIC determines that the risk-weighted asset amount for operational risk produced by the State savings association under this appendix is not commensurate with the operational risks of the State savings association, the FDIC may require the State savings association to assign a different risk-weighted asset amount for operational risk, to change elements of its operational risk analytical framework, including distributional and dependence assumptions, or to make other changes to the State savings association's operational risk management processes, data and assessment systems, or quantification systems, all as specified by the FDIC.

(3) *Regulatory capital treatment of unconsolidated entities.* The FDIC may find that the capital treatment for an exposure to a transaction not subject to consolidation on the State savings association's balance sheet does not appropriately reflect the risks imposed on the State savings association. Accordingly, the FDIC may require the State savings association to treat the transaction as if it were consolidated on the State savings association's balance sheet. The FDIC will look to the substance of and risk associated with the transaction as well as other relevant factors in determining whether to require such treatment and in calculating risk-based capital as the FDIC deems appropriate.

(4) *Other supervisory authority.* Nothing in this appendix limits the authority of the FDIC under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

(d) *Principle of conservatism.* Notwithstanding the requirements of this appendix, a State savings association may choose not to apply a provision of this appendix to one or more exposures, provided that:

(1) The State savings association can demonstrate on an ongoing basis to the satisfaction of the FDIC that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this appendix;

(2) The State savings association appropriately manages the risk of each such exposure;

(3) The State savings association notifies the FDIC in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the State savings association applies this principle are not, in the aggregate, material to the State savings association.

*Section 2. Definitions*

*Advanced internal ratings-based (IRB) systems* means a State savings association's internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of wholesale and retail exposures.

*Advanced systems* means a State savings association's advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent the State savings association uses the following systems, the internal models methodology, double default excessive correlation detection process, IMA for equity exposures, and IAA for securitization exposures to ABCP programs.

*Affiliate* with respect to a company means any company that controls, is controlled by, or is under common control with, the company.

*Applicable external rating* means:

(1) With respect to an exposure that has multiple external ratings assigned by NRSROs, the lowest solicited external rating assigned to the exposure by any NRSRO; and

(2) With respect to an exposure that has a single external rating assigned by an NRSRO, the external rating assigned to the exposure by the NRSRO.

*Applicable inferred rating* means:

(1) With respect to an exposure that has multiple inferred ratings, the lowest inferred rating based on a solicited external rating; and

(2) With respect to an exposure that has a single inferred rating, the inferred rating.

*Asset-backed commercial paper (ABCP) program* means a program that primarily issues commercial paper that:

(1) Has an external rating; and

(2) Is backed by underlying exposures held in a bankruptcy-remote SPE.

*Asset-backed commercial paper (ABCP) program sponsor* means a State savings association that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the exposures to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the underlying exposures, underwriting or otherwise arranging for the placement of debt or other obligations issued by the program, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

*Backtesting* means the comparison of a State savings association's internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

*Bank holding company* is defined in section 2 of the Bank Holding Company Act (12 U.S.C. 1841).

*Benchmarking* means the comparison of a State savings association's internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

*Business environment and internal control factors* means the indicators of a State savings association's operational risk profile that reflect a current and forward-looking assessment of the State savings association's underlying business risk factors and internal control environment.

*Carrying value* means, with respect to an asset, the value of the asset on the balance sheet of the State savings association, determined in accordance with GAAP.

*Clean-up call* means a contractual provision that permits an originating State savings association or servicer to call securitization exposures before their stated maturity or call date. See also *eligible clean-up call.*

*Commodity derivative contract* means a commodity-linked swap, purchased commodity-linked option, forward commodity-linked contract, or any other instrument linked to commodities that gives rise to similar counterparty credit risks.

*Company* means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

*Control.* A person or company *controls* a company if it:

(1) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(2) Consolidates the company for financial reporting purposes.

*Controlled early amortization provision* means an early amortization provision that meets all the following conditions:

(1) The originating State savings association has appropriate policies and procedures to ensure that it has sufficient capital and liquidity available in the event of an early amortization;

(2) Throughout the duration of the securitization (including the early amortization period), there is the same pro rata sharing of interest, principal, expenses, losses, fees, recoveries, and other cash flows from the underlying exposures based on the originating State savings association's and the investors' relative shares of the underlying exposures outstanding measured on a consistent monthly basis;

(3) The amortization period is sufficient for at least 90 percent of the total underlying exposures outstanding at the beginning of the early amortization period to be repaid or recognized as in default; and

(4) The schedule for repayment of investor principal is not more rapid than would be allowed by straight-line amortization over an 18-month period.

*Credit derivative* means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure) to another party (the protection provider). See also *eligible credit derivative.*

*Credit-enhancing interest-only strip (CEIO)* means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

*Credit-enhancing representations and warranties* means representations and warranties that are made or assumed in connection with a transfer of underlying exposures (including loan servicing assets) and that obligate a State savings association to protect another party from losses arising from the credit risk of the underlying exposures. Credit-enhancing representations and warranties include provisions to protect a party from losses resulting from the default or nonperformance of the obligors of the underlying exposures or from an insufficiency in the value of the collateral backing the underlying exposures. Credit-enhancing representations and warranties do not include:

(1) Early default clauses and similar warranties that permit the return of, or premium refund clauses that cover, first-lien residential mortgage exposures for a period not to exceed 120 days from the date of transfer, provided that the date of transfer is within one year of origination of the residential mortgage exposure;

(2) Premium refund clauses that cover underlying exposures guaranteed, in whole or in part, by the U.S. government, a U.S. government agency, or a U.S. government sponsored enterprise, provided that the clauses are for a period not to exceed 120 days from the date of transfer; or

(3) Warranties that permit the return of underlying exposures in instances of misrepresentation, fraud, or incomplete documentation.

*Credit risk mitigant* means collateral, a credit derivative, or a guarantee.

*Credit-risk-weighted assets* means 1.06 multiplied by the sum of:

(1) Total wholesale and retail risk-weighted assets;

(2) Risk-weighted assets for securitization exposures; and

(3) Risk-weighted assets for equity exposures.

*Current exposure* means, with respect to a netting set, the larger of zero or the market value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions. Current exposure is also called replacement cost.

*Default*—(1) *Retail.* (i) A retail exposure of a State savings association is in default if:

(A) The exposure is 180 days past due, in the case of a residential mortgage exposure or revolving exposure;

(B) The exposure is 120 days past due, in the case of all other retail exposures; or

(C) The State savings association has taken a full or partial charge-off, write-down of principal, or material negative fair value adjustment of principal on the exposure for credit-related reasons.

(ii) Notwithstanding paragraph (1)(i) of this definition, for a retail exposure held by a non-U.S. subsidiary of the State savings association that is subject to an internal ratings-based approach to capital adequacy consistent with the Basel Committee on Banking Supervision's ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' in a non-U.S. jurisdiction, the State savings association may elect to use the definition of default that is used in that jurisdiction, provided that the State savings association has obtained prior approval from the FDIC to use the definition of default in that jurisdiction.

(iii) A retail exposure in default remains in default until the State savings association has reasonable assurance of repayment and performance for all contractual principal and interest payments on the exposure.

(2) *Wholesale.* (i) A State savings association's wholesale obligor is in default if:

(A) The State savings association determines that the obligor is unlikely to pay its credit obligations to the State savings association in full, without recourse by the State savings association to actions such as realizing collateral (if held); or

(B) The obligor is past due more than 90 days on any material credit obligation(s) to the State savings association.[1]

(ii) An obligor in default remains in default until the State savings association has reasonable assurance of repayment and performance for all contractual principal and interest payments on all exposures of the State savings association to the obligor (other than exposures that have been fully written-down or charged-off).

*Dependence* means a measure of the association among operational losses across and within units of measure.

*Depository institution* is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

*Derivative contract* means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivatives, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

*Early amortization provision* means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating State savings association (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by obligors on the underlying exposures even after the provision is triggered.

*Economic downturn conditions* means, with respect to an exposure held by the State savings association, those conditions in which the aggregate default rates for that exposure's wholesale or retail exposure subcategory (or subdivision of such subcategory selected by the State savings association) in the exposure's national jurisdiction (or subdivision of such jurisdiction selected by the State savings association) are significantly higher than average.

*Effective maturity (M)* of a wholesale exposure means:

(1) For wholesale exposures other than repo-style transactions, eligible margin loans, and OTC derivative contracts described in paragraph (2) or (3) of this definition:

(i) The weighted-average remaining maturity (measured in years, whole or fractional) of the expected contractual cash flows from the exposure, using the undiscounted amounts of the cash flows as weights; or

(ii) The nominal remaining maturity (measured in years, whole or fractional) of the exposure.

(2) For repo-style transactions, eligible margin loans, and OTC derivative contracts subject to a qualifying master netting agreement for which the State savings association does not apply the internal models approach in paragraph (d) of section 32 of this appendix, the weighted-average remaining maturity (measured in years, whole or fractional) of the individual transactions subject to the qualifying master netting agreement, with the weight of each individual transaction set equal to the notional amount of the transaction.

(3) For repo-style transactions, eligible margin loans, and OTC derivative contracts for which the State savings association applies the internal models approach in paragraph (d) of section 32 of this appendix, the value determined in paragraph (d)(4) of section 32 of this appendix.

*Effective notional amount* means, for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the EAD of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant. For example, the effective notional amount of an eligible guarantee that covers, on a pro rata basis, 40 percent of any losses on a $100 bond would be $40.

*Eligible clean-up call* means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating State savings association or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

[1] Overdrafts are past due once the obligor has breached an advised limit or been advised of a limit smaller than the current outstanding balance.

*Eligible credit derivative* means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by the FDIC, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provides that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the State savings association records net payments received on the swap as net income, the State savings association records offsetting deterioration in the value of the hedged exposure (either through reductions in fair value or by an addition to reserves).

*Eligible credit reserves* means all general allowances that have been established through a charge against earnings to absorb credit losses associated with on- or off-balance sheet wholesale and retail exposures, including the allowance for loan and lease losses (ALLL) associated with such exposures but excluding specific reserves created against recognized losses.

*Eligible double default guarantor,* with respect to a guarantee or credit derivative obtained by a State savings association, means:

(1) *U.S.-based entities.* A depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a securities broker or dealer registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78o *et seq.*), or an insurance company in the business of providing credit protection (such as a monoline bond insurer or re-insurer) that is subject to supervision by a State insurance regulator, if:

(i) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the State savings association assigned a PD to the guarantor's rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(ii) The State savings association currently assigns a PD to the guarantor's rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category; or

(2) *Non-U.S.-based entities.* A foreign bank (as defined in § 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2)), a non-U.S.-based securities firm, or a non-U.S.-based insurance company in the business of providing credit protection, if:

(i) The State savings association demonstrates that the guarantor is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be), or has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade;

(ii) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the State savings association assigned a PD to the guarantor's rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(iii) The State savings association currently assigns a PD to the guarantor's rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category.

*Eligible guarantee* means a guarantee that:

(1) Is written and unconditional;

(2) Covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure;

(3) Gives the beneficiary a direct claim against the protection provider;

(4) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(5) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(6) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(7) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and

(8) Is not provided by an affiliate of the State savings association, unless the affiliate is an insured depository institution, bank, securities broker or dealer, or insurance company that:

(i) Does not control the State savings association; and

(ii) Is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be).

*Eligible margin loan* means an extension of credit where:

(1) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, gold, or conforming residential mortgages;

(2) The collateral is marked to market daily, and the transaction is subject to daily margin maintenance requirements;

(3) The extension of credit is conducted under an agreement that provides the State savings association the right to accelerate and terminate the extension of credit and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; [2] and

(4) The State savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

*Eligible operational risk offsets* means amounts, not to exceed expected operational loss, that:

(1) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(2) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

*Eligible purchased wholesale exposure* means a purchased wholesale exposure that:

(1) The State savings association or securitization SPE purchased from an unaffiliated seller and did not directly or indirectly originate;

(2) Was generated on an arm's-length basis between the seller and the obligor

[2] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231).

(intercompany accounts receivable and receivables subject to contra-accounts between firms that buy and sell to each other do not satisfy this criterion);

(3) Provides the State savings association or securitization SPE with a claim on all proceeds from the exposure or a pro rata interest in the proceeds from the exposure;

(4) Has an M of less than one year; and

(5) When consolidated by obligor, does not represent a concentrated exposure relative to the portfolio of purchased wholesale exposures.

*Eligible securitization guarantor* means:

(1) A sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), a multilateral development bank, a depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a foreign bank (as defined in § 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2)), or a securities firm;

(2) Any other entity (other than a securitization SPE) that has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating in one of the three highest investment-grade rating categories; or

(3) Any other entity (other than a securitization SPE) that has a PD assigned by the State savings association that is lower than or equal to the PD associated with a long-term external rating in the third highest investment-grade rating category.

*Eligible servicer cash advance facility* means a servicer cash advance facility in which:

(1) The servicer is entitled to full reimbursement of advances, except that a servicer may be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure;

(2) The servicer's right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and

(3) The servicer has no legal obligation to, and does not, make advances to the securitization if the servicer concludes the advances are unlikely to be repaid.

*Equity derivative contract* means an equity-linked swap, purchased equity-linked option, forward equity-linked contract, or any other instrument linked to equities that gives rise to similar counterparty credit risks.

*Equity exposure* means:

(1) A security or instrument (whether voting or non-voting) that represents a direct or indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the State savings association under GAAP;

(ii) The State savings association is required to deduct the ownership interest from tier 1 or tier 2 capital under this appendix;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

*Excess spread* for a period means:

(1) Gross finance charge collections and other income received by a securitization SPE (including market interchange fees) over a period minus interest paid to the holders of the securitization exposures, servicing fees, charge-offs, and other senior trust or similar expenses of the SPE over the period; divided by

(2) The principal balance of the underlying exposures at the end of the period.

*Exchange rate derivative contract* means a cross-currency interest rate swap, forward foreign-exchange contract, currency option purchased, or any other instrument linked to exchange rates that gives rise to similar counterparty credit risks.

*Excluded mortgage exposure* means any one- to four-family residential pre-sold construction loan for a residence for which the purchase contract is cancelled that would receive a 100 percent risk weight under section 618(a)(2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act and under 12 CFR 390.461 (definition of ''qualifying residential construction loan'') and 12 CFR 390.466(a)(1)(iv).

*Expected credit loss (ECL)* means:

(1) For a wholesale exposure to a non-defaulted obligor or segment of non-defaulted retail exposures that is carried at fair value with gains and losses flowing through earnings or that is classified as held-for-sale and is carried at the lower of cost or fair value with losses flowing through earnings, zero.

(2) For all other wholesale exposures to non-defaulted obligors or segments of non-defaulted retail exposures, the product of PD times LGD times EAD for the exposure or segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, the State savings association's impairment estimate for allowance purposes for the exposure or segment.

(4) Total ECL is the sum of expected credit losses for all wholesale and retail exposures other than exposures for which the State savings association has applied the double default treatment in section 34 of this appendix.

*Expected exposure (EE)* means the expected value of the probability distribution of non-negative credit risk exposures to a counterparty at any specified future date before the maturity date of the longest term transaction in the netting set. Any negative market values in the probability distribution of market values to a counterparty at a specified future date are set to zero to convert the probability distribution of market values to the probability distribution of credit risk exposures.

*Expected operational loss (EOL)* means the expected value of the distribution of potential aggregate operational losses, as generated by the State savings association's operational risk quantification system using a one-year horizon.

*Expected positive exposure (EPE)* means the weighted average over time of expected (non-negative) exposures to a counterparty where the weights are the proportion of the time interval that an individual expected exposure represents. When calculating risk-based capital requirements, the average is taken over a one-year horizon.

*Exposure at default (EAD).* (1) For the on-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction, or eligible margin loan for which the State savings association determines EAD under section 32 of this appendix), EAD means:

(i) If the exposure or segment is a security classified as available-for-sale, the State savings associations carrying value (including net accrued but unpaid interest and fees) for the exposure or segment less any unrealized gains on the exposure or segment and plus any unrealized losses on the exposure or segment; or

(ii) If the exposure or segment is not a security classified as available-for-sale, the State savings association's carrying value (including net accrued but unpaid interest and fees) for the exposure or segment.

(2) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the State savings association determines EAD under section 32 of this appendix) in the form of a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the State savings association's best estimate of net additions to the outstanding amount owed the State savings association, including estimated future additional draws of principal and accrued but unpaid interest and fees, that are likely to occur over a one-year horizon assuming the wholesale exposure or the retail exposures in the segment were to go into default. This estimate of net additions must reflect what would be expected during economic downturn conditions. Trade-related letters of credit are short-term, self-liquidating instruments that are used to finance the movement of goods and are collateralized by the underlying goods. Transaction-related contingencies relate to a particular transaction and include, among other things, performance bonds and performance-based letters of credit.

(3) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the State savings association determines EAD under section 32 of this appendix) in the form of anything other than a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the notional amount of the exposure or segment.

(4) EAD for OTC derivative contracts is calculated as described in section 32 of this appendix. A State savings association also may determine EAD for repo-style transactions and eligible margin loans as described in section 32 of this appendix.

(5) For wholesale or retail exposures in which only the drawn balance has been securitized, the State savings association must reflect its share of the exposures' undrawn balances in EAD. Undrawn balances of revolving exposures for which the drawn balances have been securitized must be allocated between the seller's and investors' interests on a pro rata basis, based on the proportions of the seller's and investors' shares of the securitized drawn balances.

*Exposure category* means any of the wholesale, retail, securitization, or equity exposure categories.

*External operational loss event data* means, with respect to a State savings association, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the State savings association.

*External rating* means a credit rating that is assigned by an NRSRO to an exposure, provided:

(1) The credit rating fully reflects the entire amount of credit risk with regard to all payments owed to the holder of the exposure. If a holder is owed principal and interest on an exposure, the credit rating must fully reflect the credit risk associated with timely repayment of principal and interest. If a holder is owed only principal on an exposure, the credit rating must fully reflect only the credit risk associated with timely repayment of principal; and

(2) The credit rating is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of positions rated by the NRSRO.

*Financial collateral* means collateral:

(1) In the form of:

(i) Cash on deposit with the State savings association (including cash held for the State savings association by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that have an applicable external rating of one category below investment grade or higher;

(iv) Short-term debt instruments that have an applicable external rating of at least investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded;

(vii) Money market mutual fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; or

(viii) Conforming residential mortgages; and

(2) In which the State savings association has a perfected, first priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent).

*GAAP* means generally accepted accounting principles as used in the United States.

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule SC of the Thrift Financial Report or in the Consolidated Reports of Condition or Income (''Call Report''), as applicable, of a State savings association that results from a securitization (other than an increase in equity capital that results from the State savings association's receipt of cash in connection with the securitization).

*Guarantee* means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider). See also *eligible guarantee.*

*High volatility commercial real estate (HVCRE) exposure* means a credit facility that finances or has financed the acquisition, development, or construction (ADC) of real property, unless the facility finances:

(1) One- to four-family residential properties; or

(2) Commercial real estate projects in which:

(i) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio in the FDIC's real estate lending standards at 12 CFR 390.264–390.265;

(ii) The borrower has contributed capital to the project in the form of cash or unencumbered readily marketable assets (or has paid development expenses out-of-pocket) of at least 15 percent of the real estate's appraised ''as completed'' value; and

(iii) The borrower contributed the amount of capital required by paragraph (2)(ii) of this definition before the State savings association advances funds under the credit facility, and the capital contributed by the borrower, or internally generated by the project, is contractually required to remain in the project throughout the life of the project. The life of a project concludes only when the credit facility is converted to permanent financing or is sold or paid in full. Permanent financing may be provided by the State savings association that provided the ADC facility as long as the permanent financing is subject to the State savings association's underwriting criteria for long-term mortgage loans.

*Inferred rating.* A securitization exposure has an *inferred rating* equal to the external rating referenced in paragraph (2)(i) of this definition if:

(1) The securitization exposure does not have an external rating; and

(2) Another securitization exposure issued by the same issuer and secured by the same underlying exposures:

(i) Has an external rating;

(ii) Is subordinated in all respects to the unrated securitization exposure;

(iii) Does not benefit from any credit enhancement that is not available to the unrated securitization exposure; and

(iv) Has an effective remaining maturity that is equal to or longer than that of the unrated securitization exposure.

*Interest rate derivative contract* means a single-currency interest rate swap, basis swap, forward rate agreement, purchased interest rate option, when-issued securities, or any other instrument linked to interest rates that gives rise to similar counterparty credit risks.

*Internal operational loss event data* means, with respect to a State savings association, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the State savings association.

*Investing State savings association* means, with respect to a securitization, a State savings association that assumes the credit risk of a securitization exposure (other than an originating State savings association of the securitization). In the typical synthetic securitization, the investing State savings association sells credit protection on a pool of underlying exposures to the originating State savings association.

*Investment fund* means a company:

(1) All or substantially all of the assets of which are financial assets; and

(2) That has no material liabilities.

*Investors' interest EAD* means, with respect to a securitization, the EAD of the underlying exposures multiplied by the ratio of:

(1) The total amount of securitization exposures issued by the securitization SPE to investors; divided by

(2) The outstanding principal amount of underlying exposures.

*Loss given default (LGD)* means:

(1) For a wholesale exposure, the greatest of:

(i) Zero;

(ii) The State savings association's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the State savings association would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the State savings association to the exposure) were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The State savings association's empirically based best estimate of the economic loss, per dollar of EAD, the State savings association would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the State savings association to the exposure) were to default within a one-year horizon during economic downturn conditions.

(2) For a segment of retail exposures, the greatest of:

(i) Zero;

(ii) The State savings association's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the State savings association would expect to incur if the exposures in the segment were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The State savings association's empirically based best estimate of the economic loss, per dollar of EAD, the State savings association would expect to incur if the exposures in the segment were to default within a one-year horizon during economic downturn conditions.

(3) The economic loss on an exposure in the event of default is all material credit-related losses on the exposure (including accrued but unpaid interest or fees, losses on the sale of collateral, direct workout costs, and an appropriate allocation of indirect workout costs). Where positive or negative cash flows on a wholesale exposure to a defaulted obligor or a defaulted retail exposure (including proceeds from the sale of collateral, workout costs, additional extensions of credit to facilitate repayment of the exposure, and draw-downs of unused credit lines) occur after the date of default, the economic loss must reflect the net present value of cash flows as of the default date using a discount rate appropriate to the risk of the defaulted exposure.

*Main index* means the Standard & Poor's 500 Index, the FTSE All-World Index, and any other index for which the State savings association can demonstrate to the satisfaction of the FDIC that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the Standard & Poor's 500 Index and FTSE All-World Index.

*Multilateral development bank* means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the FDIC determines poses comparable credit risk.

*Nationally recognized statistical rating organization (NRSRO)* means an entity registered with the SEC as a nationally recognized statistical rating organization under section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7).

*Netting set* means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement or qualifying cross-product master netting agreement. For purposes of the internal models methodology in paragraph (d) of section 32 of this appendix, each transaction that is not subject to such a master netting agreement is its own netting set.

*Nth-to-default credit derivative* means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

*Obligor* means the legal entity or natural person contractually obligated on a wholesale exposure, except that a State savings association may treat the following exposures as having separate obligors:

(1) Exposures to the same legal entity or natural person denominated in different currencies;

(2)(i) An income-producing real estate exposure for which all or substantially all of the repayment of the exposure is reliant on the cash flows of the real estate serving as collateral for the exposure; the State savings association, in economic substance, does not have recourse to the borrower beyond the real estate collateral; and no cross-default or cross-acceleration clauses are in place other than clauses obtained solely out of an abundance of caution; and

(ii) Other credit exposures to the same legal entity or natural person; and

(3) (i) A wholesale exposure authorized under section 364 of the U.S. Bankruptcy Code (11 U.S.C. 364) to a legal entity or natural person who is a debtor-in-possession for purposes of Chapter 11 of the Bankruptcy Code; and

(ii) Other credit exposures to the same legal entity or natural person.

*Operational loss* means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

*Operational loss event* means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(1) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or company policy, excluding diversity- and discrimination-type events.

(2) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law. Retail credit card losses arising from non-contractual, third-party initiated fraud (for example, identity theft) are external fraud operational losses. All other third-party initiated credit losses are to be treated as credit risk losses.

(3) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.

(4) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).

(5) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.

(6) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.

(7) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.

*Operational risk* means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

*Operational risk exposure* means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the State savings association's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

*Originating State savings association,* with respect to a securitization, means a State savings association that:

(1) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or

(2) Serves as an ABCP program sponsor to the securitization.

*Other retail exposure* means an exposure (other than a securitization exposure, an equity exposure, a residential mortgage exposure, an excluded mortgage exposure, a qualifying revolving exposure, or the residual value portion of a lease exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is either:

(1) An exposure to an individual for non-business purposes; or

(2) An exposure to an individual or company for business purposes if the State savings association's consolidated business credit exposure to the individual or company is $1 million or less.

*Over-the-counter (OTC) derivative contract* means a derivative contract that is not traded on an exchange that requires the daily receipt and payment of cash-variation margin.

*Probability of default (PD)* means:

(1) For a wholesale exposure to a non-defaulted obligor, the State savings association's empirically based best estimate of the long-run average one-year default rate for the rating grade assigned by the State savings association to the obligor, capturing the average default experience for obligors in the rating grade over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable

estimate of the average one-year default rate over the economic cycle for the rating grade.

(2) For a segment of non-defaulted retail exposures, the State savings association's empirically based best estimate of the long-run average one-year default rate for the exposures in the segment, capturing the average default experience for exposures in the segment over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable estimate of the average one-year default rate over the economic cycle for the segment and adjusted upward as appropriate for segments for which seasoning effects are material. For purposes of this definition, a segment for which seasoning effects are material is a segment where there is a material relationship between the time since origination of exposures within the segment and the State savings association's best estimate of the long-run average one-year default rate for the exposures in the segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, 100 percent.

*Protection amount (P)* means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative, reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in section 33 of this appendix).

*Publicly traded* means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question, meaning that there are enough independent bona fide offers to buy and sell so that a sales price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined promptly and a trade can be settled at such a price within five business days.

*Qualifying central counterparty* means a counterparty (for example, a clearinghouse) that:

(1) Facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts;

(2) Requires all participants in its arrangements to be fully collateralized on a daily basis; and

(3) The State savings association demonstrates to the satisfaction of the FDIC is in sound financial condition and is subject to effective oversight by a national supervisory authority.

*Qualifying cross-product master netting agreement* means a qualifying master netting agreement that provides for termination and close-out netting across multiple types of financial transactions or qualifying master netting agreements in the event of a counterparty's default, provided that:

(1) The underlying financial transactions are OTC derivative contracts, eligible margin loans, or repo-style transactions; and

(2) The State savings association obtains a written legal opinion verifying the validity and enforceability of the agreement under applicable law of the relevant jurisdictions if the counterparty fails to perform upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding.

*Qualifying master netting agreement* means any written, legally enforceable bilateral agreement, provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency, or similar proceeding, of the counterparty;

(2) The agreement provides the State savings association the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;

(3) The State savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that:

(i) The agreement meets the requirements of paragraph (2) of this definition; and

(ii) In the event of a legal challenge (including one resulting from default or from bankruptcy, insolvency, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions;

(4) The State savings association establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition; and

(5) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it would make otherwise under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement).

*Qualifying revolving exposure (QRE)* means an exposure (other than a securitization exposure or equity exposure) to an individual that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and:

(1) Is revolving (that is, the amount outstanding fluctuates, determined largely by the borrower's decision to borrow and repay, up to a pre-established maximum amount);

(2) Is unsecured and unconditionally cancelable by the State savings association to the fullest extent permitted by Federal law; and

(3) Has a maximum exposure amount (drawn plus undrawn) of up to $100,000.

*Repo-style transaction* means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the State savings association acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, gold, or conforming residential mortgages;

(2) The transaction is marked-to-market daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the State savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; or

(B) The transaction is:

(1) Either overnight or unconditionally cancelable at any time by the State savings association; and

(2) Executed under an agreement that provides the State savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(4) The State savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

*Residential mortgage exposure* means an exposure (other than a securitization exposure, equity exposure, or excluded mortgage exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is:

(1) An exposure that is primarily secured by a first or subsequent lien on one- to four-family residential property; or

(2) An exposure with an original and outstanding amount of $1 million or less that is primarily secured by a first or subsequent lien on residential property that is not one to four family.

*Retail exposure* means a residential mortgage exposure, a qualifying revolving exposure, or another retail exposure.

*Retail exposure subcategory* means the residential mortgage exposure, qualifying revolving exposure, or other retail exposure subcategory.

*Risk parameter* means a variable used in determining risk-based capital requirements for wholesale and retail exposures, specifically probability of default (PD), loss given default (LGD), exposure at default (EAD), or effective maturity (M).

*Scenario analysis* means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to a State savings association's operational risk profile and control structure.

*SEC* means the U.S. Securities and Exchange Commission.

*Securitization* means a traditional securitization or a synthetic securitization.

*Securitization exposure* means an on-balance sheet or off-balance sheet credit exposure that arises from a traditional or synthetic securitization (including credit-enhancing representations and warranties).

*Securitization special purpose entity (securitization SPE)* means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

*Senior securitization exposure* means a securitization exposure that has a first priority claim on the cash flows from the underlying exposures. When determining whether a securitization exposure has a first priority claim on the cash flows from the underlying exposures, a State savings association is not required to consider amounts due under interest rate or currency derivative contracts, fees due, or other similar payments. Both the most senior commercial paper issued by an ABCP program and a liquidity facility that supports the ABCP program may be senior securitization exposures if the liquidity facility provider's right to reimbursement of the drawn amounts is senior to all claims on the cash flows from the underlying exposures except amounts due under interest rate or currency derivative contracts, fees due, or other similar payments.

*Servicer cash advance facility* means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures. See also *eligible servicer cash advance facility.*

*Sovereign entity* means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

*Sovereign exposure* means:

(1) A direct exposure to a sovereign entity; or

(2) An exposure directly and unconditionally backed by the full faith and credit of a sovereign entity.

*Subsidiary* means, with respect to a company, a company controlled by that company.

*Synthetic securitization* means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

*Tier 1 capital* is defined in §§ 390.461–390.471, as modified in part II of this appendix.

*Tier 2 capital* is defined in §§ 390.461–390.471, as modified in part II of this appendix.

*Total qualifying capital* means the sum of tier 1 capital and tier 2 capital, after all deductions required in this appendix.

*Total risk-weighted assets* means:

(1) The sum of:

(i) Credit risk-weighted assets; and

(ii) Risk-weighted assets for operational risk; minus

(2) Excess eligible credit reserves not included in tier 2 capital.

*Total wholesale and retail risk-weighted assets* means the sum of risk-weighted assets for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures; risk-weighted assets for wholesale exposures to defaulted obligors and segments of defaulted retail exposures; risk-weighted assets for assets not defined by an exposure category; and risk-weighted assets for non-material portfolios of exposures (all as determined in section 31 of this appendix) and risk-weighted assets for unsettled transactions (as determined in section 35 of this appendix) minus the amounts deducted from capital pursuant to §§ 390.461–390.471 (excluding those deductions reversed in section 12 of this appendix).

*Traditional securitization* means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682); and

(7) The underlying exposures are not owned by a firm an investment in which is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs.

(8) The FDIC may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

(9) The FDIC may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

*Tranche* means all securitization exposures associated with a securitization that have the same seniority level.

*Underlying exposures* means one or more exposures that have been securitized in a securitization transaction.

*Unexpected operational loss (UOL)* means the difference between the State savings association's operational risk exposure and the State savings association's expected operational loss.

*Unit of measure* means the level (for example, organizational unit or operational loss event type) at which the State savings association's operational risk quantification system generates a separate distribution of potential operational losses.

*Value-at-Risk (VaR)* means the estimate of the maximum amount that the value of one or more exposures could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

*Wholesale exposure* means a credit exposure to a company, natural person, sovereign entity, or governmental entity (other than a securitization exposure, retail exposure, excluded mortgage exposure, or equity exposure). Examples of a wholesale exposure include:

(1) A non-tranched guarantee issued by a State savings association on behalf of a company;

(2) A repo-style transaction entered into by a State savings association with a company and any other transaction in which a State savings association posts collateral to a company and faces counterparty credit risk;

(3) An exposure that a State savings association treats as a covered position under any applicable market risk rule for which there is a counterparty credit risk capital requirement;

(4) A sale of corporate loans by a State savings association to a third party in which the State savings association retains full recourse;

(5) An OTC derivative contract entered into by a State savings association with a company;

(6) An exposure to an individual that is not managed by a State savings association as part of a segment of exposures with homogeneous risk characteristics; and

(7) A commercial lease.

*Wholesale exposure subcategory* means the HVCRE or non-HVCRE wholesale exposure subcategory.

*Section 3. Minimum Risk-Based Capital Requirements*

(a) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each State savings association must meet a minimum ratio of:

(1) Total qualifying capital to total risk-weighted assets of 8.0 percent; and

(2) Tier 1 capital to total risk-weighted assets of 4.0 percent.

(b) Each State savings association must hold capital commensurate with the level and nature of all risks to which the State savings association is exposed.

(c) When a State savings association subject to any applicable market risk rule calculates its risk-based capital requirements under this appendix, the State savings association must also refer to any applicable market risk rule for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

**Part II. Qualifying Capital**

*Section 11. Additional Deductions*

(a) *General.* A State savings association that uses this appendix must make the same deductions from its tier 1 capital and tier 2 capital required in §§ 390.461–390.471 except that:

(1) A State savings association is not required to deduct certain equity investments and CEIOs (as provided in section 12 of this appendix); and

(2) A State savings association also must make the deductions from capital required by paragraphs (b) and (c) of this section.

(b) *Deductions from tier 1 capital.* A State savings association must deduct from tier 1 capital any gain-on-sale associated with a securitization exposure as provided in paragraph (a) of section 41 and paragraphs (a)(1), (c), (g)(1), and (h)(1) of section 42 of this appendix.

(c) *Deductions from tier 1 and tier 2 capital.* A State savings association must deduct the exposures specified in paragraphs (c)(1) through (c)(7) in this section 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the State savings association's actual tier 2 capital, however, the State savings association must deduct the excess from tier 1 capital.

(1) *Credit-enhancing interest-only strips (CEIOs).* In accordance with paragraphs (a)(1) and (c) of section 42 of this appendix, any CEIO that does not constitute gain-on-sale.

(2) *Non-qualifying securitization exposures.* In accordance with paragraphs (a)(4) and (c) of section 42 of this appendix, any securitization exposure that does not qualify for the Ratings-Based Approach, the Internal Assessment Approach, or the Supervisory Formula Approach under sections 43, 44, and 45 of this appendix, respectively.

(3) *Securitizations of non-IRB exposures.* In accordance with paragraphs (c) and (g)(4) of section 42 of this appendix, certain exposures to a securitization any underlying exposure of which is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure.

(4) *Low-rated securitization exposures.* In accordance with section 43 and paragraph (c) of section 42 of this appendix, any securitization exposure that qualifies for and must be deducted under the Ratings-Based Approach.

(5) *High-risk securitization exposures subject to the Supervisory Formula Approach.* In accordance with paragraphs (b) and (c) of section 45 of this appendix and paragraph (c) of section 42 of this appendix, certain high-risk securitization exposures (or portions thereof) that qualify for the Supervisory Formula Approach.

(6) *Eligible credit reserves shortfall.* In accordance with paragraph (a)(1) of section 13 of this appendix, any eligible credit reserves shortfall.

(7) *Certain failed capital markets transactions.* In accordance with paragraph (e)(3) of section 35 of this appendix, the State savings association's exposure on certain failed capital markets transactions.

*Section 12. Deductions and Limitations Not Required*

(a) *Deduction of CEIOs.* A State savings association is not required to make the deduction from capital for CEIOs in 12 CFR 390.465(a)(2)(iii) and 390.471(e).

(b) *Deduction for certain equity investments.* A State savings association is not required to deduct equity securities from capital under 12 CFR 390.465(c)(2)(ii). However, it must continue to deduct equity investments in real estate under that section. *See* 12 CFR 390.461, which defines equity investments, including equity securities and equity investments in real estate.

*Section 13. Eligible Credit Reserves*

(a) *Comparison of eligible credit reserves to expected credit losses*—(1) *Shortfall of eligible credit reserves.* If a State savings association's eligible credit reserves are less than the State savings association's total expected credit losses, the State savings association must deduct the shortfall amount 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the State savings association's actual tier 2 capital, the State savings association must deduct the excess amount from tier 1 capital.

(2) *Excess eligible credit reserves.* If a State savings association's eligible credit reserves exceed the State savings association's total expected credit losses, the State savings association may include the excess amount in tier 2 capital to the extent that the excess amount does not exceed 0.6 percent of the State savings association's credit-risk-weighted assets.

(b) *Treatment of allowance for loan and lease losses.* Regardless of any provision in §§ 390.461 through 390.471, the ALLL is included in tier 2 capital only to the extent provided in paragraph (a)(2) of this section and in section 24 of this appendix.

**Part III. Qualification**

*Section 21. Qualification Process*

(a) *Timing.* (1) A State savings association that is described in paragraph (b)(1) of section 1 of this appendix must adopt a written implementation plan no later than six months after the later of April 1, 2008, or the date the State savings association meets a criterion in that section. The implementation plan must incorporate an explicit first floor period start date no later than 36 months after the later of April 1, 2008, or the date the State savings association meets at least one criterion under paragraph (b)(1) of section 1 of this appendix. The FDIC may extend the first floor period start date.

(2) A State savings association that elects to be subject to this appendix under paragraph (b)(2) of section 1 of this appendix must adopt a written implementation plan.

(b) *Implementation plan.* (1) The State savings association's implementation plan must address in detail how the State savings association complies, or plans to comply, with the qualification requirements in section 22 of this appendix. The State savings association also must maintain a comprehensive and sound planning and governance process to oversee the implementation efforts described in the plan. At a minimum, the plan must:

(i) Comprehensively address the qualification requirements in section 22 of this appendix for the State savings association and each consolidated subsidiary (U.S. and foreign-based) of the State savings association with respect to all portfolios and exposures of the State savings association and each of its consolidated subsidiaries;

(ii) Justify and support any proposed temporary or permanent exclusion of business lines, portfolios, or exposures from application of the advanced approaches in this appendix (which business lines, portfolios, and exposures must be, in the aggregate, immaterial to the State savings association);

(iii) Include the State savings association's self-assessment of:

(A) The State savings association's current status in meeting the qualification requirements in section 22 of this appendix; and

(B) The consistency of the State savings association's current practices with the FDIC's supervisory guidance on the qualification requirements;

(iv) Based on the State savings association's self-assessment, identify and describe the areas in which the State savings association proposes to undertake additional work to comply with the qualification requirements in section 22 of this appendix or to improve the consistency of the State savings association's current practices with the FDIC's supervisory guidance on the qualification requirements (gap analysis);

(v) Describe what specific actions the State savings association will take to address the areas identified in the gap analysis required by paragraph (b)(1)(iv) of this section;

(vi) Identify objective, measurable milestones, including delivery dates and a date when the State savings association's implementation of the methodologies described in this appendix will be fully operational;

(vii) Describe resources that have been budgeted and are available to implement the plan; and

(viii) Receive approval of the State savings association's board of directors.

(2) The State savings association must submit the implementation plan, together with a copy of the minutes of the board of directors' approval, to the FDIC at least 60 days before the State savings association proposes to begin its parallel run, unless the FDIC waives prior notice.

(c) *Parallel run.* Before determining its risk-based capital requirements under this appendix and following adoption of the implementation plan, the State savings association must conduct a satisfactory parallel run. A satisfactory parallel run is a period of no less than four consecutive calendar quarters during which the State savings association complies with the qualification requirements in section 22 of this appendix to the satisfaction of the FDIC. During the parallel run, the State savings association must report to the FDIC on a calendar quarterly basis its risk-based capital ratios using §§ 390.461 through 390.471 and the risk-based capital requirements described in this appendix. During this period, the State savings association is subject to §§ 390.461 through 390.471.

(d) *Approval to calculate risk-based capital requirements under this appendix.* The FDIC will notify the State savings association of the date that the State savings association may begin its first floor period if the FDIC determines that:

(1) The State savings association fully complies with all the qualification requirements in section 22 of this appendix;

(2) The State savings association has conducted a satisfactory parallel run under paragraph (c) of this section; and

(3) The State savings association has an adequate process to ensure ongoing compliance with the qualification requirements in section 22 of this appendix.

(e) *Transitional floor periods.* Following a satisfactory parallel run, a State savings association is subject to three transitional floor periods.

(1) *Risk-based capital ratios during the transitional floor periods*—(i) *Tier 1 risk-based capital ratio.* During a State savings association's transitional floor periods, the State savings association's tier 1 risk-based capital ratio is equal to the lower of:

(A) The State savings association's floor-adjusted tier 1 risk-based capital ratio; or

(B) The State savings association's advanced approaches tier 1 risk-based capital ratio.

(ii) *Total risk-based capital ratio.* During a State savings association's transitional floor periods, the State savings association's total risk-based capital ratio is equal to the lower of:

(A) The State savings association's floor-adjusted total risk-based capital ratio; or

(B) The State savings association's advanced approaches total risk-based capital ratio.

(2) *Floor-adjusted risk-based capital ratios.* (i) A State savings association's floor-adjusted tier 1 risk-based capital ratio during a transitional floor period is equal to the State savings association's tier 1 capital as calculated under §§ 390.461–390.471, divided by the product of:

(A) The State savings association's total risk-weighted assets as calculated under §§ 390.461 through 390.471; and

(B) The appropriate transitional floor percentage in Table 1.

(ii) A State savings association's floor-adjusted total risk-based capital ratio during a transitional floor period is equal to the sum of the State savings association's tier 1 and tier 2 capital as calculated under §§ 390.461 through 390.471, divided by the product of:

(A) The State savings association's total risk-weighted assets as calculated under §§ 390.461 through 390.471; and

(B) The appropriate transitional floor percentage in Table 1.

(iii) A State savings association that meets the criteria in paragraph (b)(1) or (b)(2) of section 1 of this appendix as of April 1, 2008, must use §§ 390.461 through 390.471 during the parallel run and as the basis for its transitional floors.

TABLE 1—TRANSITIONAL FLOORS

| Transitional floor period | Transitional floor percentage |
|---|---|
| First floor period | 95 |
| Second floor period | 90 |
| Third floor period | 85 |

(3) *Advanced approaches risk-based capital ratios.* (i) A State savings association's advanced approaches tier 1 risk-based capital ratio equals the State savings association's tier 1 risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(ii) A State savings association's advanced approaches total risk-based capital ratio equals the State savings association's total risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(4) *Reporting.* During the transitional floor periods, a State savings association must report to the FDIC on a calendar quarterly basis both floor-adjusted risk-based capital ratios and both advanced approaches risk-based capital ratios.

(5) *Exiting a transitional floor period.* A State savings association may not exit a transitional floor period until the State savings association has spent a minimum of four consecutive calendar quarters in the period and the FDIC has determined that the State savings association may exit the floor period. The FDIC's determination will be based on an assessment of the State savings association's ongoing compliance with the qualification requirements in section 22 of this appendix.

(6) *Interagency study.* After the end of the second transition year (2010), the Federal banking agencies will publish a study that evaluates the advanced approaches to determine if there are any material deficiencies. For any primary Federal supervisor to authorize any institution to exit the third transitional floor period, the study must determine that there are no such material deficiencies that cannot be addressed by then-existing tools, or, if such deficiencies are found, they are first remedied by changes to this appendix. Notwithstanding the preceding sentence, a primary Federal supervisor that disagrees with the finding of material deficiency may not authorize any institution under its jurisdiction to exit the third transitional floor period unless it provides a public report explaining its reasoning.

*Section 22. Qualification Requirements*

(a) *Process and systems requirements.* (1) A State savings association must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by a State savings association for risk-based capital purposes under this appendix must be consistent with the State savings association's internal risk management processes and management information reporting systems.

(3) Each State savings association must have an appropriate infrastructure with risk measurement and management processes that meet the qualification requirements of this section and are appropriate given the State savings association's size and level of complexity. Regardless of whether the systems and models that generate the risk parameters necessary for calculating a State savings association's risk-based capital requirements are located at any affiliate of the State savings association, the State savings association itself must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of its own credit risk and operational risk exposures.

(b) *Risk rating and segmentation systems for wholesale and retail exposures.* (1) A State savings association must have an internal risk rating and segmentation system that accurately and reliably differentiates among degrees of credit risk for the State savings association's wholesale and retail exposures.

(2) For wholesale exposures:

(i) A State savings association must have an internal risk rating system that accurately and reliably assigns each obligor to a single rating grade (reflecting the obligor's likelihood of default). A State savings association may elect, however, not to assign to a rating grade an obligor to whom the State savings association extends credit based solely on the financial strength of a guarantor, provided that all of the State savings association's exposures to the obligor are fully covered by eligible guarantees, the

State savings association applies the PD substitution approach in paragraph (c)(1) of section 33 of this appendix to all exposures to that obligor, and the State savings association immediately assigns the obligor to a rating grade if a guarantee can no longer be recognized under this appendix. The State savings association's wholesale obligor rating system must have at least seven discrete rating grades for non-defaulted obligors and at least one rating grade for defaulted obligors.

(ii) Unless the State savings association has chosen to directly assign LGD estimates to each wholesale exposure, the State savings association must have an internal risk rating system that accurately and reliably assigns each wholesale exposure to a loss severity rating grade (reflecting the State savings association's estimate of the LGD of the exposure). A State savings association employing loss severity rating grades must have a sufficiently granular loss severity grading system to avoid grouping together exposures with widely ranging LGDs.

(3) For retail exposures, a State savings association must have an internal system that groups retail exposures into the appropriate retail exposure subcategory, groups the retail exposures in each retail exposure subcategory into separate segments with homogeneous risk characteristics, and assigns accurate and reliable PD and LGD estimates for each segment on a consistent basis. The State savings association's system must identify and group in separate segments by subcategories exposures identified in paragraphs (c)(2)(ii) and (iii) of section 31 of this appendix.

(4) The State savings association's internal risk rating policy for wholesale exposures must describe the State savings association's rating philosophy (that is, must describe how wholesale obligor rating assignments are affected by the State savings association's choice of the range of economic, business, and industry conditions that are considered in the obligor rating process).

(5) The State savings association's internal risk rating system for wholesale exposures must provide for the review and update (as appropriate) of each obligor rating and (if applicable) each loss severity rating whenever the State savings association receives new material information, but no less frequently than annually. The State savings association's retail exposure segmentation system must provide for the review and update (as appropriate) of assignments of retail exposures to segments whenever the State savings association receives new material information, but generally no less frequently than quarterly.

(c) *Quantification of risk parameters for wholesale and retail exposures.* (1) The State savings association must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters for the State savings association's wholesale and retail exposures.

(2) Data used to estimate the risk parameters must be relevant to the State savings association's actual wholesale and retail exposures, and of sufficient quality to support the determination of risk-based capital requirements for the exposures.

(3) The State savings association's risk parameter quantification process must produce appropriately conservative risk parameter estimates where the State savings association has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The State savings association's risk parameter estimation process should not rely on the possibility of U.S. government financial assistance, except for the financial assistance that the U.S. government has a legally binding commitment to provide.

(5) Where the State savings association's quantifications of LGD directly or indirectly incorporate estimates of the effectiveness of its credit risk management practices in reducing its exposure to troubled obligors prior to default, the State savings association must support such estimates with empirical analysis showing that the estimates are consistent with its historical experience in dealing with such exposures during economic downturn conditions.

(6) PD estimates for wholesale obligors and retail segments must be based on at least five years of default data. LGD estimates for wholesale exposures must be based on at least seven years of loss severity data, and LGD estimates for retail segments must be based on at least five years of loss severity data. EAD estimates for wholesale exposures must be based on at least seven years of exposure amount data, and EAD estimates for retail segments must be based on at least five years of exposure amount data.

(7) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the State savings association must adjust its estimates of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(8) The State savings association's PD, LGD, and EAD estimates must be based on the definition of default in this appendix.

(9) The State savings association must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(10) The State savings association must at least annually conduct a comprehensive review and analysis of reference data to determine relevance of reference data to the State savings association's exposures, quality of reference data to support PD, LGD, and EAD estimates, and consistency of reference data to the definition of default contained in this appendix.

(d) *Counterparty credit risk model.* A State savings association must obtain the prior written approval of the FDIC under section 32 of this appendix to use the internal models methodology for counterparty credit risk.

(e) *Double default treatment.* A State savings association must obtain the prior written approval of the FDIC under section 34 of this appendix to use the double default treatment.

(f) *Securitization exposures.* A State savings association must obtain the prior written approval of the FDIC under section 44 of this appendix to use the Internal Assessment Approach for securitization exposures to ABCP programs.

(g) *Equity exposures model.* A State savings association must obtain the prior written approval of the FDIC under section 53 of this appendix to use the Internal Models Approach for equity exposures.

(h) *Operational risk*—(1) *Operational risk management processes.* A State savings association must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the State savings association's operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the State savings association's operational risk profile) to identify, measure, monitor, and control operational risk in State savings association products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the board of directors (or a designated committee of the board).

(2) *Operational risk data and assessment systems.* A State savings association must have operational risk data and assessment systems that capture operational risks to which the State savings association is exposed. The State savings association's operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the State savings association's current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) *Internal operational loss event data.* The State savings association must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(1) The State savings association's operational risk data and assessment systems must include a historical observation period of at least five years for internal operational loss event data (or such shorter period approved by the FDIC to address transitional situations, such as integrating a new business line).

(2) The State savings association must be able to map its internal operational loss event data into the seven operational loss event type categories.

(3) The State savings association may refrain from collecting internal operational loss event data for individual operational losses below established dollar threshold amounts if the State savings association can demonstrate to the satisfaction of the FDIC that the thresholds are reasonable, do not exclude important internal operational loss event data, and permit the State savings association to capture substantially all the dollar value of the State savings association's operational losses.

(B) *External operational loss event data.* The State savings association must have a systematic process for determining its methodologies for incorporating external operational loss event data into its operational risk data and assessment systems.

(C) *Scenario analysis.* The State savings association must have a systematic process for determining its methodologies for incorporating scenario analysis into its operational risk data and assessment systems.

(D) *Business environment and internal control factors.* The State savings association must incorporate business environment and internal control factors into its operational risk data and assessment systems. The State savings association must also periodically compare the results of its prior business environment and internal control factor assessments against its actual operational losses incurred in the intervening period.

(3) *Operational risk quantification systems.* (i) The State savings association's operational risk quantification systems:

(A) Must generate estimates of the State savings association's operational risk exposure using its operational risk data and assessment systems;

(B) Must employ a unit of measure that is appropriate for the State savings association's range of business activities and the variety of operational loss events to which it is exposed, and that does not combine business activities or operational loss events with demonstrably different risk profiles within the same loss distribution;

(C) Must include a credible, transparent, systematic, and verifiable approach for weighting each of the four elements, described in paragraph (h)(2)(ii) of this section, that a State savings association is required to incorporate into its operational risk data and assessment systems;

(D) May use internal estimates of dependence among operational losses across and within units of measure if the State savings association can demonstrate to the satisfaction of the FDIC that its process for estimating dependence is sound, robust to a variety of scenarios, and implemented with integrity, and allows for the uncertainty surrounding the estimates. If the State savings association has not made such a demonstration, it must sum operational risk exposure estimates across units of measure to calculate its total operational risk exposure; and

(E) Must be reviewed and updated (as appropriate) whenever the State savings association becomes aware of information that may have a material effect on the State savings association's estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(ii) With the prior written approval of the FDIC, a State savings association may generate an estimate of its operational risk exposure using an alternative approach to that specified in paragraph (h)(3)(i) of this section. A State savings association proposing to use such an alternative operational risk quantification system must submit a proposal to the FDIC. In determining whether to approve a State savings association's proposal to use an alternative operational risk quantification system, the FDIC will consider the following principles:

(A) Use of the alternative operational risk quantification system will be allowed only on an exception basis, considering the size, complexity, and risk profile of the State savings association;

(B) The State savings association must demonstrate that its estimate of its operational risk exposure generated under the alternative operational risk quantification system is appropriate and can be supported empirically; and

(C) A State savings association must not use an allocation of operational risk capital requirements that includes entities other than depository institutions or the benefits of diversification across entities.

(i) *Data management and maintenance.* (1) A State savings association must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements.

(2) A State savings association must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) A State savings association must retain sufficient data elements related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(j) *Control, oversight, and validation mechanisms.* (1) The State savings association's senior management must ensure that all components of the State savings association's advanced systems function effectively and comply with the qualification requirements in this section.

(2) The State savings association's board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the State savings association's advanced systems.

(3) A State savings association must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the qualification requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the State savings association's advanced systems; and

(iii) Includes adequate governance and project management processes.

(4) The State savings association must validate, on an ongoing basis, its advanced systems. The State savings association's validation process must be independent of the advanced systems' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes back-testing.

(5) The State savings association must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the State savings association's advanced systems and reports its findings to the State savings association's board of directors (or a committee thereof).

(6) The State savings association must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(k) *Documentation.* The State savings association must adequately document all material aspects of its advanced systems.

*Section 23. Ongoing Qualification*

(a) *Changes to advanced systems.* A State savings association must meet all the qualification requirements in section 22 of this appendix on an ongoing basis. A State savings association must notify the FDIC when the State savings association makes any change to an advanced system that would result in a material change in the State savings association's risk-weighted asset amount for an exposure type, or when the State savings association makes any significant change to its modeling assumptions.

(b) *Failure to comply with qualification requirements.* (1) If the FDIC determines that a State savings association that uses this appendix and has conducted a satisfactory parallel run fails to comply with the qualification requirements in section 22 of this appendix, the FDIC will notify the State savings association in writing of the State savings association's failure to comply.

(2) The State savings association must establish and submit a plan satisfactory to the FDIC to return to compliance with the qualification requirements.

(3) In addition, if the FDIC determines that the State savings association's risk-based capital requirements are not commensurate with the State savings association's credit, market, operational, or other risks, the FDIC may require such a State savings association to calculate its risk-based capital requirements:

(i) Under §§ 390.461 through 390.471; or

(ii) Under this appendix with any modifications provided by the FDIC.

*Section 24. Merger and Acquisition Transitional Arrangements*

(a) *Mergers and acquisitions of companies without advanced systems.* If a State savings association merges with or acquires a company that does not calculate its risk-based capital requirements using advanced systems, the State savings association may use §§ 390.461 through 390.471 to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the merger or acquisition consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the State savings association must submit to the FDIC an implementation plan for using its advanced systems for the acquired company. During the period when § 390.460 applies to the merged or acquired company, any ALLL associated with the merged or acquired company's exposures may be included in the State savings association's tier 2 capital up to 1.25 percent of the acquired company's risk-weighted assets. All general allowances of the merged or acquired company must be excluded from the State savings association's eligible credit reserves. In addition, the risk-weighted assets of the merged or acquired company are not included in the State savings association's credit-risk-weighted assets but are included in total risk-weighted assets. If a State savings association relies on this paragraph, the State savings association must disclose publicly the amounts of risk-weighted assets and qualifying capital calculated under this appendix for the acquiring State savings association and under §§ 390.461 through 390.471 for the acquired company.

(b) *Mergers and acquisitions of companies with advanced systems*—(1) If a State savings association merges with or acquires a company that calculates its risk-based capital requirements using advanced systems, the State savings association may use the acquired company's advanced systems to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the acquisition or merger consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the State savings association must submit to the FDIC an implementation plan for using its advanced systems for the merged or acquired company.

(2) If the acquiring State savings association is not subject to the advanced approaches in this appendix at the time of acquisition or merger, during the period when §§ 390.461 through 390.471 apply to the acquiring State savings association, the ALLL associated with the exposures of the merged or acquired company may not be directly included in tier 2 capital. Rather, any excess eligible credit reserves associated with the merged or acquired company's exposures may be included in the State savings association's tier 2 capital up to 0.6 percent of the credit-risk-weighted assets associated with those exposures.

**Part IV. Risk-Weighted Assets for General Credit Risk**

*Section 31. Mechanics for Calculating Total Wholesale and Retail Risk-Weighted Assets*

(a) *Overview.* A State savings association must calculate its total wholesale and retail risk-weighted asset amount in four distinct phases:

(1) Phase 1—categorization of exposures;

(2) Phase 2—assignment of wholesale obligors and exposures to rating grades and segmentation of retail exposures;

(3) Phase 3—assignment of risk parameters to wholesale exposures and segments of retail exposures; and

(4) Phase 4—calculation of risk-weighted asset amounts.

(b) *Phase 1—Categorization.* The State savings association must determine which of its exposures are wholesale exposures, retail exposures, securitization exposures, or equity exposures. The State savings association must categorize each retail exposure as a residential mortgage exposure, a QRE, or an other retail exposure. The State savings association must identify which wholesale exposures are HVCRE exposures, sovereign exposures, OTC derivative contracts, repo-style transactions, eligible margin loans, eligible purchased wholesale exposures, unsettled transactions to which section 35 of this appendix applies, and eligible guarantees or eligible credit derivatives that are used as credit risk mitigants. The State savings association must identify any on-balance sheet asset that does not meet the definition of a wholesale, retail, equity, or securitization exposure, as well as any non-material portfolio of exposures described in paragraph (e)(4) of this section.

(c) *Phase 2—Assignment of wholesale obligors and exposures to rating grades and retail exposures to segments*—(1) *Assignment of wholesale obligors and exposures to rating grades.*

(i) The State savings association must assign each obligor of a wholesale exposure to a single obligor rating grade and must assign each wholesale exposure to which it does not directly assign an LGD estimate to a loss severity rating grade.

(ii) The State savings association must identify which of its wholesale obligors are in default.

(2) *Segmentation of retail exposures.* (i) The State savings association must group the retail exposures in each retail subcategory into segments that have homogeneous risk characteristics.

(ii) The State savings association must identify which of its retail exposures are in default. The State savings association must segment defaulted retail exposures separately from non-defaulted retail exposures.

(iii) If the State savings association determines the EAD for eligible margin loans using the approach in paragraph (b) of section 32 of this appendix, the State savings association must identify which of its retail exposures are eligible margin loans for which the State savings association uses this EAD approach and must segment such eligible margin loans separately from other retail exposures.

(3) *Eligible purchased wholesale exposures.* A State savings association may group its eligible purchased wholesale exposures into segments that have homogeneous risk characteristics. A State savings association must use the wholesale exposure formula in Table 2 in this section to determine the risk-based capital requirement for each segment of eligible purchased wholesale exposures.

(d) *Phase 3—Assignment of risk parameters to wholesale exposures and segments of retail exposures*—(1) *Quantification process.* Subject to the limitations in this paragraph (d), the State savings association must:

(i) Associate a PD with each wholesale obligor rating grade;

(ii) Associate an LGD with each wholesale loss severity rating grade or assign an LGD to each wholesale exposure;

(iii) Assign an EAD and M to each wholesale exposure; and

(iv) Assign a PD, LGD, and EAD to each segment of retail exposures.

(2) *Floor on PD assignment.* The PD for each wholesale obligor or retail segment may not be less than 0.03 percent, except for exposures to or directly and unconditionally guaranteed by a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Commission, the European Central Bank, or a multilateral development bank, to which the State savings association assigns a rating grade associated with a PD of less than 0.03 percent.

(3) *Floor on LGD estimation.* The LGD for each segment of residential mortgage exposures (other than segments of residential mortgage exposures for which all or substantially all of the principal of each exposure is directly and unconditionally guaranteed by the full faith and credit of a sovereign entity) may not be less than 10 percent.

(4) *Eligible purchased wholesale exposures.* A State savings association must assign a PD, LGD, EAD, and M to each segment of eligible purchased wholesale exposures. If the State savings association can estimate ECL (but not PD or LGD) for a segment of eligible purchased wholesale exposures, the State savings association must assume that the LGD of the segment equals 100 percent and that the PD of the segment equals ECL divided by EAD. The estimated ECL must be calculated for the exposures without regard to any assumption of recourse or guarantees from the seller or other parties.

(5) *Credit risk mitigation—credit derivatives, guarantees, and collateral.* (i) A State savings association may take into account the risk reducing effects of eligible guarantees and eligible credit derivatives in support of a wholesale exposure by applying the PD substitution or LGD adjustment treatment to the exposure as provided in section 33 of this appendix or, if applicable, applying double default treatment to the exposure as provided in section 34 of this appendix. A State savings association may decide separately for each wholesale exposure that qualifies for the double default treatment under section 34 of this appendix whether to apply the double default treatment or to use the PD substitution or LGD adjustment treatment without recognizing double default effects.

(ii) A State savings association may take into account the risk reducing effects of guarantees and credit derivatives in support of retail exposures in a segment when quantifying the PD and LGD of the segment.

(iii) Except as provided in paragraph (d)(6) of this section, a State savings association may take into account the risk reducing effects of collateral in support of a wholesale exposure when quantifying the LGD of the exposure and may take into account the risk reducing effects of collateral in support of retail exposures when quantifying the PD and LGD of the segment.

(6) *EAD for OTC derivative contracts, repo-style transactions, and eligible margin loans.*

(i) A State savings association must calculate its EAD for an OTC derivative contract as provided in paragraphs (c) and (d) of section 32 of this appendix. A State savings association may take into account the risk-reducing effects of financial collateral in support of a repo-style transaction or eligible margin loan and of any collateral in support of a repo-style transaction that is included in the State savings association's VaR-based measure under any applicable market risk rule through an adjustment to EAD as provided in paragraphs (b) and (d) of section 32 of this appendix. A State savings association that takes collateral into account through such an adjustment to EAD under section 32 of this appendix may not reflect such collateral in LGD.

(ii) A State savings association may attribute an EAD of zero to:

(A) Derivative contracts that are publicly traded on an exchange that requires the daily receipt and payment of cash-variation margin;

(B) Derivative contracts and repo-style transactions that are outstanding with a qualifying central counterparty (but not for those transactions that a qualifying central counterparty has rejected); and

(C) Credit risk exposures to a qualifying central counterparty in the form of clearing deposits and posted collateral that arise from transactions described in paragraph (d)(6)(ii)(B) of this section.

(7) *Effective maturity.* An exposure's M must be no greater than five years and no less than one year, except that an exposure's M must be no less than one day if the exposure has an original maturity of less than one year and is not part of a State savings association's ongoing financing of the obligor. An exposure is not part of a State savings association's ongoing financing of the obligor if the State savings association:

(i) Has a legal and practical ability not to renew or roll over the exposure in the event of credit deterioration of the obligor;

(ii) Makes an independent credit decision at the inception of the exposure and at every renewal or roll over; and

(iii) Has no substantial commercial incentive to continue its credit relationship with the obligor in the event of credit deterioration of the obligor.

(e) *Phase 4—Calculation of risk-weighted assets*—(1) *Non-defaulted exposures.* (i) A State savings association must calculate the dollar risk-based capital requirement for each of its wholesale exposures to a non-defaulted obligor (except eligible guarantees and eligible credit derivatives that hedge another wholesale exposure and exposures to which the State savings association applies the double default treatment in section 34 of this appendix) and segments of non-defaulted retail exposures by inserting the assigned risk parameters for the wholesale obligor and exposure or retail segment into the appropriate risk-based capital formula specified in Table 2 and multiplying the output of the formula (K) by the EAD of the exposure or segment. Alternatively, a State savings association may apply a 300 percent risk weight to the EAD of an eligible margin loan if the State savings association is not able to meet the agencies' requirements for estimation of PD and LGD for the margin loan.

Table 2 – IRB Risk-Based Capital Formulas for Wholesale Exposures to Non-Defaulted Obligors and Segments of Non-Defaulted Retail Exposures[1]

| | | |
|---|---|---|
| Retail | **Capital Requirement (K) Non-Defaulted Exposures** | $K = \left[ LGD \times N\left( \frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right]$ |
| | **Correlation Factor (R)** | For residential mortgage exposures: $R = 0.15$ |
| | | For qualifying revolving exposures: $R = 0.04$ |
| | | For other retail exposures: $R = 0.03 + 0.13 \times e^{-35 \times PD}$ |
| Wholesale | **Capital Requirement (K) Non-Defaulted Exposures** | $K = \left[ LGD \times N\left( \frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right] \times \left( \frac{1 + (M - 2.5) \times b}{1 - 1.5 \times b} \right)$ |
| | **Correlation Factor (R)** | For HVCRE exposures: $R = 0.12 + 0.18 \times e^{-50 \times PD}$ |
| | | For wholesale exposures other than HVCRE exposures: $R = 0.12 + 0.12 \times e^{-50 \times PD}$ |
| | **Maturity Adjustment (b)** | $b = (0.11852 - 0.05478 \times \ln(PD))^2$ |

[1]N(.) means the cumulative distribution function for a standard normal random variable. $N^{-1}$(.) means the inverse cumulative distribution function for a standard normal random variable. The symbol e refers to the base of the natural logarithms, and the function ln(.) refers to the natural logarithm of the expression within parentheses. The formulas apply when PD is greater than zero. If PD equals zero, the capital requirement K is set equal to zero.

(ii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a non-defaulted obligor and segment of non-defaulted retail exposures calculated in paragraph (e)(1)(i) of this section and in paragraph (e) of section 34 of this appendix equals the total dollar risk-based capital requirement for those exposures and segments.

(iii) The aggregate risk-weighted asset amount for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(1)(ii) of this section multiplied by 12.5.

(2) *Wholesale exposures to defaulted obligors and segments of defaulted retail exposures.* (i) The dollar risk-based capital requirement for each wholesale exposure to a defaulted obligor equals 0.08 multiplied by the EAD of the exposure.

(ii) The dollar risk-based capital requirement for a segment of defaulted retail exposures equals 0.08 multiplied by the EAD of the segment.

(iii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a defaulted obligor calculated in paragraph (e)(2)(i) of this section plus the dollar risk-based capital requirements for each segment of defaulted retail exposures calculated in paragraph (e)(2)(ii) of this section equals the total dollar risk-based capital requirement for those exposures and segments.

(iv) The aggregate risk-weighted asset amount for wholesale exposures to defaulted obligors and segments of defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(2)(iii) of this section multiplied by 12.5.

(3) *Assets not included in a defined exposure category.* (i) A State savings association may assign a risk-weighted asset amount of zero to cash owned and held in all offices of the State savings association or in transit and for gold bullion held in the State savings association's own vaults, or held in another State savings association's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities.

(ii) The risk-weighted asset amount for the residual value of a retail lease exposure equals such residual value.

(iii) The risk-weighted asset amount for any other on-balance-sheet asset that does not meet the definition of a wholesale, retail, securitization, or equity exposure equals the carrying value of the asset.

(4) *Non-material portfolios of exposures.* The risk-weighted asset amount of a portfolio of exposures for which the State savings association has demonstrated to the FDIC's satisfaction that the portfolio (when combined with all other portfolios of exposures that the State savings association seeks to treat under this paragraph) is not material to the State savings association is the sum of the carrying values of on-balance sheet exposures plus the notional amounts of off-balance sheet exposures in the portfolio. For purposes of this paragraph (e)(4), the notional amount of an OTC derivative contract that is not a credit derivative is the EAD of the derivative as calculated in section 32 of this appendix.

*Section 32. Counterparty Credit Risk of Repo-Style Transactions, Eligible Margin Loans, and OTC Derivative Contracts*

(a) *In General.* (1) This section describes two methodologies—a collateral haircut approach and an internal models methodology—that a State savings association may use instead of an LGD estimation methodology to recognize the benefits of financial collateral in mitigating the counterparty credit risk of repo-style transactions, eligible margin loans, collateralized OTC derivative contracts, and single product netting sets of such transactions and to recognize the benefits of any collateral in mitigating the counterparty credit risk of repo-style transactions that are included in a State savings association's VaR-based measure under any applicable market risk rule. A third methodology, the simple VaR methodology, is available for single product netting sets of repo-style transactions and eligible margin loans.

(2) This section also describes the methodology for calculating EAD for an OTC derivative contract or a set of OTC derivative contracts subject to a qualifying master netting agreement. A State savings association also may use the internal models methodology to estimate EAD for qualifying cross-product master netting agreements.

(3) A State savings association may only use the standard supervisory haircut approach with a minimum 10-business-day holding period to recognize in EAD the benefits of conforming residential mortgage collateral that secures repo-style transactions (other than repo-style transactions included in the State savings association's VaR-based measure under any applicable market risk rule), eligible margin loans, and OTC derivative contracts.

(4) A State savings association may use any combination of the three methodologies for collateral recognition; however, it must use the same methodology for similar exposures.

(b) *EAD for eligible margin loans and repo-style transactions*—(1) *General.* A State savings association may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, or single-product netting set of such transactions by factoring the collateral into its LGD estimates for the exposure. Alternatively, a State savings association may estimate an unsecured LGD for the exposure, as well as for any repo-style transaction that is included in the State savings association's VaR-based measure under any applicable market risk rule, and determine the EAD of the exposure using:

(i) The collateral haircut approach described in paragraph (b)(2) of this section;

(ii) For netting sets only, the simple VaR methodology described in paragraph (b)(3) of this section; or

(iii) The internal models methodology described in paragraph (d) of this section.

(2) *Collateral haircut approach*—(i) *EAD equation.* A State savings association may determine EAD for an eligible margin loan, repo-style transaction, or netting set by setting EAD equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(A) $\Sigma E$ equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the State savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set));

(B) $\Sigma C$ equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the State savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(C) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current market values of the instrument or gold the State savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of that same instrument or gold the State savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(D) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(E) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current market values of any instruments or cash in the currency the State savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of any instruments or cash in the currency the State savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(F) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(ii) *Standard supervisory haircuts.* (A) Under the standard supervisory haircuts approach:

(*1*) A State savings association must use the haircuts for market price volatility (Hs) in Table 3, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(*3*) and (*4*) of this section;

TABLE 3—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS [3]

| Applicable external rating grade category for debt securities | Residual maturity for debt securities | Issuers exempt from the 3 basis point floor | Other issuers |
|---|---|---|---|
| Two highest investment-grade rating categories for long-term ratings/highest investment-grade rating category for short-term ratings. | ≤ 1 year | 0.005 | 0.01 |
| | >1 year, ≤ 5 years | 0.02 | 0.04 |
| | > 5 years | 0.04 | 0.08 |
| Two lowest investment-grade rating categories for both short- and long-term ratings. | ≤ 1 year | 0.01 | 0.02 |
| | > 1 year, ≤ 5 years | 0.03 | 0.06 |
| | > 5 years | 0.06 | 0.12 |
| One rating category below investment grade | All | 0.15 | 0.25 |
| Main index equities (including convertible bonds) and gold | | 0.15 | |
| Other publicly traded equities (including convertible bonds), conforming residential mortgages, and nonfinancial collateral. | | 0.25 | |
| Mutual funds | | Highest haircut applicable to any security in which the fund can invest. | |
| Cash on deposit with the State savings association (including a certificate of deposit issued by the State savings association). | | 0 | |

(2) For currency mismatches, a State savings association must use a haircut for foreign exchange rate volatility (Hfx) of 8 percent, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(3) and (4) of this section.

(3) For repo-style transactions, a State savings association may multiply the supervisory haircuts provided in paragraphs (b)(2)(ii)(A)(1) and (2) of this section by the square root of ½ (which equals 0.707107).

(4) A State savings association must adjust the supervisory haircuts upward on the basis of a holding period longer than ten business days (for eligible margin loans) or five business days (for repo-style transactions) where and as appropriate to take into account the illiquidity of an instrument.

(iii) *Own internal estimates for haircuts.* With the prior written approval of the FDIC, a State savings association may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates.

(A) To receive FDIC approval to use its own internal estimates, a State savings association must satisfy the following minimum quantitative standards:

(1) A State savings association must use a 99th percentile one-tailed confidence interval.

(2) The minimum holding period for a repo-style transaction is five business days and for an eligible margin loan is ten business days. When a State savings association calculates an own-estimates haircut on a $T_N$-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut ($H_M$) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}}, \text{ where}$$

(i) $T_M$ equals 5 for repo-style transactions and 10 for eligible margin loans;

(ii) $T_N$ equals the holding period used by the State savings association to derive $H_N$; and

(iii) $H_N$ equals the haircut based on the holding period $T_N$.

(3) A State savings association must adjust holding periods upwards where and as appropriate to take into account the illiquidity of an instrument.

(4) The historical observation period must be at least one year.

(5) A State savings association must update its data sets and recompute haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(B) With respect to debt securities that have an applicable external rating of investment grade, a State savings association may calculate haircuts for categories of securities. For a category of securities, the State savings association must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the State savings association has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the State savings association must at a minimum take into account:

(1) The type of issuer of the security;

(2) The applicable external rating of the security;

(3) The maturity of the security; and

(4) The interest rate sensitivity of the security.

(C) With respect to debt securities that have an applicable external rating of below investment grade and equity securities, a State savings association must calculate a separate haircut for each individual security.

(D) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the State savings association must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(E) A State savings association's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

(3) *Simple VaR methodology.* With the prior written approval of the FDIC, a State savings association may estimate EAD for a netting set using a VaR model that meets the requirements in paragraph (b)(3)(iii) of this section. In such event, the State savings association must set EAD equal to max {0, [($\Sigma$E − $\Sigma$C) + PFE]}, where:

(i) $\Sigma$E equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the State savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty under the netting set);

(ii) $\Sigma$C equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the State savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the netting set); and

(iii) PFE (potential future exposure) equals the State savings association's empirically based best estimate of the 99th percentile, one-tailed confidence interval for an increase in the value of ($\Sigma$E − $\Sigma$C) over a five-business-day holding period for repo-style transactions or over a ten-business-day holding period for eligible margin loans using a minimum one-year historical observation period of price data representing the instruments that the State savings association has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. The State savings association must validate its VaR model, including by establishing and

[3] The market price volatility haircuts in Table 3 are based on a ten-business-day holding period.

maintaining a rigorous and regular back-testing regime.

(c) *EAD for OTC derivative contracts.* (1) A State savings association must determine the EAD for an OTC derivative contract that is not subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(5) of this section or using the internal models methodology described in paragraph (d) of this section.

(2) A State savings association must determine the EAD for multiple OTC derivative contracts that are subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(6) of this section or using the internal models methodology described in paragraph (d) of this section.

(3) *Counterparty credit risk for credit derivatives.* Notwithstanding the above, (i) a State savings association that purchases a credit derivative that is recognized under section 33 or 34 of this appendix as a credit risk mitigant for an exposure that is not a covered position under any applicable market risk rule need not compute a separate counterparty credit risk capital requirement under this section so long as the State savings association does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(ii) A State savings association that is the protection provider in a credit derivative must treat the credit derivative as a wholesale exposure to the reference obligor and need not compute a counterparty credit risk capital requirement for the credit derivative under this section, so long as it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes (unless the State savings association is treating the credit derivative as a covered position under any applicable market risk rule, in which case the State savings association must compute a supplemental counterparty credit risk capital requirement under this section).

(4) *Counterparty credit risk for equity derivatives.* A State savings association must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under part VI (unless the State savings association is treating the contract as a covered position under any applicable market risk rule). In addition, if the State savings association is treating the contract as a covered position under any applicable market risk rule and in certain other cases described in section 55 of this appendix, the State savings association must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this subpart.

(5) *Single OTC derivative contract.* Except as modified by paragraph (c)(7) of this section, the EAD for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the State savings association's current credit exposure and potential future credit exposure (PFE) on the derivative contract.

(i) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the mark-to-market value of the derivative contract or zero.

(ii) *PFE.* The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative mark-to-market value, is calculated by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 4. For purposes of calculating either the PFE under this paragraph or the gross PFE under paragraph (c)(6) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency. For any OTC derivative contract that does not fall within one of the specified categories in Table 4, the PFE must be calculated using the ''other'' conversion factors. A State savings association must use an OTC derivative contract's effective notional principal amount (that is, its apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than its apparent or stated notional principal amount in calculating PFE. PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 4—CONVERSION FACTOR MATRIX FOR OTC DERIVATIVE CONTRACTS [4]

| Remaining maturity [5] | Interest rate | Foreign exchange rate and gold | Credit (investment-grade reference obligor) [6] | Credit (non-investment-grade reference obligor) | Equity | Precious metals (except gold) | Other |
|---|---|---|---|---|---|---|---|
| One year or less | 0.00 | 0.01 | 0.05 | 0.10 | 0.06 | 0.07 | 0.10 |
| Over one to five years | 0.005 | 0.05 | 0.05 | 0.10 | 0.08 | 0.07 | 0.12 |
| Over five years | 0.015 | 0.075 | 0.05 | 0.10 | 0.10 | 0.08 | 0.15 |

(6) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (c)(7) of this section, the EAD for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE exposure for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) *Net current credit exposure.* The net current credit exposure is the greater of:

(A) The net sum of all positive and negative mark-to-market values of the individual OTC derivative contracts subject to the qualifying master netting agreement; or

(B) zero.

(ii) *Adjusted sum of the PFE.* The adjusted sum of the PFE, Anet, is calculated as Anet = (0.4×Agross)+(0.6×NGR×Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts (as determined under paragraph (c)(5)(ii) of this section) for each individual OTC derivative contract subject to the qualifying master netting agreement); and

(B) NGR = the net to gross ratio (that is, the ratio of the net current credit exposure to the gross current credit exposure). In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (c)(5)(i) of this section) of all individual OTC derivative contracts subject to the qualifying master netting agreement.

(7) *Collateralized OTC derivative contracts.* A State savings association may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or single-product netting set of OTC derivatives by factoring the collateral into its LGD estimates for the contract or netting set. Alternatively, a State savings association may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set that is marked to

[4] For an OTC derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[5] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[6] A State savings association must use the column labeled ''Credit (investment-grade reference obligor)'' for a credit derivative whose reference obligor has an outstanding unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade. A State savings association must use the column labeled ''Credit (non-investment-grade reference obligor)'' for all other credit derivatives.

market on a daily basis and subject to a daily margin maintenance requirement by estimating an unsecured LGD for the contract or netting set and adjusting the EAD calculated under paragraph (c)(5) or (c)(6) of this section using the collateral haircut approach in paragraph (b)(2) of this section. The State savings association must substitute the EAD calculated under paragraph (c)(5) or (c)(6) of this section for $\Sigma E$ in the equation in paragraph (b)(2)(i) of this section and must use a ten-business-day minimum holding period ($T_M$= 10).

(d) *Internal models methodology.* (1) With prior written approval from the FDIC, a State savings association may use the internal models methodology in this paragraph (d) to determine EAD for counterparty credit risk for OTC derivative contracts (collateralized or uncollateralized) and single-product netting sets thereof, for eligible margin loans and single-product netting sets thereof, and for repo-style transactions and single-product netting sets thereof. A State savings association that uses the internal models methodology for a particular transaction type (OTC derivative contracts, eligible margin loans, or repo-style transactions) must use the internal models methodology for all transactions of that transaction type. A State savings association may choose to use the internal models methodology for one or two of these three types of exposures and not the other types. A State savings association may also use the internal models methodology for OTC derivative contracts, eligible margin loans, and repo-style transactions subject to a qualifying cross-product netting agreement if:

(i) The State savings association effectively integrates the risk mitigating effects of cross-product netting into its risk management and other information technology systems; and

(ii) The State savings association obtains the prior written approval of the FDIC. A State savings association that uses the internal models methodology for a transaction type must receive approval from the FDIC to cease using the methodology for that transaction type or to make a material change to its internal model.

(2) Under the internal models methodology, a State savings association uses an internal model to estimate the expected exposure (EE) for a netting set and then calculates EAD based on that EE.

(i) The State savings association must use its internal model's probability distribution for changes in the market value of a netting set that are attributable to changes in market variables to determine EE.

(ii) Under the internal models methodology, EAD = $\alpha$ x effective EPE, or, subject to FDIC approval as provided in paragraph (d)(7), a more conservative measure of EAD.

$$\text{(A) EffectiveEPE}_{t_k} = \sum_{k=1}^{n} \text{EffectiveEE}_{t_k} \times \Delta t_k$$

(that is, effective EPE is the time-weighted average of effective EE where the weights are the proportion that an individual effective EE represents in a one-year time interval) where:

(1) Effective $EE_tk$= max (Effective $EE_tk-1$, $EE_tk$) (that is, for a specific $date_tk$, effective EE is the greater of EE at that date or the effective EE at the previous date); and

(2)$_t$k represents the kth future time period in the model and there are n time periods represented in the model over the first year; and

(B) $\alpha$ = 1.4 except as provided in paragraph (d)(6), or when the FDIC has determined that the State savings association must set $\alpha$ higher based on the State savings association's specific characteristics of counterparty credit risk.

(iii) A State savings association may include financial collateral currently posted by the counterparty as collateral (but may not include other forms of collateral) when calculating EE.

(iv) If a State savings association hedges some or all of the counterparty credit risk associated with a netting set using an eligible credit derivative, the State savings association may take the reduction in exposure to the counterparty into account when estimating EE. If the State savings association recognizes this reduction in exposure to the counterparty in its estimate of EE, it must also use its internal model to estimate a separate EAD for the State savings association's exposure to the protection provider of the credit derivative.

(3) To obtain the FDIC's approval to calculate the distributions of exposures upon which the EAD calculation is based, the State savings association must demonstrate to the satisfaction of the FDIC that it has been using for at least one year an internal model that broadly meets the following minimum standards, with which the State savings association must maintain compliance:

(i) The model must have the systems capability to estimate the expected exposure to the counterparty on a daily basis (but is not expected to estimate or report expected exposure on a daily basis).

(ii) The model must estimate expected exposure at enough future dates to reflect accurately all the future cash flows of contracts in the netting set.

(iii) The model must account for the possible non-normality of the exposure distribution, where appropriate.

(iv) The State savings association must measure, monitor, and control current counterparty exposure and the exposure to the counterparty over the whole life of all contracts in the netting set.

(v) The State savings association must be able to measure and manage current exposures gross and net of collateral held, where appropriate. The State savings association must estimate expected exposures for OTC derivative contracts both with and without the effect of collateral agreements.

(vi) The State savings association must have procedures to identify, monitor, and control specific wrong-way risk throughout the life of an exposure. Wrong-way risk in this context is the risk that future exposure to a counterparty will be high when the counterparty's probability of default is also high.

(vii) The model must use current market data to compute current exposures. When estimating model parameters based on historical data, at least three years of historical data that cover a wide range of economic conditions must be used and must be updated quarterly or more frequently if market conditions warrant. The State savings association should consider using model parameters based on forward-looking measures, where appropriate.

(viii) A State savings association must subject its internal model to an initial validation and annual model review process. The model review should consider whether the inputs and risk factors, as well as the model outputs, are appropriate.

(4) *Maturity.* (i) If the remaining maturity of the exposure or the longest-dated contract in the netting set is greater than one year, the State savings association must set M for the exposure or netting set equal to the lower of five years or M(EPE),[7] where:

$$\text{(A)}\ M(EPE) = 1 + \frac{\sum_{t_k > 1\,year}^{maturity} EE_k \times \Delta t_k \times df_k}{\sum_{k=1}^{t_k \le 1\,year} effectiveEE_k \times \Delta t_k \times df_k}$$

(B) dfk is the risk-free discount factor for future time period tk; and

(C) $\Delta tk = tk - tk-1$.

(ii) If the remaining maturity of the exposure or the longest-dated contract in the netting set is one year or less, the State savings association must set M for the exposure or netting set equal to one year, except as provided in paragraph (d)(7) of section 31 of this appendix.

(5) *Collateral agreements.* A State savings association may capture the effect on EAD of a collateral agreement that requires receipt of collateral when exposure to the counterparty increases but may not capture the effect on EAD of a collateral agreement that requires receipt of collateral when counterparty credit quality deteriorates. For this purpose, a

[7] Alternatively, a State savings association that uses an internal model to calculate a one-sided credit valuation adjustment may use the effective credit duration estimated by the model as M(EPE) in place of the formula in paragraph (d)(4).

collateral agreement means a legal contract that specifies the time when, and circumstances under which, the counterparty is required to pledge collateral to the State savings association for a single financial contract or for all financial contracts in a netting set and confers upon the State savings association a perfected, first priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the State savings association with a right to close out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the State savings association's exercise of rights under the agreement may be stayed or avoided under applicable law in the relevant jurisdictions. Two methods are available to capture the effect of a collateral agreement:

(i) With prior written approval from the FDIC, a State savings association may include the effect of a collateral agreement within its internal model used to calculate EAD. The State savings association may set EAD equal to the expected exposure at the end of the margin period of risk. The margin period of risk means, with respect to a netting set subject to a collateral agreement, the time period from the most recent exchange of collateral with a counterparty until the next required exchange of collateral plus the period of time required to sell and realize the proceeds of the least liquid collateral that can be delivered under the terms of the collateral agreement and, where applicable, the period of time required to re-hedge the resulting market risk, upon the default of the counterparty. The minimum margin period of risk is five business days for repo-style transactions and ten business days for other transactions when liquid financial collateral is posted under a daily margin maintenance requirement. This period should be extended to cover any additional time between margin calls; any potential closeout difficulties; any delays in selling collateral, particularly if the collateral is illiquid; and any impediments to prompt re-hedging of any market risk.

(ii) A State savings association that can model EPE without collateral agreements but cannot achieve the higher level of modeling sophistication to model EPE with collateral agreements can set effective EPE for a collateralized netting set equal to the lesser of:

(A) The threshold, defined as the exposure amount at which the counterparty is required to post collateral under the collateral agreement, if the threshold is positive, plus an add-on that reflects the potential increase in exposure of the netting set over the margin period of risk. The add-on is computed as the expected increase in the netting set's exposure beginning from current exposure of zero over the margin period of risk. The margin period of risk must be at least five business days for netting sets consisting only of repo-style transactions subject to daily re-margining and daily marking-to-market, and ten business days for all other netting sets; or

(B) Effective EPE without a collateral agreement.

(6) *Own estimate of alpha.* With prior written approval of the FDIC, a State savings association may calculate alpha as the ratio of economic capital from a full simulation of counterparty exposure across counterparties that incorporates a joint simulation of market and credit risk factors (numerator) and economic capital based on EPE (denominator), subject to a floor of 1.2. For purposes of this calculation, economic capital is the unexpected losses for all counterparty credit risks measured at a 99.9 percent confidence level over a one-year horizon. To receive approval, the State savings association must meet the following minimum standards to the satisfaction of the FDIC:

(i) The State savings association's own estimate of alpha must capture in the numerator the effects of:

(A) The material sources of stochastic dependency of distributions of market values of transactions or portfolios of transactions across counterparties;

(B) Volatilities and correlations of market risk factors used in the joint simulation, which must be related to the credit risk factor used in the simulation to reflect potential increases in volatility or correlation in an economic downturn, where appropriate; and

(C) The granularity of exposures (that is, the effect of a concentration in the proportion of each counterparty's exposure that is driven by a particular risk factor).

(ii) The State savings association must assess the potential model uncertainty in its estimates of alpha.

(iii) The State savings association must calculate the numerator and denominator of alpha in a consistent fashion with respect to modeling methodology, parameter specifications, and portfolio composition.

(iv) The State savings association must review and adjust as appropriate its estimates of the numerator and denominator of alpha on at least a quarterly basis and more frequently when the composition of the portfolio varies over time.

(7) *Other measures of counterparty exposure.* With prior written approval of the FDIC, a State savings association may set EAD equal to a measure of counterparty credit risk exposure, such as peak EAD, that is more conservative than an alpha of 1.4 (or higher under the terms of paragraph (d)(2)(ii)(B) of this section) times EPE for every counterparty whose EAD will be measured under the alternative measure of counterparty exposure. The State savings association must demonstrate the conservatism of the measure of counterparty credit risk exposure used for EAD. For material portfolios of new OTC derivative products, the State savings association may assume that the current exposure methodology in paragraphs (c)(5) and (c)(6) of this section meets the conservatism requirement of this paragraph for a period not to exceed 180 days. For immaterial portfolios of OTC derivative contracts, the State savings association generally may assume that the current exposure methodology in paragraphs (c)(5) and (c)(6) of this section meets the conservatism requirement of this paragraph.

*Section 33. Guarantees and Credit Derivatives: PD Substitution and LGD Adjustment Approaches*

(a) *Scope.* (1) This section applies to wholesale exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the State savings association and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(2) Wholesale exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) are securitization exposures subject to the securitization framework in part V.

(3) A State savings association may elect to recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative covering an exposure described in paragraph (a)(1) of this section by using the PD substitution approach or the LGD adjustment approach in paragraph (c) of this section or, if the transaction qualifies, using the double default treatment in section 34 of this appendix. A State savings association's PD and LGD for the hedged exposure may not be lower than the PD and LGD floors described in paragraphs (d)(2) and (d)(3) of section 31 of this appendix.

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in paragraph (a)(1) of this section, a State savings association may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-based capital requirement for each separate exposure as described in paragraph (a)(3) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged wholesale exposures described in paragraph (a)(1) of this section, a State savings association must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-based capital requirement for each exposure as described in paragraph (a)(3) of this section.

(6) A State savings association must use the same risk parameters for calculating ECL as it uses for calculating the risk-based capital requirement for the exposure.

(b) *Rules of recognition.* (1) A State savings association may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) A State savings association may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks *pari passu* (that is, equally) with or is junior to the hedged exposure; and

(ii) The reference exposure and the hedged exposure are exposures to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(c) *Risk parameters for hedged exposures*—(1) *PD substitution approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, a State savings association may recognize the guarantee or credit derivative in determining the State savings association's risk-based capital requirement for the hedged exposure by substituting the PD associated with the rating grade of the protection provider for the PD associated with the rating grade of the obligor in the risk-based capital formula applicable to the guarantee or credit derivative in Table 2 and using the appropriate LGD as described in paragraph (c)(1)(iii) of this section. If the State savings association determines that full substitution of the protection provider's PD leads to an inappropriate degree of risk mitigation, the State savings association may substitute a higher PD than that of the protection provider.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the State savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The State savings association must calculate its risk-based capital requirement for the protected exposure under section 31 of this appendix, where PD is the protection provider's PD, LGD is determined under paragraph (c)(1)(iii) of this section, and EAD is P. If the State savings association determines that full substitution leads to an inappropriate degree of risk mitigation, the State savings association may use a higher PD than that of the protection provider.

(B) The State savings association must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(C) The treatment in this paragraph (c)(1)(ii) is applicable when the credit risk of a wholesale exposure is covered on a partial pro rata basis or when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(iii) *LGD of hedged exposures.* The LGD of a hedged exposure under the PD substitution approach is equal to:

(A) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the State savings association with the option to receive immediate payout upon triggering the protection; or

(B) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the State savings association with the option to receive immediate payout upon triggering the protection.

(2) *LGD adjustment approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, the State savings association's risk-based capital requirement for the hedged exposure is the greater of:

(A) The risk-based capital requirement for the exposure as calculated under section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative; or

(B) The risk-based capital requirement for a direct exposure to the protection provider as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD equal to the EAD of the hedged exposure.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the State savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The State savings association's risk-based capital requirement for the protected exposure would be the greater of:

(*1*) The risk-based capital requirement for the protected exposure as calculated under section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative and EAD set equal to P; or

(*2*) The risk-based capital requirement for a direct exposure to the guarantor as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD set equal to P.

(B) The State savings association must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(3) *M of hedged exposures.* The M of the hedged exposure is the same as the M of the exposure if it were unhedged.

(d) *Maturity mismatch.* (1) A State savings association that recognizes an eligible guarantee or eligible credit derivative in determining its risk-based capital requirement for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligor is scheduled to fulfill its obligation on the exposure. If a credit risk mitigant has embedded options that may reduce its term, the State savings association (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the State savings association (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the State savings association to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant. For example, where there is a step-up in cost in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant will be the remaining time to the first call.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the State savings association must apply the following adjustment to the effective notional amount of the credit risk mitigant: $Pm = E \times (t - 0.25)/(T - 0.25)$, where:

(i) Pm = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E = effective notional amount of the credit risk mitigant;

(iii) t = the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Credit derivatives without restructuring as a credit event.* If a State savings association recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the State savings association must apply the following adjustment to the effective notional amount of the credit derivative: $Pr = Pm \times 0.60$, where:

(*1*) Pr = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(*2*) Pm = effective notional amount of the credit risk mitigant adjusted for maturity mismatch (if applicable).

(f) *Currency mismatch.* (1) If a State savings association recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the State savings association must apply the following formula to the effective notional amount of the guarantee or credit derivative: $Pc = Pr \times (1 - H_{FX})$, where:

(i) Pc = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) Pr = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) $H_{FX}$= haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) A State savings association must set $H_{FX}$ equal to 8 percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period and daily marking-to-market and remargining. A State savings association qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for:

(i) The own-estimates haircuts in paragraph (b)(2)(iii) of section 32 of this appendix;

(ii) The simple VaR methodology in paragraph (b)(3) of section 32 of this appendix; or

(iii) The internal models methodology in paragraph (d) of section 32 of this appendix.

(3) A State savings association must adjust $H_{FX}$ calculated in paragraph (f)(2) of this section upward if the State savings association revalues the guarantee or credit derivative less frequently than once every ten business days using the square root of time formula provided in paragraph (b)(2)(iii)(A)(*2*) of section 32 of this appendix.

*Section 34. Guarantees and Credit Derivatives: Double Default Treatment*

(a) *Eligibility and operational criteria for double default treatment.* A State savings association may recognize the credit risk mitigation benefits of a guarantee or credit derivative covering an exposure described in paragraph (a)(1) of section 33 of this appendix by applying the double default treatment in this section if all the following criteria are satisfied.

(1) The hedged exposure is fully covered or covered on a pro rata basis by:

(i) An eligible guarantee issued by an eligible double default guarantor; or

(ii) An eligible credit derivative that meets the requirements of paragraph (b)(2) of section 33 of this appendix and is issued by an eligible double default guarantor.

(2) The guarantee or credit derivative is:

(i) An uncollateralized guarantee or uncollateralized credit derivative (for example, a credit default swap) that provides protection with respect to a single reference obligor; or

(ii) An nth-to-default credit derivative (subject to the requirements of paragraph (m) of section 42 of this appendix).

(3) The hedged exposure is a wholesale exposure (other than a sovereign exposure).

(4) The obligor of the hedged exposure is not:

(i) An eligible double default guarantor or an affiliate of an eligible double default guarantor; or

(ii) An affiliate of the guarantor.

(5) The State savings association does not recognize any credit risk mitigation benefits of the guarantee or credit derivative for the hedged exposure other than through application of the double default treatment as provided in this section.

(6) The State savings association has implemented a process (which has received the prior, written approval of the FDIC) to detect excessive correlation between the creditworthiness of the obligor of the hedged exposure and the protection provider. If excessive correlation is present, the State savings association may not use the double default treatment for the hedged exposure.

(b) *Full coverage.* If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is at least equal to the EAD of the hedged exposure, the State savings association may determine its risk-weighted asset amount for the hedged exposure under paragraph (e) of this section.

(c) *Partial coverage.* If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the State savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize double default treatment on the protected portion of the exposure.

(1) For the protected exposure, the State savings association must set EAD equal to P and calculate its risk-weighted asset amount as provided in paragraph (e) of this section.

(2) For the unprotected exposure, the State savings association must set EAD equal to the EAD of the original exposure minus P and then calculate its risk-weighted asset amount as provided in section 31 of this appendix.

(d) *Mismatches.* For any hedged exposure to which a State savings association applies double default treatment, the State savings association must make applicable adjustments to the protection amount as required in paragraphs (d), (e), and (f) of section 33 of this appendix.

(e) *The double default dollar risk-based capital requirement.* The dollar risk-based capital requirement for a hedged exposure to which a State savings association has applied double default treatment is $K_{DD}$ multiplied by the EAD of the exposure. $K_{DD}$ is calculated according to the following formula: $K_{DD}= K_o \times (0.15 + 160 \times PD_g)$,

Where:

(1)

$$K_O = LGD_g \times \left[ N\left( \frac{N^{-1}(PD_o) + N^{-1}(0.999)\sqrt{\rho_{os}}}{\sqrt{1-\rho_{os}}} \right) - PD_o \right] \times \left[ \frac{1+(M-2.5)\times b}{1-1.5\times b} \right]$$

(2) $PD_g$ = PD of the protection provider.

(3) $PD_o$ = PD of the obligor of the hedged exposure.

(4) $LGD_g$ = (i) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the State savings association with the option to receive immediate payout on triggering the protection; or

(ii) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the State savings association with the option to receive immediate payout on triggering the protection.

(5) $\rho_{OS}$(asset value correlation of the obligor) is calculated according to the appropriate formula for (R) provided in Table 2 in section 31 of this appendix, with PD equal to $PD_o$.

(6) b (maturity adjustment coefficient) is calculated according to the formula for b provided in Table 2 in section 31 of this appendix, with PD equal to the lesser of $PD_o$ and $PD_g$.

(7) M (maturity) is the effective maturity of the guarantee or credit derivative, which may not be less than one year or greater than five years.

*Section 35. Risk-Based Capital Requirement for Unsettled Transactions*

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

(1) *Delivery-versus-payment (DvP) transaction* means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) *Payment-versus-payment (PvP) transaction* means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) *Normal settlement period.* A transaction has a *normal settlement period* if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) *Positive current exposure.* The positive current exposure of a State savings association for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the State savings association to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Transactions accepted by a qualifying central counterparty that are subject to daily marking-to-market and daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions (which are addressed in sections 31 and 32 of this appendix);

(3) One-way cash payments on OTC derivative contracts (which are addressed in sections 31 and 32 of this appendix); or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts and addressed in sections 31 and 32 of this appendix).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement or clearing system, the FDIC may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* A State savings association must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the State savings association's counterparty has not made delivery or payment within five business days after the settlement date. The State savings association must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the State savings association by the appropriate risk weight in Table 5.

TABLE 5—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

| Number of business days after contractual settlement date | Risk weight to be applied to positive current exposure (percent) |
|---|---|
| From 5 to 15 | 100 |
| From 16 to 30 | 625 |
| From 31 to 45 | 937.5 |
| 46 or more | 1,250 |

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) A State savings association must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the State savings association has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The State savings association must continue to hold risk-based capital against the transaction until the State savings association has received its corresponding deliverables.

(2) From the business day after the State savings association has made its delivery until five business days after the counterparty delivery is due, the State savings association must calculate its risk-based capital requirement for the transaction by treating the current market value of the deliverables owed to the State savings association as a wholesale exposure.

(i) A State savings association may assign an obligor rating to a counterparty for which it is not otherwise required under this appendix to assign an obligor rating on the basis of the applicable external rating of any outstanding unsecured long-term debt security without credit enhancement issued by the counterparty.

(ii) A State savings association may use a 45 percent LGD for the transaction rather than estimating LGD for the transaction provided the State savings association uses the 45 percent LGD for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(iii) A State savings association may use a 100 percent risk weight for the transaction provided the State savings association uses this risk weight for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(3) If the State savings association has not received its deliverables by the fifth business day after the counterparty delivery was due, the State savings association must deduct the current market value of the deliverables owed to the State savings association 50 percent from tier 1 capital and 50 percent from tier 2 capital.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

**Part V. Risk-Weighted Assets for Securitization Exposures**

*Section 41. Operational Criteria for Recognizing the Transfer of Risk*

(a) *Operational criteria for traditional securitizations.* A State savings association that transfers exposures it has originated or purchased to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each of the conditions in this paragraph (a) is satisfied. A State savings association that meets these conditions must hold risk-based capital against any securitization exposures it retains in connection with the securitization. A State savings association that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The transfer is considered a sale under GAAP;

(2) The State savings association has transferred to third parties credit risk associated with the underlying exposures; and

(3) Any clean-up calls relating to the securitization are eligible clean-up calls.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, a State savings association may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each of the conditions in this paragraph (b) is satisfied. A State savings association that fails to meet these conditions must hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is financial collateral, an eligible credit derivative from an eligible securitization guarantor or an eligible guarantee from an eligible securitization guarantor;

(2) The State savings association transfers credit risk associated with the underlying exposures to third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the State savings association to alter or replace the underlying exposures to improve the credit quality of the pool of underlying exposures;

(iii) Increase the State savings association's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the State savings association in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the State savings association after the inception of the securitization;

(3) The State savings association obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

*Section 42. Risk-Based Capital Requirement for Securitization Exposures*

(a) *Hierarchy of approaches.* Except as provided elsewhere in this section:

(1) A State savings association must deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization and must deduct from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and qualifies for the Ratings-Based Approach in section 43 of this appendix, a State savings association must apply the Ratings-Based Approach to the exposure.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the State savings association may either apply the Internal Assessment Approach in section 44 of this appendix to the exposure (if the State savings association, the exposure, and the relevant ABCP program qualify for the Internal Assessment Approach) or the Supervisory Formula Approach in section 45 of this appendix to the exposure (if the State savings association and the exposure qualify for the Supervisory Formula Approach).

(4) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the Internal Assessment Approach, or the Supervisory Formula Approach, the State savings association must deduct the exposure from total capital in accordance with paragraph (c) of this section.

(5) If a securitization exposure is an OTC derivative contract (other than a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), with approval of the FDIC, a State savings association may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (e) of this section rather than apply the hierarchy of approaches described in paragraphs (a)(1) through (4) of this section.

(b) *Total risk-weighted assets for securitization exposures.* A State savings association's total risk-weighted assets for securitization exposures is equal to the sum of its risk-weighted assets calculated using the Ratings-Based Approach in section 43 of this appendix, the Internal Assessment Approach in section 44 of this appendix, and the Supervisory Formula Approach in section 45 of this appendix, and its risk-weighted assets amount for early amortization provisions calculated in section 47 of this appendix.

(c) *Deductions.* (1) If a State savings association must deduct a securitization exposure from total capital, the State savings association must take the deduction 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the State savings association's tier 2 capital, the State savings association must deduct the excess from tier 1 capital.

(2) A State savings association may calculate any deduction from tier 1 capital and tier 2 capital for a securitization exposure net of any deferred tax liabilities associated with the securitization exposure.

(d) *Maximum risk-based capital requirement.* Regardless of any other provisions of this subpart, unless one or more underlying exposures does not meet the definition of a wholesale, retail, securitization, or equity exposure, the total risk-based capital requirement for all securitization exposures held by a single State savings association associated with a single securitization (including any risk-based capital requirements that relate to an early amortization provision of the securitization but excluding any risk-based capital requirements that relate to the State savings association's gain-on-sale or CEIOs associated with the securitization) may not exceed the sum of:

(1) The State savings association's total risk-based capital requirement for the underlying exposures as if the State savings association directly held the underlying exposures; and

(2) The total ECL of the underlying exposures.

(e) *Amount of a securitization exposure.* (1) The amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is:

(i) The State savings association's carrying value minus any unrealized gains and plus any unrealized losses on the exposure, if the exposure is a security classified as available-for-sale; or

(ii) The State savings association's carrying value, if the exposure is not a security classified as available-for-sale.

(2) The amount of an off-balance sheet securitization exposure that is not an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure. For an off-balance-sheet securitization exposure to an ABCP program, such as a liquidity facility, the notional amount may be reduced to the maximum potential amount that the State savings association could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets).

(3) The amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is the EAD of the exposure as calculated in section 32 of this appendix.

(f) *Overlapping exposures.* If a State savings association has multiple securitization exposures that provide duplicative coverage of the underlying exposures of a securitization (such as when a State savings association provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the State savings association is not required to hold duplicative risk-based capital against the overlapping position. Instead, the State savings association may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(g) *Securitizations of non-IRB exposures.* If a State savings association has a securitization exposure where any underlying exposure is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure, the State savings association must:

(1) If the State savings association is an originating State savings association, deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization and deduct from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale;

(2) If the securitization exposure does not require deduction under paragraph (g)(1), apply the RBA in section 43 of this appendix to the securitization exposure if the exposure qualifies for the RBA;

(3) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA, apply the IAA in section 44 of this appendix to the exposure (if the State savings association, the exposure, and the relevant ABCP program qualify for the IAA); and

(4) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA or the IAA, deduct the exposure from total capital in accordance with paragraph (c) of this section.

(h) *Implicit support.* If a State savings association provides support to a securitization in excess of the State savings association's contractual obligation to provide credit support to the securitization (implicit support):

(1) The State savings association must hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The State savings association must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the State savings association of providing such implicit support.

(i) *Eligible servicer cash advance facilities.* Regardless of any other provisions of this part, a State savings association is not required to hold risk-based capital against the undrawn portion of an eligible servicer cash advance facility.

(j) *Interest-only mortgage-backed securities.* Regardless of any other provisions of this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(k) *Small-business loans and leases on personal property transferred with recourse.* (1) Regardless of any other provisions of this part, a State savings association that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only the contractual amount of retained recourse if all the following conditions are met:

(i) The transaction is a sale under GAAP.

(ii) The State savings association establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the State savings association's reasonably estimated liability under the recourse arrangement.

(iii) The loans and leases are to businesses that meet the criteria for a small-business concern established by the Small Business Administration under section 3(a) of the Small Business Act (15 U.S.C. 632).

(iv) The State savings association is well capitalized, as defined in the FDIC's prompt corrective action regulation at Subpart Y of Part 390. For purposes of determining whether a State savings association is well capitalized for purposes of this paragraph, the State savings association's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section.

(2) The total outstanding amount of recourse retained by a State savings association on transfers of small-business obligations receiving the capital treatment specified in paragraph (k)(1) of this section cannot exceed 15 percent of the State savings association's total qualifying capital.

(3) If a State savings association ceases to be well capitalized or exceeds the 15 percent capital limitation, the preferential capital treatment specified in paragraph (k)(1) of this section will continue to apply to any transfers of small-business obligations with recourse that occurred during the time that the State savings association was well capitalized and did not exceed the capital limit.

(4) The risk-based capital ratios of the State savings association must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section as provided in 12 CFR 390.466(b)(5)(v).

(l) *Nth-to-default credit derivatives*—(1) *First-to-default credit derivatives*—(i) *Protection purchaser.* A State savings association that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-based capital requirement for the underlying exposures as if the State savings association synthetically securitized the underlying exposure with the lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A State savings association that provides credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-weighted asset amount for the derivative by applying the RBA in section 43 of this appendix (if the derivative qualifies for the RBA) or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative;

(B) 12.5; and

(C) The sum of the risk-based capital requirements of the individual underlying exposures, up to a maximum of 100 percent.

(2) *Second-or-subsequent-to-default credit derivatives*—(i) *Protection purchaser.* (A) A State savings association that obtains credit protection on a group of underlying exposures through a nth-to-default credit derivative (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The State savings association also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If a State savings association satisfies the requirements of paragraph (m)(2)(i)(A) of this section, the State savings association must determine its risk-based capital requirement for the underlying exposures as if the State savings association had only synthetically securitized the underlying exposure with the nth-lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A State savings association that provides credit protection on a group of underlying exposures through a nth-to-default credit derivative (other than a first-to-default credit derivative) must determine its risk-weighted asset amount for the derivative by applying the RBA in section 43 of this appendix (if the derivative qualifies for the RBA) or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative;

(B) 12.5; and

(C) The sum of the risk-based capital requirements of the individual underlying exposures (excluding the n-1 underlying exposures with the lowest risk-based capital requirements), up to a maximum of 100 percent.

*Section 43. Ratings-Based Approach (RBA)*

(a) *Eligibility requirements for use of the RBA*—(1) *Originating State savings association.* An originating State savings association must use the RBA to calculate its risk-based capital requirement for a securitization exposure if the exposure has two or more external ratings or inferred ratings (and may not use the RBA if the exposure has fewer than two external ratings or inferred ratings).

(2) *Investing State savings association.* An investing State savings association must use the RBA to calculate its risk-based capital requirement for a securitization exposure if the exposure has one or more external or inferred ratings (and may not use the RBA if the exposure has no external or inferred rating).

(b) *Ratings-based approach.* (1) A State savings association must determine the risk-weighted asset amount for a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight provided in Table 6 and Table 7.

(2) A State savings association must apply the risk weights in Table 6 when the securitization exposure's applicable external or applicable inferred rating represents a long-term credit rating, and must apply the risk weights in Table 7 when the securitization exposure's applicable external or applicable inferred rating represents a short-term credit rating.

(i) A State savings association must apply the risk weights in column 1 of Table 6 or Table 7 to the securitization exposure if:

(A) N (as calculated under paragraph (e)(6) of section 45 of this appendix) is six or more (for purposes of this section only, if the notional number of underlying exposures is 25 or more or if all of the underlying exposures are retail exposures, a State savings association may assume that N is six or more unless the State savings association knows or has reason to know that N is less than six); and

(B) The securitization exposure is a senior securitization exposure.

(ii) A State savings association must apply the risk weights in column 3 of Table 6 or Table 7 to the securitization exposure if N is less than six, regardless of the seniority of the securitization exposure.

(iii) Otherwise, a State savings association must apply the risk weights in column 2 of Table 6 or Table 7.

TABLE 6—LONG-TERM CREDIT RATING RISK WEIGHTS UNDER RBA AND IAA

| Applicable external or inferred rating (Illustrative rating example) | Column 1 Risk weights for senior securitization exposures backed by granular pools (percent) | Column 2 Risk weights for non-senior securitization exposures backed by granular pools (percent) | Column 3 Risk weights for securitization exposures backed by non-granular pools (percent) |
|---|---|---|---|
| Highest investment grade (for example, AAA) | 7 | 12 | 20 |
| Second highest investment grade (for example, AA) | 8 | 15 | 25 |
| Third-highest investment grade—positive designation (for example, A+) | 10 | 18 | 35 |
| Third-highest investment grade (for example, A) | 12 | 20 | |
| Third-highest investment grade—negative designation (for example, A−) | 20 | 35 | |
| Lowest investment grade—positive designation (for example, BBB+) | 35 | 50 | 50 |
| Lowest investment grade (for example, BBB) | 60 | 75 | 75 |
| Lowest investment grade—negative designation (for example, BBB−) | 100 | | |
| One category below investment grade—positive designation (for example, BB+) | 250 | | |
| One category below investment grade (for example, BB) | 425 | | |
| One category below investment grade—negative designation (for example, BB−) | 650 | | |
| More than one category below investment grade | Deduction from tier 1 and tier 2 capital. | | |

TABLE 7—SHORT-TERM CREDIT RATING RISK WEIGHTS UNDER RBA AND IAA

| Applicable external or inferred rating (Illustrative rating example) | Column 1<br>Risk weights for senior securitization exposures backed by granular pools (percent) | Column 2<br>Risk weights for non-senior securitization exposures backed by granular pools (percent) | Column 3<br>Risk weights for securitization exposures backed by non-granular pools (percent) |
|---|---|---|---|
| Highest investment grade (for example, A1) | 7 | 12 | 20 |
| Second highest investment grade (for example, A2) | 12 | 20 | 35 |
| Third highest investment grade (for example, A3) | 60 | 75 | 75 |
| All other ratings | Deduction from tier 1 and tier 2 capital. | | |

*Section 44. Internal Assessment Approach (IAA)*

(a) *Eligibility requirements.* A State savings association may apply the IAA to calculate the risk-weighted asset amount for a securitization exposure that the State savings association has to an ABCP program (such as a liquidity facility or credit enhancement) if the State savings association, the ABCP program, and the exposure qualify for use of the IAA.

(1) *State savings association qualification criteria.* A State savings association qualifies for use of the IAA if the State savings association has received the prior written approval of the FDIC. To receive such approval, the State savings association must demonstrate to the FDIC's satisfaction that the State savings association's internal assessment process meets the following criteria:

(i) The State savings association's internal credit assessments of securitization exposures must be based on publicly available rating criteria used by an NRSRO.

(ii) The State savings association's internal credit assessments of securitization exposures used for risk-based capital purposes must be consistent with those used in the State savings association's internal risk management process, management information reporting systems, and capital adequacy assessment process.

(iii) The State savings association's internal credit assessment process must have sufficient granularity to identify gradations of risk. Each of the State savings association's internal credit assessment categories must correspond to an external rating of an NRSRO.

(iv) The State savings association's internal credit assessment process, particularly the stress test factors for determining credit enhancement requirements, must be at least as conservative as the most conservative of the publicly available rating criteria of the NRSROs that have provided external ratings to the commercial paper issued by the ABCP program.

(A) Where the commercial paper issued by an ABCP program has an external rating from two or more NRSROs and the different NRSROs' benchmark stress factors require different levels of credit enhancement to achieve the same external rating equivalent, the State savings association must apply the NRSRO stress factor that requires the highest level of credit enhancement.

(B) If any NRSRO that provides an external rating to the ABCP program's commercial paper changes its methodology (including stress factors), the State savings association must evaluate whether to revise its internal assessment process.

(v) The State savings association must have an effective system of controls and oversight that ensures compliance with these operational requirements and maintains the integrity and accuracy of the internal credit assessments. The State savings association must have an internal audit function independent from the ABCP program business line and internal credit assessment process that assesses at least annually whether the controls over the internal credit assessment process function as intended.

(vi) The State savings association must review and update each internal credit assessment whenever new material information is available, but no less frequently than annually.

(vii) The State savings association must validate its internal credit assessment process on an ongoing basis and at least annually.

(2) *ABCP-program qualification criteria.* An ABCP program qualifies for use of the IAA if all commercial paper issued by the ABCP program has an external rating.

(3) *Exposure qualification criteria.* A securitization exposure qualifies for use of the IAA if the exposure meets the following criteria:

(i) The State savings association initially rated the exposure at least the equivalent of investment grade.

(ii) The ABCP program has robust credit and investment guidelines (that is, underwriting standards) for the exposures underlying the securitization exposure.

(iii) The ABCP program performs a detailed credit analysis of the sellers of the exposures underlying the securitization exposure.

(iv) The ABCP program's underwriting policy for the exposures underlying the securitization exposure establishes minimum asset eligibility criteria that include the prohibition of the purchase of assets that are significantly past due or of assets that are defaulted (that is, assets that have been charged off or written down by the seller prior to being placed into the ABCP program or assets that would be charged off or written down under the program's governing contracts), as well as limitations on concentration to individual obligors or geographic areas and the tenor of the assets to be purchased.

(v) The aggregate estimate of loss on the exposures underlying the securitization exposure considers all sources of potential risk, such as credit and dilution risk.

(vi) Where relevant, the ABCP program incorporates structural features into each purchase of exposures underlying the securitization exposure to mitigate potential credit deterioration of the underlying exposures. Such features may include wind-down triggers specific to a pool of underlying exposures.

(b) *Mechanics.* A State savings association that elects to use the IAA to calculate the risk-based capital requirement for any securitization exposure must use the IAA to calculate the risk-based capital requirements for all securitization exposures that qualify for the IAA approach. Under the IAA, a State savings association must map its internal assessment of such a securitization exposure to an equivalent external rating from an NRSRO. Under the IAA, a State savings association must determine the risk-weighted asset amount for such a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight in Table 6 and Table 7 in paragraph (b) of section 43 of this appendix.

*Section 45. Supervisory Formula Approach (SFA)*

(a) *Eligibility requirements.* A State savings association may use the SFA to determine its risk-based capital requirement for a securitization exposure only if the State savings association can calculate on an ongoing basis each of the SFA parameters in paragraph (e) of this section.

(b) *Mechanics.* Under the SFA, a securitization exposure incurs a deduction from total capital (as described in paragraph (c) of section 42 of this appendix) and/or an SFA risk-based capital requirement, as determined in paragraph (c) of this section. The risk-weighted asset amount for the securitization exposure equals the SFA risk-based capital requirement for the exposure multiplied by 12.5.

(c) *The SFA risk-based capital requirement.* (1) If $K_{IRB}$ is greater than or equal to L + T, the entire exposure must be deducted from total capital.

(2) If $K_{IRB}$ is less than or equal to L, the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) 0.0056 * T; or

(ii) S[L + T] − S[L].

(3) If $K_{IRB}$ is greater than L and less than L + T, the State savings association must deduct from total capital an amount equal to UE *TP * ($K_{IRB}$ − L), and the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) 0.0056 * (T − ($K_{IRB}$ − L)); or

(ii) S[L + T] − S[$K_{IRB}$].

(d) *The supervisory formula:*

$$(1)\ S[Y] = \begin{cases} Y & \text{when } Y \le K_{IRB} \\ K_{IRB} + K[Y] - K[K_{IRB}] + \dfrac{d \cdot K_{IRB}}{20}\left(1 - e^{\frac{20 \cdot (K_{IRB} - Y)}{K_{IRB}}}\right) & \text{when } Y > K_{IRB} \end{cases}$$

$$(2)\ K[Y] = (1-h) \cdot \left[(1 - \beta[Y; a, b]) \cdot Y + \beta[Y; a+1, b] \cdot c\right]$$

$$(3)\ h = \left(1 - \frac{K_{IRB}}{EWALGD}\right)^{N}$$

$$(4)\ a = g \cdot c$$

$$(5)\ b = g \cdot (1-c)$$

$$(6)\ c = \frac{K_{IRB}}{1-h}$$

$$(7)\ g = \frac{(1-c) \cdot c}{f} - 1$$

$$(8)\ f = \frac{v + K_{IRB}^{\ 2}}{1-h} - c^2 + \frac{(1-K_{IRB}) \cdot K_{IRB} - v}{(1-h) \cdot 1000}$$

$$(9)\ v = K_{IRB} \cdot \frac{(EWALGD - K_{IRB}) + .25 \cdot (1 - EWALGD)}{N}$$

$$(10)\ d = 1 - (1-h) \cdot (1 - \beta[K_{IRB}; a, b]).$$

(11) In these expressions, β[Y; a, b] refers to the cumulative beta distribution with parameters a and b evaluated at Y. In the case where N = 1 and EWALGD = 100 percent, S[Y] in formula (1) must be calculated with K[Y] set equal to the product of $K_{IRB}$ and Y, and d set equal to 1 − $K_{IRB}$.

(e) *SFA parameters*—(1) *Amount of the underlying exposures (UE).* UE is the EAD of any underlying exposures that are wholesale and retail exposures (including the amount of any funded spread accounts, cash collateral accounts, and other similar funded credit enhancements) plus the amount of any underlying exposures that are securitization exposures (as defined in paragraph (e) of section 42 of this appendix) plus the adjusted carrying value of any underlying exposures that are equity exposures (as defined in paragraph (b) of section 51 of this appendix).

(2) *Tranche percentage (TP).* TP is the ratio of the amount of the State savings association's securitization exposure to the amount of the tranche that contains the securitization exposure.

(3) *Capital requirement on underlying exposures ($K_{IRB}$).* (i) $K_{IRB}$ is the ratio of:

(A) The sum of the risk-based capital requirements for the underlying exposures plus the expected credit losses of the underlying exposures (as determined under this appendix as if the underlying exposures were directly held by the State savings association); to

(B) UE.

(ii) The calculation of $K_{IRB}$ must reflect the effects of any credit risk mitigant applied to the underlying exposures (either to an individual underlying exposure, to a group of underlying exposures, or to the entire pool of underlying exposures).

(iii) All assets related to the securitization are treated as underlying exposures, including assets in a reserve account (such as a cash collateral account).

(4) *Credit enhancement level (L).* (i) L is the ratio of:

(A) The amount of all securitization exposures subordinated to the tranche that contains the State savings association's securitization exposure; to

(B) UE.

(ii) A State savings association must determine L before considering the effects of any tranche-specific credit enhancements.

(iii) Any gain-on-sale or CEIO associated with the securitization may not be included in L.

(iv) Any reserve account funded by accumulated cash flows from the underlying exposures that is subordinated to the tranche that contains the State savings association's securitization exposure may be included in the numerator and denominator of L to the extent cash has accumulated in the account. Unfunded reserve accounts (that is, reserve accounts that are to be funded from future cash flows from the underlying exposures) may not be included in the calculation of L.

(v) In some cases, the purchase price of receivables will reflect a discount that provides credit enhancement (for example, first loss protection) for all or certain tranches of the securitization. When this arises, L should be calculated inclusive of this discount if the discount provides credit enhancement for the securitization exposure.

(5) *Thickness of tranche (T).* T is the ratio of:

(i) The amount of the tranche that contains the State savings association's securitization exposure; to

(ii) UE.

(6) *Effective number of exposures (N).* (i) Unless the State savings association elects to use the formula provided in paragraph (f) of this section,

$$N = \frac{(\sum_i EAD_i)^2}{\sum_i EAD_i^2}$$

where $EAD_i$ represents the EAD associated with the ith instrument in the pool of underlying exposures.

(ii) Multiple exposures to one obligor must be treated as a single underlying exposure.

(iii) In the case of a re-securitization (that is, a securitization in which some or all of the underlying exposures are themselves securitization exposures), the State savings association must treat each underlying exposure as a single underlying exposure and must not look through to the originally securitized underlying exposures.

(7) *Exposure-weighted average loss given default (EWALGD).* EWALGD is calculated as:

$$EWALGD = \frac{\sum_i LGD_i \cdot EAD_i}{\sum_i EAD_i}$$

where $LGD_i$ represents the average LGD associated with all exposures to the ith obligor. In the case of a re-securitization, an LGD of 100 percent must be assumed for the underlying exposures that are themselves securitization exposures.

(f) *Simplified method for computing N and EWALGD.* (1) If all underlying exposures of a securitization are retail exposures, a State savings association may apply the SFA using the following simplifications:

(i) h = 0; and

(ii) v = 0.

(2) Under the conditions in paragraphs (f)(3) and (f)(4) of this section, a State savings association may employ a simplified method for calculating N and EWALGD.

(3) If $C_1$ is no more than 0.03, a State savings association may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure or EWALGD = 1 if one or more of the underlying exposures is a securitization exposure, and may set N equal to the following amount:

$$N = \frac{1}{C_1 C_m + \left(\frac{C_m - C_1}{m-1}\right)\max(1 - mC_1, 0)}$$

Where:

(i) $C_m$ is the ratio of the sum of the amounts of the 'm' largest underlying exposures to UE; and

(ii) The level of m is to be selected by the State savings association.

(4) Alternatively, if only $C_1$ is available and $C_1$ is no more than 0.03, the State savings association may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure or EWALGD = 1 if one or more of the underlying exposures is a securitization exposure and may set $N = 1/C_1$.

*Section 46. Recognition of Credit Risk Mitigants for Securitization Exposures*

(a) *General.* An originating State savings association that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in section 41 of this appendix may recognize the credit risk mitigant, but only as provided in this section. An investing State savings association that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant, but only as provided in this section. A State savings association that has used the RBA in section 43 of this appendix or the IAA in section 44 of this appendix to calculate its risk-based capital requirement for a securitization exposure whose external or inferred rating (or equivalent internal rating under the IAA) reflects the benefits of a credit risk mitigant provided to the associated securitization or that supports some or all of the underlying exposures may not use the credit risk mitigation rules in this section to further reduce its risk-based capital requirement for the exposure to reflect that credit risk mitigant.

(b) *Collateral*—(1) *Rules of recognition.* A State savings association may recognize financial collateral in determining the State savings association's risk-based capital requirement for a securitization exposure (other than a repo-style transaction, an eligible margin loan, or an OTC derivative contract for which the State savings association has reflected collateral in its determination of exposure amount under section 32 of this appendix) as follows. The State savings association's risk-based capital requirement for the collateralized securitization exposure is equal to the risk-based capital requirement for the securitization exposure as calculated under the RBA in section 43 of this appendix or under the SFA in section 45 of this appendix multiplied by the ratio of adjusted exposure amount (SE*) to original exposure amount (SE),

where:

(i) SE* = max {0, [SE—C x (1 − Hs − Hfx)]};

(ii) SE = the amount of the securitization exposure calculated under paragraph (e) of section 42 of this appendix;

(iii) C = the current market value of the collateral;

(iv) Hs = the haircut appropriate to the collateral type; and

(v) Hfx = the haircut appropriate for any currency mismatch between the collateral and the exposure.

(2) *Mixed collateral.* Where the collateral is a basket of different asset types or a basket of assets denominated in different currencies, the haircut on the basket will be

$$H = \sum_i a_i H_i,$$

where $a_i$ is the current market value of the asset in the basket divided by the current market value of all assets in the basket and $H_i$ is the haircut applicable to that asset.

(3) *Standard supervisory haircuts.* Unless a State savings association qualifies for use of and uses own-estimates haircuts in paragraph (b)(4) of this section:

(i) A State savings association must use the collateral type haircuts (Hs) in Table 3;

(ii) A State savings association must use a currency mismatch haircut (Hfx) of 8 percent if the exposure and the collateral are denominated in different currencies;

(iii) A State savings association must multiply the supervisory haircuts obtained in paragraphs (b)(3)(i) and (ii) by the square root of 6.5 (which equals 2.549510); and

(iv) A State savings association must adjust the supervisory haircuts upward on the basis of a holding period longer than 65 business days where and as appropriate to take into account the illiquidity of the collateral.

(4) *Own estimates for haircuts.* With the prior written approval of the FDIC, a State savings association may calculate haircuts using its own internal estimates of market price volatility and foreign exchange volatility, subject to paragraph (b)(2)(iii) of section 32 of this appendix. The minimum holding period (TM) for securitization exposures is 65 business days.

(c) *Guarantees and credit derivatives*—(1) *Limitations on recognition.* A State savings association may only recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the State savings association's risk-based capital requirement for a securitization exposure.

(2) *ECL for securitization exposures.* When a State savings association recognizes an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the State savings association's risk-based capital requirement for a securitization exposure, the State savings association must also:

(i) Calculate ECL for the protected portion of the exposure using the same risk parameters that it uses for calculating the risk-weighted asset amount of the exposure as described in paragraph (c)(3) of this section; and

(ii) Add the exposure's ECL to the State savings association's total ECL.

(3) *Rules of recognition.* A State savings association may recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the State savings association's risk-based capital requirement for the securitization exposure as follows:

(i) *Full coverage.* If the protection amount of the eligible guarantee or eligible credit derivative equals or exceeds the amount of the securitization exposure, the State savings association may set the risk-weighted asset amount for the securitization exposure equal to the risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the State savings association's PD for the guarantor, the State savings association's LGD for the guarantee or credit derivative, and an EAD equal to the amount of the securitization exposure (as determined in paragraph (e) of section 42 of this appendix).

(ii) *Partial coverage.* If the protection amount of the eligible guarantee or eligible credit derivative is less than the amount of the securitization exposure, the State savings association may set the risk-weighted asset amount for the securitization exposure equal to the sum of:

(A) *Covered portion.* The risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the State savings association's PD for the guarantor, the State savings association's LGD for the guarantee or credit derivative, and an EAD equal to the protection amount of the credit risk mitigant; and

(B) *Uncovered portion.* (1) 1.0 minus the ratio of the protection amount of the eligible guarantee or eligible credit derivative to the amount of the securitization exposure); multiplied by

(2) The risk-weighted asset amount for the securitization exposure without the credit risk mitigant (as determined in sections 42 through 45 of this appendix).

(4) *Mismatches.* The State savings association must make applicable adjustments to the protection amount as required in paragraphs (d), (e), and (f) of section 33 of this appendix for any hedged securitization exposure and any more senior securitization exposure that benefits from the hedge. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the State savings association must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

*Section 47. Risk-Based Capital Requirement for Early Amortization Provisions*

(a) *General.* (1) An originating State savings association must hold risk-based capital against the sum of the originating State savings association's interest and the investors' interest in a securitization that:

(i) Includes one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contains an early amortization provision.

(2) For securitizations described in paragraph (a)(1) of this section, an originating State savings association must calculate the risk-based capital requirement for the originating State savings association's interest under sections 42 through 45 of this appendix, and the risk-based capital requirement for the investors' interest under paragraph (b) of this section.

(b) *Risk-weighted asset amount for investors' interest.* The originating State savings association's risk-weighted asset amount for the investors' interest in the securitization is equal to the product of the following 5 quantities:

(1) The investors' interest EAD;

(2) The appropriate conversion factor in paragraph (c) of this section;

(3) $K_{IRB}$ (as defined in paragraph (e)(3) of section 45 of this appendix);

(4) 12.5; and

(5) The proportion of the underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit.

(c) *Conversion factor.* (1)(i) Except as provided in paragraph (c)(2) of this section, to calculate the appropriate conversion factor, a State savings association must use Table 8 for a securitization that contains a controlled early amortization provision and must use Table 9 for a securitization that contains a non-controlled early amortization provision. In circumstances where a securitization contains a mix of retail and nonretail exposures or a mix of committed and uncommitted exposures, a State savings association may take a pro rata approach to determining the conversion factor for the securitization's early amortization provision. If a pro rata approach is not feasible, a State savings association must treat the mixed securitization as a securitization of nonretail exposures if a single underlying exposure is a nonretail exposure and must treat the mixed securitization as a securitization of committed exposures if a single underlying exposure is a committed exposure.

(ii) To find the appropriate conversion factor in the tables, a State savings association must divide the three-month average annualized excess spread of the securitization by the excess spread trapping point in the securitization structure. In securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average annualized excess spread, the excess spread trapping point is 4.5 percent.

TABLE 8—CONTROLLED EARLY AMORTIZATION PROVISIONS

| | Uncommitted | Committed |
|---|---|---|
| Retail Credit Lines | Three-month average annualized excess spread Conversion Factor (CF)<br>133.33% of trapping point or more, 0% CF.<br>less than 133.33% to 100% of trapping point, 1% CF.<br>less than 100% to 75% of trapping point, 2% CF.<br>less than 75% to 50% of trapping point, 10% CF.<br>less than 50% to 25% of trapping point, 20% CF.<br>less than 25% of trapping point, 40% CF. | 90% CF. |
| Non-retail Credit Lines | 90% CF | 90% CF. |

TABLE 9—NON-CONTROLLED EARLY AMORTIZATION PROVISIONS

| | Uncommitted | Committed |
|---|---|---|
| Retail Credit Lines | Three-month average annualized excess spread Conversion Factor (CF)<br>133.33% of trapping point or more, 0% CF.<br>less than 133.33% to 100% of trapping point, 5% CF.<br>less than 100% to 75% of trapping point, 15% CF.<br>less than 75% to 50% of trapping point, 50% CF.<br>less than 50% of trapping point, 100% CF. | 100% CF. |
| Non-retail Credit Lines | 100% CF | 100% CF. |

(2) For a securitization for which all or substantially all of the underlying exposures are residential mortgage exposures, a State savings association may calculate the appropriate conversion factor using paragraph (c)(1) of this section or may use a conversion factor of 10 percent. If the State savings association chooses to use a conversion factor of 10 percent, it must use that conversion factor for all securitizations for which all or substantially all of the

underlying exposures are residential mortgage exposures.

**Part VI. Risk-Weighted Assets for Equity Exposures**

*Section 51. Introduction and Exposure Measurement*

(a) *General.* To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to investment funds, a State savings association may apply either the Simple Risk Weight Approach (SRWA) in section 52 of this appendix or, if it qualifies to do so, the Internal Models Approach (IMA) in section 53 of this appendix. A State savings association must use the look-through approaches in section 54 of this appendix to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(b) *Adjusted carrying value.* For purposes of this part, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the State savings association's carrying value of the exposure reduced by any unrealized gains on the exposure that are reflected in such carrying value but excluded from the State savings association's tier 1 and tier 2 capital; and

(2) For the off-balance sheet component of an equity exposure, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section. For unfunded equity commitments that are unconditional, the effective notional principal amount is the notional amount of the commitment. For unfunded equity commitments that are conditional, the effective notional principal amount is the State savings association's best estimate of the amount that would be funded under economic downturn conditions.

*Section 52. Simple Risk Weight Approach (SRWA)*

(a) *General.* Under the SRWA, a State savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of the risk-weighted asset amounts for each of the State savings association's individual equity exposures (other than equity exposures to an investment fund) as determined in this section and the risk-weighted asset amounts for each of the State savings association's individual equity exposures to an investment fund as determined in section 54 of this appendix.

(b) *SRWA computation for individual equity exposures.* A State savings association must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this paragraph (b).

(1) *0 percent risk weight equity exposures.* An equity exposure to an entity whose credit exposures are exempt from the 0.03 percent PD floor in paragraph (d)(2) of section 31 of this appendix is assigned a 0 percent risk weight.

(2) *20 percent risk weight equity exposures.* An equity exposure to a Federal Home Loan Bank or Farmer Mac is assigned a 20 percent risk weight.

(3) *100 percent risk weight equity exposures.* The following equity exposures are assigned a 100 percent risk weight:

(i) An equity exposure that is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs, excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(ii) *Effective portion of hedge pairs.* The effective portion of a hedge pair.

(iii) *Non-significant equity exposures.* Equity exposures, excluding exposures to an investment firm that would meet the definition of a traditional securitization were it not for the FDIC's application of paragraph (8) of that definition and has greater than immaterial leverage, to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the State savings association's tier 1 capital plus tier 2 capital.

(A) To compute the aggregate adjusted carrying value of a State savings association's equity exposures for purposes of this paragraph (b)(3)(iii), the State savings association may exclude equity exposures described in paragraphs (b)(1), (b)(2), (b)(3)(i), and (b)(3)(ii) of this section, the equity exposure in a hedge pair with the smaller adjusted carrying value, and a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that meet the criterion of paragraph (b)(3)(i) of this section. If a State savings association does not know the actual holdings of the investment fund, the State savings association may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the State savings association must assume for purposes of this paragraph (b)(3)(iii) that the investment fund invests to the maximum extent possible in equity exposures.

(B) When determining which of a State savings association's equity exposures qualify for a 100 percent risk weight under this paragraph, a State savings association first must include equity exposures to unconsolidated small business investment companies or held through consolidated small business investment companies described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682), then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(4) *300 percent risk weight equity exposures.* A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(6) of this section and including the ineffective portion of a hedge pair) is assigned a 300 percent risk weight.

(5) *400 percent risk weight equity exposures.* An equity exposure (other than an equity exposure described in paragraph (b)(6) of this section) that is not publicly traded is assigned a 400 percent risk weight.

(6) *600 percent risk weight equity exposures.* An equity exposure to an investment firm that:

(i) Would meet the definition of a traditional securitization were it not for the FDIC's application of paragraph (8) of that definition; and

(ii) Has greater than immaterial leverage is assigned a 600 percent risk weight.

(c) *Hedge transactions* —(1) *Hedge pair.* A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) *Effective hedge.* Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the State savings association acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the State savings association will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. A State savings association must measure E at least quarterly and must use one of three alternative measures of E:

(i) Under the dollar-offset method of measuring effectiveness, the State savings association must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the periodic changes in value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure. If RVC is positive, the hedge is not effective and E equals 0. If RVC is negative and greater than or equal to $-1$ (that is, between zero and $-1$), then E equals the absolute value of RVC. If RVC is negative and less than $-1$, then E equals 2 plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T}(X_t - X_{t-1})^2}{\sum_{t=1}^{T}(A_t - A_{t-1})^2}, \text{ where}$$

(A) $X_t = A_t - B_t$;

(B) $A_t$ = the value at time t of one exposure in a hedge pair; and

(C) $B_t$ = the value at time t of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, E equals the coefficient of determination of a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then the value of E is zero.

(3) The effective portion of a hedge pair is E multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is (1–E) multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

*Section 53. Internal Models Approach (IMA)*

(a) *General.* A State savings association may calculate its risk-weighted asset amount for equity exposures using the IMA by modeling publicly traded and non-publicly traded equity exposures (in accordance with paragraph (c) of this section) or by modeling only publicly traded equity exposures (in accordance with paragraph (d) of this section).

(b) *Qualifying criteria.* To qualify to use the IMA to calculate risk-based capital requirements for equity exposures, a State savings association must receive prior written approval from the FDIC. To receive such approval, the State savings association must demonstrate to the FDIC's satisfaction that the State savings association meets the following criteria:

(1) The State savings association must have one or more models that:

(i) Assess the potential decline in value of its modeled equity exposures;

(ii) Are commensurate with the size, complexity, and composition of the State savings association's modeled equity exposures; and

(iii) Adequately capture both general market risk and idiosyncratic risk.

(2) The State savings association's model must produce an estimate of potential losses for its modeled equity exposures that is no less than the estimate of potential losses produced by a VaR methodology employing a 99.0 percent, one-tailed confidence interval of the distribution of quarterly returns for a benchmark portfolio of equity exposures comparable to the State savings association's modeled equity exposures using a long-term sample period.

(3) The number of risk factors and exposures in the sample and the data period used for quantification in the State savings association's model and benchmarking exercise must be sufficient to provide confidence in the accuracy and robustness of the State savings association's estimates.

(4) The State savings association's model and benchmarking process must incorporate data that are relevant in representing the risk profile of the State savings association's modeled equity exposures, and must include data from at least one equity market cycle containing adverse market movements relevant to the risk profile of the State savings association's modeled equity exposures. In addition, the State savings association's benchmarking exercise must be based on daily market prices for the benchmark portfolio. If the State savings association's model uses a scenario methodology, the State savings association must demonstrate that the model produces a conservative estimate of potential losses on the State savings association's modeled equity exposures over a relevant long-term market cycle. If the State savings association employs risk factor models, the State savings association must demonstrate through empirical analysis the appropriateness of the risk factors used.

(5) The State savings association must be able to demonstrate, using theoretical arguments and empirical evidence, that any proxies used in the modeling process are comparable to the State savings association's modeled equity exposures and that the State savings association has made appropriate adjustments for differences. The State savings association must derive any proxies for its modeled equity exposures and benchmark portfolio using historical market data that are relevant to the State savings association's modeled equity exposures and benchmark portfolio (or, where not, must use appropriately adjusted data), and such proxies must be robust estimates of the risk of the State savings association's modeled equity exposures.

(c) *Risk-weighted assets calculation for a State savings association modeling publicly traded and non-publicly traded equity exposures.* If a State savings association models publicly traded and non-publicly traded equity exposures, the State savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix) and each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the State savings association's equity exposures (other than equity exposures referenced in paragraph (c)(1) of this section) generated by the State savings association's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the State savings association's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund;

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs; and

(C) 300 percent multiplied by the aggregate adjusted carrying value of the State savings association's equity exposures that are not publicly traded, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund.

(d) *Risk-weighted assets calculation for a State savings association using the IMA only for publicly traded equity exposures.* If a State savings association models only publicly traded equity exposures, the State savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix), each equity exposure that qualifies for a 400 percent risk weight under paragraph (b)(5) of section 52 or a 600 percent risk weight under paragraph (b)(6) of section 52 (as determined under section 52 of this appendix), and each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the State savings association's equity exposures (other than equity exposures referenced in paragraph (d)(1) of this section) generated by the State savings association's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the State savings association's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund; and

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs.

*Section 54. Equity Exposures to Investment Funds*

(a) *Available approaches.* (1) Unless the exposure meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix, a State savings association must determine the risk-weighted asset amount of an equity exposure to an investment fund under the Full Look-Through Approach in paragraph (b) of this section, the Simple Modified Look-Through Approach in paragraph (c) of this section, the Alternative Modified Look-Through Approach in paragraph (d) of this section, or, if the investment fund qualifies for the Money Market Fund Approach, the Money Market Fund Approach in paragraph (e) of this section.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the State savings association does not use the Full Look-Through Approach, the State savings association may use the ineffective portion of the hedge pair as determined under paragraph (c) of section 52 of this appendix as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) *Full Look-Through Approach.* A State savings association that is able to calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this appendix as if the proportional ownership share of each exposure were held directly by the State savings association) may either:

(1) Set the risk-weighted asset amount of the State savings association's exposure to the fund equal to the product of:

(i) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the State savings association; and

(ii) The State savings association's proportional ownership share of the fund; or

(2) Include the State savings association's proportional ownership share of each exposure held by the fund in the State savings association's IMA.

(c) *Simple Modified Look-Through Approach.* Under this approach, the risk-weighted asset amount for a State savings association's equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight in Table 10 that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund's permissible investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund's exposures).

TABLE 10—MODIFIED LOOK-THROUGH APPROACHES FOR EQUITY EXPOSURES TO INVESTMENT FUNDS

| Risk weight | Exposure class |
|---|---|
| 0 percent | Sovereign exposures with a long-term applicable external rating in the highest investment-grade rating category and sovereign exposures of the United States. |
| 20 percent | Non-sovereign exposures with a long-term applicable external rating in the highest or second-highest investment-grade rating category; exposures with a short-term applicable external rating in the highest investment-grade rating category; and exposures to, or guaranteed by, depository institutions, foreign banks (as defined in 12 CFR 211.2), or securities firms subject to consolidated supervision and regulation comparable to that imposed on U.S. securities broker-dealers that are repo-style transactions or bankers' acceptances. |
| 50 percent | Exposures with a long-term applicable external rating in the third-highest investment-grade rating category or a short-term applicable external rating in the second-highest investment-grade rating category. |
| 100 percent | Exposures with a long-term or short-term applicable external rating in the lowest investment-grade rating category. |
| 200 percent | Exposures with a long-term applicable external rating one rating category below investment grade. |
| 300 percent | Publicly traded equity exposures. |
| 400 percent | Non-publicly traded equity exposures; exposures with a long-term applicable external rating two rating categories or more below investment grade; and exposures without an external rating (excluding publicly traded equity exposures). |
| 1,250 percent | OTC derivative contracts and exposures that must be deducted from regulatory capital or receive a risk weight greater than 400 percent under this appendix. |

(d) *Alternative Modified Look-Through Approach.* Under this approach, a State savings association may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories in Table 10 based on the investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted asset amount for the State savings association's equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight. If the sum of the investment limits for exposure classes within the fund exceeds 100 percent, the State savings association must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure class with the highest risk weight under Table 10, and continues to make investments in order of the exposure class with the next highest risk weight under Table 10 until the maximum total investment level is reached. If more than one exposure class applies to an exposure, the State savings association must use the highest applicable risk weight. A State savings association may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund's exposures.

(e) *Money Market Fund Approach.* The risk-weighted asset amount for a State savings association's equity exposure to an investment fund that is a money market fund subject to 17 CFR 270.2a–7 and that has an applicable external rating in the highest investment-grade rating category equals the adjusted carrying value of the equity exposure multiplied by 7 percent.

*Section 55. Equity Derivative Contracts*

Under the IMA, in addition to holding risk-based capital against an equity derivative contract under this part, a State savings association must hold risk-based capital against the counterparty credit risk in the equity derivative contract by also treating the equity derivative contract as a wholesale exposure and computing a supplemental risk-weighted asset amount for the contract under part IV. Under the SRWA, a State savings association may choose not to hold risk-based capital against the counterparty credit risk of equity derivative contracts, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, a State savings association using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure.

**Part VII. Risk-Weighted Assets for Operational Risk**

*Section 61. Qualification Requirements for Incorporation of Operational Risk Mitigants*

(a) *Qualification to use operational risk mitigants.* A State savings association may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The State savings association's operational risk quantification system is able to generate an estimate of the State savings association's operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the State savings association's operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The State savings association's methodology for incorporating the effects of insurance, if the State savings association uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancellation terms of the policy, where less than one year;

(iii) The policy's timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) *Qualifying operational risk mitigants.* Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that has a claims payment ability that is rated in one of the three highest rating categories by a NRSRO;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event; and

(2) Operational risk mitigants other than insurance for which the FDIC has given prior written approval. In evaluating an operational risk mitigant other than insurance, the FDIC will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding regulatory capital.

*Section 62. Mechanics of Risk-Weighted Asset Calculation*

(a) If a State savings association does not qualify to use or does not have qualifying operational risk mitigants, the State savings association's dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If a State savings association qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the State savings association's dollar risk-based capital requirement for operational risk is the greater of:

(1) The State savings association's operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The State savings association's operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The State savings association's risk-weighted asset amount for operational risk equals the State savings association's dollar risk-based capital requirement for operational risk determined under paragraph (a) or (b) of this section multiplied by 12.5.

**Part VIII. Disclosure**

*Section 71. Disclosure Requirements*

(a) Each State savings association must publicly disclose each quarter its total and tier 1 risk-based capital ratios and their components (that is, tier 1 capital, tier 2 capital, total qualifying capital, and total risk-weighted assets).[8]

(b) A State savings association must comply with paragraph (c) of section 71 of this appendix unless it is a consolidated subsidiary of a depository institution or bank holding company that is subject to these requirements.

(c)(1) Each consolidated State savings association described in paragraph (b) of this section that is not a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction and has successfully completed its parallel run must provide timely public disclosures each calendar quarter of the information in tables 11.1 through 11.11 of this appendix. If a significant change occurs, such that the most recent reported amounts are no longer reflective of the State savings association's capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be provided as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter (for example, a general summary of the State savings association's risk management objectives and policies, reporting system, and definitions) may be disclosed annually, provided any significant changes to these are disclosed in the interim. Management is encouraged to provide all of the disclosures required by this appendix in one place on the State savings association's public Web site.[9] The State savings association must make these disclosures publicly available for each of the last three years (twelve quarters) or such shorter period since it began its first floor period.

(2) Each State savings association is required to have a formal disclosure policy approved by the board of directors that addresses its approach for determining the disclosures it makes. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this appendix, and must ensure that appropriate review of the disclosures takes place. One or more senior officers of the State savings association must attest that the disclosures required by this appendix meet the requirements of this appendix.

(3) If a State savings association believes that disclosure of specific commercial or financial information would prejudice seriously its position by making public information that is either proprietary or confidential in nature, the State savings association need not disclose those specific items, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed.

TABLE 11.1—SCOPE OF APPLICATION

| | |
|---|---|
| Qualitative Disclosures | (a) The name of the top corporate entity in the group to which the appendix applies. |
| | (b) An outline of differences in the basis of consolidation for accounting and regulatory purposes, with a brief description of the entities [10] within the group that are fully consolidated; that are deconsolidated and deducted; for which the regulatory capital requirement is deducted; and that are neither consolidated nor deducted (for example, where the investment is risk-weighted). |
| | (c) Any restrictions, or other major impediments, on transfer of funds or regulatory capital within the group. |
| Quantitative Disclosures | (d) The aggregate amount of surplus capital of insurance subsidiaries (whether deducted or subjected to an alternative method) included in the regulatory capital of the consolidated group. |
| | (e) The aggregate amount by which actual regulatory capital is less than the minimum regulatory capital requirement in all subsidiaries with regulatory capital requirements and the name(s) of the subsidiaries with such deficiencies. |

[8] Other public disclosure requirements continue to apply—for example, Federal securities law and regulatory reporting requirements.

[9] Alternatively, a State savings association may provide the disclosures in more than one place, as some of them may be included in public financial reports (for example, in Management's Discussion and Analysis included in SEC filings) or other regulatory reports. The State savings association must provide a summary table on its public Web site that specifically indicates where all the disclosures may be found (for example, regulatory report schedules, page numbers in annual reports).

[10] Entities include securities, insurance and other financial subsidiaries, commercial subsidiaries (where permitted), and significant minority equity investments in insurance, financial and commercial entities.

TABLE 11.2—CAPITAL STRUCTURE

| | |
|---|---|
| Qualitative Disclosures | (a) Summary information on the terms and conditions of the main features of all capital instruments, especially in the case of innovative, complex or hybrid capital instruments. |
| Quantitative Disclosures | (b) The amount of tier 1 capital, with separate disclosure of:<br>• Common stock/surplus;<br>• Retained earnings;<br>• Minority interests in the equity of subsidiaries;<br>• Regulatory calculation differences deducted from tier 1 capital; [11] and<br>• Other amounts deducted from tier 1 capital, including goodwill and certain intangibles.<br>(c) The total amount of tier 2 capital.<br>(d) Other deductions from capital.[12]<br>(e) Total eligible capital. |

TABLE 11.3—CAPITAL ADEQUACY

| | |
|---|---|
| Qualitative Disclosures | (a) A summary discussion of the State savings association's approach to assessing the adequacy of its capital to support current and future activities. |
| Quantitative Disclosures | (b) Risk-weighted assets for credit risk from:<br>• Wholesale exposures;<br>• Residential mortgage exposures;<br>• Qualifying revolving exposures;<br>• Other retail exposures;<br>• Securitization exposures;<br>• Equity exposures;<br>• Equity exposures subject to the simple risk weight approach; and<br>• Equity exposures subject to the internal models approach.<br>(c) Risk-weighted assets for market risk as calculated under any applicable market risk rule: [13]<br>• Standardized approach for specific risk; and<br>• Internal models approach for specific risk.<br>(d) Risk-weighted assets for operational risk.<br>(e) Total and tier 1 risk-based capital ratios: [14]<br>• For the top consolidated group; and<br>• For each DI subsidiary. |

General Qualitative Disclosure Requirement

For each separate risk area described in tables 11.4 through 11.11, the State savings association must describe its risk management objectives and policies, including:

• Strategies and processes;

• The structure and organization of the relevant risk management function;

• The scope and nature of risk reporting and/or measurement systems;

• Policies for hedging and/or mitigating risk and strategies and processes for monitoring the continuing effectiveness of hedges/mitigants.

TABLE 11.4 [15]—CREDIT RISK: GENERAL DISCLOSURES

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement with respect to credit risk (excluding counterparty credit risk disclosed in accordance with Table 11.6), including:<br>• Definitions of past due and impaired (for accounting purposes);<br>• Description of approaches followed for allowances, including statistical methods used where applicable; and<br>• Discussion of the State savings association's credit risk management policy. |
| Quantitative Disclosures | (b) Total credit risk exposures and average credit risk exposures, after accounting offsets in accordance with GAAP,[16] and without taking into account the effects of credit risk mitigation techniques (for example, collateral and netting), over the period broken down by major types of credit exposure.[17]<br>(c) Geographic [18] distribution of exposures, broken down in significant areas by major types of credit exposure.<br>(d) Industry or counterparty type distribution of exposures, broken down by major types of credit exposure.<br>(e) Remaining contractual maturity breakdown (for example, one year or less) of the whole portfolio, broken down by major types of credit exposure.<br>(f) By major industry or counterparty type:<br>• Amount of impaired loans;<br>• Amount of past due loans; [19] |

[11] Representing 50 percent of the amount, if any, by which total expected credit losses as calculated within the IRB approach exceed eligible credit reserves, which must be deducted from tier 1 capital.

[12] Including 50 percent of the amount, if any, by which total expected credit losses as calculated within the IRB approach exceed eligible credit reserves, which must be deducted from tier 2 capital.

[13] Risk-weighted assets determined under any applicable market risk rule are to be disclosed only for the approaches used.

[14] Total risk-weighted assets should also be disclosed.

[15] Table 4 does not include equity exposures.

[16] For example, FASB Interpretations 39 and 41.

[17] For example, State savings associations could apply a breakdown similar to that used for accounting purposes.

[18] Geographical areas may comprise individual countries, groups of countries, or regions within countries.

[19] A State savings association is encouraged also to provide an analysis of the aging of past-due loans.

TABLE 11.4 [15]—CREDIT RISK: GENERAL DISCLOSURES—Continued

| | |
|---|---|
| | • Allowances; and<br>• Charge-offs during the period.<br>(g) Amount of impaired loans and, if available, the amount of past due loans broken down by significant geographic areas including, if practical, the amounts of allowances related to each geographical area.[20]<br>(h) Reconciliation of changes in the allowance for loan and lease losses.[21] |

Such a breakdown might, for instance, be (a) loans, off-balance sheet commitments, and other non-derivative off-balance sheet exposures, (b) debt securities, and (c) OTC derivatives.

A State savings association might choose to define the geographical areas based on the way the company's portfolio is geographically managed. The criteria used to allocate the loans to geographical areas must be specified.

TABLE 11.5—CREDIT RISK: DISCLOSURES FOR PORTFOLIOS SUBJECT TO IRB RISK-BASED CAPITAL FORMULAS

| | |
|---|---|
| Qualitative Disclosures | (a) Explanation and review of the:<br>• Structure of internal rating systems and relation between internal and external ratings;<br>• Use of risk parameter estimates other than for regulatory capital purposes;<br>• Process for managing and recognizing credit risk mitigation (see table 11.7); and<br>• Control mechanisms for the rating system, including discussion of independence, accountability, and rating systems review.<br>(b) Description of the internal ratings process, provided separately for the following:<br>• Wholesale category;<br>• Retail subcategories;<br>• Residential mortgage exposures;<br>• Qualifying revolving exposures; and<br>• Other retail exposures.<br>For each category and subcategory the description should include:<br>• The types of exposure included in the category/subcategories; and<br>• The definitions, methods and data for estimation and validation of PD, LGD, and EAD, including assumptions employed in the derivation of these variables.[22] |
| Quantitative Disclosures: Risk assessment. | (c) For wholesale exposures, present the following information across a sufficient number of PD grades (including default) to allow for a meaningful differentiation of credit risk: [23]<br>• Total EAD; [24]<br>• Exposure-weighted average LGD (percentage);<br>• Exposure-weighted average risk weight; and<br>• Amount of undrawn commitments and exposure-weighted average EAD for wholesale exposures.<br>For each retail subcategory, present the disclosures outlined above across a sufficient number of segments to allow for a meaningful differentiation of credit risk. |
| Quantitative Disclosures: Historical results. | (d) Actual losses in the preceding period for each category and subcategory and how this differs from past experience. A discussion of the factors that impacted the loss experience in the preceding period—for example, has the State savings association experienced higher than average default rates, loss rates or EADs.<br>(e) State savings association's estimates compared against actual outcomes over a longer period.[25] At a minimum, this should include information on estimates of losses against actual losses in the wholesale category and each retail subcategory over a period sufficient to allow for a meaningful assessment of the performance of the internal rating processes for each category/subcategory.[26] Where appropriate, the State savings association should further decompose this to provide analysis of PD, LGD, and EAD outcomes against estimates provided in the quantitative risk assessment disclosures above.[27] |

[20] The portion of general allowance that is not allocated to a geographical area should be disclosed separately.

[21] The reconciliation should include the following: a description of the allowance; the opening balance of the allowance; charge-offs taken against the allowance during the period; amounts provided (or reversed) for estimated probable loan losses during the period; any other adjustments (for example, exchange rate differences, business combinations, acquisitions and disposals of subsidiaries), including transfers between allowances; and the closing balance of the allowance. Charge-offs and recoveries that have been recorded directly to the income statement should be disclosed separately.

[22] This disclosure does not require a detailed description of the model in full—it should provide the reader with a broad overview of the model approach, describing definitions of the variables and methods for estimating and validating those variables set out in the quantitative risk disclosures below. This should be done for each of the four category/subcategories. The State savings association should disclose any significant differences in approach to estimating these variables within each category/subcategories.

[23] The PD, LGD and EAD disclosures in Table 11.5(c) should reflect the effects of collateral, qualifying master netting agreements, eligible guarantees and eligible credit derivatives as defined in part I. Disclosure of each PD grade should include the exposure-weighted average PD for each grade. Where a State savings association aggregates PD grades for the purposes of disclosure, this should be a representative breakdown of the distribution of PD grades used for regulatory capital purposes.

[24] Outstanding loans and EAD on undrawn commitments can be presented on a combined basis for these disclosures.

[25] These disclosures are a way of further informing the reader about the reliability of the information provided in the ''quantitative disclosures: risk assessment'' over the long run. The disclosures are requirements from year-end 2010; in the meantime, early adoption is encouraged. The phased implementation is to allow a State savings association sufficient time to build up a longer run of data that will make these disclosures meaningful.

[26] This regulation is not prescriptive about the period used for this assessment. Upon implementation, it might be expected that a State savings association would provide these disclosures for as long a run of data as possible—for example, if a State savings association has 10 years of data, it might choose to disclose the average default rates for each PD grade over that 10-year period. Annual amounts need not be disclosed.

[27] A State savings association should provide this further decomposition where it will allow users greater insight into the reliability of the estimates

TABLE 11.6—GENERAL DISCLOSURE FOR COUNTERPARTY CREDIT RISK OF OTC DERIVATIVE CONTRACTS, REPO-STYLE TRANSACTIONS, AND ELIGIBLE MARGIN LOANS

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement with respect to OTC derivatives, eligible margin loans, and repo-style transactions, including:<br>• Discussion of methodology used to assign economic capital and credit limits for counterparty credit exposures;<br>• Discussion of policies for securing collateral, valuing and managing collateral, and establishing credit reserves;<br>• Discussion of the primary types of collateral taken;<br>• Discussion of policies with respect to wrong-way risk exposures; and<br>• Discussion of the impact of the amount of collateral the State savings association would have to provide if the State savings association were to receive a credit rating downgrade. |
| Quantitative Disclosures | (b) Gross positive fair value of contracts, netting benefits, netted current credit exposure, collateral held (including type, for example, cash, government securities), and net unsecured credit exposure.[28] Also report measures for EAD used for regulatory capital for these transactions, the notional value of credit derivative hedges purchased for counterparty credit risk protection, and, for State savings associations not using the internal models methodology in section 32(d) of this appendix, the distribution of current credit exposure by types of credit exposure.[29]<br>(c) Notional amount of purchased and sold credit derivatives, segregated between use for the State savings association's own credit portfolio and for its intermediation activities, including the distribution of the credit derivative products used, broken down further by protection bought and sold within each product group.<br>(d) The estimate of alpha if the State savings association has received supervisory approval to estimate alpha. |

TABLE 11.7—CREDIT RISK MITIGATION [30] [31] [32]

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement with respect to credit risk mitigation including:<br>• Policies and processes for, and an indication of the extent to which the State savings association uses, on- and off-balance sheet netting;<br>• Policies and processes for collateral valuation and management;<br>• A description of the main types of collateral taken by the State savings association;<br>• The main types of guarantors/credit derivative counterparties and their creditworthiness; and<br>• Information about (market or credit) risk concentrations within the mitigation taken. |
| Quantitative Disclosures | (b) For each separately disclosed portfolio, the total exposure (after, where applicable, on-or off-balance sheet netting) that is covered by guarantees/credit derivatives. |

TABLE 11.8—SECURITIZATION

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement with respect to securitization (including synthetics), including a discussion of:<br>• The State savings association's objectives relating to securitization activity, including the extent to which these activities transfer credit risk of the underlying exposures away from the State savings association to other entities;<br>• The roles played by the State savings association in the securitization process [33] and an indication of the extent of the State savings association's involvement in each of them; and<br>• The regulatory capital approaches (for example, RBA, IAA and SFA) that the State savings association follows for its securitization activities.<br>(b) Summary of the State savings association's accounting policies for securitization activities, including:<br>• Whether the transactions are treated as sales or financings;<br>• Recognition of gain-on-sale;<br>• Key assumptions for valuing retained interests, including any significant changes since the last reporting period and the impact of such changes; and |

provided in the ''quantitative disclosures: risk assessment.'' In particular, it should provide this information where there are material differences between its estimates of PD, LGD or EAD compared to actual outcomes over the long run. The State savings association should also provide explanations for such differences.

[28] Net unsecured credit exposure is the credit exposure after considering the benefits from legally enforceable netting agreements and collateral arrangements, without taking into account haircuts for price volatility, liquidity, *etc.*

[29] This may include interest rate derivative contracts, foreign exchange derivative contracts, equity derivative contracts, credit derivatives, commodity or other derivative contracts, repo-style transactions, and eligible margin loans.

[30] At a minimum, a State savings association must provide the disclosures in Table 11.7 in relation to credit risk mitigation that has been recognized for the purposes of reducing capital requirements under this appendix. Where relevant, State savings associations are encouraged to give further information about mitigants that have not been recognized for that purpose.

[31] Credit derivatives that are treated, for the purposes of this appendix, as synthetic securitization exposures should be excluded from the credit risk mitigation disclosures and included within those relating to securitization.

[32] Counterparty credit risk-related exposures disclosed pursuant to Table 11.6 should be excluded from the credit risk mitigation disclosures in Table 11.7.

[33] For example: originator, investor, servicer, provider of credit enhancement, sponsor of asset backed commercial paper facility, liquidity provider, or swap provider.

TABLE 11.8—SECURITIZATION—Continued

| | |
|---|---|
| | • Treatment of synthetic securitizations.<br>(c) Names of NRSROs used for securitizations and the types of securitization exposure for which each agency is used. |
| Quantitative Disclosures | (d) The total outstanding exposures securitized by the State savings association in securitizations that meet the operational criteria in section 41 of this appendix (broken down into traditional/synthetic), by underlying exposure type.[34] [35] [36]<br>(e) For exposures securitized by the State savings association in securitizations that meet the operational criteria in Section 41 of this appendix:<br>• Amount of securitized assets that are impaired/past due; and<br>• Losses recognized by the State savings association during the current period[37] broken down by exposure type.<br>(f) Aggregate amount of securitization exposures broken down by underlying exposure type.<br>(g) Aggregate amount of securitization exposures and the associated IRB capital requirements for these exposures broken down into a meaningful number of risk weight bands. Exposures that have been deducted from capital should be disclosed separately by type of underlying asset.<br>(h) For securitizations subject to the early amortization treatment, the following items by underlying asset type for securitized facilities:<br>• The aggregate drawn exposures attributed to the seller's and investors' interests; and<br>• The aggregate IRB capital charges incurred by the State savings association against the investors' shares of drawn balances and undrawn lines.<br>(i) Summary of current year's securitization activity, including the amount of exposures securitized (by exposure type), and recognized gain or loss on sale by asset type. |

TABLE 11.9—OPERATIONAL RISK

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement for operational risk.<br>(b) Description of the AMA, including a discussion of relevant internal and external factors considered in the State savings association's measurement approach.<br>(c) A description of the use of insurance for the purpose of mitigating operational risk. |

TABLE 11.10—EQUITIES NOT SUBJECT TO MARKET RISK RULE

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement with respect to equity risk, including:<br>• Differentiation between holdings on which capital gains are expected and those held for other objectives, including for relationship and strategic reasons; and<br>• Discussion of important policies covering the valuation of and accounting for equity holdings in the banking book. This includes the accounting techniques and valuation methodologies used, including key assumptions and practices affecting valuation as well as significant changes in these practices. |
| Quantitative Disclosures | (b) Value disclosed in the balance sheet of investments, as well as the fair value of those investments; for quoted securities, a comparison to publicly-quoted share values where the share price is materially different from fair value.<br>(c) The types and nature of investments, including the amount that is:<br>• Publicly traded; and<br>• Non-publicly traded.<br>(d) The cumulative realized gains (losses) arising from sales and liquidations in the reporting period.<br>(e) • Total unrealized gains (losses)[38]<br>• Total latent revaluation gains (losses)[39]<br>• Any amounts of the above included in tier 1 and/or tier 2 capital.<br>(f) Capital requirements broken down by appropriate equity groupings, consistent with the State savings association's methodology, as well as the aggregate amounts and the type of equity investments subject to any supervisory transition regarding regulatory capital requirements.[40] |

[34] Underlying exposure types may include, for example, one- to four-family residential loans, home equity lines, credit card receivables, and auto loans.

[35] Securitization transactions in which the originating State savings association does not retain any securitization exposure should be shown separately but need only be reported for the year of inception.

[36] Where relevant, a State savings association is encouraged to differentiate between exposures resulting from activities in which they act only as sponsors, and exposures that result from all other State savings association securitization activities.

[37] For example, charge-offs/allowances (if the assets remain on the State savings association's balance sheet) or write-downs of I/O strips and other residual interests.

[38] Unrealized gains (losses) recognized in the balance sheet but not through earnings.

[39] Unrealized gains (losses) not recognized either in the balance sheet or through earnings.

[40] This disclosure should include a breakdown of equities that are subject to the 0 percent, 20 percent, 100 percent, 300 percent, 400 percent, and 600 percent risk weights, as applicable.

TABLE 11.11—INTEREST RATE RISK FOR NON-TRADING ACTIVITIES

| | |
|---|---|
| Qualitative Disclosures | (a) The general qualitative disclosure requirement, including the nature of interest rate risk for non-trading activities and key assumptions, including assumptions regarding loan prepayments and behavior of non-maturity deposits, and frequency of measurement of interest rate risk for non-trading activities. |
| Quantitative Disclosures | (b) The increase (decline) in earnings or economic value (or relevant measure used by management) for upward and downward rate shocks according to management's method for measuring interest rate risk for non-trading activities, broken down by currency (as appropriate). |

**Part IX—Transition Provisions**

*Section 81. Optional Transition Provisions Related to the Implementation of Consolidation Requirements Under FAS 167*

(a) *Scope, applicability, and purpose.* This section 81 provides optional transition provisions for a State savings association that is required for financial and regulatory reporting purposes, as a result of its implementation of Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* (FAS 167), to consolidate certain variable interest entities (VIEs) as defined under GAAP. These transition provisions apply through the end of the fourth quarter following the date of a State savings association's implementation of FAS 167 (implementation date).

(b) *Exclusion period.*

(1) *Exclusion of risk-weighted assets for the first and second quarters.* For the first two quarters after the implementation date (exclusion period), including for the two calendar quarter-end regulatory report dates within those quarters, a State savings association may exclude from risk-weighted assets:

(i) Subject to the limitations in paragraph (d) of section 81, assets held by a VIE, provided that the following conditions are met:

(A) The VIE existed prior to the implementation date,

(B) The State savings association did not consolidate the VIE on its balance sheet for calendar quarter-end regulatory report dates prior to the implementation date,

(C) The State savings association must consolidate the VIE on its balance sheet beginning as of the implementation date as a result of its implementation of FAS 167, and

(D) The State savings association excludes all assets held by VIEs described in paragraphs (b)(1)(i)(A) through (C) of this section 81; and

(ii) Subject to the limitations in paragraph (d) of this section 81, assets held by a VIE that is a consolidated ABCP program, provided that the following conditions are met:

(A) The State savings association is the sponsor of the ABCP program,

(B) Prior to the implementation date, the State savings association consolidated the VIE onto its balance sheet under GAAP and excluded the VIE's assets from the State savings association's risk-weighted assets, and

(C) The State savings association chooses to exclude all assets held by ABCP program VIEs described in paragraphs (b)(1)(ii)(A) and (B) of this section 81.

(2) *Risk-weighted assets during exclusion period.* During the exclusion period, including for the two calendar quarter-end regulatory report dates within the exclusion period, a State savings association adopting the optional provisions in paragraph (b) of this section must calculate risk-weighted assets for its contractual exposures to the VIEs referenced in paragraph (b)(1) of this section 81 on the implementation date and include this calculated amount in risk-weighted assets. Such contractual exposures may include direct-credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans.

(3) *Inclusion of ALLL in tier 2 capital for the first and second quarters.* During the exclusion period, including for the two calendar quarter-end regulatory report dates within the exclusion period, a State savings association that excludes VIE assets from risk-weighted assets pursuant to paragraph (b)(1) of this section 81 may include in tier 2 capital the full amount of the ALLL calculated as of the implementation date that is attributable to the assets it excludes pursuant to paragraph (b)(1) of this section 81 (inclusion amount). The amount of ALLL includable in tier 2 capital in accordance with this paragraph shall not be subject to the limitations set forth in section 13(A)(2) and 13(b) of this Appendix.

(c) *Phase-in period.*

(1) *Exclusion amount.* For purposes of this paragraph (c), exclusion amount is defined as the amount of risk-weighted assets excluded in paragraph (b)(1) of this section as of the implementation date.

(2) *Risk-weighted assets for the third and fourth quarters.* A State savings association that excludes assets of consolidated VIEs from risk-weighted assets pursuant to paragraph (b)(1) of this section may, for the third and fourth quarters after the implementation date (phase-in period), including for the two calendar quarter-end regulatory report dates within those quarters, exclude from risk-weighted assets 50 percent of the exclusion amount, provided that the State savings association may not include in risk-weighted assets pursuant to this paragraph an amount less than the aggregate risk-weighted assets calculated pursuant to paragraph (b)(2) of this section 81.

(3) *Inclusion of ALLL in tier 2 capital for the third and fourth quarters.* A State savings association that excludes assets of consolidated VIEs from risk-weighted assets pursuant to paragraph (c)(2) of this section may, for the phase-in period, include in tier 2 capital 50 percent of the inclusion amount it included in tier 2 capital, during the exclusion period, notwithstanding the limit on including ALLL in tier 2 capital in section 13(a)(2) and 13(b) of this Appendix.

(d) *Implicit recourse limitation.* Notwithstanding any other provision in this section 81, assets held by a VIE to which the State savings association has provided recourse through credit enhancement beyond any contractual obligation to support assets it has sold may not be excluded from risk-weighted assets.

## PART 391—FORMER OFFICE OF THRIFT SUPERVISION REGULATIONS

### Subpart A—Security Procedures

Sec.



### Subpart B—Safety and Soundness Guidelines and Compliance Procedures



### Subpart C—Fair Credit Reporting



### Subpart D—Loans in Areas Having Special Flood Hazards

**Subpart E—Acquisition of Control of State Savings Associations**



**Authority:** 12 U.S.C. 1819 (Tenth).

Subpart A also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; 1881–1884; 15 U.S.C. 1681w; 15 U.S.C. 6801; 6805.

Subpart B also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; 1881–1884; 15 U.S.C.1681w; 15 U.S.C. 6801; 6805.

Subpart C also issued under 12 U.S.C. 1462a; 1463; 1464; 1828; 1831p–1; and 1881–1884; 15 U.S.C. 1681m; 1681w.

Subpart D also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 42 U.S.C. 4012a; 4104a; 4104b; 4106; 4128.

Subpart E also issued under 12 U.S.C. 1467a; 1468; 1817; 1831i.

## Subpart A—Security Procedures

### § 391.1 Authority, purpose, and scope.

(a) This subpart is issued by the Federal Deposit Insurance Corporation (FDIC) under section 3 of the Bank Protection Act of 1968 (12 U.S.C 1828), and sections 501 and 505(b)(1) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805(b)(1)), and section 628 of the Fair Credit Reporting Act (15 U.S.C. 1681w). This subpart is applicable to State savings associations. It requires each State savings association to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in the identification and prosecution of persons who commit such acts. Section 391.5 is applicable to State savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers). Section 391.5 requires covered institutions to establish and implement appropriate administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

(b) It is the responsibility of a State savings association's board of directors to comply with this regulation and ensure that a written security program for the State savings association's main office and branches is developed and implemented.

### § 391.2 Designation of security officer.

Within 30 days after the effective date of insurance of accounts, the board of directors of each State savings association shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time but no later than 180 days, and to administer a written security program for each of the State savings association's offices.

### § 391.3 Security program.

(a) *Contents of security program.* The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the State savings association and that will preserve evidence that may aid in their identification and prosecution. Such procedures may include, but are not limited to:

(i) Maintaining a camera that records activity in the office;

(ii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices; and

(iii) Retaining a record of any robbery, burglary, or larceny committed against the State savings association;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a burglary, robbery, or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) *Security devices.* Each State savings association shall have, at a minimum, the following security devices:

(1) A means of protecting cash and other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the office;

(3) Tamper-resistant locks on exterior doors and exterior windows that may be opened;

(4) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency and other valuables exposed to robbery, burglary, or larceny;

(iii) The distance of the office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the office; and

(vi) The physical characteristics of the structure of the office and its surroundings.

### § 391.4 Report.

The security officer for each State savings association shall report at least annually to the State savings association's board of directors on the implementation, administration, and effectiveness of the security program.

### § 391.5 Protection of customer information.

State savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) must comply with the Interagency Guidelines Establishing Information Security Standards set forth in appendix B to subpart B. Supplement A to appendix B to subpart B provides interpretive guidance.

## Subpart B—Safety and Soundness Guidelines and Compliance Procedures

### § 391.10 Authority, purpose, scope, and preservation of existing authority.

(a) *Authority.* This subpart and the Guidelines in Appendices A and B to this subpart are issued by the FDIC under section 39 (section 39) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831p–1) as added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102–242, 105 Stat. 2236 (1991)), and as amended by section 956 of the Housing and Community Development Act of 1992 (Pub. L. 102–550, 106 Stat. 3895 (1992)), and as amended by section 318 of the Community Development Banking Act of 1994 (Pub. L. 103–325, 108 Stat. 2160 (1994)). Appendix B to this subpart is further issued under sections 501(b) and 505 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999)).

(b) *Purpose.* Section 39 of the FDI Act requires the FDIC to establish safety and soundness standards. Pursuant to section 39, a State savings association may be required to submit a compliance plan if it is not in compliance with a safety and soundness standard established by guideline under section 39(a) or (b). An enforceable order under section 8 of the FDI Act may be issued if, after being notified that it is in violation of a safety and soundness standard prescribed under section 39, the State savings association fails to submit an acceptable compliance plan or fails in any material respect to implement an accepted plan. This subpart establishes procedures for submission and review of safety and soundness compliance plans and for issuance and review of orders pursuant to section 39. Interagency Guidelines Establishing Standards for Safety and Soundness pursuant to section 39 of the FDI Act are set forth in Appendix A to this subpart. Interagency Guidelines Establishing Information Security Standards are set forth in appendix B to this subpart.

(c) *Scope.* This subpart and the Interagency Guidelines Establishing Standards for Safety and Soundness as set forth at appendix A to this subpart and the Interagency Guidelines Establishing Information Security Standards at appendix B to this subpart implement the provisions of section 39 of the FDI Act as they apply to State savings associations.

(d) *Preservation of existing authority.* Neither section 39 of the FDI Act nor this subpart in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. Action under section 39 and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC.

**§ 391.11 Determination and notification of failure to meet safety and soundness standards and request for compliance plan.**

(a) *Determination.* The FDIC may, based upon an examination, inspection, or any other information that becomes available to the FDIC, determine that a State savings association has failed to satisfy the safety and soundness standards contained in the Interagency Guidelines Establishing Standards for Safety and Soundness as set forth in appendix A to this subpart or the Interagency Guidelines Establishing Information Security Standards as set forth in appendix B to this subpart.

(b) *Request for compliance plan.* If the FDIC determines that a State savings association has failed to meet a safety and soundness standard pursuant to paragraph (a) of this section, the FDIC may request by letter or through a report of examination, the submission of a compliance plan. The State savings association shall be deemed to have notice of the request three days after mailing or delivery of the letter or report of examination by the FDIC.

**§ 391.12 Filing of safety and soundness compliance plan.**

(a) *Schedule for filing compliance plan*—(1) *In general.* A State savings association shall file a written safety and soundness compliance plan with the FDIC within 30 days of receiving a request for a compliance plan pursuant to § 391.11(b), unless the FDIC notifies the State savings association in writing that the plan is to be filed within a different period.

(2) *Other plans.* If a State savings association is obligated to file, or is currently operating under, a capital restoration plan submitted pursuant to section 38 of the FDI Act (12 U.S.C. 1831o), a cease-and-desist order entered into pursuant to section 8 of the FDI Act, a formal or informal agreement, or a response to a report of examination, it may, with the permission of the FDIC, submit a compliance plan under this section as part of that plan, order, agreement, or response, subject to the deadline provided in paragraph (a)(1) of this section.

(b) *Contents of plan.* The compliance plan shall include a description of the steps the State savings association will take to correct the deficiency and the time within which those steps will be taken.

(c) *Review of safety and soundness compliance plans.* Within 30 days after receiving a safety and soundness compliance plan under this subpart, the FDIC shall provide written notice to the State savings association of whether the plan has been approved or seek additional information from the State savings association regarding the plan. The FDIC may extend the time within which notice regarding approval of a plan will be provided.

(d) *Failure to submit or implement a compliance plan.* If a State savings association fails to submit an acceptable plan within the time specified by the FDIC or fails in any material respect to implement a compliance plan, then the FDIC shall, by order, require the State savings association to correct the deficiency and may take further actions provided in section 39(e)(2)(B) of the FDI Act. Pursuant to section 39(e)(3), the FDIC may be required to take certain actions if the State savings association commenced operations or experienced a change in control within the previous 24-month period, or the State savings association experienced extraordinary growth during the previous 18-month period.

(e) *Amendment of compliance plan.* A State savings association that has filed an approved compliance plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the State savings association shall implement the compliance plan as previously approved.

**§ 391.13 Issuance of orders to correct deficiencies and to take or refrain from taking other actions.**

(a) *Notice of intent to issue order*—(1) *In general.* The FDIC shall provide a State savings association prior written notice of the FDIC's intention to issue an order requiring the State savings association to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39 of the FDI Act. The State savings association shall have such time to respond to a proposed order as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final order.* If the FDIC finds it necessary in order to carry out the purposes of section 39 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue an order requiring a State savings association immediately to take actions to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39. A State savings association that is subject to such an immediately effective order may submit a written appeal of the order to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the order, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely manner, within 60 days of receiving the appeal. During such period of review, the order shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the order.

(b) *Contents of notice.* A notice of intent to issue an order shall include:

(1) A statement of the safety and soundness deficiency or deficiencies that have been identified at the State savings association;

(2) A description of any restrictions, prohibitions, or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of any required action; and

(4) The date by which the State savings association subject to the order may file with the FDIC a written response to the notice.

(c) *Response to notice*— (1) *Time for response.* A State savings association may file a written response to a notice of intent to issue an order within the time period set by the FDIC. Such a response must be received by the FDIC within 14 calendar days from the date of the notice unless the FDIC determines that a different period is appropriate in light of the safety and soundness of the State savings association or other relevant circumstances.

(2) *Contents of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 39 of the FDI Act;

(ii) Any recommended modification of the proposed order; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the State savings association regarding the proposed order.

(d) *The FDIC's consideration of response.* After considering the response, the FDIC may:

(1) Issue the order as proposed or in modified form;

(2) Determine not to issue the order and so notify the State savings association; or

(3) Seek additional information or clarification of the response from the State savings association, or any other relevant source.

(e) *Failure to file response.* Failure by a State savings association to file with the FDIC, within the specified time period, a written response to a proposed order shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the order.

(f) *Request for modification or rescission of order.* Any State savings association that is subject to an order under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the order, and may propose that the order be rescinded or modified. Unless otherwise ordered by the FDIC, the order shall continue in place while such request is pending before the FDIC.

**§ 391.14 Enforcement of orders.**

(a) *Judicial remedies.* Whenever a State savings association fails to comply with an order issued under section 39 of the FDI Act, the FDIC may seek enforcement of the order in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any State savings association that violates or otherwise fails to comply with any final order issued under section 39 and against any State savings association-affiliated party who participates in such violation or noncompliance.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 39 of the FDI Act or this part through any other judicial or administrative proceeding authorized by law.

**Appendix A to Subpart B of Part 391—Interagency Guidelines Establishing Standards for Safety and Soundness**



**I. Introduction**

i. Section 39 of the Federal Deposit Insurance Act [1] (FDI Act) requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guideline for all insured depository institutions. Under section 39, the agencies must establish three types of standards: (1) Operational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate.

ii. Section 39(a) requires the agencies to establish operational and managerial standards relating to: (1) Internal controls, information systems and internal audit systems, in accordance with section 36 of the FDI Act (12 U.S.C. 1831m); (2) loan documentation; (3) credit underwriting; (4) interest rate exposure; (5) asset growth; and (6) compensation, fees, and benefits, in accordance with subsection (c) of section 39. Section 39(b) requires the agencies to establish standards relating to asset quality, earnings, and stock valuation that the agencies determine to be appropriate.

iii. Section 39(c) requires the agencies to establish standards prohibiting as an unsafe and unsound practice any compensatory arrangement that would provide any executive officer, employee, director, or principal shareholder of the institution with excessive compensation, fees or benefits and any compensatory arrangement that could lead to material financial loss to an institution. Section 39(c) also requires that the agencies establish standards that specify when compensation is excessive.

iv. If an agency determines that an institution fails to meet any standard established by guideline under subsection (a) or (b) of section 39, the agency may require the institution to submit to the agency an acceptable plan to achieve compliance with the standard. In the event that an institution fails to submit an acceptable plan within the time allowed by the agency or fails in any material respect to implement an accepted plan, the agency must, by order, require the institution to correct the deficiency. The agency may, and in some cases must, take other supervisory actions until the deficiency has been corrected.

v. The agencies have adopted amendments to their rules and regulations to establish deadlines for submission and review of compliance plans.[2]

vi. The following Guidelines set out the safety and soundness standards that the agencies use to identify and address problems at insured depository institutions before capital becomes impaired. The agencies believe that the standards adopted in these Guidelines serve this end without dictating how institutions must be managed and operated. These standards are designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the Deposit Insurance Fund.

*A. Preservation of Existing Authority*

Neither section 39 nor these Guidelines in any way limits the authority of the agencies to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. Action under section 39 and these Guidelines may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the agencies. Nothing in these Guidelines limits the authority of the FDIC pursuant to section 38(i)(2)(F) of the FDI Act (12 U.S.C. 1831(o)) and Part 325 of Title 12 of the Code of Federal Regulations.

[1] Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) was added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Public Law 102–242, 105 Stat. 2236 (1991), and amended by section 956 of the Housing and Community Development Act of 1992, Public Law 102–550, 106 Stat. 3895 (1992) and section 318 of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, 108 Stat. 2160 (1994).

[2] For the Office of the Comptroller of the Currency, these regulations appear at 12 CFR part 30; for the Board of Governors of the Federal Reserve System, these regulations appear at 12 CFR part 263; for the Federal Deposit Insurance Corporation, these regulations appear at 12 CFR part 308, subpart R, and subpart B of part 391.

*B. Definitions*

1. *In general.* For purposes of these Guidelines, except as modified in the Guidelines or unless the context otherwise requires, the terms used have the same meanings as set forth in sections 3 and 39 of the FDI Act (12 U.S.C. 1813 and 1831p–1).

2. *Board of directors,* in the case of a state-licensed insured branch of a foreign bank and in the case of a federal branch of a foreign bank, means the managing official in charge of the insured foreign branch.

3. *Compensation* means all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

4. *Director* shall have the meaning described in 12 CFR 215.2(d).[3]

5. *Executive officer* shall have the meaning described in 12 CFR 215.2(e).[4]

6. *Principal shareholder* shall have the meaning described in 12 CFR 215.2(m).[5]

**II. Operational and Managerial Standards**

A. *Internal controls and information systems.* An institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities and that provide for:

1. An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies;

2. Effective risk assessment;

3. Timely and accurate financial, operational and regulatory reports;

4. Adequate procedures to safeguard and manage assets; and

5. Compliance with applicable laws and regulations.

B. *Internal audit system.* An institution should have an internal audit system that is appropriate to the size of the institution and the nature and scope of its activities and that provides for:

1. Adequate monitoring of the system of internal controls through an internal audit function. For an institution whose size, complexity or scope of operations does not warrant a full scale internal audit function, a system of independent reviews of key internal controls may be used;

2. Independence and objectivity;

3. Qualified persons;

4. Adequate testing and review of information systems;

5. Adequate documentation of tests and findings and any corrective actions;

6. Verification and review of management actions to address material weaknesses; and

7. Review by the institution's audit committee or board of directors of the effectiveness of the internal audit systems.

C. *Loan documentation.* An institution should establish and maintain loan documentation practices that:

1. Enable the institution to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

2. Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner;

3. Ensure that any claim against a borrower is legally enforceable;

4. Demonstrate appropriate administration and monitoring of a loan; and

5. Take account of the size and complexity of a loan.

D. *Credit underwriting.* An institution should establish and maintain prudent credit underwriting practices that:

1. Are commensurate with the types of loans the institution will make and consider the terms and conditions under which they will be made;

2. Consider the nature of the markets in which loans will be made;

3. Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed;

4. Establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors;

5. Take adequate account of concentration of credit risk; and

6. Are appropriate to the size of the institution and the nature and scope of its activities.

E. *Interest rate exposure.* An institution should:

1. Manage interest rate risk in a manner that is appropriate to the size of the institution and the complexity of its assets and liabilities; and

2. Provide for periodic reporting to management and the board of directors regarding interest rate risk with adequate information for management and the board of directors to assess the level of risk.

F. *Asset growth.* An institution's asset growth should be prudent and consider:

1. The source, volatility and use of the funds that support asset growth;

2. Any increase in credit risk or interest rate risk as a result of growth; and

3. The effect of growth on the institution's capital.

G. *Asset quality.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration in those assets. The institution should:

1. Conduct periodic asset quality reviews to identify problem assets;

2. Estimate the inherent losses in those assets and establish reserves that are sufficient to absorb estimated losses;

3. Compare problem asset totals to capital;

4. Take appropriate corrective action to resolve problem assets;

5. Consider the size and potential risks of material asset concentrations; and

6. Provide periodic asset reports with adequate information for management and the board of directors to assess the level of asset risk.

H. *Earnings.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to evaluate and monitor earnings and ensure that earnings are sufficient to maintain adequate capital and reserves. The institution should:

1. Compare recent earnings trends relative to equity, assets, or other commonly used benchmarks to the institution's historical results and those of its peers;

2. Evaluate the adequacy of earnings given the size, complexity, and risk profile of the institution's assets and operations;

3. Assess the source, volatility, and sustainability of earnings, including the effect of nonrecurring or extraordinary income or expense;

4. Take steps to ensure that earnings are sufficient to maintain adequate capital and reserves after considering the institution's asset quality and growth rate; and

5. Provide periodic earnings reports with adequate information for management and the board of directors to assess earnings performance.

I. *Compensation, fees and benefits.* An institution should maintain safeguards to prevent the payment of compensation, fees, and benefits that are excessive or that could lead to material financial loss to the institution.

**III. Prohibition on Compensation That Constitutes an Unsafe and Unsound Practice**

*A. Excessive Compensation*

Excessive compensation is prohibited as an unsafe and unsound practice. Compensation shall be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by an executive officer, employee, director, or principal shareholder, considering the following:

1. The combined value of all cash and non-cash benefits provided to the individual;

2. The compensation history of the individual and other individuals with comparable expertise at the institution;

3. The financial condition of the institution;

4. Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the loan portfolio or other assets;

5. For postemployment benefits, the projected total cost and benefit to the institution;

6. Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the institution; and

7. Any other factors the agencies determines to be relevant.

[3] In applying these definitions for State savings associations, State savings associations shall use the terms "State savings association" and "insured State savings association" in place of the terms "member bank" and "insured bank".

[4] See footnote 3 in section I.B.4. of this appendix.

[5] See footnote 3 in section I.B.4. of this appendix.

*B. Compensation Leading to Material Financial Loss*

Compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.

## Appendix B to Subpart B of Part 391—Interagency Guidelines Establishing Information Security Standards

**Table of Contents**



**I. Introduction**

The Interagency Guidelines Establishing Information Security Standards (Guidelines) set forth standards pursuant to section 39(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1), and sections 501 and 505(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805(b)). These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information. These Guidelines also address standards with respect to the proper disposal of consumer information, pursuant to section 628 of the Fair Credit Reporting Act (15 U.S.C. 1681w).

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of entities over which FDIC has authority. For purposes of this appendix, these entities are State savings associations whose deposits are FDIC-insured and any subsidiaries of such State savings associations, except brokers, dealers, persons providing insurance, investment companies, and investment advisers. This appendix refers to such entities as ''you''. These Guidelines also apply to the proper disposal of consumer information by or on behalf of such entities.

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit FDIC's authority to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. FDIC may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to FDIC.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Consumer information* means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report and that is maintained or otherwise possessed by you or on your behalf for a business purpose. Consumer information also means a compilation of such records. The term does not include any record that does not identify an individual.

i. *Examples.* (1) *Consumer information* includes:

(A) A consumer report that a State savings association obtains;

(B) Information from a consumer report that you obtain from your affiliate after the consumer has been given a notice and has elected not to opt out of that sharing;

(C) Information from a consumer report that you obtain about an individual who applies for but does not receive a loan, including any loan sought by an individual for a business purpose;

(D) Information from a consumer report that you obtain about an individual who guarantees a loan (including a loan to a business entity); or

(E) Information from a consumer report that you obtain about an employee or prospective employee.

(2) *Consumer information* does not include:

(A) Aggregate information, such as the mean credit score, derived from a group of consumer reports; or

(B) Blind data, such as payment history on accounts that are not personally identifiable, that may be used for developing credit scoring models or for other purposes.

b. *Consumer report* has the same meaning as set forth in the Fair Credit Reporting Act, 15 U.S.C. 1681a(d).

c. *Customer* means any consumer who has a customer relationship with you.

d. *Customer information* means any record containing nonpublic personal information about a customer, whether in paper, electronic, or other form, that you maintain or that is maintained on your behalf.

e. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

f. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information or consumer information, through its provision of services directly to you.

**II. Standards for Information Security**

A. *Information Security Program.* You shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to your size and complexity and the nature and scope of your activities. While all parts of your organization are not required to implement a uniform set of policies, all elements of your information security program must be coordinated.

B. *Objectives.* Your information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information;

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer; and

4. Ensure the proper disposal of customer information and consumer information.

**III. Development and Implementation of Information Security Program**

A. *Involve the Board of Directors.* Your board of directors or an appropriate committee of the board shall:

1. Approve your written information security program; and

2. Oversee the development, implementation, and maintenance of your information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* You shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* You shall:

1. Design your information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of your activities. You must consider whether the following security measures are appropriate for you and, if so, adopt those measures you conclude are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with your information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions for you to take when you suspect or detect that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement your information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by your risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

4. Develop, implement, and maintain, as part of your information security program, appropriate measures to properly dispose of customer information and consumer information in accordance with each of the requirements in this paragraph III.

D. *Oversee Service Provider Arrangements.* You shall:

1. Exercise appropriate due diligence in selecting your service providers;

2. Require your service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by your risk assessment, monitor your service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, you should review audits, summaries of test results, or other equivalent evaluations of your service providers.

E. *Adjust the Program.* You shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of your customer information, internal or external threats to information, and your own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* You shall report to your board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and your compliance with these Guidelines. The reports should discuss material matters related to your program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.* 1. *Effective date.* You must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that you have entered into with a service provider to perform services for you or functions on your behalf satisfies the provisions of paragraph III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as you entered into the contract on or before March 5, 2001.

3. *Effective date for measures relating to the disposal of consumer information.* You must satisfy these Guidelines with respect to the proper disposal of consumer information by July 1, 2005.

4. *Exception for existing agreements with service providers relating to the disposal of consumer information.* Notwithstanding the requirement in paragraph III.G.3., your contracts with service providers that have access to consumer information and that may dispose of consumer information, entered into before July 1, 2005, must comply with the provisions of the Guidelines relating to the proper disposal of consumer information by July 1, 2006.

## *Supplement to Appendix B of Part 391—Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice*

### I. Background

This Guidance [1] interprets section 501(b) of the Gramm-Leach-Bliley Act (''GLBA'') and the Interagency Guidelines Establishing Information Security Standards (the ''Security Guidelines'') [2] and describes response programs, including customer notification procedures, that a financial institution should develop and implement to address unauthorized access to or use of customer information that could result in substantial harm or inconvenience to a customer. The scope of, and definitions of terms used in, this Guidance are identical to those of the Security Guidelines. For example, the term ''customer information'' is the same term used in the Security Guidelines, and means any record containing nonpublic personal information about a customer, whether in paper, electronic, or other form, maintained by or on behalf of the institution.

#### *A. Interagency Security Guidelines*

Section 501(b) of the GLBA required the Agencies to establish appropriate standards for financial institutions subject to their jurisdiction that include administrative, technical, and physical safeguards, to protect the security and confidentiality of customer information.

Accordingly, the Agencies issued Security Guidelines requiring every financial institution to have an information security program designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

#### *B. Risk Assessment and Controls*

1. The Security Guidelines direct every financial institution to assess the following risks, among others, when developing its information security program:

a. Reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems;

b. The likelihood and potential damage of threats, taking into consideration the sensitivity of customer information; and

c. The sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.[3]

2. Following the assessment of these risks, the Security Guidelines require a financial institution to design a program to address the identified risks. The particular security measures an institution should adopt will depend upon the risks presented by the complexity and scope of its business. At a minimum, the financial institution is required to consider the specific security measures enumerated in the Security Guidelines,[4] and adopt those that are appropriate for the institution, including:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means;

b. Background checks for employees with responsibilities for access to customer information; and

c. Response programs that specify actions to be taken when the financial institution suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies.[5]

#### *C. Service Providers*

The Security Guidelines direct every financial institution to require its service providers by contract to implement appropriate measures designed to protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.[6]

[1] This Guidance is being jointly issued by the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).

[2] 12 CFR part 30, app. B (OCC); 12 CFR part 208, app. D–2 and part 225, app. F (Board); 12 CFR part 364, app. A and app. B of Subpart B of Part 391 (FDIC). The ''Interagency Guidelines Establishing Information Security Standards'' were formerly known as ''The Interagency Guidelines Establishing Standards for Safeguarding Customer Information.''

[3] See Security Guidelines, III.B.

[4] See Security Guidelines, III.C.

[5] See Security Guidelines, III.C.

[6] See Security Guidelines, II.B. and III.D. Further, the Agencies note that, in addition to contractual obligations to a financial institution, a service provider may be required to implement its own comprehensive information security program in accordance with the Safeguards Rule promulgated by the Federal Trade Commission (''FTC''), 16 CFR part 314.

## II. Response Program

Millions of Americans, throughout the country, have been victims of identity theft.[7] Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Therefore, financial institutions should take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information. For example, financial institutions should place access controls on customer information systems and conduct background checks for employees who are authorized to access customer information.[8] However, every financial institution should also develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems [9] that occur nonetheless. A response program should be a key part of an institution's information security program.[10] The program should be appropriate to the size and complexity of the institution and the nature and scope of its activities.

In addition, each institution should be able to address incidents of unauthorized access to customer information in customer information systems maintained by its domestic and foreign service providers. Therefore, consistent with the obligations in the Guidelines that relate to these arrangements, and with existing guidance on this topic issued by the Agencies,[11] an institution's contract with its service provider should require the service provider to take appropriate actions to address incidents of unauthorized access to the financial institution's customer information, including notification to the institution as soon as possible of any such incident, to enable the institution to expeditiously implement its response program.

### *A. Components of a Response Program*

1. At a minimum, an institution's response program should contain procedures for the following:

a. Assessing the nature and scope of an incident, and identifying what customer information systems and types of customer information have been accessed or misused;

b. Notifying its primary Federal regulator as soon as possible when the institution becomes aware of an incident involving unauthorized access to or use of *sensitive* customer information, as defined below;

c. Consistent with the Agencies' Suspicious Activity Report (''SAR'') regulations,[12] notifying appropriate law enforcement authorities, in addition to filing a timely SAR in situations involving Federal criminal violations requiring immediate attention, such as when a reportable violation is ongoing;

d. Taking appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information, for example, by monitoring, freezing, or closing affected accounts, while preserving records and other evidence;[13] and

e. Notifying customers when warranted.

2. Where an incident of unauthorized access to customer information involves customer information systems maintained by an institution's service providers, it is the responsibility of the financial institution to notify the institution's customers and regulator. However, an institution may authorize or contract with its service provider to notify the institution's customers or regulator on its behalf.

## III. Customer Notice

Financial institutions have an affirmative duty to protect their customers' information against unauthorized access or use. Notifying customers of a security incident involving the unauthorized access or use of the customer's information in accordance with the standard set forth below is a key part of that duty. Timely notification of customers is important to manage an institution's reputation risk. Effective notice also may reduce an institution's legal risk, assist in maintaining good customer relations, and enable the institution's customers to take steps to protect themselves against the consequences of identity theft. When customer notification is warranted, an institution may not forgo notifying its customers of an incident because the institution believes that it may be potentially embarrassed or inconvenienced by doing so.

### *A. Standard for Providing Notice*

When a financial institution becomes aware of an incident of unauthorized access to sensitive customer information, the institution should conduct a reasonable investigation to promptly determine the likelihood that the information has been or will be misused. If the institution determines that misuse of its information about a customer has occurred or is reasonably possible, it should notify the affected customer as soon as possible. Customer notice may be delayed if an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the institution with a written request for the delay. However, the institution should notify its customers as soon as notification will no longer interfere with the investigation.

1. Sensitive Customer Information

Under the Guidelines, an institution must protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer. Substantial harm or inconvenience is most likely to result from improper access to *sensitive customer information* because this type of information is most likely to be misused, as in the commission of identity theft. For purposes of this Guidance, *sensitive customer information* means a customer's name, address, or telephone number, in conjunction with the customer's social security number, driver's license number, account number, credit or debit card number, or a personal identification number or password that would permit access to the customer's account. *Sensitive customer information* also includes any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name and password or password and account number.

2. Affected Customers

If a financial institution, based upon its investigation, can determine from its logs or other data precisely which customers' information has been improperly accessed, it may limit notification to those customers with regard to whom the institution determines that misuse of their information has occurred or is reasonably possible. However, there may be situations where the institution determines that a group of files has been accessed improperly, but is unable

[7] The FTC estimates that nearly 10 million Americans discovered they were victims of some form of identity theft in 2002. See The Federal Trade Commission, Identity Theft Survey Report, (September 2003), available at *http://www.ftc.gov/os/2003/09/synovatereport.pdf.*

[8] Institutions should also conduct background checks of employees to ensure that the institution does not violate 12 U.S.C. 1829, which prohibits an institution from hiring an individual convicted of certain criminal offenses or who is subject to a prohibition order under 12 U.S.C. 1818(e)(6).

[9] Under the Guidelines, an institution's customer information systems consist of all of the methods used to access, collect, store, use, transmit, protect, or dispose of customer information, including the systems maintained by its service providers. See Security Guidelines, I.C.2.d (I.C.2.c for FDIC).

[10] See FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002 available at *http://www.ffiec.gov/ffiecinfobase/html_pages/infosec_book_frame.htm.* Federal Reserve SR 97–32, Sound Practice Guidance for Information Security for Networks, Dec. 4, 1997; OCC Bulletin 2000–14, ''Infrastructure Threats—Intrusion Risks'' (May 15, 2000), for additional guidance on preventing, detecting, and responding to intrusions into financial institution computer systems.

[11] See Federal Reserve SR Ltr. 00–04, Outsourcing of Information and Transaction Processing, Feb. 9, 2000; OCC Bulletin 2001–47, ''Third-Party Relationships Risk Management Principles,'' Nov. 1, 2001; FDIC FIL 68–99, Risk Assessment Tools and Practices for Information System Security, July 7, 1999; Thrift Bulletin 82a, Third Party Arrangements, Sept. 1, 2004.

[12] An institution's obligation to file a SAR is set out in the Agencies' SAR regulations and Agency guidance. See 12 CFR 21.11 (national banks, Federal branches and agencies); 12 CFR 208.62 (State member banks); 12 CFR 211.5(k) (Edge and agreement corporations); 12 CFR 211.24(f) (uninsured State branches and agencies of foreign banks); 12 CFR 225.4(f) (bank holding companies and their nonbank subsidiaries); 12 CFR part 353 (State non-member banks); and 390.355 (State savings associations). National banks must file SARs in connection with computer intrusions and other computer crimes. See OCC Bulletin 2000–14, ''Infrastructure Threats—Intrusion Risks'' (May 15, 2000); Advisory Letter 97–9, ''Reporting Computer Related Crimes'' (November 19, 1997) (general guidance still applicable though instructions for new SAR form published in 65 FR 1229, 1230 (January 7, 2000)). See also Federal Reserve SR 01–11, Identity Theft and Pretext Calling, Apr. 26, 2001; SR 97–28, Guidance Concerning Reporting of Computer Related Crimes by Financial Institutions, Nov. 6, 1997; FDIC FIL 48–2000, Suspicious Activity Reports, July 14, 2000; FIL 47–97, Preparation of Suspicious Activity Reports, May 6, 1997; CEO Memorandum 139, Identity Theft and Pretext Calling, May 4, 2001; CEO Memorandum 126, New Suspicious Activity Report Form, July 5, 2000.

[13] See FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002, pp. 68–74.

to identify which specific customers' information has been accessed. If the circumstances of the unauthorized access lead the institution to determine that misuse of the information is reasonably possible, it should notify all customers in the group.

*B. Content of Customer Notice*

1. Customer notice should be given in a clear and conspicuous manner. The notice should describe the incident in general terms and the type of customer information that was the subject of unauthorized access or use. It also should generally describe what the institution has done to protect the customers' information from further unauthorized access. In addition, it should include a telephone number that customers can call for further information and assistance.[14] The notice also should remind customers of the need to remain vigilant over the next twelve to twenty-four months, and to promptly report incidents of suspected identity theft to the institution. The notice should include the following additional items, when appropriate:

a. A recommendation that the customer review account statements and immediately report any suspicious activity to the institution;

b. A description of fraud alerts and an explanation of how the customer may place a fraud alert in the customer's consumer reports to put the customer's creditors on notice that the customer may be a victim of fraud;

c. A recommendation that the customer periodically obtain credit reports from each nationwide credit reporting agency and have information relating to fraudulent transactions deleted;

d. An explanation of how the customer may obtain a credit report free of charge; and

e. Information about the availability of the FTC's online guidance regarding steps a consumer can take to protect against identity theft. The notice should encourage the customer to report any incidents of identity theft to the FTC, and should provide the FTC's Web site address and toll-free telephone number that customers may use to obtain the identity theft guidance and report suspected incidents of identity theft.[15]

2. The Agencies encourage financial institutions to notify the nationwide consumer reporting agencies prior to sending notices to a large number of customers that include contact information for the reporting agencies.

*C. Delivery of Customer Notice*

Customer notice should be delivered in any manner designed to ensure that a customer can reasonably be expected to receive it. For example, the institution may choose to contact all customers affected by telephone or by mail, or by electronic mail for those customers for whom it has a valid e-mail address and who have agreed to receive communications electronically.

[14] The institution should, therefore, ensure that it has reasonable policies and procedures in place, including trained personnel, to respond appropriately to customer inquiries and requests for assistance.

[15] Currently, the FTC Web site for the ID Theft brochure and the FTC Hotline phone number are *http://www.consumer.gov/idtheft* and 1–877–IDTHEFT. The institution may also refer customers to any materials developed pursuant to section 151(b) of the FACT Act (educational materials developed by the FTC to teach the public how to prevent identity theft).

## Subpart C—Fair Credit Reporting

### § 391.20 Examples.

The examples in this subpart are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this subpart. Examples in a section illustrate only the issue described in the section and do not illustrate any other issue that may arise in this subpart.

### § 391.21 Disposal of consumer information.

(a) *Scope.* This section applies to State savings associations whose deposits are insured by the Federal Deposit Insurance Corporation (defined as ''you'').

(b) *In general.* You must properly dispose of any consumer information that you maintain or otherwise possess in accordance with the Interagency Guidelines Establishing Information Security Standards, to the extent that you are covered by the scope of the Guidelines.

(c) *Rule of construction.* Nothing in this section shall be construed to:

(1) Require you to maintain or destroy any record pertaining to a consumer that is not imposed under any other law; or

(2) Alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

### § 391.22 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope.* This section applies to a financial institution or creditor that is a State savings association whose deposits are insured by the Federal Deposit Insurance Corporation.

(b) *Definitions.* For purposes of this section and the appendix to subpart C of part 391, the following definitions apply:

(1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes:

(i) An extension of credit, such as the purchase of property or services involving a deferred payment; and

(ii) A deposit account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identity theft* has the same meaning as in 16 CFR 603.2(a).

(9) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(10) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic identification of covered accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program* —(1) *Program requirement.* Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft

Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Program.* The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Program.* Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement a Program must consider the guidelines in the appendix to this subpart and include in its Program those guidelines that are appropriate.

**§ 391.23 Duties of card issuers regarding changes of address.**

(a) *Scope.* This section applies to an issuer of a debit or credit card (card issuer) that is a State savings association whose deposits are insured by the Federal Deposit Insurance Corporation.

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

(1) *Cardholder* means a consumer who has been issued a credit or debit card.

(2) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 391.22.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

## Appendix to Subpart C of Part 391—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 391.22 requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in § 391.22(b)(3), to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of § 391.22.

### I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

### II. Identifying Relevant Red Flags

(a) *Risk Factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

### III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(l) (31 CFR 103.121); and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

**IV. Preventing and Mitigating Identity Theft**

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

**V. Updating the Program**

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

**VI. Methods for Administering the Program**

(a) *Oversight of Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

(1) Assigning specific responsibility for the Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 391.22; and

(3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) *Reports.* (1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with § 391.22.

(2) *Contents of report.* The report should address material matters related to the Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

**VII. Other Applicable Legal Requirements**

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c–1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

## *Supplement A to Appendix to Subpart C of Part 391*

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in this Appendix, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

*Alerts, Notifications or Warnings from a Consumer Reporting Agency*

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy;

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

*Suspicious Documents*

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

*Suspicious Personal Identifying Information*

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

*Unusual Use of, or Suspicious Activity Related to, the Covered Account*

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement card or a cell phone, or for the addition of authorized users on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (*e.g.,* electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

*Notice from Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor*

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

## Subpart D—Loans in Areas Having Special Flood Hazards

### § 391.30 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to 12 U.S.C. 1462, 1462a, 1463, 1464, 1819 (Tenth) and 42 U.S.C. 4012a, 4104a, 4104b, 4106, 4128.

(b) *Purpose.* The purpose of this subpart is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) *Scope.* This subpart, except for §§ 391.35 and 391.37, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 391.35 and 391.37 apply to loans secured by buildings or mobile homes, regardless of location.

### § 391.31 Definitions.

(a) *Act* means the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001–4129).

(b) *State savings association* means, for purposes of this subpart, a State savings association as that term is defined in 12 U.S.C. 1813(b)(3) and any subsidiaries thereof.

(c) *Building* means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) *Community* means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) *Designated loan* means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) *Director of FEMA* means the Director of the Federal Emergency Management Agency.

(g) *Mobile home* means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term *mobile home* does not include a recreational vehicle. For purposes of this subpart, the term *mobile home* means a mobile home on a permanent foundation. The term *mobile home* includes a manufactured home as that term is used in the NFIP.

(h) *NFIP* means the National Flood Insurance Program authorized under the Act.

(i) *Residential improved real estate* means real estate upon which a home or other residential building is located or to be located.

(j) *Servicer* means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) *Special flood hazard area* means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) *Table funding* means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

### § 391.32 Requirement to purchase flood insurance where available.

(a) *In general.* A State savings association shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) *Table funded loans.* A State savings association that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this subpart.

**§ 391.33 Exemptions.**

The flood insurance requirement prescribed by § 391.32 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

**§ 391.34 Escrow requirement.**

If a State savings association requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by *residential* improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the State savings association shall also require the escrow of all premiums and fees for any flood insurance required under § 391.32. The State savings association, or a servicer acting on behalf of the State savings association, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the State savings association, or a servicer acting on behalf of the State savings association, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

**§ 391.35 Required use of standard flood hazard determination form.**

(a) *Use of form.* A State savings association shall use the standard flood hazard determination form developed by the Director of FEMA when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner. A State savings association may obtain the standard flood hazard determination form from FEMA, P.O. Box 2012, Jessup, MD 20794–2012.

(b) *Retention of form.* A State savings association shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the State savings association owns the loan.

**§ 391.36 Forced placement of flood insurance.**

If a State savings association, or a servicer acting on behalf of the State savings association, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 391.32, then the State savings association or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 391.32, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the State savings association or its servicer shall purchase insurance on the borrower's behalf. The State savings association or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

**§ 391.37 Determination fees.**

(a) *General.* Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any State savings association, or a servicer acting on behalf of the State savings association, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) *Borrower fee.* The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA's publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 391.36.

(c) *Purchaser or transferee fee.* The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

**§ 391.38 Notice of special flood hazards and availability of Federal disaster relief assistance.**

(a) *Notice requirement.* When a State savings association makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the State savings association shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) *Contents of notice.* The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster.

(c) *Timing of notice.* The State savings association shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the State savings association provides notice to the borrower and in any event no later than the State savings association provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) *Record of receipt.* The State savings association shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the State savings association owns the loan.

(e) *Alternate method of notice.* Instead of providing the notice to the borrower required by paragraph (a) of this section, a State savings association may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The State savings association shall retain a record of the written assurance from the seller or lessor for the period of time the State savings association owns the loan.

(f) *Use of prescribed form of notice.* A State savings association will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this subpart within a reasonable time before the completion of the transaction. The notice presented in appendix A to this subpart satisfies the borrower notice requirements of the Act.

### § 391.39 Notice of servicer's identity.

(a) *Notice requirement.* When a State savings association makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the State savings association shall notify the Director of FEMA (or the Director's designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the State savings association's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee.

(b) *Transfer of servicing rights.* The State savings association shall notify the Director of FEMA (or the Director's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

## Appendix to Subpart D of Part 391—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

(a) The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

(b) The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's *Flood Insurance Rate Map* or the *Flood Hazard Boundary Map* for the following community: ____. This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

(c) Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

(d) The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

• Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

• At a minimum, flood insurance purchased must cover *the lesser of:*

(1) The outstanding principal balance of the loan; *or*

(2) The maximum amount of coverage allowed for the type of property under the NFIP.

(e) Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

(f) Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

## Subpart E—Acquisition of Control of State Savings Associations

### § 391.40 Scope of subpart.

The purpose of this subpart is to implement the provisions of the Change in Bank Control Act, 12 U.S.C. 1817 (j) (''Control Act''), relating to acquisitions and changes in control of State savings associations that are organized in stock form.

### § 391.41 Definitions.

As used in this subpart and in the forms under this subpart, the following definitions apply, unless the context otherwise requires:

*Acquire* when used in connection with the acquisition of stock of a State savings association means obtaining ownership, control, power to vote, or sole power of disposition of stock, directly or indirectly or through one or more transactions or subsidiaries, through purchase, assignment, transfer, exchange, succession, or other means, including:

(1) An increase in percentage ownership resulting from a redemption, repurchase, reverse stock split or a similar transaction involving other securities of the same class, and

(2) The acquisition of stock by a group of persons and/or companies acting in concert which shall be deemed to occur upon formation of such group: *Provided,* That an investment advisor shall not be deemed to acquire the voting stock of its advisee if the advisor:

(i) Votes the stock only upon instruction from the beneficial owner, and

(ii) Does not provide the beneficial owner with advice concerning the voting of such stock.

*Acquiror* means a person or company.

*Acting in concert* means: (1) Knowing participation in a joint activity or interdependent conscious parallel action towards a common goal whether or not pursuant to an express agreement, or

(2) A combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

(3) A person or company which acts in concert with another person or company (''other party'') shall also be deemed to be acting in concert with any person or company who is also acting in concert with that other party, except that any tax-qualified employee stock

benefit plan as defined in 12 CFR 192.25 will not be deemed to be acting in concert with its trustee or a person who serves in a similar capacity solely for the purpose of determining whether stock held by the trustee and stock held by the plan will be aggregated.

*Affiliate* means any person or company which controls, is controlled by or is under common control with a person, State savings association, or company.

*Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in the definition of *similar organization* in this section; but a company does not include:

(1) The FDIC or any Federal Home Loan Bank, or

(2) Any company the majority of shares of which is owned by:

(i) The United States or any State;

(ii) An officer of the United States or any State in his or her official capacity;

(iii) An instrumentality of the United States or any State; or

(iv) A savings and loan holding company registered under section 10(b) of the Home Owners' Loan Act.

*Controlling shareholder* means any person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of his or her immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company or controls in any manner the election or appointment of a majority of the company's board of directors.

*Immediate family* means a person's spouse, father, mother, children, brothers, sisters and grandchildren; the father, mother, brothers, and sisters of the person's spouse; and the spouse of the person's child, brother or sister.

*Management official* means any president, chief executive officer, chief operating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a State savings association or a company, whether or not incorporated.

*Person* means an individual or a group of individuals acting in concert who do not constitute a *company* as defined in this section.

*Repealed Control Act* means the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q), as in effect immediately prior to its repeal by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

*State savings association* means a state-chartered savings association, building and loan, savings and loan or homestead association or a cooperative bank (other than a cooperative bank described in 12 U.S.C. 1813(a)(2)) the deposits of which are insured by the FDIC, and any corporation (other than a bank) the deposits of which are insured by the FDIC that the FDIC determines to be operating in substantially the same manner as a State savings association.

*Similar organization* for purposes *company* as defined in this section means a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:

(1) The transferability and voting of any stock or other indicia of participation in another entity, or

(2) Achievement of a common or shared objective, such as to collectively manage or control another entity.

*Stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests.

*Uninsured institution* means any financial institution the deposits of which are not insured by the FDIC.

*Voting stock* means:

(1) Common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interests, by statute, charter or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing State savings association or company); or

(ii) To vote or to direct the conduct of the operations or other significant policies of the issuer.

(2) Notwithstanding anything in this definition, preferred stock, limited partnership shares or interests, or similar interests are not *voting stock* if:

(i) Voting rights associated with the stock, shares or interests are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the stock, security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the stock, security or interest, the dissolution of the issuer, or the payment of dividends by the issuer when preferred dividends are in arrears;

(ii) The stock, shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuer; and

(iii) The stock, shares or interests do not at the time entitle the holder, by statute, charter, or otherwise, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuer;

(3) Notwithstanding anything in this definition, *voting stock* shall be deemed to include stock and other securities that, upon transfer or otherwise, are convertible into voting stock or exercisable to acquire voting stock where the holder of the stock, convertible security or right to acquire voting stock has the preponderant economic risk in the underlying voting stock. Securities immediately convertible into voting stock at the option of the holder without payment of additional consideration shall be deemed to constitute the voting stock into which they are convertible; other convertible securities and rights to acquire voting stock shall not be deemed to vest the holder with the preponderant economic risk in the underlying voting stock if the holder has paid less than 50 percent of the consideration required to directly acquire the voting stock and has no other economic interest in the underlying voting stock. For purposes of calculating the percentage of voting stock held by a particular acquiror, stock or other securities convertible into voting stock or exercisable to acquire voting stock which are deemed voting stock under this paragraph (3) shall be included in calculating the amount of voting stock held by the acquiror and the total amount of stock outstanding only to the extent of the voting stock obtainable by such acquiror by such conversion or exercise of rights.

**§ 391.42 Acquisition of control of State savings associations.**

(a) [Reserved]

(b) *Acquisition by a person or company.* Unless a transaction is exempt from prior notice under paragraph (d) of this section, no person or company (other than certain persons affiliated with a savings and loan holding company who are subject to § 10(e)(4) of the Home Owners' Loan Act), shall acquire control, as defined in § 391.43 (a) and (b), of a State savings association until written notice has been provided to the FDIC and (1) the FDIC indicates in writing its intent not to disapprove the proposed acquisition or (2) 60 days (or such period of time as the FDIC may specify if the review period has been extended under § 391.45(c)(3)) have passed since receipt of a notice deemed sufficient under § 391.45(c)(2). Notwithstanding the forgoing, acquisitions by persons or companies by means of a merger with an interim association are not subject to this subpart, but shall be subject to approval under § 390.332, and either 12 CFR 152.13 or applicable state law.

(c) *Exempt transactions.* (1) [Reserved]

(2) The following transactions are exempt from the notice requirements of paragraph (b) of this section:

(i)(A) Control of a State savings association acquired by a bank holding company that is registered under and subject to, the Bank Holding Company Act of 1956, or any company controlled by such bank holding company;

(B) Control of a State savings association acquired solely as a result of a pledge or hypothecation of stock to secure a loan contracted for in good faith or the liquidation of a loan contracted for in good faith, in either case where such loan was made in the ordinary course of the business of the lender: *Provided, further,* That acquisition of control pursuant to such pledge, hypothecation or liquidation is reported to the FDIC within 30 days, and *Provided, further,* That the acquiror shall not retain such control for more than one year from the date on which such control was acquired; however, the FDIC may, upon application by an acquiror, extend such one-year period from year to year, for an additional period of time not exceeding three years, if the FDIC finds such extension is warranted and would not be detrimental to the public interest;

(C) Control of a State savings association acquired through a percentage increase in stock ownership following a *pro rata* stock dividend or stock split, if the proportional interests of the recipients remain substantially the same;

(D) Acquisition of additional stock after a non-disapproval under § 391.46, or any predecessor provision, has been received: *Provided*, That such acquisition is consistent with any conditions imposed in connection with such approval and with the representations made by the acquirer in its application;

(E) Acquisitions of up to twenty-five percent (25%) of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25; and

(ii) Transactions for which approval is required under the Home Owners' Loan Act;

(iii) Transactions for which approval is required under 12 CFR 152.13 and 390.332;

(iv) Transactions for which a change of control notice must be submitted to the Board of Governors of the Federal Reserve System pursuant to the Change in Bank Control Act, 12 U.S.C. 1817(j);

(v) Acquisition of additional stock of a State savings association by any person who:

(A) Has held power to vote 25 percent or more of any class of voting stock in such association continuously since March 9, 1979; or

(B) Has maintained control of the State savings association continuously since acquiring control in compliance with the Control Act (or the Repealed Control Act) and the regulations thereunder then in effect: *Provided,* That such acquisition is consistent with any conditions imposed in connection with such acquisition of control and with the representations made by the acquiror in its notice; and

(vi) [Reserved]

(3) An acquiror that would be considered to be in control of a State savings association pursuant to § 391.43 on December 26, 1985, shall not be subject to this § 391.42 unless the acquiror acquires additional stock of the State savings association or obtains a control factor with respect to such association after December 26, 1985: *Provided,* That an acquiror shall not be deemed to have acquired control of a State savings association on the basis of actions taken prior to December 26, 1985, or on the basis of actions taken after December 26, 1985, if such actions are pursuant to and consistent with a materially complete application under the Holding Company Act or notice under the Repealed Control Act filed prior to December 26, 1985, if such acquisition is made pursuant to an application approved under the Holding Company Act or a notice under the Repealed Control Act that was not disapproved.

(d) *Transactions exempt from prior approval or notice.* (1) Subject to the conditions set forth in paragraph (d)(2) of this section, the following transactions are exempt from prior approval and prior notice under § 391.42: *Provided,* That the timing of the transaction was not within the control of the acquiror.

(i) Control of a State savings association acquired through *bona fide* gift;

(ii) Control of a State savings association acquired through liquidation of a loan contracted in good faith where the loan was not made in the ordinary course of business of the lender;

(iii) Control of a State savings association acquired through a percentage increase in ownership following a stock split or redemption that was not *pro rata;*

(iv) Control determined pursuant to § 391.43 (a) or (b) as a result of actions by third parties that are not within the control of the acquiror;

(v) Control of a State savings association acquired through testate or intestate succession: *Provided,* That the acquiror transmits written notification of the acquisition to the FDIC within 60 days of the acquisition and provides such additional information as the FDIC may specifically request.

(2) The exemptions provided by paragraphs (d)(1)(i) through (d)(1)(iv) of this section are subject to the following conditions:

(i) The acquiror shall file a notice or rebuttal, as appropriate, with the FDIC within 90 days of acquisition of control;

(ii) The acquiror shall not take any action to direct the management or policies of the State savings association or which are designed to effect a change in the business plan of the State savings association other than voting on matters that may be presented to stockholders by management of the State savings association until the FDIC has acted favorably upon the acquiror's notice or rebuttal, and the FDIC may require that the acquiror take such steps as the FDIC deems necessary to insure that control is not exercised; and

(iii) If the FDIC disapproves the acquiror's notice or rebuttal, the acquiror shall divest such portion of the stock held by the acquiror so as to cause the acquiror not to be determined to be in control of the State savings association under § 391.43, within one year or such shorter period of time and in the manner that the FDIC may order.

**§ 391.43 Control.**

(a) *Conclusive control.* (1) An acquiror shall be deemed to have acquired control of a State savings association, other than a savings and loan holding company, if the acquiror directly or indirectly, through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires 25 percent or more of any class of voting stock of the State savings association; or

(ii) Acquires irrevocable proxies representing 25 percent or more of any class of voting stock of the State savings association; or

(iii) Acquires any combination of voting stock and irrevocable proxies representing 25 percent or more of any class of voting stock of a State savings association; or

(iv) [Reserved]

(2) [Reserved]

(3) [Reserved]

(4) A person or company shall be deemed to control a State savings association if the FDIC determines that such person has the power to direct the management or policies of the State savings association.

(b) *Rebuttable control determinations.* (1) An acquiror shall be determined, subject to rebuttal, to have acquired control of a State savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires more than 10 percent of any class of voting stock of the State savings association and is subject to any control factor, as defined in paragraph (c) of this section;

(ii) Acquires 25 percent or more of any class of stock of the State savings association and is subject to any control factor, as defined in paragraph (c) of this section.

(2) An acquiror shall be determined, subject to rebuttal, to have acquired control of a State savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies, holds any combination of voting stock and revocable and/or irrevocable proxies, representing 25 percent or more of any class of voting stock of a State savings association, excluding such proxies held in connection with a solicitation by, or in opposition to, a solicitation on behalf of management of the State savings association, but including a solicitation in connection with an election of directors, and such proxies would enable the acquiror to:

(i) Elect one-third or more of the State savings association's board of directors, including nominees or representatives of the acquiror currently serving on such board;

(ii) Cause the State savings association's stockholders to approve the acquisition or corporate reorganization of the State savings association; or

(iii) Exert a continuing influence on a material aspect of the business operations of the State savings association.

(c) *Control factors.* For purposes of paragraph (b)(1) of this section, the following constitute control factors. References to the acquiror include actions taken directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(1) The acquiror would be one of the two largest holders of any class of voting stock of the State savings association.

(2) The acquiror would hold 25 percent or more of the total stockholders' equity of the State savings association.

(3) The acquiror would hold more than 35 percent of the combined debt securities and stockholders' equity of the State savings association.

(4) The acquiror is party to any agreement:

(i) Pursuant to which the acquiror possesses a material economic stake in the State savings association resulting from a profit-sharing arrangement, use of common names, facilities or personnel, or the provision of essential services to the State savings association; or

(ii) That enables the acquiror to influence a material aspect of the management or policies of the State savings association, other than agreements to which the State savings association is a party where the restrictions are customary under the circumstances and in the case of an acquisition agreement, which apply only during the period when the acquiror is seeking the FDIC's approval to acquire the State savings association, the agreement prohibits transactions between the acquiror and the State savings association and their respective affiliates without approval by the appropriate Regional Director during the pendency of the notice process, and the agreement contains no material forfeiture provisions applicable to the State savings association in the event the acquisition is not approved or not approved by a specified date.

(5) The acquiror would have the ability, other than through the holding of revocable proxies, to direct the votes of 25 percent or more of a class of the State savings association's voting stock or to vote 25 percent or more of a class of the State savings association's voting stock in the future upon the occurrence of a future event.

(6) The acquiror would have the power to direct the disposition of 25 percent or more of a class of the State savings association's voting stock in a manner other than a widely dispersed or public offering.

(7) The acquiror and/or the acquiror's representatives or nominees would constitute more than one member of the State savings association's board of directors.

(8) The acquiror or a nominee or management official of the acquiror would serve as the chairman of the board of directors, chairman of the executive committee, chief executive officer, chief operating officer, chief financial officer or in any position with similar policymaking authority in the State savings association.

(d) *Rebuttable presumptions of concerted action.* An acquiror will be presumed to be acting in concert with the following persons and companies:

(1) A company will be presumed to be acting in concert with a controlling shareholder, partner, trustee or management official of such company with respect to the acquisition of stock of a State savings association, if

(i) Both the company and the person own stock in the State savings association,

(ii) The company provides credit to the person to purchase the State savings association's stock, or

(iii) The company pledges its assets or otherwise is instrumental in obtaining financing for the person to acquire stock of the State savings association;

(2) A person will be presumed to be acting in concert with members of the person's immediate family;

(3) Persons will be presumed to be acting in concert with each other where

(i) Both own stock in a State savings association and both are also management officials, controlling shareholders, partners, or trustees of another company, or

(ii) One person provides credit to another person or is instrumental in obtaining financing for another person to purchase stock of the State savings association;

(4) A company controlling or controlled by another company and companies under common control will be presumed to be acting in concert;

(5) Persons or companies will be presumed to be acting in concert where they constitute a group under the beneficial ownership reporting rules under section 13 or the proxy rules under section 14 of the Securities Exchange Act of 1934, promulgated by the Securities and Exchange Commission.

(6) A person or company will be presumed to be acting in concert with any trust for which such person or company serves as trustee, except that a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25 shall not be presumed to be acting in concert with its trustee or person acting in a similar fiduciary capacity solely for the purposes of determining whether to combine the holdings of a plan and its trustee or fiduciary.

(7) Persons or companies will be presumed to be acting in concert with each other and with any other person or company with which they also are presumed to act in concert.

(e) *Procedures for rebuttal*—(1) *Rebuttal of control determination.* An acquiror attempting to rebut a determination of control that would arise under paragraph (b) of this section shall file a submission with the FDIC setting forth the facts and circumstances which support the acquiror's contention that no control relationship would exist if the acquiror acquires stock or obtains a control factor with respect to a State savings association. The rebuttal must be filed and accepted in accordance with this section before the acquiror acquires such stock or control factor.

(i) An acquiror seeking to rebut the determination of control arising under paragraph (b)(1) of this section shall submit to the FDIC an executed agreement materially conforming to the agreement set forth at § 391.48. Unless agreed to by the FDIC in writing, no other agreement or filing shall be deemed to rebut the determination of control arising under paragraph (b)(1) of this section. If accepted by the FDIC the acquiror shall furnish a copy of the executed agreement to the association to which the rebuttal pertains.

(ii) An acquiror seeking to rebut the determination of control with respect to holding of proxies arising under paragraph (b)(2) of this section shall be subject to the requirements of paragraph (e)(1) of this section, except that in the case of a rebuttal of the presumption of control arising under paragraph (b)(2) of this section, the FDIC may require the acquiror to furnish information in response to a specific request for information and depending upon the particular facts and circumstances, to provide an executed rebuttal agreement materially conforming to the agreement set forth at § 391.48, with any modifications deemed necessary by the FDIC.

(2) *Presumptions of concerted action.* An acquiror attempting to rebut the presumption of concerted action arising under paragraph (d) of this section shall file a submission with the FDIC setting forth facts and circumstances which clearly and convincingly demonstrate the acquiror's contention that no action in concert exists. Such a statement must be accompanied by an affidavit, in form and content satisfactory to the FDIC, executed by each person or company presumed to be acting in concert, stating that such person or company does not and shall not, without having made necessary filings and obtained approval or clearance thereof under the Holding Company Act or the Control Act, as applicable, have any agreements or understandings, written or tacit, with respect to the exercise of control, directly or indirectly, over the management or policies of the State savings association, including agreements relating to voting, acquisition or disposition of the State savings association's stock. The affidavit shall also recite that the signatory is aware that the filing of a false affidavit may subject the person or company to criminal sanctions, would constitute a violation of the FDIC's regulations at § 390.355(b) and would be considered a ''presumptive disqualifier'' under 12 CFR 391.46(g)(1)(v).

(3) *Determination.* A rebuttal filed pursuant to paragraph (e) of this section shall not be deemed sufficient unless it includes all the information, agreements, and affidavits required by the FDIC and this subpart, as well as any additional relevant information as the FDIC may require by written request to the acquiror. Within 20 calendar days after proper filing of a rebuttal submission, the FDIC will provide written notification of its determination to accept or reject the submission; request additional information in connection with the submission; or return the submission to the acquiror as materially deficient. Within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the FDIC, the FDIC shall notify the acquiror in writing as to whether the rebuttal is thereby deemed to be sufficient. If the FDIC fails to notify an acquiror within such time, the rebuttal shall be deemed to be accepted. The FDIC may reject any rebuttal which is inconsistent with facts and circumstances known to it or where the rebuttal does not clearly and convincingly refute the rebuttable determination of control or presumption of action in concert, and may determine to reject a submission solely on such bases.

(f) *Safe harbor.* Notwithstanding any other provision of this section, where an acquiror has no intention to participate in or to seek to exercise control over a State savings association's management or policies, the acquiror may seek to qualify for a safe harbor with respect to its ownership of stock of a State savings association.

(1) In order to qualify for the safe harbor, an acquiror must submit a certification to the FDIC that shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned makes this submission pursuant to § 391.43(f) with respect to [name of State savings association] and hereby certifies to the FDIC the following:

The undersigned is not in control of [name of State savings association] under § 391.43(a);

The undersigned is not subject to any control factor as enumerated in § 391.43(c) with respect to the [name of State savings association];

The undersigned will not solicit proxies relating to the voting stock of [name of State savings association];

Before any change in status occurs that would bring the undersigned within the scope of § 391.43(a) or (b), the undersigned will file and obtain approval of a rebuttal, or non-disapproval of a notice, or holding company application, as appropriate.

The undersigned has not acquired stock of [name of State savings association] for the purpose or effect of changing or influencing the control of [name of State savings association] or in connection with or as a participant in any transaction having such purpose or effect.

(2) An acquiror claiming safe-harbor status may vote freely and dissent with respect to its own stock. Certifications provided for in this paragraph must be filed with FDIC in accordance with §§ 390.106 and 390.108.

### § 391.44 Certifications of ownership.

(a) *Acquisition of stock.* (1) Upon the acquisition of beneficial ownership that exceeds, in the aggregate, 10 percent of any class of stock of a State savings association or additional stock above 10 percent of the stock of a State savings association occurring after December 26, 1985, an acquiror shall file with the FDIC a certification as described in this section.

(2) The certification filed pursuant to this section shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned is the beneficial owner of 10 percent or more of a class of stock of [name of State savings association]. The undersigned is not in control of such association, as defined in 12 CFR 391.43(a), and is not subject to a rebuttable determination of control under § 391.43(b), and will take no action that would result in a determination of control or a rebuttable determination of control without first filing and obtaining approval of an application under the Savings and Loan Holding Company Act, 12 U.S.C. 1467a, or a notice under the Change in Bank Control Act, 12 U.S.C. 1817(j), or filing and obtaining acceptance by the FDIC of a rebuttal of the rebuttable determination of control.

(3) Notwithstanding anything contained in this paragraph (a), an acquiror is not required to file a certification if—

(i) The FDIC has issued a notice of non-disapproval of the acquisition of the State savings association; or

(ii) The acquiror has filed a materially complete notice pursuant to § 391.42.

(b) *Privacy.* All certifications filed under this § 391.44 shall be for the information of the FDIC in connection with its examination functions and shall be provided confidential treatment by the FDIC.

**§ 391.45 Procedural requirements.**

(a) *Form of application or notice.* A notice required by § 391.42 shall be filed on the form indicated below. An acquiror may request confidential treatment of portions of a notice only by complying with the requirements of paragraph (f) of this section.

(a)(1) through (5) [Reserved]

(6) *Notice Form 1393, parts A and B.* This form shall be used for all notices filed under § 391.42(b) regarding the acquisition of control of a State savings association by any person or persons not constituting a company.

(b) *Filing requirements*—(1) *Notices and rebuttals.* (i) Complete copies including exhibits and all other pertinent documents of notices, and rebuttal submissions shall be filed with the appropriate Regional Director in the region in which the State savings association or associations involved in the transaction have their home office or offices. Unsigned copies shall be conformed. Each copy shall include a summary of the proposed transaction.

(ii) Any person or company may amend a notice or rebuttal submission, or file additional information, upon request of the FDIC or, in the case of the party filing a notice or rebuttal, upon such party's own initiative.

(2) [Reserved]

(c) *Sufficiency and waiver.* (1) Except as provided in § 391.45(c)(5), a notice filed pursuant to § 391.42(b) shall not be deemed sufficient unless it includes all of the information required by the form prescribed by the FDIC and this section, including a complete description of the acquiror's proposed plan for acquisition of control whether pursuant to one or more transactions, and any additional relevant information as the FDIC may require by written request to the acquiror. Unless a notice specifically indicates otherwise, the notice shall be considered to pertain to acquisition of 100 percent of a State savings association's voting stock. Where a notice pertains to a lesser amount of stock, the FDIC may condition its non-disapproval to apply only to such amount, in which case additional acquisitions may be made only by amendment to the acquiror's notice and the FDIC's approval or non-disapproval thereof. Failure by an applicant to respond completely to a written request by the FDIC for additional information within 30 calendar days of the date of such request may be deemed to constitute withdrawal of the notice or rebuttal filing or may be treated as grounds for issuance of a notice of disapproval of a notice or rejection of a rebuttal.

(2) The period for the FDIC's review of any proposed acquisition will commence upon receipt by the FDIC of a notice deemed sufficient under paragraph (c)(1) of this section. The FDIC shall notify an acquiror in writing within 30 calendar days after proper filing of a notice as to whether the notice—

(i) Is sufficient;

(ii) Is insufficient, and what additional information is requested in order to render the application or notice sufficient; or

(iii) Is materially deficient and will not be processed. The FDIC shall also notify an acquiror in writing within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the FDIC as to whether the notice is thereby deemed to be sufficient. If the FDIC fails to so notify an acquiror within such time, the application or notice shall be deemed to be sufficient as of the expiration of the applicable period.

(3) After additional information has been requested and supplied, the FDIC may request additional information only with respect to matters derived from or prompted by information already furnished, or information of a material nature that was not reasonably available from the acquiror, was concealed, or pertains to developments subsequent to the time of the FDIC's initial request for additional information. With regard to information of a material nature that was not reasonably available from the acquiror or was concealed at the time a notice was deemed to be sufficient or which pertains to developments subsequent to the time a notice was deemed to be sufficient, the FDIC, at its option, may request such additional information as it considers necessary, or may deem the notice not to be sufficient until such additional information is furnished and cause the review period to commence again in its entirety upon receipt of such additional information.

(i) The 60-day period for the FDIC's review of a notice deemed to be sufficient also may be extended by the FDIC for up to an additional 30 days.

(ii) The period for the FDIC's review of a notice may be further extended not to exceed two additional times for not more than 45 days each time if—

(A) The FDIC determines that any acquiring party has not furnished all the information required under this subpart;

(B) In the FDIC's judgment, any material information submitted is substantially inaccurate;

(C) The FDIC has been unable to complete an investigation of each acquiror because of any delay caused by, or the inadequate cooperation of, such acquiror; or

(D) The FDIC determines that additional time is needed to investigate and determine that no acquiring party has a record of failing to comply with the requirements of subchapter II of chapter 53 of title 31 of the United States Code.

(4) [Reserved]

(5) The FDIC may waive any requirements of this paragraph (c) determined to be unnecessary by the FDIC, upon its own initiative, upon the written request of an acquiring person, or in a supervisory case.

(d) *Public notice.* (1) The acquiror must publish a public notice of a notice under § 391.42(b), in accordance with the procedures in §§ 390.111 through 390.115. Promptly after publication, the acquiror must transmit copies of the public notice and the publisher's affidavit to FDIC.

(2) The acquiror must provide a copy of the public notice to the State savings association whose stock is sought to be acquired, and may provide a copy of the public notice to any other person who may have an interest in the notice.

(3) The FDIC will notify the appropriate state supervisor and will notify persons whose requests for announcements, as described in 12 CFR 163e, Appendix B, have been received in time for the notification. The FDIC may also notify any other persons who may have an interest in the notice.

(e) *Submission of comments.* Commenters may submit comments on the notice in accordance with the procedures in §§ 390.116 through 390.120.

(f) *Disclosure.* (1) Any notice, other filings, public comment, or portion thereof, made pursuant to this subpart for which confidential treatment is not requested in accordance with this paragraph (f), shall be immediately available to the public and not subject to the procedures set forth herein. Public disclosure shall be made of other portions of a notice, other filing or public comment in accordance with paragraph (f)(2) of this section, the provisions of the Freedom of Information Act (5 U.S.C. 552a) and parts 309 and 310. Applicants and other submitters should provide confidential and non-confidential versions of their filings, as described in § 391.45(f)(2) and (3) in order to facilitate this process.

(2) Any person who submits any information or causes or permits any information to be submitted to the FDIC pursuant to this subpart may request that the FDIC afford confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality, which shall include such information that would be deemed to result in the commencement of a tender offer under § 240.14d–2 of title 17 of the Code of Federal Regulations, or for any other reason permitted by Federal law. Such request for confidentiality must be made and justified in accordance with paragraph (f)(5) of this section at the time of filing, and must, to the extent practicable, identify with specificity the information for which confidential treatment may be available and not merely indicate portions of documents or entire documents in which such information is contained. Failure to specifically identify information for which confidential treatment is requested, failure to specifically justify the bases upon which confidentiality is claimed in accordance with paragraph (f)(5) of this section, or overbroad and indiscriminate claims for confidential treatment, may be bases for denial of the request. In addition, the filing party should take all steps reasonably necessary to ensure, as nearly as practicable, that at the time the information is first received by the FDIC it is supplied segregated from information for which confidential treatment is not being requested, it is appropriately marked as confidential, and it is accompanied by a written request for confidential treatment which identifies with specificity the information as to which confidential treatment is requested. Any such request must be substantiated in accordance with paragraph (f)(5) of this section.

(3) All documents which contain information for which a request for confidential treatment is made or the appropriate segregable portions thereof shall be marked by the person submitting the records with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page, stating ‘‘Confidential Treatment Requested by [name].’’ If such marking is impracticable under the circumstances, a cover sheet prominently marked ‘‘Confidential Treatment Requested by [name]’’ should be securely attached to each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this manner should be individually marked with an identifying number and code so that they are separately identifiable.

(4) A determination as to the validity of any request for confidential treatment may be made when a request for disclosure of the information under the Freedom of Information Act is received, or at any time prior thereto. If the FDIC receives a request for the information under the Freedom of Information Act, FDIC will advise the filing party before it discloses material for which confidential treatment has been requested.

(5) Substantiation of a request for confidential treatment shall consist of a statement setting forth, to the extent appropriate or necessary for the determination of the request for confidential treatment, the following information regarding the request:

(i) The reasons, concisely stated and referring to specific exemptive provisions of the Freedom of Information Act, why the information should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions which govern or may govern the treatment of the information;

(iii) The existence and applicability of any prior determination by the FDIC, other Federal agencies, or a court, concerning confidential treatment of the information;

(iv) The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position;

(v) The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the FDIC;

(vi) The ease or difficulty of a competitor's obtaining or compiling the commercial or financial information;

(vii) Whether commercial or financial information was voluntarily submitted to the FDIC, and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the FDIC;

(viii) The extent, if any, to which portions of the substantiation of the request for confidential treatment should be afforded confidential treatment;

(ix) The amount of time after the consummation of the proposed acquisition for which the information should remain confidential and a justification thereof;

(x) Such additional facts and such legal and other authorities as the requesting person may consider appropriate.

(6) Any person requesting access to a notice, other filing, or public comment made pursuant to this subpart for purposes of commenting on a pending submission may prominently label such request: ‘‘Request for Disclosure of Filing(s) Made Under Subpart E of Part 391/Priority Treatment Requested.’’

(g) *Supervisory cases.* The provisions of paragraphs (d), (e), and (f) of this section may be waived by the FDIC in connection with a transaction approved by the FDIC for supervisory reasons.

(h) *Notification of State supervisor.* Upon receiving a notice relating to an acquisition of control of a State savings association, the FDIC shall forward a copy of the notice to the appropriate state savings and loan association supervisory agency, and shall allow 30 days within which the views and recommendations of such state supervisory agency may be submitted. The FDIC shall give due consideration to the views and recommendations of such state agency in determining whether to disapprove any proposed acquisition. Notwithstanding the provisions of this paragraph (h), if the FDIC determines that it must act immediately upon any notice of a proposed acquisition in order to prevent the default of the association involved in the proposed acquisition, the FDIC may dispense with the requirement of this paragraph (h) or, if a copy of the notice is forwarded to the state supervisory agency, the FDIC may request that the views and recommendations of such state supervisory agency be submitted immediately in any form or by any means acceptable to the FDIC.

(i) *Additional procedures for acquisitions involving mergers.* Acquisitions of control involving mergers (including mergers with an interim association) shall also be subject to the procedures set forth in § 390.332 to the extent applicable, except as provided in paragraph (a) of this section.

(j) *Additional procedures for acquisitions of recently converted State savings associations.* Notices and rebuttals involving acquisitions of the stock of a recently converted State savings association under 12 CFR 192.3(i)(3) shall also address the criteria for approval set forth at 12 CFR 192.3(i)(5).

### § 391.46 Determination by the FDIC.

(a) through (c) [Reserved]

(d) *Notice criteria.* In making its determination whether to disapprove a notice, the FDIC may disapprove any proposed acquisition, if the FDIC determines that:

(1) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the banking business in any part of the United States;

(2) The effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(3) The financial condition of the acquiring person is such as might jeopardize the financial stability of the association or prejudice the interests of the depositors of the State savings association;

(4) The competence, experience, or integrity of the acquiring person or any of the proposed management personnel indicates that it would not be in the interests of the depositors of the State savings association, the FDIC, or the public to permit such person to control the State savings association;

(5) The acquiring person fails or refuses to furnish information requested by the FDIC; or

(6) The FDIC determines that the proposed acquisition would have an adverse effect on the Deposit Insurance Fund.

(e) *Failure to disapprove a notice.* If, upon expiration of the 60-day review period of any notice deemed to be sufficient filed pursuant to § 391.45(c), or extension thereof, the FDIC has failed to disapprove such notice, the proposed acquisition may take place: *Provided,* That it is consummated within one year and in accordance with the terms and representations in the notice and that there is no material change in circumstances prior to the acquisition.

(f) [Reserved]

(g) *Presumptive disqualifiers* —(1) *Integrity factors.* The following factors shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the integrity test of paragraph (d)(4) of this section:

(i) During the 10-year period immediately preceding filing the notice, criminal, civil or administrative judgments, consents or orders, and any indictments, formal investigations, examinations, or civil or administrative proceedings (excluding routine or customary audits, inspections and investigations) that terminated in any agreements, undertakings, consents or orders, issued against, entered into by, or involving the acquiror or affiliates of the acquiror by any federal or state court, any department, agency, or commission of the U.S. Government, any state or municipality, any Federal Home Loan Bank, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involve:

(A) Fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering;

(B) Violation of securities or commodities laws or regulations;

(C) Violation of depository institution laws or regulations;

(D) Violation of housing authority laws or regulations; or

(E) Violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization;

(ii) Denial, or withdrawal after receipt of formal or informal notice of an intent to deny, by the acquiror or affiliates of the acquiror, of

(A) Any application relating to the organization of a financial institution,

(B) An application to acquire any financial institution or holding company thereof under the Holding Company Act or the Bank Holding Company Act or otherwise,

(C) A notice relating to a change in control of any of the foregoing under the Control Act or the Repealed Control Act; or

(D) An application or notice under a state holding company or change in control statute;

(iii) The acquiror or affiliates of the acquiror were placed in receivership or conservatorship during the preceding 10 years, or any management official of the acquiror was a management official or director (other than an official or director serving at the request of the FDIC, the former Resolution Trust Corporation, or the former Federal Savings and Loan Insurance Corporation) or controlling shareholder of a company or savings association that was placed into receivership, conservatorship, or a management consignment program, or was liquidated during his or her tenure or control or within two years thereafter;

(iv) Felony conviction of the acquiror, an affiliate of the acquiror or a management official of the acquiror or an affiliate of the acquiror;

(v) Knowingly making any written or oral statement to the FDIC or any predecessor agency (or its delegate) in connection with a notice or other filing under this subpart that is false or misleading with respect to a material fact or omits to state a material fact with respect to information furnished or requested in connection with such notice or other filing;

(vi) Acquisition and retention at the time of submission of a notice, of stock in the State savings association by the acquiror in violation of § 391.42 or its predecessor sections.

(2) *Financial factors.* The following shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the financial condition test of paragraph (d)(3) of this section:

(i) Liability for amounts of debt which, in the opinion of the FDIC, create excessive risks of default and pressure on the State savings association to be acquired; or

(ii) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with economical home financing.

### § 391.47 [Reserved]

### § 391.48 Rebuttal of control agreement.

Agreement

Rebuttal of Rebuttable Determination Of Control Under Subpart A

I. WHEREAS

A. [ ] is the owner of [ ] shares (the ''Shares'') of the [ ] stock (the ''Stock'') of [name and address of State savings association], which Shares represent [ ] percent of a class of ''voting stock'' of [ ] as defined under the Acquisition of Control Regulations (''Regulations'') of the FDIC, Subpart A of Part 391 (''Voting Stock'');

B. [ ] is a ''State savings association'' within the meaning of the Regulations;

C. [ ] seeks to acquire additional shares of stock of [ ] (''Additional Shares''), such that [ ]'s ownership thereof will represent 10 percent or more of a class of Voting Stock but will not represent 25 percent or more of any class of Voting Stock of [ ]; [and/or] [ ] seeks to [ ], which would constitute the acquisition of a ''control factor'' as defined in the Regulations (''Control Factor'');

D. [ ] does not seek to acquire the [Additional Shares or Control Factor] for the purpose or effect of changing the control of [ ] or in connection with or as a participant in any transaction having such purpose or effect;

E. The Regulations require a company or a person who intends to hold 10 percent or more but not 25 percent or more of any class of Voting Stock of a State savings association or holding company thereof and that also would possess any of the Control Factors specified in the Regulations, to file and obtain clearance of a notice (''Notice'') under the Change in Control Act (''Control Act''), 12 U.S.C. 1817(j), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted.

F. Under the Regulations, [ ] would be determined to be in control, subject to rebuttal, of [ ] upon acquisition of the [Additional Shares or Control Factor];

G. [ ] has no intention to manage or control, directly or indirectly, [ ];

H. [ ] has filed on [ ], a written statement seeking to rebut the determination of control, attached hereto and incorporated by reference herein, (this submission referred to as the ''Rebuttal'');

I. In order to rebut the rebuttable determination of contro1, [ ] agrees to offer this Agreement as evidence that the acquisition of the [Additional Shares or Control Factor] as proposed would not constitute an acquisition of control under the Regulations.

II. The FDIC has determined, and hereby agrees, to act favorably on the Rebuttal, and in consideration of such a determination and agreement by the FDIC to act favorably on the Rebuttal, [ ] and any other existing, resulting or successor entities of [ ] agree with the FDIC that:

A. Unless [ ] shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and shall have obtained clearance of the Notice in accordance with the Regulations, [ ] will not, except as expressly permitted otherwise herein or pursuant to an amendment to this Rebuttal Agreement:

1. Seek or accept representation of more than one member of the board of directors of [insert name of State savings association and any holding company thereof];

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of [insert name of State savings association and any holding company thereof]'s board of directors or as president or chief executive officer of [insert name of State savings association and any holding company thereof];

3. Engage in any intercompany transaction with [ ] or [ ]'s affiliates;

4. Propose a director in opposition to nominees proposed by the management of [insert name of State savings association and any holding company thereof] for the board of directors of [insert name of State savings association and any holding company thereof] other than as permitted in paragraph A–1;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders [ ] other than in support of, or in opposition to, a solicitation conducted on behalf of management of [ ];

6. Do any of the following, except as necessary solely in connection with [ ]'s performance of duties as a member of [ ]'s board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of [ ], the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of [ ];

(b) Influence or attempt to influence the dividend policies and practices of [ ] or any decisions or policies of [ ] as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or charter of [ ];

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of [ ]; or

(e) Seek or accept access to any non-public information concerning [ ].

B. [ ] is not a party to any agreement with [ ].

C. [ ]shall not assist, aid or abet any of [ ]'s affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by [ ] with the FDIC for its determination;

E. Prior to acquisition of any shares of ''Voting Stock'' of [ ] as defined in the Regulations in excess of the Additional Shares, any required filing will be made by [ ] under the Control Act or the Holding Company Act and either approval of the acquisition under the Holding Company Act shall be obtained or any Notice filed under the Control Act shall be cleared in accordance with the Regulations;

F. At any time during which 10 percent or more of any class of Voting Stock of [ ] is owned or controlled by [ ], no action which is inconsistent with the provisions of this Agreement shall be taken by [ ] until [ ] files and either obtains from the FDIC a favorable determination with respect to either an amended rebuttal or clearance of a Notice under the Control Act, in accordance with the Regulations;

G. Where any amended rebuttal filed by[ ] is denied or disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of a class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either obtaining approval of the Application or clearance of the Notice, in accordance with the Regulations;

H. Where any Notice filed by [ ] is disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond [ ]'s control result in [ ] being placed in a position to direct the management or policies of [ ], then [ ] shall either (1) promptly file a Notice under the Control Act or an Application under the Holding Company Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Application or Notice, or (2) promptly reduce the amount of shares of [ ] Voting Stock owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock of [ ] is owned or controlled, directly or indirectly, by [ ], and [ ] possesses any Control Factor as defined in the Regulations, [ ] will submit to the jurisdiction of the Regulations, including (1) the filing of an amended rebuttal or Notice for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates or with reckless disregard for the safety or soundness of a State savings association participates in a violation of the Control Act and the Regulations thereunder, and any regulation or order issued by the FDIC.

K. Any violation of this Agreement shall be deemed to be a violation of the [Control Act or Holding Company Act] and the Regulations, and shall be subject to such remedies and procedures as are provided in the [Control Act or Holding Company Act] and the Regulations for a violation thereunder and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the FDIC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the FDIC.

V. This Agreement shall terminate upon (i) clearance by the FDIC of [ ]'s Notice under the Control Act to acquire [ ], and consummation of the transaction as described in Notice, (ii) in the disposition by [ ] of a sufficient number of shares of [ ], or (iii) the taking of such other action that thereafter [ ] is not in control and would not be determined to be in control of [ ] under the Control Act or the Regulations of the FDIC as in effect at that time.

VI. *In Witness Thereof,* the parties thereto have executed this Agreement by their duly authorized officer.______

[Acquiror]

Federal Deposit Insurance Corporation.

Date: ______________________________

By: ______________________________

Dated at Washington, DC, this 14th day of June 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2011–18276 Filed 7–22–11; 4:15 pm]

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Part III

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2012; Changes in Size and Square Footage of Inpatient Rehabilitation Units and Inpatient Psychiatric Units; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Part 412**

**[CMS–1349–F]**

**RIN 0938–AQ28**

# Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2012; Changes in Size and Square Footage of Inpatient Rehabilitation Units and Inpatient Psychiatric Units

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule will implement section 3004 of the Affordable Care Act, which establishes a new quality reporting program that provides for a 2 percent reduction in the annual increase factor beginning in 2014 for failure to report quality data to the Secretary of Health and Human Services. This final rule will also update the prospective payment rates for inpatient rehabilitation facilities (IRFs) for Federal fiscal year (FY) 2012 (for discharges occurring on or after October 1, 2011 and on or before September 30, 2012) as required under section 1886(j)(3)(C) of the Social Security Act (the Act). Section 1886(j)(5) of the Act requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each FY the classification and weighting factors for the IRF prospective payment system (PPS) case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year. We are also consolidating, clarifying, and revising existing policies regarding IRF hospitals and IRF units of hospitals to eliminate unnecessary confusion and enhance consistency. Furthermore, in accordance with the general principles of the President's January 18, 2011 Executive Order entitled ''Improving Regulation and Regulatory Review,'' we are amending existing regulatory provisions regarding ''new'' facilities and changes in the bed size and square footage of IRFs and inpatient psychiatric facilities (IPFs) to improve clarity and remove obsolete material.

**DATES:** *Effective Date:* This final rule becomes effective on October 1, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Gwendolyn Johnson, (410) 786–6954, for general information about the final rule.

Hillary Loeffler, (410) 786–0456, for information about the payment rates.

Susanne Seagrave, (410) 786–0044, for information about the payment policies.

Judith C. Tobin, (410) 786–6892, for information about the quality reporting program.

**SUPPLEMENTARY INFORMATION:**

## Table of Contents

To assist readers in referencing sections contained in this document, we are providing the following table of contents.



## Acronyms

To assist the reader, we are listing the acronyms used and their corresponding meaning in alphabetical order.

ADC Average Daily Census
AHA American Hospital Association
ASCA Administrative Simplification Compliance Act of 2002, Public Law 107–105
BBA Balanced Budget Act of 1997, Public Law 105–33
BBRA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, Public Law 106–113
BEA Bureau of Economic Analysis
BIPA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Benefits Improvement and Protection Act of 2000, Public Law 106–554
BLS Bureau of Labor Statistics
CAH Critical Access Hospital
CAUTI Catheter-Associated Urinary Tract Infection
CBSA Core-Based Statistical Area
CDC Centers for Disease Control and Prevention
CCR Cost-to-Charge Ratio
CFR Code of Federal Regulations
CIPI Capital Input Price Index
CMG Case-Mix Group
CMS Centers for Medicare & Medicaid Services
CPI Consumer Price Index
DSH Disproportionate Share Hospital
ECI Employment Cost Index
EHR Electronic Health Record
FI Fiscal Intermediary
FR **Federal Register**
FTE Full-time Equivalent
FY Federal Fiscal Year
GDP Gross Domestic Product
GME Graduate Medical Education
HAI Healthcare Associated Infection
HHH Hubert H. Humphrey Building
HHS Department of Health and Human Services
HIPAA Health Insurance Portability and Accountability Act of 1996, Public Law 104–191
HOMER Home Office Medicare Records
IGI IHS Global Insight
IME Indirect Medical Education
I–O Input-Output
IPF Inpatient Psychiatric Facility
IPPS Inpatient Prospective Payment System
IRF Inpatient Rehabilitation Facility
IRF–PAI Inpatient Rehabilitation Facility—Patient Assessment Instrument
IRF PPS Inpatient Rehabilitation Facility Prospective Payment System
IRVEN Inpatient Rehabilitation Validation and Entry
LTCH Long Term Care Hospital
LIP Low-Income Percentage
LOS Length of Stay
MA Medicare Advantage
MAC Medicare Administrative Contractor
MedPAR Medicare Provider Analysis and Review
MFP Multifactor Productivity
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Public Law 110—173
MSA Metropolitan Statistical Area
NAICS North American Industry Classification System
NHSN National Healthcare Safety Network
NQF National Quality Forum
OMB Office of Management and Budget
PLI Professional Liability Insurance
PPI Producer Price Indexes
PPS Prospective Payment System
QM Quality Measure
RFA Regulatory Flexibility Act of 1980, Public Law 96–354
RIA Regulatory Impact Analysis
RIC Rehabilitation Impairment Category
RO Regional Office
RP Rehabilitation and Psychiatric
RPL Rehabilitation, Psychiatric, and Long-Term Care Hospital
SCHIP State Children's Health Insurance Program
SSI Supplemental Security Income
TEFRA Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97–248

## I. Background

### *A. Historical Overview of the Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS)*

Section 4421 of the Balanced Budget Act of 1997 (Pub. L. 105–33, enacted on August 5, 1997) (BBA), as amended by section 125 of the Medicare, Medicaid, State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (Pub. L. 106–113, enacted on November 29, 1999) (BBRA) and by section 305 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (Pub. L. 106–554, enacted on December 21, 2000) (BIPA) provides for the implementation of a per discharge prospective payment system (PPS) under section 1886(j) of the Social Security Act (the Act) for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (hereinafter referred to as IRFs).

Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs) but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing below a general description of the IRF PPS for fiscal years (FYs) 2002 through 2010.

Under the IRF PPS from FY 2002 through FY 2005, as described in the FY 2002 IRF PPS final rule (66 FR 41316), the Federal prospective payment rates were computed across 100 distinct case-mix groups (CMGs). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed 5 special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the Federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget neutral conversion factor). For a detailed discussion of the budget neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted Federal prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRF's unadjusted Federal prospective payment rates.

For cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the Federal IRF PPS rate and the payment that the IRF would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the Federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the Federal IRF PPS rate.

We established a CMS Web site as a primary information resource for the IRF PPS. The Web site URL is *http://www.cms.gov/InpatientRehabFacPPS/* and may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the Office of Management and Budget's (OMB) Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, revision and rebasing of the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments is a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments would continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the Federal prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF Federal prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA), amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act required the Secretary to develop an increase factor to update the IRF Federal prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 Federal prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF Federal prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007 and on or before March 31, 2008; and the revised FY 2008 IRF Federal prospective payment rates were effective for discharges occurring on or after April 1, 2008 and on or before September 30, 2008. The revised FY 2008 Federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage.*

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of ''New England deemed'' counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent (''the 60 percent rule'') and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent market basket increase factor for FY 2009 in accordance with section 115 of the MMSEA. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF Federal prospective payment rates.

In the FY 2010 IRF PPS final rule (74 FR 39762) and in correcting amendments to the FY 2010 IRF PPS final rule (74 FR 50712) that we published on October 1, 2009, we updated the Federal prospective payment rates, the CMG relative weights, the average length of stay values, the rural, LIP, and teaching status adjustment factors, and the outlier threshold; implemented new IRF coverage requirements for determining whether an IRF claim is reasonable and necessary; and revised the regulation text to require IRFs to submit patient assessments on Medicare Advantage (MA) (Medicare Part C) patients for use in the 60 percent rule calculations. Any reference to the FY 2010 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For more information on the policy changes implemented for FY 2010, please refer to the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712), in which we published the final FY 2010 IRF Federal prospective payment rates.

After publication of the FY 2010 IRF PPS final rule (74 FR 39762), section 3401(d) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) as amended by section 10319 of the same Act and by section 1105 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010) (collectively, hereafter referred to as ''The Affordable Care Act''), amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010–2019.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act defined the adjustments that were to be applied to the market basket increase factors in FYs 2010 and 2011. Under these provisions, the Secretary was required to reduce the market basket increase factor in FY 2010 by a 0.25 percentage point adjustment. Notwithstanding this provision, in accordance with section 3401(p) of the Affordable Care Act, the adjusted FY 2010 rate was only to be applied to discharges occurring on or after April 1, 2010. Based on the self-implementing legislative changes to section 1886(j)(3) of the Act, we adjusted the FY 2010 Federal prospective payment rates as required, and applied these rates to IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2010. Thus, the final FY 2010 IRF Federal prospective payment rates that were published in the FY 2010 IRF PPS final rule (74 FR 39762) were used for discharges occurring on or after October 1, 2009 and on or before March 31, 2010; and the adjusted FY 2010 IRF Federal prospective payment rates applied to discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The adjusted FY 2010 Federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage.*

In addition, sections 1886(j)(3)(C) and (D) of the Act also affected the FY 2010 IRF outlier threshold amount because they required an adjustment to the FY 2010 RPL market basket increase factor, which changed the standard payment conversion factor for FY 2010. Specifically, the original FY 2010 IRF outlier threshold amount was determined based on the original estimated FY 2010 RPL market basket increase factor of 2.5 percent and the standard payment conversion factor of $13,661. However, as adjusted, the IRF prospective payments are based on the adjusted RPL market basket increase factor of 2.25 percent and the revised standard payment conversion factor of $13,627. To maintain estimated outlier payments for FY 2010 equal to the established standard of 3 percent of total estimated IRF PPS payments for FY 2010, we revised the IRF outlier threshold amount for FY 2010 for discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The revised IRF outlier threshold amount for FY 2010 was $10,721.

Sections 1886(j)(3)(ii)(II) and 1886(j)(3)(D)(i) of the Act also required the Secretary to reduce the market basket increase factor in FY 2011 by a 0.25 percentage point adjustment. The FY 2011 IRF PPS notice (75 FR 42836) and the correcting amendments to the FY 2011 IRF PPS notice (75 FR 70013, November 16, 2010) described the required adjustments to the FY 2011 and FY 2010 IRF PPS Federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2011. It also updated the FY 2011 Federal prospective payment rates, the CMG relative weights, and the average length of stay values. Any reference to the FY 2011 IRF PPS notice in this final rule also includes the provisions effective in the correcting amendments. For more information on the FY 2010 and FY 2011 adjustments or the updates for FY 2011, please refer to the FY 2011 IRF PPS notice (75 FR 42836 and 75 FR 70013).

*B. Provisions of the Affordable Care Act Affecting the IRF PPS in FY 2012 and Beyond*

The Affordable Care Act included several provisions that affect the IRF PPS in FYs 2012 and beyond. In addition to what was discussed above, section 3401(d) of the Affordable Care Act also added section 1886(j)(3)(C)(ii)(I) of the Act (providing for a ''productivity adjustment'' for fiscal year 2012 and each subsequent fiscal year). The productivity adjustment for FY 2012 is discussed in section VI.A.6 of this final rule, and the 0.1 percentage point reduction is discussed in section VI.A of this final rule. Section 1886(j)(3)(C)(ii)(II) of the Act notes that the application of these adjustments to the market basket update may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than payment rates for the preceding fiscal year.

Section 3004(b) of the Affordable Care Act also addressed the IRF PPS program. It reassigned the previously-designated section 1886(j)(7) of the Act to section 1886(j)(8) and inserted a new section 1886(j)(7) of the Act, which contains new requirements for the Secretary to establish a quality reporting program for IRFs. Under that program, data must be submitted in a form and manner, and at a time specified by the Secretary. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act will require application of a 2 percentage point reduction to the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than payment rates for the preceding fiscal year. Reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved.

Under section 1886(j)(7)(D)(i) and (ii) of the Act, the Secretary is generally required to select quality measures for the IRF quality reporting program from those that have been endorsed by the consensus-based entity which holds a performance measurement contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). So long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization, section 1886(j)(7)(D)(ii) of the Act authorizes the Secretary to select non-endorsed measures for specified areas or medical topics when there are no feasible or practical endorsed measure(s). Under section 1886(j)(7)(D)(iii) of the Act, the Secretary is required to publish the measures that will be used in FY 2014 no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF PPS quality reporting data available to the public. Also, the Secretary must ensure that IRFs have the opportunity to review any data prior to its release to the public. Future rulemaking will address these public reporting obligations.

The quality reporting program for IRFs, in accordance with section 1886(j)(7) of the Act, is discussed in detail in section X. of this final rule.

*C. Operational Overview of the Current IRF PPS*

As described in the FY 2002 IRF PPS final rule, upon the admission and discharge of a Medicare Part A fee-for-service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument, designated as the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Part C (Medicare Advantage) patient, as described in the FY 2010 IRF PPS final rule. All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the GROUPER software. The GROUPER software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The GROUPER software produces a 5-digit CMG number. The first digit is an alpha-character that indicates the comorbidity tier. The last 4 digits represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the GROUPER software, are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/06_Software.asp.*

Once a patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996) (HIPAA) compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (Pub. L. 107–105, enacted on December 27, 2002) (ASCA) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-digit CMG number and sends it to the appropriate Medicare fiscal intermediary (FI) or Medicare

Administrative Contractor (MAC). Claims submitted to Medicare must comply with both ASCA and HIPAA. For further discussion of these requirements, please see the FY 2011 IRF PPS Notice (75 FR 42836 at 42838).

The Medicare FI or MAC processes the claim through its software system. This software system includes pricing programming called the ''PRICER'' software. The PRICER software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the new teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

## II. Summary of Provisions of the Proposed Rule

In the FY 2012 IRF PPS proposed rule (76 FR 24214), we proposed to update the IRF Federal prospective payment rates, to rebase and revise the RPL market basket, to implement refinements to the methodologies for calculating the LIP adjustment, and to establish a new quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act. We also proposed to revise existing regulations text for the purpose of updating and providing greater clarity. These proposals are as follows:

### *A. Proposed Updates to the IRF Federal Prospective Payment Rates for Federal Fiscal Year (FY) 2012*

The proposed updates to the IRF Federal prospective payment rates for FY 2012 are as follows:

- Update the FY 2012 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget neutral manner, as discussed in section III. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24219 through 24220).
- Update the FY 2012 IRF facility-level adjustments (rural, LIP, and teaching status adjustments) in a budget neutral manner using the most current and complete Medicare claims and cost report data and by removing the weighting methodology previously used to analyze the data, and propose a temporary cap adjustment policy for the teaching status adjustment to reflect interns and residents displaced due to closure of IRFs or IRF residency training programs, as discussed in section IV. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24226).
- Update the FY 2012 IRF PPS payment rates by the proposed market basket increase factor, based upon the most current data available, with a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24228 through 24241).
- Update the wage index and the labor-related share of the FY 2012 IRF PPS payment rates in a budget neutral manner, as discussed in section V. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24241 through 24244).
- Calculate the IRF Standard Payment Conversion Factor for FY 2012, as discussed in section V. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24244 through 24245).
- Update the outlier threshold amount for FY 2012, as discussed in section VI. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24248 through 24249).
- Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2012, as discussed in section VI. of the FY 2012 IRF PPS proposed rule 76 (FR 24214, 24249).
- Discuss the impact of the Inpatient Prospective Payment System (IPPS) data matching process changes on the IRF PPS calculation of the Supplemental Security Income (SSI) ratios used to compute the IRF LIP adjustment factor, as discussed in section VII. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24249 through 24250).
- Implement the IRF quality reporting program provisions of section 1886(j)(7) of the Act, as discussed in section IX. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24252 through 24257).

### *B. Proposed Revisions to Existing Regulation Text*

We proposed to revise the existing requirements at § 412.25(b), § 412.25(b)(1), § 412.25(b)(2), and § 412.25(b)(3) that apply to all units that are excluded from the IPPS, as described in section VIII. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24250 through 24252). To amend the regulatory reference to conform with the other proposed changes, we also proposed to revise the existing requirements at § 412.25(e)(2)(ii)(A). With the exception of § 412.25(e)(2)(ii)(A), the proposed revisions would affect both IRFs and IPFs.

We also proposed to relocate and revise the existing requirements at § 412.23(b), § 412.29, and § 412.30 that describe the requirements for facilities to qualify to receive payment under the IRF PPS, as described in section VIII. of the FY 2012 IRF PPS proposed rule (76 FR 24214, 24252).

Finally, we proposed to re-designate the existing paragraph § 412.624(c)(4) as § 412.624(c)(5) and add a new paragraph § 412.624(c)(4) to implement the IRF quality reporting program.

## III. Analysis and Responses to Public Comments

We received approximately 46 timely responses, many of which contained multiple comments on the FY 2012 IRF PPS proposed rule (76 FR 24214) from the public. We received comments from various trade associations, inpatient rehabilitation facilities, individual physicians, therapists, clinicians, health care industry organizations, and health care consulting firms. The following sections, arranged by subject area, include a summary of the public comments that we received, and our responses.

## IV. Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2012

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care, as well as provider efficiency.

In the FY 2012 proposed rule (76 FR 24214, 24219 through 24225), we proposed to update the CMG relative weights and average length of stay values for FY 2012. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. This ensures that the CMG relative weights and average length of stay values reflect as accurately as possible the current costs of care in IRFs. For FY 2012, we proposed to use the FY 2010 IRF claims and FY 2009 IRF cost report data. These data are the most current and complete data available at this time. Currently, only a small portion of the

FY 2010 IRF cost report data are available for analysis, but the majority of the FY 2010 IRF claims data are available for analysis.

We proposed to use the same methodology that we have used to update the CMG relative weights and average length of stay values in the FY 2009 IRF PPS final rule (73 FR 46370), the FY 2010 IRF PPS final rule (74 FR 39762), and the FY 2011 notice (75 FR 42836).

In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process we use to calculate the CMG relative weights is as follows:

*Step 1.* We estimate the effects that comorbidities have on costs.

*Step 2.* We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

*Step 3.* We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

*Step 4.* We normalize the FY 2012 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the FY 2011 IRF PPS notice (75 FR 42836).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we proposed to update the CMG relative weights for FY 2012 in a way that total estimated aggregate payments to IRFs for FY 2012 are the same with or without the changes (that is, in a budget neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate budget neutrality factor for use in updating the FY 2012 CMG relative weights, we use the following steps:

*Step 1.* Calculate the estimated total amount of IRF PPS payments for FY 2012 (with no changes to the CMG relative weights).

*Step 2.* Calculate the estimated total amount of IRF PPS payments for FY 2012 by applying the changes to the CMG relative weights (as discussed above).

*Step 3.* Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor (0.9988) that would maintain the same total estimated aggregate payments in FY 2012 with and without the changes to the CMG relative weights.

*Step 4.* Apply the budget neutrality factor (0.9988) to the FY 2011 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section VI.C. of this final rule, we discuss the use of the existing methodology to calculate the standard payment conversion factor for FY 2012.

Note that the budget neutrality factor that we used to update the CMG relative weights for FY 2012 changed from 0.9989 in the proposed rule to 0.9988 in this final rule due to the use of updated FY 2010 IRF claims data in this final rule.

We received 2 comments on the proposed updates to the CMG relative weights and average length of stay values, which are summarized below.

*Comment:* One commenter expressed confusion about whether CMS might have used an ''older'' methodology to calculate the CMG relative weights in the FY 2011 IRF PPS Notice (75 FR 42836) that differed from the methodology that CMS used to calculate the CMG relative weights in the FY 2009 IRF PPS final rule (73 FR 46370), the FY 2010 IRF PPS final rule (74 FR 39762), or the FY 2012 IRF PPS proposed rule (76 FR 24214).

*Response:* We used the same methodology to update the CMG relative weights in the FY 2002 IRF PPS final rule (66 FR 41316), the FY 2006 IRF PPS final rule (70 FR 47880), and the FY 2007 IRF PPS final rule (71 FR 48354). We did not update the CMG relative weights in the FY 2008 IRF PPS final rule (72 FR 44284). In the FY 2009 IRF PPS final rule (73 FR 46370), we implemented one change to the methodology which involved the use of more detailed cost-to-charge ratio (CCR) data from the cost reports of IRF subprovider units of primary acute care hospitals, instead of CCR data from the associated primary acute care hospitals, to calculate IRFs' average costs per case. We have used this same revised methodology from FY 2009 to update the CMG relative weights in the FY 2010 IRF PPS final rule (74 FR 39762), the FY 2011 notice (75 FR 42836), and the FY 2012 IRF PPS proposed rule (76 FR 24214). We continue to use the same methodology that was revised in FY 2009 for updating the CMG relative weights in this final rule.

*Comment:* Two commenters requested that CMS provide more information about the methodology that we use to calculate the average length of stay values. One commenter noted that it would be useful for CMS to provide information on the standard deviations for the average length of stay values, and another commenter suggested that we reiterate the purpose of the average length of stay values.

*Response:* To calculate the average length of stay values for the proposed and final rules each year, we use the following steps:

*Step 1.* Sum the lengths of stay for all of the cases in each CMG and tier using the most current IRF claims data (for this final rule, we used FY 2010 IRF claims data).

*Step 2.* Divide the number in step 1 by the number of cases in each CMG and tier in the most current IRF claims data (for this final rule, we used FY 2010 IRF claims data) to obtain an average.

*Step 3.* Use the average length of stay value calculated in step 2 to identify all of the cases in each CMG and tier that would meet the criteria for payment under the IRF short-stay transfer policy, and remove those cases from the analysis.

*Step 4.* Repeat steps 1 through 3 until no additional cases are identified in step 3 (that is, until all of the cases left in step 3 are ''full CMG'' cases that would not meet the short-stay transfer policy criteria).

As we have stated in previous rules, the average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment. The average length of stay values should not be used to limit a patient's length of stay in an IRF.

At the request of several of the commenters, we have placed the standard deviations for the proposed average length of stay values from the FY 2012 IRF PPS proposed rule (76 FR 24214) with the other proposed rule data files on the IRF PPS Web site at *http://www.cms.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage.* We will continue to provide this information as part of our standard rulemaking files that we post to the Web site in conjunction with the IRF PPS rules.

*Final Decision:* After carefully considering all of the comments that we received on the proposed updates to the CMG relative weights and average length of stay values, we are implementing the FY 2012 updates to the CMG relative weights and average length of stay values presented in Table 1 (which are different from the relative weights and average length of stay values that we had proposed because these final values are based on analysis of updated FY 2010 IRF claims data).

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS

| CMG | CMG Description (M = motor, C = cognitive, A = age) | Relative weight | | | | Average length of stay | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Tier 1 | Tier 2 | Tier 3 | None | Tier 1 | Tier 2 | Tier 3 | None |
| 0101 | Stroke M > 51.05 | 0.7676 | 0.7182 | 0.6451 | 0.6102 | 10 | 10 | 9 | 8 |
| 0102 | Stroke M > 44.45 and M < 51.05 and C > 18.5 | 0.9527 | 0.8913 | 0.8007 | 0.7573 | 12 | 13 | 10 | 10 |
| 0103 | Stroke M > 44.45 and M< 51.05 and C < 18.5 | 1.1377 | 1.0644 | 0.9562 | 0.9043 | 14 | 14 | 12 | 12 |
| 0104 | Stroke M > 38.85 and M < 44.45 | 1.1819 | 1.1058 | 0.9934 | 0.9395 | 15 | 14 | 13 | 12 |
| 0105 | Stroke M > 34.25 and M < 38.85 | 1.3733 | 1.2849 | 1.1542 | 1.0916 | 16 | 17 | 14 | 14 |
| 0106 | Stroke M > 30.05 and M < 34.25 | 1.5815 | 1.4796 | 1.3291 | 1.2571 | 20 | 18 | 16 | 16 |
| 0107 | Stroke M > 26.15 and M < 30.05 | 1.7906 | 1.6753 | 1.5049 | 1.4233 | 20 | 20 | 18 | 18 |
| 0108 | Stroke M < 26.15 and A > 84.5 | 2.2178 | 2.0749 | 1.8639 | 1.7629 | 31 | 25 | 23 | 22 |
| 0109 | Stroke M > 22.35 and M < 26.15 and A < 84.5 | 2.0508 | 1.9188 | 1.7236 | 1.6302 | 24 | 23 | 20 | 20 |
| 0110 | Stroke M < 22.35 and A < 84.5 | 2.6434 | 2.4731 | 2.2216 | 2.1012 | 33 | 29 | 26 | 25 |
| 0201 | Traumatic brain injury M > 53.35 and C > 23.5 | 0.7470 | 0.6132 | 0.5680 | 0.5158 | 8 | 8 | 7 | 8 |
| 0202 | Traumatic brain injury M > 44.25 and M < 53.35 and C > 23.5 | 1.0613 | 0.8712 | 0.8070 | 0.7327 | 12 | 12 | 10 | 10 |
| 0203 | Traumatic brain injury M > 44.25 and C < 23.5 | 1.2080 | 0.9917 | 0.9185 | 0.8341 | 16 | 11 | 13 | 12 |
| 0204 | Traumatic brain injury M > 40.65 and M < 44.25 | 1.2655 | 1.0388 | 0.9622 | 0.8737 | 16 | 12 | 12 | 12 |
| 0205 | Traumatic brain injury M > 28.75 and M < 40.65 | 1.5982 | 1.3120 | 1.2152 | 1.1035 | 17 | 18 | 15 | 14 |
| 0206 | Traumatic brain injury M > 22.05 and M < 28.75 | 1.9895 | 1.6332 | 1.5128 | 1.3736 | 23 | 19 | 19 | 18 |
| 0207 | Traumatic brain injury M < 22.05 | 2.6903 | 2.2085 | 2.0456 | 1.8574 | 35 | 27 | 25 | 22 |
| 0301 | Non-traumatic brain injury M > 41.05 | 1.0576 | 0.9514 | 0.8441 | 0.7730 | 12 | 12 | 11 | 10 |
| 0302 | Non-traumatic brain injury M > 35.05 and M < 41.05 | 1.3393 | 1.2048 | 1.0689 | 0.9789 | 12 | 15 | 13 | 13 |
| 0303 | Non-traumatic brain injury M > 26.15 and M < 35.05 | 1.5924 | 1.4325 | 1.2709 | 1.1640 | 21 | 17 | 15 | 14 |
| 0304 | Non-traumatic brain injury M < 26.15 | 2.2048 | 1.9834 | 1.7596 | 1.6116 | 29 | 23 | 20 | 19 |
| 0401 | Traumatic spinal cord injury M > 48.45 | 1.0588 | 0.8815 | 0.8019 | 0.7036 | 14 | 14 | 11 | 10 |
| 0402 | Traumatic spinal cord injury M > 30.35 and M < 48.45 | 1.3802 | 1.1491 | 1.0453 | 0.9171 | 17 | 14 | 13 | 12 |
| 0403 | Traumatic spinal cord injury M > 16.05 and M < 30.35 | 2.4659 | 2.0529 | 1.8675 | 1.6386 | 29 | 26 | 23 | 20 |
| 0404 | Traumatic spinal cord injury M < 16.05 and A > 63.5 | 4.3797 | 3.6461 | 3.3169 | 2.9102 | 52 | 39 | 38 | 35 |
| 0405 | Traumatic spinal cord injury M < 16.05 and A < 63.5 | 3.8686 | 3.2206 | 2.9298 | 2.5706 | 52 | 39 | 36 | 29 |
| 0501 | Non-traumatic spinal cord injury M > 51.35 | 0.6559 | 0.6297 | 0.5616 | 0.4977 | 10 | 10 | 7 | 7 |
| 0502 | Non-traumatic spinal cord injury M > 40.15 and M < 51.35 | 0.9815 | 0.9423 | 0.8404 | 0.7448 | 13 | 13 | 11 | 10 |
| 0503 | Non-traumatic spinal cord injury M > 31.25 and M < 40.15 | 1.2460 | 1.1962 | 1.0668 | 0.9455 | 16 | 14 | 13 | 12 |
| 0504 | Non-traumatic spinal cord injury M > 29.25 and M < 31.25 | 1.5023 | 1.4423 | 1.2863 | 1.1400 | 18 | 16 | 16 | 14 |
| 0505 | Non-traumatic spinal cord injury M > 23.75 and M < 29.25 | 1.7558 | 1.6856 | 1.5033 | 1.3324 | 20 | 21 | 18 | 17 |
| 0506 | Non-traumatic spinal cord injury M < 23.75 | 2.4607 | 2.3624 | 2.1069 | 1.8673 | 34 | 28 | 24 | 23 |
| 0601 | Neurological M > 47.75 | 0.9457 | 0.7992 | 0.7289 | 0.6589 | 10 | 11 | 9 | 9 |
| 0602 | Neurological M > 37.35 and M < 47.75 | 1.2516 | 1.0577 | 0.9648 | 0.8721 | 12 | 13 | 12 | 11 |
| 0603 | Neurological M > 25.85 and M < 37.35 | 1.6164 | 1.3660 | 1.2460 | 1.1263 | 17 | 16 | 14 | 14 |
| 0604 | Neurological M < 25.85 | 2.1432 | 1.8112 | 1.6521 | 1.4934 | 24 | 21 | 19 | 18 |
| 0701 | Fracture of lower extremity M > 42.15 | 0.8001 | 0.7877 | 0.7586 | 0.6772 | 10 | 12 | 10 | 9 |

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

| CMG | CMG Description (M = motor, C = cognitive, A = age) | Relative weight | | | | Average length of stay | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Tier 1 | Tier 2 | Tier 3 | None | Tier 1 | Tier 2 | Tier 3 | None |
| 0702 | Fracture of lower extremity M > 34.15 and M < 42.15 | 1.0470 | 1.0307 | 0.9927 | 0.8861 | 12 | 13 | 12 | 12 |
| 0703 | Fracture of lower extremity M > 28.15 and M < 34.15 | 1.2599 | 1.2402 | 1.1945 | 1.0662 | 15 | 15 | 14 | 14 |
| 0704 | Fracture of lower extremity M < 28.15 | 1.6283 | 1.6029 | 1.5439 | 1.3780 | 18 | 19 | 18 | 17 |
| 0801 | Replacement of lower extremity joint M > 49.55 | 0.5745 | 0.5745 | 0.5354 | 0.4888 | 7 | 8 | 7 | 7 |
| 0802 | Replacement of lower extremity joint M > 37.05 and M < 49.55 | 0.7725 | 0.7725 | 0.7199 | 0.6573 | 8 | 11 | 9 | 9 |
| 0803 | Replacement of lower extremity joint M > 28.65 and M < 37.05 and A > 83.5 | 1.0651 | 1.0651 | 0.9926 | 0.9062 | 11 | 14 | 13 | 12 |
| 0804 | Replacement of lower extremity joint M > 28.65 and M < 37.05 and A < 83.5 | 0.9407 | 0.9407 | 0.8767 | 0.8004 | 10 | 12 | 11 | 10 |
| 0805 | Replacement of lower extremity joint M > 22.05 and M < 28.65 | 1.1584 | 1.1584 | 1.0795 | 0.9856 | 11 | 14 | 13 | 13 |
| 0806 | Replacement of lower extremity joint M < 22.05 | 1.4144 | 1.4144 | 1.3181 | 1.2034 | 13 | 18 | 16 | 15 |
| 0901 | Other orthopedic M > 44.75 | 0.8467 | 0.7460 | 0.6751 | 0.6116 | 10 | 10 | 9 | 8 |
| 0902 | Other orthopedic M > 34.35 and M < 44.75 | 1.1324 | 0.9978 | 0.9029 | 0.8180 | 12 | 13 | 12 | 11 |
| 0903 | Other orthopedic M > 24.15 and M < 34.35 | 1.4503 | 1.2779 | 1.1564 | 1.0477 | 16 | 16 | 14 | 13 |
| 0904 | Other orthopedic M < 24.15 | 1.8791 | 1.6557 | 1.4983 | 1.3575 | 21 | 20 | 18 | 17 |
| 1001 | Amputation, lower extremity M > 47.65 | 1.0335 | 0.9087 | 0.8119 | 0.7256 | 13 | 12 | 10 | 10 |
| 1002 | Amputation, lower extremity M > 36.25 and M < 47.65 | 1.3571 | 1.1931 | 1.0660 | 0.9528 | 16 | 14 | 13 | 12 |
| 1003 | Amputation, lower extremity M < 36.25 | 2.0050 | 1.7628 | 1.5750 | 1.4077 | 21 | 21 | 18 | 17 |
| 1101 | Amputation, non-lower extremity M > 36.35 | 1.0359 | 1.0359 | 0.9826 | 0.9222 | 11 | 11 | 12 | 11 |
| 1102 | Amputation, non-lower extremity M < 36.35 | 1.5586 | 1.5586 | 1.4783 | 1.3875 | 14 | 18 | 16 | 16 |
| 1201 | Osteoarthritis M > 37.65 | 0.8102 | 0.8102 | 0.8104 | 0.7660 | 13 | 13 | 11 | 10 |
| 1202 | Osteoarthritis M > 30.75 and M < 37.65 | 1.0564 | 1.0564 | 1.0566 | 0.9987 | 16 | 16 | 14 | 13 |
| 1203 | Osteoarthritis M < 30.75 | 1.3031 | 1.3031 | 1.3033 | 1.2319 | 13 | 19 | 15 | 15 |
| 1301 | Rheumatoid, other arthritis M > 36.35 | 0.8937 | 0.9714 | 0.9714 | 0.7882 | 11 | 10 | 11 | 10 |
| 1302 | Rheumatoid, other arthritis M > 26.15 and M < 36.35 | 1.1769 | 1.2792 | 1.2792 | 1.0379 | 17 | 17 | 14 | 13 |
| 1303 | Rheumatoid, other arthritis M < 26.15 | 1.5211 | 1.6533 | 1.6533 | 1.3415 | 15 | 19 | 18 | 16 |
| 1401 | Cardiac M > 48.85 | 0.9411 | 0.7535 | 0.6663 | 0.6026 | 10 | 10 | 9 | 8 |
| 1402 | Cardiac M > 38.55 and M < 48.85 | 1.2638 | 1.0118 | 0.8947 | 0.8092 | 13 | 12 | 11 | 10 |
| 1403 | Cardiac M > 31.15 and M < 38.55 | 1.5263 | 1.2220 | 1.0806 | 0.9773 | 18 | 14 | 13 | 12 |
| 1404 | Cardiac M < 31.15 | 1.9770 | 1.5828 | 1.3997 | 1.2659 | 24 | 19 | 16 | 15 |
| 1501 | Pulmonary M > 49.25 | 0.9610 | 0.8973 | 0.7734 | 0.7311 | 10 | 11 | 8 | 9 |
| 1502 | Pulmonary M > 39.05 and M < 49.25 | 1.2094 | 1.1293 | 0.9734 | 0.9201 | 13 | 13 | 11 | 11 |
| 1503 | Pulmonary M > 29.15 and M < 39.05 | 1.4914 | 1.3926 | 1.2003 | 1.1346 | 16 | 16 | 13 | 13 |
| 1504 | Pulmonary M < 29.15 | 1.8840 | 1.7592 | 1.5163 | 1.4333 | 22 | 18 | 17 | 16 |
| 1601 | Pain syndrome M > 37.15 | 1.1177 | 0.8798 | 0.7721 | 0.7217 | 12 | 12 | 10 | 10 |
| 1602 | Pain syndrome M > 26.75 and M < 37.15 | 1.4972 | 1.1785 | 1.0342 | 0.9667 | 19 | 13 | 13 | 13 |
| 1603 | Pain syndrome M < 26.75 | 1.9348 | 1.5230 | 1.3365 | 1.2493 | 22 | 18 | 16 | 15 |
| 1701 | Major multiple trauma without brain or spinal cord injury M > 39.25 | 1.0436 | 0.9289 | 0.8430 | 0.7369 | 10 | 11 | 11 | 10 |
| 1702 | Major multiple trauma without brain or spinal cord injury M > 31.05 and M < 39.25 | 1.3771 | 1.2256 | 1.1123 | 0.9723 | 13 | 15 | 14 | 13 |

TABLE 1—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

| CMG | CMG Description (M = motor, C = cognitive, A = age) | Relative weight | | | | Average length of stay | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Tier 1 | Tier 2 | Tier 3 | None | Tier 1 | Tier 2 | Tier 3 | None |
| 1703 | Major multiple trauma without brain or spinal cord injury M > 25.55 and M < 31.05 | 1.6240 | 1.4454 | 1.3117 | 1.1467 | 15 | 16 | 15 | 15 |
| 1704 | Major multiple trauma without brain or spinal cord injury M < 25.55 | 2.0792 | 1.8505 | 1.6794 | 1.4681 | 26 | 22 | 20 | 18 |
| 1801 | Major multiple trauma with brain or spinal cord injury M > 40.85 | 1.2016 | 0.9858 | 0.9517 | 0.8705 | 14 | 15 | 12 | 11 |
| 1802 | Major multiple trauma with brain or spinal cord injury M > 23.05 and M < 40.85 | 1.6515 | 1.3548 | 1.3080 | 1.1964 | 18 | 20 | 15 | 15 |
| 1803 | Major multiple trauma with brain or spinal cord injury M < 23.05 | 2.8314 | 2.3228 | 2.2425 | 2.0512 | 34 | 32 | 26 | 24 |
| 1901 | Guillain Barre M > 35.95 | 1.1498 | 1.0129 | 0.9189 | 0.8923 | 13 | 14 | 12 | 12 |
| 1902 | Guillain Barre M > 18.05 and M < 35.95 | 2.1903 | 1.9296 | 1.7504 | 1.6999 | 22 | 22 | 21 | 21 |
| 1903 | Guillain Barre M < 18.05 | 3.6722 | 3.2351 | 2.9348 | 2.8501 | 48 | 29 | 34 | 32 |
| 2001 | Miscellaneous M > 49.15 | 0.8541 | 0.7547 | 0.6766 | 0.6079 | 9 | 10 | 9 | 8 |
| 2002 | Miscellaneous M > 38.75 and M < 49.15 | 1.1431 | 1.0100 | 0.9056 | 0.8136 | 12 | 12 | 11 | 10 |
| 2003 | Miscellaneous M > 27.85 and M < 38.75 | 1.4435 | 1.2755 | 1.1436 | 1.0274 | 15 | 15 | 13 | 13 |
| 2004 | Miscellaneous M < 27.85 | 1.9356 | 1.7104 | 1.5335 | 1.3777 | 24 | 20 | 18 | 16 |
| 2101 | Burns M > 0 | 2.5153 | 2.1771 | 1.7338 | 1.4053 | 34 | 23 | 19 | 18 |
| 5001 | Short-stay cases, length of stay is 3 days or fewer | | | | 0.1475 | | | | 3 |
| 5101 | Expired, orthopedic, length of stay is 13 days or fewer | | | | 0.5856 | | | | 7 |
| 5102 | Expired, orthopedic, length of stay is 14 days or more | | | | 1.4718 | | | | 18 |
| 5103 | Expired, not orthopedic, length of stay is 15 days or fewer | | | | 0.6970 | | | | 8 |
| 5104 | Expired, not orthopedic, length of stay is 16 days or more | | | | 1.8778 | | | | 23 |

## V. Updates to the Facility-Level Adjustment Factors for FY 2012

### *A. Updates to the IRF Facility-Level Adjustment Factors*

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate ''by such * * * factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities.'' For example, we adjust the Federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2010 IRF PPS final rule (74 FR 39762), we updated the adjustment factors for calculating the rural, LIP, and teaching status adjustments based on the most recent 3 consecutive years worth of IRF claims data (at that time, FY 2006, FY 2007, and FY 2008) and the most recent available corresponding IRF cost report data. As discussed in the FY 2010 IRF PPS proposed rule (74 FR 21060 through 21061), we observed relatively large year-to-year fluctuations in the underlying data used to compute the adjustment factors, especially the teaching status adjustment factor. Therefore, we implemented a 3-year moving average approach to updating the facility-level adjustment factors in the FY 2010 IRF PPS final rule (74 FR 39762) to provide greater stability and predictability of Medicare payments for IRFs.

Although the 3-year moving average approach that we implemented in FY 2010 improves the year-to-year stability and predictability of the facility-level adjustment factors, we have continued to find unusually large year-to-year fluctuations in the teaching status adjustment factor. To determine the underlying reasons for these large year-to-year fluctuations in the teaching status adjustment factor, we analyzed the data and reviewed the methodology that we were using to estimate all three of the facility-level adjustment factors (that is, the rural, the LIP, and the teaching status adjustment factors). We found that the use of a weighting methodology, which assigns greater weight to some facilities than to others, applied to the regression analysis used to estimate the facility-level adjustment factors inappropriately exaggerated the differences among different types of IRF facilities. We proposed to remove the weighting methodology from our analysis of the facility-level adjustment factors and update the IRF facility-level adjustment factors for FY 2012 using an un-weighted regression analysis.

We received 22 comments on the proposed updates to the facility-level adjustment factors, which are summarized below.

*Comment:* Several commenters requested that CMS release data that would enable facilities to replicate the calculation of the facility-level adjustment factors, provide more information on how CMS calculates the 3-year moving average, and provide more information on CMS's research and computations used to support an un-weighted regression methodology.

*Response:* We provided additional information on the calculation of the facility-level adjustment factors on the Inpatient Rehabilitation Facility PPS Web page under the ''Research'' link on the left hand side of the page: *http://www.cms.gov/InpatientRehabFacPPS/09_Research.asp#TopOfPage.* As we stated in the FY 2010 IRF PPS final rule, the 3-year moving average is computed by determining the adjustment factor for each year and then averaging those adjustment factors over 3 years. For FY 2012, we used the adjustment factors generated from our analysis of claims data and the corresponding year's cost report data or, if unavailable, the most recent available cost report data for FY 2008, FY 2009 and FY 2010. Our estimates of the proposed FY 2012 adjustment factors, based on FY 2008, FY 2009, and FY 2010 data, are shown below in Table 2.

TABLE 2—FACILITY-LEVEL ADJUSTMENT FACTORS USING THE UN-WEIGHTED REGRESSION METHODOLOGY, FY 2012 PROPOSED RULE

| | FY 2008 | FY 2009 | FY 2010 | FY 2012 proposed |
|---|---|---|---|---|
| LIP Adjustment Factor | 0.1773 | 0.2158 | 0.1764 | 0.1897 |
| Teaching Status Adjustment Factor | 0.3554 | 0.5183 | 0.6036 | 0.4888 |
| Rural Adjustment | 0.192 | 0.188 | 0.182 | 0.187 |

*Comment:* Several commenters supported the proposed update to the facility-level adjustment factors in the FY 2012 proposed rule, including the use of an un-weighted regression methodology to determine the facility-level adjustment factors, stating that they believe the changes will result in a more accurate payment system. However, several other commenters expressed concern about the resulting updates to the teaching status and LIP adjustment factors for FY 2012 from using an un-weighted regression methodology. The commenters stated that the proposed updates would create financial hardships for facilities with teaching programs and a higher disproportionate share of low-income patients. Several of the commenters, including the Medicare Payment Advisory Commission (MedPAC), suggested that CMS defer the implementation of the un-weighted regression methodology and conduct more analysis on the underlying causes of the instability in the teaching status adjustment factor and on the most appropriate methodology for calculating the facility-level adjustment factors. Several other commenters suggested that CMS mitigate the impact of any changes in the facility-level adjustment factors by phasing the changes in over several years, or by capping the amount that a facility adjustment can decrease in a given year.

*Response:* We agree with the commenters that it is appropriate to defer implementation of the un-weighted regression methodology for an additional year so that we can further analyze some anomalies that appear to exist in the underlying data. We believe that these anomalies are causing the results of the weighted regression methodology to differ substantially from the results of the un-weighted regression methodology. Thus, we believe that the best course of action for FY 2012 is to defer the implementation of the un-weighted regression methodology while we conduct more research into the reasons for these anomalies and alternative ways of computing the facility-level adjustments that will reduce the volatility in the teaching status adjustment factor and provide the most accurate reflection of cost differences among different types of facilities.

*Comment:* One commenter offered several suggestions on ways to improve the computation of the facility-level adjustment factors without altering the weighting methodology. Those suggestions included: pooling three year's worth of data into a single data set to increase sample size; continuing to use existing weighted regression model, but with added control variables; and matching claims to corresponding cost report data, even if that creates a 3-year lag in the last data year used and the IRF PPS payment year.

*Response:* We appreciate all of the suggestions that we received on ways to improve our methodology for computing the facility-level adjustments and will take those suggestions under advisement while we continue to research ways to ensure that we are using the best methods to determine the facility-level adjustments.

*Final Decision:* After carefully considering all of the comments that we received on the proposed updates to the rural, LIP and teaching status adjustment factors for FY 2012, we are holding the facility-level adjustment factors at FY 2011 levels for FY 2012 while we conduct further research on the underlying data and the best methodology for calculating the facility-level adjustment factors. Thus, the facility-level adjustments factors for FY 2012 will be the same as those finalized in the FY 2011 IRF PPS notice (75 FR 42836 at 42848), which were the same as those finalized in the FY 2010 IRF PPS final rule (74 FR 39762 at 39775). For the convenience of the reader, we reiterate the final adjustment factors (from the FY 2010 IRF PPS final rule) as follows: For FY 2012, the IRF PPS payments to IRFs in rural areas will be computed with an 18.4 percent upward adjustment for rural status. IRF PPS payments to eligible IRFs that qualify for the LIP adjustment for FY 2012 will be adjusted using a LIP adjustment formula of (1 + disproportionate share hospital (DSH) patient percentage) raised to the power of (0.4613), where the—

$$\text{DSH patient percentage for each IRF} = \frac{\text{Medicare SSI Days}}{\text{Total Medicare Days}} + \frac{\text{Medicaid, Non-Medicare Days}}{\text{Total Days}}$$

Finally, IRF PPS payments to eligible IRFs that qualify for the teaching status adjustment will be adjusted by the following formula for FY 2012: (1 + full-time equivalent (FTE) interns and residents/average daily census) raised to the power of (0.6876).

In section VI.C. of this final rule, we discuss the methodology for calculating the standard payment conversion factor for FY 2012.

*B. Policy for Temporary Cap Adjustments To Reflect Interns and Residents Displaced Due to Closure of IRFs or IRF Residency Training Programs*

1. Background

In the FY 2006 IRF PPS final rule (70 FR 47880 at 47928 through 47932), we implemented regulations at § 412.624(e)(4) to establish a facility-level adjustment for IRFs that are, or are part of, teaching hospitals. The teaching status adjustment accounts for the higher indirect operating costs experienced by hospitals that participate in graduate medical education (GME) programs. The payment adjustments are made based on the number of FTE interns and residents training in the IRF and the IRF's average daily census.

We established the IRF teaching status adjustment in a manner that limited the incentives for IRFs to add FTE interns and residents for the purpose of increasing their teaching status adjustment. We imposed a cap on the number of FTE interns and residents that may be counted for purposes of calculating the teaching status adjustment. The cap limits the number of FTE interns and residents that teaching IRFs may count for the purpose of calculating the IRF PPS teaching status adjustment, not the number of interns and residents teaching institutions can hire or train. We calculated the number of FTE interns and residents that trained in the IRF during a ''base year'' and used that FTE intern and resident number as the cap. An IRF's FTE intern and resident cap is ultimately determined based on the final settlement of the IRF's most recent cost reporting period ending on or before November 15, 2004. A complete discussion of how the IRF teaching status adjustment was calculated appears in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47932).

2. FTE Intern and Resident Temporary Cap Adjustment

Sometimes, interns and residents that are training in an IRF find themselves unable to complete their training in the IRF, either because the IRF closes or closes a residency training program (we refer to these interns and residents as ''displaced''). Although we have not heard of any instances where IRFs did not accept displaced interns and residents because the additional interns and residents would put the facility over the facility's FTE intern and resident cap, we believe that it is important to maintain consistent policies with other Medicare PPS systems, to the extent feasible. The IPPS indirect medical education (IME) adjustment and the direct GME policies contain provisions that allow for temporary adjustments to the IME/GME caps for IPPS hospitals that train interns and residents that are displaced because a hospital closes or closes a medical residency training program. We have recently implemented a similar temporary cap adjustment policy for the inpatient psychiatric facility (IPF) PPS teaching status adjustment outlined in the rate year 2012 IPF PPS final rule (76 FR 26432 at 26454 through 26456). Consistent with the IPPS and the IPF PPS, in the FY 2012 IRF PPS proposed rule (76 FR 24214), we proposed to permit a temporary increase in the FTE intern and resident cap when an IRF increases the number of FTE interns and residents it trains in order to accept displaced interns and residents because another IRF closes or closes a medical residency training program.

When an IRF temporarily takes on interns and residents that are displaced because another IRF closes or closes a residency training program, we believe that a temporary adjustment to the cap would be appropriate. In these situations, interns and residents may have partially completed a residency training program at the IRF that has closed or closed a training program and may be unable to complete their training at another IRF that is already training interns and residents up to or in excess of its FTE intern and resident cap. We believe that it is appropriate to allow temporary adjustments to the FTE caps for an IRF that provides residency training to medical interns and residents who have partially completed a residency training program at an IRF that closes or at an IRF that discontinues training interns and residents in a residency training program(s). For this reason, we are adopting the following temporary intern and resident cap adjustment policies, similar to the temporary adjustments to the FTE cap used for acute care hospitals and the temporary adjustments to the FTE caps for IPFs.

The cap adjustment will be temporary because it is intern and resident specific and will only apply to the displaced intern(s) or resident(s) until those intern(s) or resident(s) have completed their training in the program in which they were training at the time of the IRF closure or the closure of the program. As under the IPPS policy for displaced interns and residents, the IRF PPS temporary cap adjustment will apply only to interns and residents that were still training at the IRF at the time the IRF closed or at the time the IRF ceased training interns and residents in the residency training program(s). Interns and residents who leave the IRF, for whatever reason, before the closure of the IRF or the closure of the residency training program will not be considered displaced interns and residents for purposes of the IRF temporary cap adjustment policy. We are adopting the same definition of ''closure of a hospital residency training program'' as it is currently defined at § 413.79(h)(1)(ii); that is, the hospital ceases to offer training for residents in a particular approved medical residency training program. Similarly, as under the IPPS policy, medical students who are accepted into a program at an IRF but the IRF or residency training program closes before the individual begins training at that IRF are also not considered displaced interns and residents for purposes of the IRF temporary cap adjustments. We note that although we are adopting a policy under the IRF PPS that is consistent with the policy applicable under the IPPS, the actual caps under the two payment systems are separate and distinct. This means, for example, if a program closes at an IPPS hospital that has an IRF unit, but the interns and residents from that closed program were not rotating into the IRF unit when the program closed, then there would be no temporary FTE cap adjustment under the IRF PPS, since the interns and residents were not displaced from the IRF. However, if an IPPS hospital that has an IRF unit closes a training program and interns and residents from that program were rotating into the IRF unit when the program closed, an IRF hospital or IRF unit may temporarily adjust their FTE intern and resident cap if they train the displaced interns and residents, but only for the portion of the training that has to be completed in the IRF setting and only if all of the requirements specified in section IV.C. of this final rule are met.

3. Temporary Adjustment to the FTE Cap To Reflect Interns and Residents Displaced Due to an IRF Closure

We will allow an IRF to receive a temporary adjustment to the FTE cap to reflect interns and residents added because of another IRF's closure. The temporary cap adjustment is intended to account for medical interns and residents who have partially completed a medical residency training program at the IRF that has closed and may be unable to complete their training at another IRF because that IRF is already training interns and residents up to or in excess of its cap. We are implementing this change because IRFs may be reluctant to accept additional interns and residents from a closed IRF without a temporary adjustment to their caps. For purposes of this policy, we are adopting the IPPS definition of ''closure of a hospital'' in § 413.79(h)(1)(i) to mean the IRF terminates its Medicare provider agreement as specified in § 489.52. Therefore, we will allow a temporary adjustment to an IRF's FTE cap to reflect interns and residents added because of an IRF's closure. The policy will be effective for cost reporting periods beginning on or after October 1, 2011, when an IRF trains an intern or resident from an IRF that closed. We will allow an adjustment to an IRF's FTE cap if the IRF meets the following criteria:

(a) The IRF is training displaced interns and residents from an IRF that closed.

(b) The IRF that is training the displaced interns and residents from the closed IRF submits a timely request for a temporary adjustment to its FTE cap to its Medicare contractor. Requests generally must be submitted no later than 60 days after the hospital first begins training the displaced interns and residents. In the case of an IRF that is already training the displaced interns and residents as of October 1, 2011, requests must be submitted by December 1, 2011. Requests must document that the IRF is eligible for this temporary adjustment to its FTE cap by identifying the interns and residents who have come from the closed IRF and have caused the IRF to exceed its cap, (or the IRF may already be over its cap), and specifies the length of time that the adjustment is needed.

After the displaced interns and residents leave the IRF's training program or complete their residency program, the IRF's cap will revert to its original level. Therefore, the temporary adjustment to the FTE cap will be available to the IRF only for the period of time necessary for the displaced interns and residents to complete their training. Further, as under the IPPS policy, the total amount of temporary cap adjustment that can be allotted to all receiving IRFs cannot exceed the cap amount of the IRF that closed.

We also note that section 5506 of the Affordable Care Act, ''Preservation of Resident Cap Positions from Closed Hospitals,'' does not apply to IRFs that closed. Section 5506 of the Affordable Care Act only amends sections 1886(d) and (h) of the Act for direct GME and IPPS IME payments. Therefore, the IME FTE cap redistributions under section 5506 of the Affordable Care Act only apply to ''subsection (d)'' IPPS hospitals. Section 5506 of the Affordable Care Act has no applicability to the teaching status adjustments under the IRF PPS (or the IPF PPS, for that matter).

4. Temporary Adjustment to FTE Cap to Reflect Interns and Residents Displaced Due to a Residency Program Closure

If an IRF ceases training interns and residents in a residency training program(s) and agrees to temporarily reduce its FTE cap, another IRF may receive a temporary adjustment to its FTE cap to reflect the addition of the displaced interns and residents. For purposes of this policy on closed residency programs, we are adopting the IPPS definition of ''closure of a hospital residency training program'' as specified in § 413.79(h)(1)(ii) which means that the hospital ceases to offer training for interns and residents in a particular approved medical residency training program. The methodology for adjusting the caps for the ''receiving IRF'' and the ''IRF that closed its program'' is described below.

a. Receiving IRF

An IRF may receive a temporary adjustment to its FTE cap to reflect interns and residents added because of the closure of another IRF's residency training program for cost reporting periods beginning on or after October 1, 2011 if—

- The IRF is training displaced interns and residents from the residency training program of an IRF that closed its program; and
- The IRF that is training the displaced interns and residents from the closed program must submit a timely request for a temporary adjustment to its FTE cap to its Medicare contractor. Requests generally must be submitted no later than 60 days after the IRF begins to train the interns and residents. In the case of an IRF that is already training the displaced interns and residents as of October 1, 2011, requests must be submitted by December 1, 2011. Requests must document that the IRF is eligible for this temporary adjustment by identifying the interns and residents who have come from another IRF's closed program and have caused the IRF to exceed its cap (or the IRF may already be in excess of its cap), specifies the length of time the adjustment is needed, and, as explained in more detail below, submits to its Medicare contractor a copy of the FTE cap reduction statement by the IRF closing the residency training program.

In general, the temporary adjustment criteria established for closed medical residency training programs at IRFs is similar to the criteria established for closed IRFs. More than 1 IRF may be eligible to apply for the temporary adjustment because interns and residents from one closed program may rotate to different IRFs, or they may complete their training at more than one IRF. Also, only to the extent to which an IRF would exceed its FTE cap by training displaced interns and residents would it be eligible for the temporary adjustment. Thus, for example, if the IRF has room below its cap to take 1 additional displaced FTE intern or resident but taking a second displaced FTE intern or resident would cause the IRF to exceed its FTE intern and resident cap, then the IRF would potentially qualify for a temporary cap adjustment for 1 FTE intern or resident, not 2.

b. IRF That Closed Its Program(s)

An IRF that agrees to train interns and residents who have been displaced by the closure of another IRF's residency training program may receive a temporary FTE cap adjustment only if the IRF that closed its program meets the following criteria—

- Temporarily reduces its FTE cap by the number of FTE interns and residents in each program year training and in the program at the time of the program's closure. The yearly reduction would be determined by deducting the number of those interns and residents who would have been training in the program up to the IRF's cap during the year of the closure, had the program not closed; and
- Submits a timely statement to its Medicare contractor that has been signed and dated by its representative that specifies that it agrees to the temporary reduction in its FTE cap to allow the IRF training the displaced interns and residents to obtain a temporary adjustment to its cap. Statements generally must be submitted no later than 60 days after the interns and residents who were in the closed program begin training at another IRF. In the situation where another IRF is already training the displaced interns and residents as of October 1, 2011, statements must be submitted no later than December 1, 2011. The statement must identify the interns and residents who were training at the time of the program's closure, identify the IRFs to which the interns and residents are transferring once the program closes,

and specify the reduction for the applicable program years.

In addition, under this closed program policy, in order for the receiving IRF(s) to qualify for a temporary adjustment to their FTE cap, the IRFs that are closing their programs would need to reduce their FTE cap for the expected duration of time the displaced interns and residents would need to finish their training. We are implementing this because the IRF that closes the program still retains the FTE slots in its cap, even if the IRF chooses not to fill the slots with interns and residents. We believe that it is inappropriate to allow an increase to the receiving IRF's cap without an attendant decrease to the cap of the IRF with the closed program, because the IRF that ceased training the interns and residents could fill these slots with interns and residents from other programs even if the increase and related decrease is only temporary.

The cap reduction for the IRF with the closed program will be based on the number of FTE interns and residents in each program year that were in the program at the IRF at the time of the program's closure, and who begin training at another IRF.

We received 3 comments on the proposed temporary adjustment to the FTE cap to reflect interns and residents displaced due to an IRF closure or a residency training program closure, which are summarized below.

*Comment:* One commenter suggested that the proposed temporary adjustment to the FTE cap would be too difficult for CMS to monitor. This commenter also stated that few IRFs with teaching programs have taken displaced interns and residents.

*Response:* We believe that a policy allowing for temporary adjustments to the FTE caps for IRFs that take displaced interns and residents would be no more difficult to monitor than the similar policy that is already being administered for IPPS hospitals. Although we agree that few IRFs currently take displaced interns and residents, we believe that it is reasonable to allow for temporary adjustments to the FTE caps for those IRFs that do.

*Comment:* Two commenters strongly supported our proposed policy to allow a temporary adjustment to the intern and resident cap when an IRF accepts interns or residents that are displaced due to an IRF closure or a residency training program closure. However, these commenters requested that CMS modify the proposed policy to allow IRFs to receive the temporary cap adjustment if they are training displaced interns or residents as of October 1, 2011.

*Response:* We share the commenters' concern for those FTE interns and residents who have been displaced before October 1, 2011 due to closure of an IRF or a residency training program. We carefully considered the commenters' request that CMS modify the IRF temporary cap adjustment policy to allow IRFs that volunteered to train displaced interns and residents before October 1, 2011 to receive the temporary cap adjustment. In keeping with the similar policy for IPPS hospitals, we are revising our proposed policy to allow IRFs to receive temporary cap adjustments for cost reporting periods beginning on or after October 1, 2011 for displaced interns and residents that they are training as of October 1, 2011. For example, if an IRF closed or closed a residency training program on October 1, 2009, then an intern or resident who was in their first program year at that time would likely be in their third program year as of October 1, 2011 and thus would still be in the middle of their training. An IRF that assumed the training of this intern or resident who was displaced by the 2009 IRF or residency training program closure would be eligible to receive a temporary cap adjustment for cost reporting periods beginning on or after October 1, 2011. As noted above, an IRF that is requesting the temporary cap adjustment for the displaced interns and residents that it is training as of October 1, 2011 must submit the required documentation to CMS no later than December 1, 2011.

*Final Decision:* After carefully considering the comments that we received on the proposed temporary adjustment to the FTE cap to reflect interns and residents displaced due to an IRF closure or the closure of a residency training program, we are implementing the new policy for IRFs as proposed, with the one exception noted above. We will allow IRFs to qualify for the temporary cap adjustment for cost reporting periods beginning on or after October 1, 2011 if they are already training interns and residents displaced by IRF closures or residency program closures that occurred prior to October 1, 2011. In these instances, all required documentation must be received by CMS no later than December 1, 2011. IRFs that meet the criteria will be eligible to receive temporary adjustments to their FTE caps for cost reporting periods beginning on or after October 1, 2011.

## VI. FY 2012 IRF PPS Federal Prospective Payment Rates

### *A. Market Basket Increase Factor, Productivity Adjustment, and Labor-Related Share for FY 2012*

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF Federal prospective payment rates for each FY. Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act require the application of a 0.1 percentage point reduction to the market basket increase factor for FYs 2012 and 2013. In addition, section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment, as described below. Thus, in this final rule, we are updating the IRF PPS payments for FY 2012 by a market basket increase factor based upon the most current data available, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act as described below and a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. Further, we are rebasing the RPL market basket from a 2002-based market basket to a 2008-based market basket. We typically rebase the RPL market basket every 5 to 7 years to ensure that it continues to reflect the most accurate account of the cost of relevant goods and services.

Thus, in this final rule, we start with a rebased RPL market basket (updated from a 2002 base year to a 2008 base year) and then apply a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act and a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. In section VI.A.1 of this final rule, we describe the methodology for rebasing the RPL market basket from a 2002 base year to a 2008 base year, and then in section VI.A.2 of this final rule, we describe the methodology for calculating the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act. Finally, in section VI.A.3 of this final rule, we describe the calculation of the market basket increase factor to be used to adjust IRF PPS payments for FY 2012.

1. Rebasing and Revising of the RPL Market Basket Used for IRF PPS for FY 2012

a. Background

The input price index (that is, the market basket) that was used to develop the IRF PPS was the Excluded Hospital with Capital market basket. This market basket was based on 1997 Medicare cost report data and included data for Medicare participating IRFs, IPFs, LTCHs, cancer hospitals, and children's hospitals. Although ''market basket'' technically describes the mix of goods and services used in providing hospital care, this term is also commonly used to denote the input price index (that is, cost category weights and price proxies combined) derived from that market basket. Accordingly, the term ''market basket'', as used in this document, refers to an input price index.

Beginning with FY 2006, IRF PPS payments were updated using a FY 2002-based RPL market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding IPFs, and LTCHs (70 FR 47908). We excluded cancer and children's hospitals from the RPL market basket because their payments are based entirely on reasonable costs subject to rate-of-increase limits established under the authority of section 1886(b) of the Act, which is implemented at § 413.40. Cancer and children's hospitals are not reimbursed through a PPS. Also, the FY 2002 cost structures for cancer and children's hospitals are noticeably different than the cost structures of freestanding IRFs, freestanding IPFs, and LTCHs. A complete discussion of the FY 2002-based RPL market basket can be found in the FY 2006 IRF PPS final rule (70 FR 47908 through 47915).

In the FY 2010 IRF PPS proposed rule (74 FR 21062), we expressed our interest in exploring the possibility of creating a stand-alone IRF market basket that reflects the cost structures of only IRF providers. We noted that, of the available options, one is to combine the Medicare cost report data from freestanding IRF providers (presently incorporated into the FY 2002-based RPL market basket) with data from hospital-based IRF providers. We indicated that an examination of the Medicare cost report data comparing freestanding and hospital-based IRFs revealed considerable differences between the two types of providers, both in terms of cost levels and cost structures. At that time, we were unable to fully understand the differences between these two types of IRF providers. As a result, we believed that further research was required and we solicited public comment for additional information that might help us to better understand the reasons for the variations in costs and cost structures, as indicated by the cost report data, between freestanding and hospital-based IRFs (74 FR 21062).

We summarized the public comments we received and our responses in the FY 2010 IRF PPS final rule (74 FR 39762, 39776 through 39777). Despite receiving comments from the public on this issue, we remain unable to sufficiently understand the observed differences in costs and cost structures between hospital-based and freestanding IRFs, and therefore we do not believe it is appropriate, at this time, to incorporate data from hospital-based IRFs with those of freestanding IRFs to create a stand-alone IRF market basket.

Although we do not believe it would be appropriate to propose a stand-alone IRF market basket, we are currently exploring the viability of creating two separate market baskets from the current RPL, one of which would include freestanding IRFs and freestanding IPFs and would be used to update payments under both the IPF and IRF payment systems. The other would be a stand-alone LTCH market basket. Depending on the outcome of our research, we anticipate the possibility of proposing a rehabilitation and psychiatric (RP) market basket in the next update cycle.

In the FY 2012 IRF PPS proposed rule (76 FR 24229), we invited public comment on the possibility of using this type of market basket to update IRF payments in the future.

*Comment:* One commenter stated that CMS' ongoing work to develop a market basket that reflects freestanding IRF and freestanding IPF data should be research that CMS continues to explore. The commenter also stressed that a separate market basket which excludes LTC hospital costs must be contingent on the availability of reliable data from a representative group of IRF and IPF facilities.

*Response:* We will consider the commenters' concerns as we continue to investigate the feasibility of developing a market basket derived using data from freestanding IPF and freestanding IRF providers. We agree that before moving away from the existing RPL market basket, we must be confident that we have reliable data gathered from a representative group of IRF and IPF providers. Any change to the market basket used to update IRF payments will also be subject to the rulemaking process.

*Comment:* One commenter recommended that CMS proceed with caution in its efforts to create a market basket based solely on freestanding IRF and freestanding IPF data. They noted that there are substantial geographic differences in the location of RPL providers. Several commenters requested that CMS share its research with the industry in advance of any proposed rulemaking so that any unintended consequences of a change could be addressed by CMS and stakeholders.

*Response:* We agree with the commenter's observation that there are substantial geographic differences in the location of IRF and IPF facilities. We would note that the CMS market baskets, including the RPL, necessarily reflect the relative costs of inputs for a given base year at the national level. We will continue to investigate the feasibility of creating a market basket that is nationally representative and is based on IPF and IRF data. Any changes to the market basket, including changes in methodology, would be subject to the rulemaking process.

For this update cycle (FY 2012), we are finalizing our intent to continue to use an RPL market basket based on freestanding IRF, freestanding IPF, and long term care hospital (LTCH) data. We will continue to pursue the feasibility of creating two separate market baskets from the current RPL, one of which would include freestanding IRFs and freestanding IPFs and would be used to update payments under both the IPF and IRF payment systems. The other would be a stand-alone LTCH market basket.

For this update cycle, we proposed to rebase and revise the FY 2002-based RPL market basket to a FY 2008-based RPL market basket. In the following discussion, we provide an overview of the market basket and describe the methodologies we use for purposes of determining the operating and capital portions of the proposed FY 2008-based RPL market basket.

b. Overview of the FY 2008-Based RPL Market Basket

The FY 2008-based RPL market basket is a fixed-weight, Laspeyres-type price index. A Laspeyres price index measures the change in price, over time, of the same mix of goods and services purchased in the base period. Any changes in the quantity or mix of goods and services (that is, intensity) purchased over time relative to a base period are not measured.

The index itself is constructed in three steps. First, a base period is selected (in the proposed rule, the base period is FY 2008) and total base period expenditures are estimated for a set of mutually exclusive and exhaustive spending categories with the proportion of total costs that each category represents being calculated. These proportions are called cost or expenditure weights. Second, each expenditure category is matched to an appropriate price or wage variable, referred to as a price proxy. In nearly every instance, these price proxies are derived from publicly available statistical series that are published on a consistent schedule (preferably at least on a quarterly basis). Finally, the expenditure weight for each cost category is multiplied by the level of its respective price proxy. The sum of these products (that is, the expenditure weights multiplied by their price levels) for all cost categories yields the composite index level of the market basket in a given period. Repeating this step for other periods produces a series of market basket levels over time. Dividing an index level for a given period by an index level for an earlier period produces a rate of growth in the input price index over that timeframe.

As noted above, the market basket is described as a fixed-weight index because it represents the change in price over time of a constant mix (quantity and intensity) of goods and services needed to furnish hospital services. The effects on total expenditures resulting from changes in the mix of goods and services purchased subsequent to the base period are not measured. For example, a hospital hiring more nurses to accommodate the needs of patients would increase the volume of goods and services purchased by the hospital, but would not be factored into the price change measured by a fixed-weight hospital market basket. Only when the index is rebased would changes in the quantity and intensity be captured, with those changes being reflected in the cost weights. Therefore, we rebase the market basket periodically so that the cost weights reflect recent changes in the mix of goods and services that hospitals purchase (hospital inputs) to furnish inpatient care between base periods.

c. Rebasing and Revising of the RPL Market Basket

The terms ''rebasing'' and ''revising,'' while often used interchangeably, actually denote different activities. ''Rebasing'' means moving the base year for the structure of costs of an input price index (for example, in the proposed rule, we proposed to shift the base year cost structure for the RPL market basket from FY 2002 to FY 2008). ''Revising'' means changing data sources, price proxies, or methods, used to derive the input price index. For FY 2012, we proposed to rebase and revise the market basket used to update the IRF PPS.

(1) Development of Cost Categories and Weights

(a) Medicare Cost Reports

The FY 2008-based RPL market basket consists of several major cost categories derived from the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs including wages and salaries, pharmaceuticals, professional liability insurance (PLI), capital, and a residual. This residual reflects all remaining costs that are not captured in the four cost categories listed above. The FY 2008 cost reports include providers whose cost report begin date is on or between October 1, 2007, and September 30, 2008. We choose to use FY 2008 as the base year because we believe that the Medicare cost reports for this year represent the most recent, complete set of Medicare cost report data available for IRFs, IPFs, and LTCHs. However, there is an issue with obtaining data specifically for benefits and contract labor from this set of FY 2008 Medicare cost reports since IRFs, IPFs, and LTCHs were not required to complete the Medicare cost report worksheet from which these data were collected (Worksheet S–3, part II). As a result, only a small number of providers (less than 30 percent) reported data for these categories, and we do not expect these data to improve over time. Furthermore, since IRFs, IPFs, and LTCHs were not required to submit data for Worksheet S–3, part II in previous cost reporting years, we have always had this issue of incomplete Medicare cost report data for benefits and contract labor (including when we finalized the FY 2002-based RPL market basket). Due to the incomplete benefits and contract labor data for IRFs, IPFs, and LTCHs, we will develop these cost weights using FY 2008 Medicare cost report data for IPPS hospitals (similar to the method that was used for the FY 2002-based RPL market basket). Additional detail is provided later in this section.

Since our goal is to measure cost shares that are reflective of case mix and practice patterns associated with providing services to Medicare beneficiaries, we proposed to limit our selection of Medicare cost reports to those from hospitals that have a Medicare average length of stay (LOS) that is within a comparable range of their total facility average LOS. We believe this provides a more accurate reflection of the structure of costs for Medicare covered days. We use the cost reports of IRFs and LTCHs with Medicare average LOS within 15 percent (that is, 15 percent higher or lower) of the total facility average LOS for the hospital. This is the same edit applied to derive the FY 2002-based RPL market basket and generally includes those LTCHs and IRFs with Medicare LOS within approximately 5 days of the facility average LOS of the hospital.

We use a less stringent measure of Medicare LOS for IPFs. For this provider-type, and in order to produce a robust sample size, we will use those facilities' Medicare cost reports whose average LOS is within 30 or 50 percent (depending on the total facility average LOS) of the total facility average LOS. This is the same edit applied to derive the FY 2002-based RPL market basket.

We applied these LOS edits to first obtain a set of cost reports for facilities that have a Medicare LOS within a comparable range of their total facility LOS. Using this set of Medicare cost reports, we then calculated cost weights for 4 cost categories and a residual as represented by all other costs directly from the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs (see Table 3 for these four cost categories and their associated weights). These Medicare cost report cost weights were then supplemented with information obtained from other data sources (explained in more detail below) to derive the proposed FY 2008-based RPL market basket cost weights.

TABLE 3—MAJOR COST CATEGORIES AND THEIR RESPECTIVE COST WEIGHTS AS CALCULATED DIRECTLY FROM FY 2008 MEDICARE COST REPORTS

| Major cost categories | FY 2008-based RPL market basket (percent) |
| --- | --- |
| Wages and salaries | 47.371 |
| Professional Liability Insurance (Malpractice) | 0.764 |

TABLE 3—MAJOR COST CATEGORIES AND THEIR RESPECTIVE COST WEIGHTS AS CALCULATED DIRECTLY FROM FY 2008 MEDICARE COST REPORTS—Continued

| Major cost categories | FY 2008-based RPL market basket (percent) |
|---|---|
| Pharmaceuticals | 6.514 |
| Capital | 8.392 |
| All other | 36.959 |

(b) Other Data Sources

In addition to the IRF, IPF and LTCH Medicare cost reports for freestanding IRFs and freestanding IPFs, and LTCHs, the other data sources we used to develop the proposed FY 2008-based RPL market basket cost weights were the FY 2008 IPPS Medicare cost reports and the Benchmark Input-Output (I–O) Tables created by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce. The FY 2008 Medicare cost reports include providers whose cost report begin date is on or between October 1, 2007 and September 30, 2008.

As noted above, the FY 2008-based RPL cost weights for benefits and contract labor were derived using FY 2008-based IPPS Medicare cost reports. We used these Medicare cost reports to calculate cost weights for Wages and Salaries, Benefits, and Contract Labor for IPPS hospitals for FY 2008. For the Benefits cost weight for the FY 2008-based RPL market basket, the ratio of the FY 2008 IPPS Benefits cost weight to the FY 2008 IPPS Wages and Salaries cost weight was applied to the RPL Wages and Salaries cost weight. Similarly, the ratio of the FY 2008 IPPS Contract Labor cost weight to the FY 2008 IPPS Wages and Salaries cost weight was applied to the RPL Wages and Salaries cost weight to derive a Contract Labor cost weight for the proposed FY 2008-based RPL market basket.

The All Other cost category is divided into other hospital expenditure category shares using the 2002 BEA Benchmark I–O data following the removal of the portions of the All Other cost category provided in Table 3 that are attributable to Benefits and Contract Labor. The BEA Benchmark I–O data are scheduled for publication every 5 years. The most recent data available are for 2002. BEA also produces Annual I–O estimates; however, the 2002 Benchmark I–O data represent a much more comprehensive and complete set of data that are derived from the 2002 Economic Census. The Annual I–O is simply an update of the Benchmark I–O tables. For the FY 2002-based RPL market basket, we used the 1997 Benchmark I–O data. We use the 2002 Benchmark I–O data in the FY 2008-based RPL market basket. Instead of using the less detailed Annual I–O data, we inflated the 2002 Benchmark I–O data forward to 2008. The methodology we used to inflate the data forward involves applying the annual price changes from the respective price proxies to the appropriate cost categories. We repeat this practice for each year.

The ''All Other'' cost category expenditure shares are determined as being equal to each category's proportion to total ''all other'' based on the inflated 2002 Benchmark I–O data. For instance, if the cost for telephone services represented 10 percent of the sum of the ''all other'' Benchmark I–O hospital expenditures, then telephone services would represent 10 percent of the RPL market basket's All Other cost category.

*Comment:* One commenter supported using the latest available data to update the IRF PPS; however, the commenter observed that CMS relied on acute care hospital data for certain items (that is, Employee Benefits, Contract Labor) that were not collected in the RPL settings. The commenter recommend that CMS consider revisions to the cost report data for the RPL settings to collect this information in advance of the next rebasing to allow the use of specific RPL data for all cost categories, weights, and price proxies.

*Response:* Effective for cost reports beginning on or after May 1, 2010, we finalized a revised Hospital and Hospital Health Care Complex Cost Report, Form CMS 2552–10, which is available for download from the CMS Web page at *http://www.cms.gov/Transmittals/2010Trans/list.asp?intNumPerPage=10* by clicking on the link to CMS Transmittal #R1P240. Form CMS 2552–10 includes a new worksheet (Worksheet S–3, part V) which identifies the contract labor costs and benefit costs for the hospital complex and is applicable to sub-providers and units. We believe that all providers will report this data so that we will be able to include it in future market basket rebasings.

(2) Final Cost Category Computation

As stated previously, for this rebasing we proposed to use the Medicare cost reports for IRFs, IPFs, and LTCHs to derive four major cost categories. The proposed FY 2008-based RPL market basket includes 2 additional cost categories that were not broken out separately in the FY 2002-based RPL market basket: ''Administrative and Business Support Services'' and ''Financial Services''. The inclusion of these 2 additional cost categories, which are derived using the Benchmark I–O data, is consistent with the addition of these two cost categories to the FY 2006-based IPPS market basket (74 FR 43845). We are breaking out both categories so we can better match their respective expenses with more appropriate price proxies. A thorough discussion of our rationale for each of these cost categories is provided in section VI.A.1.c.(3) of this final rule. Also, the FY 2008-based RPL market basket excludes 1 cost category: Photo Supplies. The 2002 Benchmark I–O weight for this category is considerably smaller than the 1997 Benchmark I–O weight, presently accounting for less than one-tenth of one percentage point of the RPL market basket. Therefore, we will include the photo supplies costs in the Chemical cost category weight with other similar chemical products.

We are not changing our definition of the labor-related share. However, we are renaming our aggregate cost categories from ''labor-intensive'' and ''nonlabor-intensive'' services to ''labor-related'' and ''nonlabor-related'' services. This is consistent with the FY 2006-based IPPS market basket (74 FR 43845). As discussed in more detail below and similar to the FY 2002-based RPL market basket, we classify a cost category as labor-related and include it in the labor-related share if the cost category is defined as being labor-intensive and its cost varies with the local labor market. In previous regulations, we grouped cost categories that met both of these criteria into labor-intensive services. We believe the new labels more accurately reflect the concepts that they are intended to convey. We are not changing our definition of the labor-related share because we continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

(3) Selection of Price Proxies

After computing the FY 2008 cost weights for the rebased RPL market basket, it was necessary to select appropriate wage and price proxies to reflect the rate of price change for each expenditure category. With the exception of the proxy for PLI, all of the proxies for the operating portion of the proposed FY 2008-based RPL market basket are based on Bureau of Labor Statistics (BLS) data and are grouped into one of the following BLS categories:

*(a) Producer Price Indexes*—Producer Price Indexes (PPIs) measure price changes for goods sold in markets other than the retail market. PPIs are preferable price proxies for goods and services that hospitals purchase as inputs because these PPIs better reflect the actual price changes faced by hospitals. For example, we use a special PPI for prescription drugs, rather than the Consumer Price Index (CPI) for prescription drugs, because hospitals generally purchase drugs directly from a wholesaler. The PPIs that we use measure price changes at the final stage of production.

*(b) Consumer Price Indexes*—CPIs measure change in the prices of final goods and services bought by the typical consumer. Because they may not represent the price faced by a producer, we used CPIs only if an appropriate PPI was not available, or if the expenditures were more similar to those faced by retail consumers in general rather than by purchasers of goods at the wholesale level. For example, the CPI for food purchased away from home is used as a proxy for contracted food services.

*(c) Employment Cost Indexes*—Employment Cost Indexes (ECIs) measure the rate of change in employee wage rates and employer costs for employee benefits per hour worked. These indexes are fixed-weight indexes and strictly measure the change in wage rates and employee benefits per hour. Appropriately, these indexes are not affected by shifts in employment mix.

We evaluated the price proxies using the criteria of reliability, timeliness, availability, and relevance. Reliability indicates that the index is based on valid statistical methods and has low sampling variability. Timeliness implies that the proxy is published regularly, preferably at least once a quarter. Availability means that the proxy is publicly available. Finally, relevance means that the proxy is applicable and representative of the cost category weight to which it is applied. The proposed CPIs, PPIs, and ECIs selected meet these criteria.

Table 4 sets forth the proposed FY 2008-based RPL market basket including cost categories, and their respective weights and price proxies. For comparison purposes, the corresponding FY 2002-based RPL market basket cost weights are listed, as well. For example, Wages and Salaries are 49.447 percent of total costs in the proposed FY 2008-based RPL market basket compared to 52.895 percent for the FY 2002-based RPL market basket. Employee Benefits are 12.831 percent in the proposed FY 2008-based RPL market basket compared to 12.982 percent for the FY 2002-based RPL market basket. As a result, compensation costs (Wages and Salaries plus Employee Benefits) for the proposed FY 2008-based RPL market basket are 62.278 percent of total costs compared to 65.877 percent for the FY 2002-based RPL market basket.

Following Table 4 is a summary outlining the choice of the proxies we are using for the operating portion of the FY 2008-based RPL market basket. The price proxies for the capital portion are described in more detail in the capital methodology section (see section VI.A.1.c.(4) of this final rule).

We note that the proxies for the operating portion of the FY 2008-based RPL market basket are the same as those used for the FY 2006-based IPPS operating market basket. Because these proxies meet our criteria of reliability, timeliness, availability, and relevance, we believe they are the best measures of price changes for the cost categories. For further discussion on the FY 2006-based IPPS market basket, see the IPPS final rule published in the August 27, 2009 **Federal Register** (74 FR 43843).

TABLE 4—FY 2008-BASED RPL MARKET BASKET COST CATEGORIES, WEIGHTS, AND PRICE PROXIES WITH FY 2002-BASED RPL MARKET BASKET COST WEIGHTS INCLUDED FOR COMPARISON

| Cost categories | FY 2008-based RPL market basket cost weights | FY 2002-based RPL market basket cost weights | FY 2008-based RPL market basket price proxies |
|---|---|---|---|
| 1. Compensation | 62.278 | 65.877 | |
| A. Wages and Salaries[1] | 49.447 | 52.895 | ECI for Wages and Salaries, Civilian Hospital Workers. |
| B. Employee Benefits[1] | 12.831 | 12.982 | ECI for Benefits, Civilian Hospital Workers. |
| 2. Utilities | 1.578 | 0.656 | |
| A. Electricity | 1.125 | 0.351 | PPI for Commercial Electric Power. |
| B. Fuel, Oil, and Gasoline | 0.371 | 0.108 | PPI for Petroleum Refineries. |
| C. Water and Sewage | 0.082 | 0.197 | CPI–U for Water and Sewerage Maintenance. |
| 3. Professional Liability Insurance | 0.764 | 1.161 | CMS Hospital Professional Liability Insurance Premium Index. |
| 4. All Other Products and Services | 26.988 | 22.158 | |
| A. All Other Products | 15.574 | 13.325 | |
| (1.) Pharmaceuticals | 6.514 | 5.103 | PPI for Pharmaceutical Preparations for Human Use (Prescriptions). |
| (2.) Food: Direct Purchases | 2.959 | 0.873 | PPI for Processed Foods and Feeds. |
| (3.) Food: Contract Services | 0.392 | 0.620 | CPI–U for Food Away From Home. |
| (4.) Chemicals[2] | 1.100 | 1.100 | Blend of Chemical PPIs. |
| (5.) Medical Instruments | 1.795 | 1.014 | PPI for Medical, Surgical, and Personal Aid Devices. |
| (6.) Photographic Supplies | | 0.096 | |
| (7.) Rubber and Plastics | 1.131 | 1.052 | PPI for Rubber and Plastic Products. |
| (8.) Paper and Printing Products | 1.021 | 1.000 | PPI for Converted Paper and Paperboard Products. |
| (9.) Apparel | 0.210 | 0.207 | PPI for Apparel. |
| (10.) Machinery and Equipment | 0.106 | 0.297 | PPI for Machinery and Equipment. |

TABLE 4—FY 2008-BASED RPL MARKET BASKET COST CATEGORIES, WEIGHTS, AND PRICE PROXIES WITH FY 2002-BASED RPL MARKET BASKET COST WEIGHTS INCLUDED FOR COMPARISON—Continued

| Cost categories | FY 2008-based RPL market basket cost weights | FY 2002-based RPL market basket cost weights | FY 2008-based RPL market basket price proxies |
|---|---|---|---|
| (11.) Miscellaneous Products | 0.346 | 1.963 | PPI for Finished Goods less Food and Energy. |
| B. All Other Services | 11.414 | 8.833 | |
| (1.) Labor-related Services | 4.681 | 5.111 | |
| (a.) Professional Fees: Labor-related [3] | 2.114 | 2.892 | ECI for Compensation for Professional and Related Occupations. |
| (b.) Administrative and Business Support Services [4] | 0.422 | n/a | ECI for Compensation for Office and Administrative Services. |
| (c.) All Other: Labor-Related Services [5] | 2.145 | 2.219 | ECI for Compensation for Private Service Occupations. |
| (2.) Nonlabor-Related Services | 6.733 | 3.722 | |
| (a.) Professional Fees: Nonlabor-Related [3] | 4.211 | n/a | ECI for Compensation for Professional and Related Occupations. |
| (b.) Financial Services [5] | 0.853 | n/a | ECI for Compensation for Financial Activities. |
| (c.) Telephone Services | 0.416 | 0.240 | CPI–U for Telephone Services. |
| (d.) Postage | 0.630 | 0.682 | CPI–U for Postage. |
| (e.) All Other: Nonlabor-Related Services [4] | 0.623 | 2.800 | CPI–U for All Items less Food and Energy. |
| 5. Capital-Related Costs | 8.392 | 10.149 | |
| A. Depreciation | 5.519 | 6.187 | |
| (1.) Fixed Assets | 3.286 | 4.250 | BEA chained price index for nonresidential construction for hospitals and special care facilities—vintage weighted (26 years). |
| (2.) Movable Equipment | 2.233 | 1.937 | PPI for Machinery and Equipment—vintage weighted (11 years). |
| B. Interest Costs | 1.954 | 2.775 | |
| (1.) Government/Nonprofit | 0.653 | 2.081 | Average yield on domestic municipal bonds (Bond Buyer 20 bonds)—vintage-weighted (26 years). |
| (2.) For Profit | 1.301 | 0.694 | Average yield on Moody's Aaa bonds—vintage-weighted (26 years). |
| C. Other Capital-Related Costs | 0.919 | 1.187 | CPI–U for Residential Rent. |
| Total | 100.000 | 100.000 | |

**Note:** Detail may not add to total due to rounding.

[1] Contract Labor is distributed to Wages and Salaries and Employee Benefits based on the share of total compensation that each category represents.

[2] To proxy the Chemicals cost category, we used a blended PPI composed of the PPI for Industrial Gases, the PPI for Other Basic Inorganic Chemical Manufacturing, the PPI for Other Basic Organic Chemical Manufacturing, and the PPI for Soap and Cleaning Compound Manufacturing. For more detail about this proxy, see section V.A.1.c.(3).(c).(x) of this proposed rule.

[3] The Professional Fees: Labor-related and Professional Fees: Nonlabor-related cost categories were included in one cost category called Professional Fees in the FY 2002-based RPL market basket. For more detail about how these new categories were derived, we refer readers to sections VI.A.1.c.(3).(c).(xviii) and VI.A.1.c.(3).(c).(xxi) of this final rule.

[4] The Administrative and Business Support Services cost category was contained within All Other: Labor-intensive Services cost category in the FY 2002-based RPL market basket. The All Other: Labor-intensive Services cost category is renamed the All Other: Labor-related Services cost category for the FY 2008-based RPL market basket.

[5] The Financial Services cost category was contained within the All Other: Non-labor Intensive Services cost category in the FY 2002-based RPL market basket. The All Other: Non-labor Intensive Services cost category is renamed the All Other: Nonlabor-related Services cost category for the FY 2008-based RPL market basket.

(i) Wages and Salaries

We use the ECI for Wages and Salaries for Hospital Workers (All Civilian) (BLS series code CIU1026220000000I) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(ii) Employee Benefits

We use the ECI for Employee Benefits for Hospital Workers (All Civilian) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(iii) Electricity

We use the PPI for Commercial Electric Power (BLS series code WPU0542). This same proxy was used in the FY 2002-based RPL market basket.

(iv) Fuel, Oil, and Gasoline

For the FY 2002-based RPL market basket, this category only included expenses classified under North American Industry Classification System (NAICS) 21 (Mining). We proxied this category using the PPI for Commercial Natural Gas (BLS series code WPU0552). For the FY 2008-based market basket, we add costs to this category that had previously been grouped in other categories. The added costs include petroleum-related expenses under NAICS 324110 (previously captured in the miscellaneous category), as well as petrochemical manufacturing classified under NAICS 325110 (previously captured in the chemicals category). These added costs represent 80 percent of the hospital industry's fuel, oil, and gasoline expenses (or 80 percent of this category). Because the majority of the industry's fuel, oil, and gasoline expenses originate from petroleum refineries (NAICS 324110), we use the PPI for Petroleum Refineries (BLS series code PCU324110324110) as the proxy for this cost category.

(v) Water and Sewage

We use the CPI for Water and Sewerage Maintenance (All Urban Consumers) (BLS series code CUUR0000SEHG01) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(vi) Professional Liability Insurance

We proxy price changes in hospital PLI premiums using percentage changes as estimated by the CMS Hospital Professional Liability Index. To generate these estimates, we collect commercial insurance premiums for a fixed level of coverage while holding non-price factors constant (such as a change in the level of coverage). This method is also used to proxy PLI price changes in the Medicare Economic Index (75 FR 73268). This same proxy was used in the FY 2002-based RPL market basket.

(vii) Pharmaceuticals

We use the PPI for Pharmaceuticals for Human Use, Prescription (BLS series code WPUSI07003) to measure the price growth of this cost category. We note that we are not making a change to the PPI that is used to proxy this cost category. There was a recent change to the BLS naming convention for this series; however, this is the same proxy that was used in the FY 2002-based RPL market basket.

(viii) Food: Direct Purchases

We use the PPI for Processed Foods and Feeds (BLS series code WPU02) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(ix) Food: Contract Services

We use the CPI for Food Away From Home (All Urban Consumers) (BLS series code CUUR0000SEFV) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(x) Chemicals

We use a blended PPI composed of the PPI for Industrial Gas Manufacturing (NAICS 325120) (BLS series code PCU325120325120P), the PPI for Other Basic Inorganic Chemical Manufacturing (NAICS 325180) (BLS series code PCU32518–32518–), the PPI for Other Basic Organic Chemical Manufacturing (NAICS 325190) (BLS series code PCU32519–32519–), and the PPI for Soap and Cleaning Compound Manufacturing (NAICS 325610) (BLS series code PCU32561–32561–). Using the 2002 Benchmark I–O data, we found that these NAICS industries accounted for approximately 90 percent of the hospital industry's chemical expenses.

Therefore, we use this blended index because we believe its composition better reflects the composition of the purchasing patterns of hospitals than does the PPI for Industrial Chemicals (BLS series code WPU061), the proxy used in the FY 2002-based RPL market basket. Table 5 shows the weights for each of the four PPIs used to create the blended PPI, which we determined using the 2002 Benchmark I–O data.

TABLE 5—BLENDED CHEMICAL PPI WEIGHTS

| Name | Weights (in percent) | NAICS |
|---|---|---|
| PPI for Industrial Gas Manufacturing | 35 | 325120 |
| PPI for Other Basic Inorganic Chemical Manufacturing | 25 | 325180 |
| PPI for Other Basic Organic Chemical Manufacturing | 30 | 325190 |
| PPI for Soap and Cleaning Compound Manufacturing | 10 | 325610 |

(xi) Medical Instruments

We use the PPI for Medical, Surgical, and Personal Aid Devices (BLS series code WPU156) to measure the price growth of this cost category. In the 1997 Benchmark I–O data, approximately half of the expenses classified in this category were for surgical and medical instruments. Therefore, we used the PPI for Surgical and Medical Instruments and Equipment (BLS series code WPU1562) to proxy this category in the FY 2002-based RPL market basket. The 2002 Benchmark I–O data show that surgical and medical instruments now represent only 33 percent of these expenses and that the largest expense category is surgical appliance and supplies manufacturing (corresponding to BLS series code WPU1563). Due to this reallocation of costs over time, we are changing the price proxy for this cost category to the more aggregated PPI for Medical, Surgical, and Personal Aid Devices.

(xii) Photographic Supplies

We eliminate the cost category specific to photographic supplies for the proposed FY 2008 based RPL market basket. These costs are now included in the Chemicals cost category because the costs are presently reported as all other chemical products. Notably, although we are eliminating the specific cost category, these costs are still accounted for within the RPL market basket.

(xiii) Rubber and Plastics

We use the PPI for Rubber and Plastic Products (BLS series code WPU07) to measure price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xiv) Paper and Printing Products

We use the PPI for Converted Paper and Paperboard Products (BLS series code WPU0915) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xv) Apparel

We use the PPI for Apparel (BLS series code WPU0381) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xvi) Machinery and Equipment

We use the PPI for Machinery and Equipment (BLS series code WPU11) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xvii) Miscellaneous Products

We use the PPI for Finished Goods Less Food and Energy (BLS series code WPUSOP3500) to measure the price growth of this cost category. Using this index removes the double-counting of food and energy prices, which are already captured elsewhere in the market basket. This same proxy was used in the FY 2002-based RPL market basket.

(xviii) Professional Fees: Labor-Related

We use the ECI for Compensation for Professional and Related Occupations (Private Industry) (BLS series code CIS2020000120000I) to measure the price growth of this category. It includes occupations such as legal, accounting, and engineering services. This same proxy was used in the FY 2002-based RPL market basket.

(xix) Administrative and Business Support Services

We use the ECI for Compensation for Office and Administrative Support Services (Private Industry) (BLS series code CIU2010000220000I) to measure the price growth of this category. Previously these costs were included in the All Other: Labor-intensive category (now renamed the All Other: Labor-related Services category), and were proxied by the ECI for Compensation for Service Occupations. We believe that this compensation index better reflects the changing price of labor associated with the provision of administrative services and its incorporation represents a technical improvement to the market basket.

(xx) All Other: Labor-Related Services

We use the ECI for Compensation for Service Occupations (Private Industry) (BLS series code CIU2010000300000I) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxi) Professional Fees: Nonlabor-Related

We use the ECI for Compensation for Professional and Related Occupations (Private Industry) (BLS series code CIS2020000120000I) to measure the price growth of this category. This is the same price proxy that we are using to use for the Professional Fees: Labor-related cost category.

(xxii) Financial Services

We use the ECI for Compensation for Financial Activities (Private Industry) (BLS series code CIU201520A000000I) to measure the price growth of this cost category. Previously these costs were included in the All Other: Nonlabor-intensive category (now renamed the All Other: Nonlabor-related Services category), and were proxied by the CPI for All Items. We believe that this compensation index better reflects the changing price of labor associated with the provision of financial services and its incorporation represents a technical improvement to the market basket.

(xxiii) Telephone Services

We use the CPI for Telephone Services (BLS series code CUUR0000SEED) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxiv) Postage

We use the CPI for Postage (BLS series code CUUR0000SEEC01) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxv) All Other: Nonlabor-Related Services

We use the CPI for All Items Less Food and Energy (BLS series code CUUR0000SA0L1E) to measure the price growth of this cost category. Previously these costs were proxied by the CPI for All Items in the FY 2002-based RPL market basket. We believe that using the CPI for All Items Less Food and Energy removes the double counting of changes in food and energy prices, as they are already captured elsewhere in the market basket. Consequently, we believe that the incorporation of this proxy represents a technical improvement to the market basket.

*Comment:* One commenter observed that the compensation cost weight showed a decline from the FY 2002 to FY 2008 base year. The commenter noted that these reductions may be a result of low salary increases salary freezes or other similar factors and are not necessarily indicative of a reduction in the labor intensity of the services provided by IRFs.

*Response:* We agree with the commenter that a variety of factors and trends can influence changes in the cost shares of the RPL market basket. Relative to growth in nonlabor costs, slower growth in the cost of labor (due to low salary increases or freezes in salary), could result in a lower cost weight associated with wages and salaries. Likewise, stable growth in labor costs coupled with relatively faster growth in nonlabor costs could also result in a lower cost weight associated with wages and salaries. As the rebased and revised 2008-based RPL market basket's cost weights reflect an updated distribution of costs and represent the best available data, we are finalizing this market basket in this final rule.

(4) Methodology for Capital Portion of the RPL Market Basket

In the FY 2002-based RPL market basket, we did not have freestanding IRF, freestanding IPF, and LTCH 2002 Medicare cost report data for the capital cost weights, due to a change in the 2002 reporting requirements. Therefore, we used these hospitals' 2001 expenditure data for the capital cost categories of depreciation, interest, and other capital expenses, and inflated the data to a 2002 base year using relevant price proxies.

For the FY 2008-based RPL market basket, we calculate weights for the proposed RPL market basket capital costs using the same set of FY 2008 Medicare cost reports used to develop the operating share for IRFs, IPFs, and LTCHs. To calculate the total capital cost weight, we first apply the same LOS edits as applied when calculating the operating cost weights as described above in section VI.A.1.c.(1)(a) of this final rule. The resulting capital weight for the FY 2008 base year is 8.392 percent.

Lease expenses are unique in that they are not broken out as a separate cost category in the RPL market basket, but rather are proportionally distributed amongst the cost categories of Depreciation, Interest, and Other, reflecting the assumption that the underlying cost structure of leases is similar to that of capital costs in general. As was done in the FY 2002-based RPL market basket, we first assumed 10 percent of lease expenses represents overhead and assigned those costs to the ''Other Capital-Related Costs'' category accordingly. The remaining lease expenses were distributed across the 3 cost categories based on the respective weights of depreciation, interest, and other capital not including lease expenses.

Depreciation contains two subcategories: (1) Building and Fixed Equipment; and (2) Movable Equipment. The apportionment between building and fixed equipment and movable equipment was determined using the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs. This methodology was also used to compute the apportionment used in the FY 2002-based RPL market basket (70 FR 47912).

The total Interest expense cost category is split between government/nonprofit interest and for-profit interest. The FY 2002-based RPL market basket allocated 75 percent of the total Interest cost weight to government/nonprofit interest and proxied that category by the average yield on domestic municipal bonds. The remaining 25 percent of the Interest cost weight was allocated to for-profit interest and was proxied by the average yield on Moody's Aaa bonds (70 FR 47912). This was based on the FY 2002-based IPPS Capital input price index (CIPI) (70 FR 23406) due to insufficient Medicare cost report data for freestanding IRFs, freestanding IPFs, and LTCHs. For the FY 2008-based RPL market basket, we proposed to derive the split using the FY 2008 Medicare cost report data on interest expenses for government/nonprofit and for-profit freestanding IRFs, freestanding IPFs, and LTCHs. Based on these data, we calculated a 33/67 split between government/nonprofit and for-profit interest. We believe it is important that this split reflects the latest relative cost structure of interest expenses for RPL providers. As stated above, we first apply the LOS edits (as described in section VI.A.1.c.(1)(a) of this final rule) prior to calculating this split. Therefore, we are using cost reports that are reflective of case mix and practice patterns associated with providing services to Medicare beneficiaries. Using data specific to government/nonprofit and for-profit freestanding IRFs, freestanding IPFs, and LTCHs as well as the application of these LOS edits are the primary reasons for the difference in this split relative to the FY 2002-based RPL market basket.

Because capital is acquired and paid for over time, capital expenses in any given year are determined by both past and present purchases of physical and financial capital. The vintage-weighted capital portion of the FY 2008-based RPL market basket is intended to capture the long-term consumption of capital, using vintage weights for depreciation (physical capital) and interest (financial capital). These vintage weights reflect the proportion of capital purchases attributable to each year of the expected life of building and fixed equipment, movable equipment, and interest. We use the vintage weights to compute vintage-weighted price changes associated with depreciation and interest expense.

Vintage weights are an integral part of the proposed FY 2008-based RPL market basket. Capital costs are inherently complicated and are determined by complex capital purchasing decisions, over time, based on such factors as interest rates and debt financing. In addition, capital is depreciated over time instead of being consumed in the same period it is purchased. The capital portion of the FY 2008-based RPL market basket reflects the annual price changes associated with capital costs, and would be a useful simplification of the actual capital investment process. By accounting for the vintage nature of capital, we are able to provide an accurate and stable annual measure of price changes. Annual nonvintage price changes for capital are unstable due to the volatility of interest rate changes and, therefore, do not reflect the actual annual price changes for Medicare capital-related costs. The capital component of the proposed FY 2008-based RPL market basket reflects the underlying stability of the capital acquisition process and provides hospitals with the ability to plan for changes in capital payments.

To calculate the vintage weights for depreciation and interest expenses, we needed a time series of capital purchases for building and fixed equipment and movable equipment. We found no single source that provides an appropriate time series of capital purchases by hospitals for all of the above components of capital purchases. The early Medicare cost reports did not have sufficient capital data to meet this need. Data we obtained from the American Hospital Association (AHA) do not include annual capital purchases. However, AHA does provide a consistent database back to 1963. We used data from the AHA Panel Survey and the AHA Annual Survey to obtain a time series of total expenses for hospitals. We then used data from the AHA Panel Survey supplemented with the ratio of depreciation to total hospital expenses obtained from the Medicare cost reports to derive a trend of annual depreciation expenses for 1963 through 2008.

To estimate capital purchases using data on depreciation expenses, the expected life for each cost category (building and fixed equipment, movable equipment, and interest) is needed to calculate vintage weights. For the FY 2002-based RPL market basket, due to insufficient Medicare cost report data for freestanding IRFs, freestanding IPFs, and LTCHs, we used 2001 Medicare Cost Reports for IPPS hospitals to determine the expected life of building and fixed equipment and movable equipment (70 FR 47913). The FY 2002-based RPL market basket was based on an expected life of building and fixed equipment of 23 years. It used 11 years as the expected life for movable equipment. We believed that this data source reflected the latest relative cost structure of depreciation expenses for hospitals at the time and was analogous to freestanding IRFs, freestanding IPFs, and LTCHs.

The expected life of any piece of equipment can be determined by dividing the value of the asset (excluding fully depreciated assets) by its current year depreciation amount. This calculation yields the estimated useful life of an asset if depreciation were to continue at current year levels, assuming straight-line depreciation. Following a similar method to what was applied for the FY 2002-based RPL market basket, we use the expected life of building and fixed equipment to be equal to 26 years, and the expected life of movable equipment to be 11 years. These expected lives are calculated using FY 2008 Medicare cost reports for IPPS hospitals since we are currently unable to obtain robust measures of the expected lives for building and fixed equipment and movable equipment using the Medicare cost reports from freestanding IRFs, freestanding IPFs, and LTCHs.

We also use the building and fixed equipment and movable equipment weights derived from FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs to separate the depreciation expenses into annual amounts of building and fixed equipment depreciation and movable equipment depreciation. Year-end asset costs for building and fixed equipment and movable equipment were determined by multiplying the annual depreciation amounts by the expected life calculations. We then calculated a time series, back to 1963, of annual capital purchases by subtracting the previous year asset costs from the current year asset costs. From this capital purchase time series, we were able to calculate the vintage weights for building and fixed equipment and for movable equipment. Each of these sets of vintage weights is explained in more detail below.

For the building and fixed equipment vintage weights, we used the real annual capital purchase amounts for building and fixed equipment to capture the actual amount of the physical acquisition, net of the effect of price inflation. This real annual purchase amount for building and fixed equipment was produced by deflating the nominal annual purchase amount by the building and fixed equipment price proxy, BEA's chained price index for nonresidential construction for hospitals and special care facilities. Because building and fixed equipment have an expected life of 26 years, the vintage weights for building and fixed equipment are deemed to represent the average purchase pattern of building and fixed equipment over 26-year periods. With real building and fixed equipment purchase estimates available from 2008 back to 1963, we averaged twenty 26-year periods to determine the average vintage weights for building and fixed equipment that are representative of average building and fixed equipment purchase patterns over time. Vintage weights for each 26-year period are calculated by dividing the real building and fixed capital purchase amount in any given year by the total amount of purchases in the 26-year period. This calculation is done for each year in the 26-year period, and for each of the twenty 26-year periods. We used the average of each year across the twenty 26-year periods to determine the average building and fixed equipment vintage weights for the FY 2008-based RPL market basket.

For the movable equipment vintage weights, the real annual capital purchase amounts for movable equipment were used to capture the actual amount of the physical acquisition, net of price inflation. This real annual purchase amount for movable equipment was calculated by deflating the nominal annual purchase amounts by the movable equipment price proxy, the PPI for Machinery and Equipment. This is the same proxy used for the FY 2002-based RPL market basket. Based on our determination that movable equipment has an expected life of 11 years, the vintage weights for movable equipment represent the average expenditure for movable equipment over an 11-year period. With real movable equipment purchase estimates available from 2008 back to 1963, thirty-five 11-year periods were averaged to determine the average vintage weights for movable equipment that are representative of average movable equipment purchase patterns over time. Vintage weights for each 11-year period are calculated by dividing the real movable capital purchase amount for any given year by the total amount of purchases in the 11-year period. This calculation was done for each year in the 11-year period and for each of the thirty-five 11-year periods. We used the average of each year across the thirty-five 11-year periods to determine the average movable equipment vintage weights for the FY 2008-based RPL market basket.

For the interest vintage weights, the nominal annual capital purchase amounts for total equipment (building and fixed, and movable) were used to capture the value of the debt instrument. Because we have determined that hospital debt instruments have an expected life of 26 years, the vintage weights for interest are deemed to represent the average purchase pattern of total equipment over 26-year periods. With nominal total equipment purchase estimates available from 2008 back to 1963, twenty 26-year periods were averaged to determine the average vintage weights for interest that are representative of average capital purchase patterns over time. Vintage weights for each 26-year period are calculated by dividing the nominal total capital purchase amount for any given year by the total amount of purchases in the 26-year period. This calculation is done for each year in the 26-year period and for each of the twenty 26-year periods. We used the average of each year across the twenty 26-year periods to determine the average interest vintage weights for the FY 2008-based RPL market basket. The vintage weights for the capital portion of the FY 2002-based RPL market basket and the FY 2008-based RPL market basket are presented in Table 6.

TABLE 6—FY 2002 AND FY 2008 VINTAGE WEIGHTS FOR CAPITAL-RELATED PRICE PROXIES

| Year | Building and fixed equipment | | Movable Equipment | | Interest | |
|---|---|---|---|---|---|---|
| | FY 2002 23 years | FY 2008 26 years | FY 2002 11 years | FY 2008 11 years | FY 2002 23 years | FY 2008 26 years |
| 1 | 0.021 | 0.021 | 0.065 | 0.071 | 0.010 | 0.010 |
| 2 | 0.022 | 0.023 | 0.071 | 0.075 | 0.012 | 0.012 |
| 3 | 0.025 | 0.025 | 0.077 | 0.080 | 0.014 | 0.014 |
| 4 | 0.027 | 0.027 | 0.082 | 0.083 | 0.016 | 0.016 |
| 5 | 0.029 | 0.028 | 0.086 | 0.085 | 0.019 | 0.018 |
| 6 | 0.031 | 0.030 | 0.091 | 0.089 | 0.023 | 0.020 |
| 7 | 0.033 | 0.031 | 0.095 | 0.092 | 0.026 | 0.021 |
| 8 | 0.035 | 0.033 | 0.100 | 0.098 | 0.029 | 0.024 |
| 9 | 0.038 | 0.035 | 0.106 | 0.103 | 0.033 | 0.026 |
| 10 | 0.040 | 0.037 | 0.112 | 0.109 | 0.036 | 0.029 |
| 11 | 0.042 | 0.039 | 0.117 | 0.116 | 0.039 | 0.033 |
| 12 | 0.045 | 0.041 | | | 0.043 | 0.035 |
| 13 | 0.047 | 0.042 | | | 0.048 | 0.038 |
| 14 | 0.049 | 0.043 | | | 0.053 | 0.041 |
| 15 | 0.051 | 0.044 | | | 0.056 | 0.043 |
| 16 | 0.053 | 0.045 | | | 0.059 | 0.046 |
| 17 | 0.056 | 0.046 | | | 0.062 | 0.049 |
| 18 | 0.057 | 0.047 | | | 0.064 | 0.052 |
| 19 | 0.058 | 0.047 | | | 0.066 | 0.053 |
| 20 | 0.060 | 0.045 | | | 0.070 | 0.053 |
| 21 | 0.060 | 0.045 | | | 0.071 | 0.055 |
| 22 | 0.061 | 0.045 | | | 0.074 | 0.056 |
| 23 | 0.061 | 0.046 | | | 0.076 | 0.060 |
| 24 | | 0.046 | | | | 0.063 |
| 25 | | 0.045 | | | | 0.064 |
| 26 | | 0.046 | | | | 0.068 |
| Total | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |

**Note:** Numbers may not add to total due to rounding.

After the capital cost category weights were computed, it was necessary to select appropriate price proxies to reflect the rate-of-increase for each expenditure category. We use the same price proxies for the capital portion of the FY 2008-based RPL market basket that were used in the FY 2002-based RPL market basket with the exception of the Boeckh Construction Index. We replaced the Boeckh Construction Index with BEA's chained price index for nonresidential construction for hospitals and special care facilities. The BEA index represents construction of facilities such as hospitals, nursing homes, hospices, and rehabilitation centers. Although these price indices move similarly over time, we believe that it is more technically appropriate to use an index that is more specific to the hospital industry. We believe these are the most appropriate proxies for hospital capital costs that meet our selection criteria of relevance, timeliness, availability, and reliability.

The price proxies (prior to any vintage weighting) for each of the capital cost categories are the same as those used for the FY 2006-based CIPI as described in the IPPS FY 2010 final rule (74 FR at 43857).

We received no comments related to the proposed capital portion of the RPL methodology including the selection of cost categories, cost weights, and the price proxies. Therefore, we are finalizing the capital portion of the 2008-based RPL market basket as proposed with no further changes.

(5) FY 2012 RPL Market Basket Update Factor for IRFs

For FY 2012 (that is, beginning October 1, 2011 and ending September 30, 2012), we will use an estimate of the FY 2008-based RPL market basket increase factor based on the best available data. Consistent with historical practice, we estimate the RPL market basket update for the IRF PPS based on IHS Global Insight's forecast using the most recent available data. IHS Global Insight (IGI), Inc. is a nationally recognized economic and financial forecasting firm that contracts with CMS to forecast the components of the market baskets.

Based on IGI's 1st quarter 2011 forecast with historical data through the fourth quarter of 2010, the projected market basket increase factor for FY 2012 was 2.8 percent. Consistent with our historical practice of estimating market basket increases based on the best available data, we proposed a market basket increase factor of 2.8 percent for FY 2012. We also proposed that if more recent data became subsequently available (for example, a more recent estimate of the market basket), we would use that data, if appropriate, to determine the FY 2012 update in the final rule.

Based on IGI's second quarter 2011 forecast with history through the first quarter of 2011, the projected market basket update for FY 2012 based on the 2008-based RPL market basket is 2.9 percent.

Using the current FY 2002-based RPL market basket and IGI's second quarter 2011 forecast for the market basket components, the FY 2012 update would be 3.0 percent (before taking into account any statutory adjustments). Table 7 compares the FY 2008-based RPL market basket and the FY 2002-based RPL market basket percent changes.

TABLE 7—FY 2002-BASED AND FY 2008-BASED RPL MARKET BASKET PERCENT CHANGES, FY 2006 THROUGH FY 2014

| Fiscal year (FY) | FY 2002-based RPL market basket index percent change | FY 2008-based RPL market basket index percent change |
|---|---|---|
| Historical data: | | |
| FY 2006 | 3.9 | 3.7 |
| FY 2007 | 3.4 | 3.4 |
| FY 2008 | 3.8 | 3.7 |
| FY 2009 | 2.5 | 2.7 |
| FY 2010 | 2.3 | 2.2 |
| Average 2006–2010 | 3.2 | 3.1 |
| Forecast: | | |
| FY 2011 | 2.7 | 2.7 |
| FY 2012 | 3.0 | 2.9 |
| FY 2013 | 3.0 | 2.9 |
| FY 2014 | 3.0 | 3.0 |
| Average 2011–2014 | 2.9 | 2.9 |

Note that these market basket percent changes do not include any further adjustments as may be statutorily required.
*Source:* IHS Global Insight, Inc. 2nd quarter 2011 forecast.

For FY 2012, the FY 2008-based RPL market basket update (2.9 percent) is slightly lower than the FY 2002-based RPL market basket update (3.0 percent). The lower total compensation weight in the FY 2008-based RPL market basket (62.278 percent) relative to the FY 2002-based RPL market basket (65.877 percent), absent other factors, would have resulted in a slightly lower market basket update using the FY 2008-based RPL market basket. This impact, however, is partially offset by the larger weight associated with the Professional Fees category. In both market baskets, these expenditures are proxied by the ECI for Compensation for Professional and Related Services. The weight for Professional Fees in the FY 2002-based RPL market basket is 2.892 percent compared to 6.325 percent in the proposed FY 2008-based RPL market basket. The net effect is that the market basket update is slightly lower for FY 2012 based on the FY 2008-based RPL market basket relative to the FY 2002-based RPL market basket.

*Comment:* Several commenters expressed support that CMS update the RPL market basket with more recent cost data. They note that using more up-to-date cost report data (2008) makes the RPL market basket more representative of the costs faced by IRF providers relative to more outdated cost report data (2002).

*Response:* We agree that the use of more recent cost report data allows for the index to better reflect the actual costs faced by IRF providers. Based on the positive comments received regarding the rebasing of the RPL market basket, we are finalizing our proposal to rebase and revise the index. Based on IGI's second quarter 2011 forecast with history through the first quarter of 2011, the projected market basket update for FY 2012 is 2.9 percent. Therefore, consistent with our historical practice of estimating market basket increases based on the best available data, we are finalizing a market basket update of 2.9 percent for FY 2012.

2. Productivity Adjustment

According to section 1886(j)(3)(C)(i) of the Act, the Secretary shall establish an increase factor ''based on an appropriate percentage increase in a market basket of goods and services.'' As described in section VI.A.1 of this final rule, we estimate the IRF PPS increase factor for FY 2012 based on the FY 2008-based RPL market basket. Section 1886(j)(3)(C)(ii) of the Act then requires that, after establishing the increase factor for a FY, ''the Secretary shall reduce such increase factor for FY 2012 and each subsequent FY, by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II)'' of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable FY cost reporting period, or other annual period) (the ''MFP adjustment''). The Bureau of Labor Statistics (BLS) is the agency that publishes the official measure of private nonfarm business MFP. We refer readers to the BLS Web site at *http://www.bls.gov/mfp* to obtain the historical BLS-published MFP data.

The projection of MFP is currently produced by IGI, an economic forecasting firm. In order to generate a forecast of MFP, IGI replicated the MFP measure calculated by the BLS using a series of proxy variables derived from IGI's U.S. macroeconomic models. These models take into account a very broad range of factors that influence the total U.S. economy. IGI forecasts the underlying proxy components such as Gross Domestic Product (GDP), capital, and labor inputs required to estimate MFP and then combines those projections according to the BLS methodology. In Table 8, we identify each of the major MFP component series employed by the BLS to measure MFP. We also provide the corresponding concepts forecasted by IGI and determined to be the best available proxies for the BLS series.

TABLE 8—MULTIFACTOR PRODUCTIVITY COMPONENT SERIES EMPLOYED BY THE BUREAU OF LABOR STATISTICS AND IHS GLOBAL INSIGHT

| BLS series | IGI series |
|---|---|
| Real value-added output, constant 2005 dollars | Non-housing, non-government, non-farm real GDP, Billions of chained 2005 dollars − annual rate. |
| Private non-farm business sector labor input; 2005 = 100.00 | Hours of all persons in private non-farm establishments, 2005 = 100.00, adjusted for labor composition effects. |
| Aggregate capital inputs; 2005 = 100.00 | Real effective capital stock used for full employment GDP, Billions of chained 2005 dollars. |

IGI found that the historical growth rates of the BLS components used to calculate MFP and the IGI components identified are consistent across all series and therefore suitable proxies for calculating MFP. We have included below a more detailed description of the methodology used by IGI to construct a forecast of MFP, which is aligned closely with the methodology employed by the BLS. For more information regarding the BLS method for estimating productivity, see the BLS Web site at *http://www.bls.gov/mfp/mprtech.pdf.*

At the time of the development of the FY 2012 final rule, the BLS had published a historical time series of private nonfarm business MFP for 1987 through 2010, with 2010 being a preliminary value. Using this historical MFP series and the IGI forecasted series, IGI has developed a forecast of MFP for 2011 through 2021, as described below.

To create a forecast of BLS' MFP index, the forecasted annual growth rates of the ''non-housing, non-government, non-farm, real GDP'', ''hours of all persons in private non-farm establishments adjusted for labor composition,'' and ''real effective capital stock'' series (ranging from 2011 to 2021) are used to ''grow'' the levels of the ''real value-added output,'' ''private non-farm business sector labor input,'' and ''aggregate capital inputs'' series published by the BLS. Projections of the ''hours of all persons'' measure are calculated using the difference between projections of the BLS index of output per hour and real GDP. This difference is then adjusted to account for changes in labor composition in the forecast interval.

Using these 3 key concepts, MFP is derived by subtracting the contribution of labor and capital inputs from output growth. However, in order to estimate MFP, we need to understand the relative contributions of labor and capital to total output growth. Therefore, 2 additional measures are needed to operationalize the estimation of the IGI MFP projection: Labor compensation and capital income. The sum of labor compensation and capital income represents total income. The BLS calculates labor compensation and capital income (in current dollar terms) to derive the nominal values of labor and capital inputs. IGI uses the ''non-government total compensation'' and ''flow of capital services from the total private non-residential capital stock'' series as proxies for the BLS' income measures. These two proxy measures for income are divided by total income to obtain the shares of labor compensation and capital income to total income. To estimate labor's contribution and capital's contribution to the growth in total output, the growth rates of the proxy variables for labor and capital inputs are multiplied by their respective shares of total income. These contributions, of labor and capital to output growth, are subtracted from total output growth to calculate the ''change in the growth rates of multifactor productivity'':

*MFP* = *Total output growth* − *((labor input growth * labor compensation share)* + *(capital input growth * capital income share))*

The change in the growth rates (also referred to as the compound growth rates) of the IGI MFP are multiplied by 100 in order to calculate the percent change in growth rates (the percent change in growth rates are published by the BLS for its historical MFP measure). Finally, the growth rates of the IGI MFP are converted to index levels based to 2005 to be consistent with the BLS' methodology. For benchmarking purposes, the historical growth rates of IGI's proxy variables were used to estimate a historical measure of MFP, which was compared to the historical MFP estimate published by the BLS. The comparison revealed that the growth rates of the components were consistent across all series, and therefore validated the use of the proxy variables in generating the IGI MFP projections. The resulting MFP index was then interpolated to a quarterly frequency using the Bassie method for temporal disaggregation. The Bassie technique utilizes an indicator (pattern) series for its calculations. IGI uses the index of output per hour (published by the BLS) as an indicator when interpolating the MFP index.

3. Calculation of the IRF PPS Market Basket Increase Factor for FY 2012

To calculate the MFP-adjusted IRF PPS increase factor for FY 2012, in accordance with section 1886(j)(3)(C) of the Act, we start with the FY 2008-based RPL market basket increase factor described above in section VI.A.1. of this final rule and subtract from that the MFP percentage adjustment described in section VI.A.2. of this final rule. Additionally, in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(ii) of the Act, we further proposed to reduce the MFP-adjusted IRF PPS increase factor by 0.1 percentage point for FY 2012.

Specifically, in calculating the MFP percentage adjustment, the end of the 10-year moving average of changes in the MFP should coincide with the end of the appropriate FY update period. Since the market basket update is reduced by the MFP adjustment to determine the annual update for the IRF PPS, we believe it is appropriate for the numbers associated with both components of the calculation (the market basket and the productivity adjustment) to line up so that changes in market conditions are aligned. Therefore, for the FY 2012 update, the MFP adjustment is calculated as the 10-year moving average of changes in MFP for the period ending September 30, 2012. We round the final annual adjustment to the one-tenth of 1 percentage point level up or down as applicable according to conventional rounding rules (that is, if the number we are rounding is followed by 5, 6, 7, 8, or 9, we will round the number up; if the number we are rounding is followed by 0, 1, 2, 3, or 4, we will round the number down).

Thus, in accordance with section 1886(j)(3)(C) of the Act, the proposed IRF PPS increase factor for FY 2012 was based on the 1st quarter 2011 forecast of the proposed FY 2008-based RPL market basket update, which was estimated to be 2.8 percent. This increase factor was then reduced by the proposed MFP adjustment (the 10-year moving average of MFP for the period ending FY 2012) of 1.2 percentage points, based on the methodology described above and IHS Global Insight's 1st quarter 2011 forecast. The increase factor for FY 2012 was then further reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. The resulting proposed IRF PPS increase factor reduced by the productivity adjustment and the ''other adjustment'' for FY 2012 was equal to 1.5 percent, or 2.8 percent less 1.2 percentage points (for the MFP) less 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. Consistent with historical practice, we update the market basket increase factor estimate and the MFP adjustment in this final rule to reflect the most recent available data.

*Comment:* Several commenters recognized that the productivity adjustment is mandated by law (section 3401(d) of the Affordable Care Act). However, they expressed concern about the negative impact that it could have on IRF providers and the beneficiaries they serve. They recommend that CMS takes steps to mitigate any negative effects caused by the MFP reduction.

*Response:* Section 3401(d) of the Affordable Care Act mandates that the market basket used to update IRF payments be reduced by a productivity adjustment beginning in FY 2012. As a result, we have no discretionary authority in this area, and we are applying this reduction in this final rule.

*Comment:* Several commenters stated that the provision of inpatient rehabilitation services is largely dependent on skilled rehabilitation physicians, therapists, nurses, and other highly trained personnel and that efficiencies which might result from use of advanced technology are more limited in this setting than may be observed in the general economy. One commenter noted that many of the treatment plans in the IRF setting do not lend themselves to continual productivity improvements. The commenter stated that it will be challenging for efficient providers, over time, to achieve continued efficiencies at a rate that will be required by ongoing application of productivity adjustments.

*Response:* We recognize that a complex and sophisticated mix of inputs are required to provide care to IRF patients. However, the agency is required by law to apply the MFP adjustment to provider payments as stipulated by section 3401(d) of the Affordable Care Act.

*Comment:* Several commenters suggested that CMS carefully monitor the impact that these MFP adjustments will have on the IRF hospital sector and provide feedback to Congress as appropriate.

*Response:* We will continue to monitor the effect of the MFP adjustments and share the results with policymakers. That practice will continue as we implement other provisions mandated by the Affordable Care Act.

*Final Decision:* After careful consideration of the public comments, we are finalizing our proposed method for calculating and applying the MFP adjustment. In accordance with section 1886(j)(3)(C) of the Act, as amended by section 3401(d) of the Affordable Care Act, we will base the FY 2012 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the second quarter 2011 forecast of the FY 2008-based RPL market basket (estimated to be 2.9 percent). This percentage increase will then be reduced by the MFP adjustment (the 10-year moving average of MFP for the period ending FY 2012) of 1.0 percent, which was calculated as described above and based on IGI's second quarter 2011 forecast. Following application of the productivity adjustment, the applicable percentage increase will then be further reduced by 0.1 percentage point, as required by section 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act, as amended by sections 3401(d) of the Affordable Care Act. Therefore the final FY 2012 IRF update is 1.8 percent (2.9 percent market basket update less 1.0 percentage point MFP adjustment less 0.1 percentage point legislative adjustment).

4. Calculation of the Labor-Related Share for FY 2012

Section 1886(j)(6) of the Act specifies that ''[t]he Secretary shall adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs which are attributable to wages and wage-related costs, of the prospective payment rates computed under paragraph (3) for area differences in wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for the facilities. Not later than October 1, 2001 (and at least every 36 months thereafter), the Secretary shall update the factor under the preceding sentence on the basis of information available to the Secretary (and updated as appropriate) of the wages and wage-related costs incurred in furnishing rehabilitation services. Any adjustments or updates made under this paragraph for a fiscal year shall be made in a manner that assures that the aggregated payments under this subsection in the fiscal year are not greater or less than those that would have been made in the year without such adjustment.''

The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market. Given this, based on our definition of the labor-related share, we proposed to include in the labor-related share the sum of the relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Business Support Services, All Other: Labor-related Services (previously referred to in the FY 2002-based RPL market basket as labor-intensive), and a portion of the Capital-Related cost weight.

Consistent with previous rebasings, the ''All Other'' Labor-related Services cost category is mostly comprised of building maintenance and security services (including, but not limited to, commercial and industrial machinery and equipment repair, nonresidential maintenance and repair, and investigation and security services). Because these services tend to be labor-intensive and are mostly performed at the hospital facility (therefore, unlikely to be purchased in the national market), we believe that they meet our definition of labor-related services.

As stated in the FY 2006 IRF PPS final rule (70 FR 47880, 47915), the labor-related share was defined as the sum of the relative importance of Wages and Salaries, Fringe Benefits, Professional Fees, Labor-intensive Services, and a portion of the capital share from an appropriate market basket. Therefore, to determine the labor-related share for the IRF PPS for FY 2011, we used the FY 2002-based RPL market basket cost weights relative importance to determine the labor-related share for the IRF PPS.

For the FY 2008-based RPL market basket rebasing, the inclusion of the Administrative and Business Support Services cost category into the labor-related share remains consistent with the current labor-related share because this cost category was previously included in the Labor-intensive cost category. As previously stated, we establish a separate Administrative and Business Support Service cost category so that we can use the ECI for Compensation for Office and Administrative Support Services to more precisely proxy these specific expenses.

For the FY 2002-based RPL market basket, we assumed that all nonmedical professional services (including accounting and auditing services, engineering services, legal services, and management and consulting services) were purchased in the local labor market and, therefore, all of their associated fees varied with the local labor market. As a result, we previously included 100 percent of these costs in the labor-related share. In an effort to more accurately determine the share of professional fees that should be included in the labor-related share, we surveyed hospitals regarding the proportion of those fees that go to companies that are located beyond their own local labor market (the results are discussed below).

We continue to look for ways to refine our market basket approach to more accurately account for the proportion of costs influenced by the local labor market. To that end, we conducted a survey of hospitals to empirically determine the proportion of contracted professional services purchased by the industry that are attributable to local firms and the proportion that are purchased from national firms. We notified the public of our intent to conduct this survey on December 9, 2005 (70 FR 73250) and received no comments.

With approval from the OMB (Control Number 0938–1036), we contacted a sample of IPPS hospitals and received responses to our survey from 108 hospitals. We believe that these data serve as an appropriate proxy for the purchasing patterns of professional services for IRFs as they are also institutional providers of health care services. Using data on FTEs to allocate responding hospitals across strata (region of the country and urban/rural status), we calculated post-stratification weights. Based on these weighted results, we determined that hospitals purchase, on average, the following portions of contracted professional services outside of their local labor market:

- 34 percent of accounting and auditing services.
- 30 percent of engineering services.
- 33 percent of legal services.
- 42 percent of management consulting services.

We applied each of these percentages to its respective Benchmark I–O cost category underlying the professional fees cost category to determine the Professional Fees: Nonlabor-related costs. The Professional Fees: Labor-related costs were determined to be the difference between the total costs for each Benchmark I–O category and the Professional Fees: Nonlabor-related costs. This is the methodology that we used to separate the FY 2008-based RPL market basket professional fees category into Professional Fees: Labor-related and Professional Fees: Nonlabor-related cost categories. In addition to the professional services listed above, we also classified expenses under NAICS 55, Management of Companies and Enterprises, into the Professional Fees cost category as was done in previous rebasings. The NAICS 55 data are mostly comprised of corporate, subsidiary, and regional managing offices, or otherwise referred to as home offices. Formerly, all of the expenses within this category were considered to vary with, or be influenced by, the local labor market and were thus included in the labor-related share. Because many hospitals are not located in the same geographic area as their home office, we analyzed data from a variety of sources in order to determine what proportion of these costs should be appropriately included in the labor-related share.

Using data primarily from the Medicare cost reports and a CMS database of Home Office Medicare Records (HOMER) (a database that provides city and State information (addresses) for home offices), we were able to determine that 19 percent of the total number of freestanding IRFs, IPFs, and LTCHs that had home offices had those home offices located in their respective local labor markets—defined as being in the same Metropolitan Statistical Area (MSA).

The Medicare cost report requires hospitals to report their home office provider numbers. Using the HOMER database to determine the home office location for each home office provider number, we compared the location of the provider with the location of the hospital's home office. We then placed providers into one of the following three groups:

- Group 1—Provider and home office are located in different States.
- Group 2—Provider and home office are located in the same State and same city.
- Group 3—Provider and home office are located in the same State and different city.

We found that 63 percent of the providers with home offices were classified into Group 1 (that is, different State) and, thus, these providers were determined to not be located in the same local labor market as their home office. Although there were a very limited number of exceptions (that is, providers located in different States but the same MSA as their home office), the 63 percent estimate was unchanged.

We found that 9 percent of all providers with home offices were classified into Group 2 (that is, same State and same city and, therefore, the same MSA). Consequently, these providers were determined to be located in the same local labor market as their home offices.

We found that 27 percent of all providers with home offices were classified into Group 3 (that is, same State and different city). Using data from the Census Bureau to determine the specific MSA for both the provider and its home office, we found that 10 percent of all providers with home offices were identified as being in the same State, a different city, but the same MSA.

Pooling these results, we were able to determine that approximately 19 percent of providers with home offices had home offices located within their local labor market (that is, 9 percent of providers with home offices had their home offices in the same State and city (and, thus, the same MSA), and 10 percent of providers with home offices had their home offices in the same State, a different city, but the same MSA). We proposed to apportion the NAICS 55 expense data by this percentage. Thus, we proposed to classify 19 percent of these costs into the Professional Fees: Labor-related cost category and the remaining 81 percent into the Professional Fees: Nonlabor-related Services cost category.

Using this method and the IGI forecast for the first quarter 2011 of the FY 2008-based RPL market basket, the proposed IRF labor-related share for FY 2012 was the sum of the FY 2012 relative importance of each labor-related cost category. Consistent with our policy for updating the labor-related share with the most recent available data, the labor-related share for this final rule reflects IGI's second quarter 2011 forecast of the FY 2008-based RPL market basket. Table 9 shows the FY 2012 relative importance labor-related share using the FY 2008-based RPL market basket and the FY 2002-based RPL market basket.

TABLE 9—COMPARISON OF THE FY 2011 RELATIVE IMPORTANCE LABOR-RELATED SHARE BASED ON THE FY 2002-BASED RPL MARKET BASKET AND THE FY 2012 RELATIVE IMPORTANCE LABOR-RELATED SHARE BASED ON THE FY 2008-BASED RPL MARKET BASKET

| | FY 2011 relative importance labor-related share [1] | FY 2012 relative importance labor-related share [2] |
|---|---|---|
| Wages and Salaries | 52.449 | 48.984 |
| Employee Benefits | 13.971 | 12.998 |
| Professional Fees: Labor-Related | 2.855 | 2.072 |
| Administrative and Business Support Services | .................................. | 0.416 |
| All Other: Labor-Related Services | 2.109 | 2.094 |
| Subtotal | 71.384 | 66.564 |
| Labor-Related Portion of Capital Costs (46%) | 3.887 | 3.635 |
| Total Labor-Related Share | 75.271 | 70.199 |

[1] Published in the FY 2011 IRF PPS Notice (75 FR 42849) and based on the second quarter 2010 IGI forecast.
[2] Based on the second quarter 2011 IGI forecast.

The labor-related share for FY 2012 is the sum of the FY 2012 relative importance of each labor-related cost category, and would reflect the different rates of price change for these cost categories between the base year (FY 2008) and FY 2012. The sum of the relative importance for FY 2012 for operating costs (Wages and Salaries, Employee Benefits, Professional Fees: Labor-Related, Administrative and Business Support Services, and All Other: Labor-related Services) would be 66.564 percent, as shown in Table 9.

The portion of Capital that is influenced by the local labor market is estimated to be 46 percent, which is the same percentage applied to the FY 2002-based RPL market basket. Since the relative importance for Capital-Related Costs would be 7.903 percent of the proposed FY 2008-based RPL market basket in FY 2012, we take 46 percent of 7.903 percent to determine the proposed labor-related share of Capital for FY 2012. The result would be 3.635 percent, which we add to 66.564 percent for the operating cost amount to determine the total labor-related share for FY 2012. Thus, the labor-related share that we use for the IRF PPS in FY 2012 will be 70.199 percent. This labor-related share is determined using the same methodology that we used to calculate all previous IRF labor-related shares.

*Comment:* One commenter stated that the CMS proposal to no longer include 100 percent of certain types of costs in the labor-related share calculation does not coincide with the application of the area wage index. This commenter noted that costs captured in the ''Other Services'' cost category in the RPL, whether employees, local contractors, national contractors, or home office allocations, represent personal services, which are in essence labor-related. The commenter also noted that the labor-related portion of the base rate is adjusted by the area wage index. The IPPS wage index includes in its calculation of the local (CBSA) wage index not a portion based on location relative to the provider, but 100 percent of the allocated home office wages, benefits, and hours. The commenter noted that the hospital wage index also includes contracted administrative and general services, which would include those categories in CMS' survey such as accounting, legal, *etc.* The commenter suggested that if these costs are included in the IPPS wage index, then they should also be included in full in the labor-related portion of the base rate that will be multiplied by the adjustment factor for the IRF calculation.

*Response:* We appreciate the commenter's suggestion. However, we disagree that we should allocate 100 percent of service costs as labor-related. The wage index that is applied to the labor-related portion of any payment system measures the variation in labor costs based on geographic differences. Therefore, it is appropriate that the wage index would include all relative cost differences for various labor categories. The labor-related share is defined as the proportion of total costs that are related to, influenced by, or vary with the local labor market. A cost category is defined as labor-related if both the costs of the service are labor-intensive *and* those costs vary with the local labor market. That is, the labor-related share must only include the proportion of costs that are determined to vary with the local labor market. The apportionment of some of the costs associated with various nonmedical professional fees and home office expenses into nonlabor-related categories reflects the findings of our analyses that concluded portions of those costs are purchased (or paid for) beyond the organization's local labor market and thus, are not related to or influenced by the local labor market.

*Comment:* One commenter expressed concerns regarding the drop in the labor-related share from around 75 percent to 70 percent. The commenter asked CMS to articulate the driving factors contributing to the drop in the estimated labor-related share and consider the appropriateness of those factors.

*Response:* Of the decrease in the labor-related share from about 75 percent to 70 percent, over 3-quarters of that decrease is the result of the decrease in the compensation cost weight. As displayed in Table 4, the 2008-based RPL market basket compensation cost weight is 62.278 percent while the 2002-based RPL market basket compensation cost weight is 65.877 percent, a decrease of about 3.6 percentage points. The compensation cost weights for both the 2002-based and the 2008-based RPL market baskets were calculated using the Medicare cost reports for freestanding IRFs, IPFs, and LTCHS. We found during our most-recent rebasing process that the compensation cost weight had begun gradually decreasing over the 2003 to 2008 time period. The new labor-related share reflects the most recently available and complete set of Medicare cost reports, and thus reflects the updated and appropriate proportion of costs that are related to, influenced by, or vary with the local labor market for IRFs, IPFs, and LTCHs.

The remaining difference between the 2002-based and the 2008-based labor-related shares is primarily attributable to the classification of costs as labor-related and nonlabor-related using an empirically based apportionment of professional fees and home office costs. We believe the data and methods used to derive this apportionment were technically appropriate and result in a more accurate updated labor-related share.

*Comment:* One commenter pointed out that Table 9 in the FY 2012 IRF Proposed Rule showed a reduction in the labor-related share of 4.937 percent. The commenter attributed this change to the change in the methodology for how CMS classified professional fees and home office costs. The commenter noted that CMS only counted 19 percent of costs for professional fees and home office costs as labor-related and subject to the area wage index adjustment. The commenter noted their support for the use of new data to ensure the IRF PPS accurately reimburses IRFs for the services they provide, but expressed concern that the survey upon which CMS based its decision to make a change to the labor-related share was conducted with acute care hospitals paid under the IPPS. The commenter expressed concern that the results of the professional fees survey may not accurately reflect the percentage of nonmedical professional services provided by entities outside the local labor market utilized by IRFs. The commenter requested in the future that CMS conduct a study of nonmedical professional services using only IRFs, IPFs, and LTCHs.

*Response:* The overall proposed labor-related share as shown in Table 9 of the FY 2012 IRF proposed rule (76 FR 24243) showed a decline of 4.937 percent. The commenter attributed the entire change in the labor-related share from the 2002-based RPL market basket to the 2008-based market basket to our change in the professional fees and home office cost labor-related designations. We disagree that this is the principal driver for the decline in the labor-related share. The majority of the decline is based on a decline in relative compensation costs from 2002 to 2008 as reported on the Medicare cost reports. In particular, this accounts for over 3-quarters of the difference in the labor-related share. The remaining decrease in the labor-related share is primarily the result of the treatment of professional fees as labor-related or nonlabor-related. Finally, we did not use 19 percent as the value to determine the professional fees that were purchased within the local labor market. That is the percentage of home office costs that was determined to be purchased within the local labor market. For estimates associated with the apportionment of professional fees, we refer the reader to the discussion of the use of the survey results and how they were applied to determine the labor-related portions. This discussion can be found in the FY 2012 IRF PPS proposed rule at (76 FR at 24241 through 24242). We note that while this survey was conducted using responses from IPPS hospitals, we would expect that these data serve as an appropriate proxy for the purchasing patterns of professional services for IRFs as they are also institutional providers of health care services.

*Comment:* Several commenters recommended that CMS phase-in the change to the labor-related share over a 2 year period to allow IRFs a longer period of time to absorb the impact of this reduction to the labor-related share.

*Response:* We do not believe that a phase-in of the labor-related share is necessary. We estimate that only 3 IRFs would lose more than 5 percent in payments from this change, with the maximum estimated loss being 7.85 percent. While significant, this is similar to percentage changes in payments due to annual wage index fluctuations, and we do not typically provide phase-ins for the standard wage index fluctuations that occur from year to year.

*Final Decision:* After consideration of the public comments received, we are finalizing our methodology for calculating the labor-related share for FY 2012 using the 2008-based RPL market basket and the most recent forecast data available at the time of this final rule which is IHS Global Insight Inc.'s second quarter 2011 forecast. This is also the same forecast we are using to derive the FY 2012 market basket update for this final rule. As the updated labor-related share reflects the current proportion of costs that are related to, are influenced by, or vary with the local labor market, we believe it is appropriate to incorporate the results in full into the FY 2012 payment update. Table 9 shows the relative importance of the FY 2012 labor-related share using the FY 2008-based RPL market basket and the FY 2011 relative importance labor-related share using the FY 2002-based RPL market basket.

*B. Area Wage Adjustment*

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget neutral manner.

In the FY 2009 IRF PPS final rule (73 FR 46378), we maintained the methodology described in the FY 2006 IRF PPS final rule to determine the wage index, labor market area definitions and hold harmless policy consistent with the rationale outlined in the FY 2006 IRF PPS final rule (70 FR 47880, 47917 through 47926).

For FY 2012, we are maintaining the policies and methodologies described in the FY 2009 IRF PPS final rule (73 FR 46378) relating to the labor market area definitions and the wage index methodology for areas with wage data. Thus, we are using the CBSA labor market area definitions and the FY 2011 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2011 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2006, and ending September 30, 2007 (that is, FY 2007 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We will continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation for the FY 2012 IRF PPS wage index.

Additionally, we will incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current IRF PPS wage index. The changes were nominal and did not represent substantive changes to the CBSA-based designations. Specifically, OMB added or deleted certain CBSA numbers and revised certain titles. The OMB bulletins are available at *http://www.whitehouse.gov/omb/bulletins/index.html*.

To calculate the wage-adjusted facility payment for the payment rates set forth in this final rule, we multiply the unadjusted Federal payment rate for IRFs by the FY 2012 labor-related share based on the FY 2008-based RPL market basket (70.199 percent) to determine the labor-related portion of the standard payment amount. We then multiply the labor-related portion by the applicable IRF wage index from the tables in the addendum to this final rule. Table A is for urban areas and Table B is for rural areas.

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget neutral manner. We calculate a budget neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We use the listed steps to ensure that the FY 2012 IRF standard payment conversion factor reflects the update to the wage indexes (based on the FY 2007 hospital cost report data) and the labor-related share in a budget neutral manner:

*Step 1.* Determine the total amount of the estimated FY 2011 IRF PPS rates, using the FY 2011 standard payment conversion factor and the labor-related share and the wage indexes from FY 2011 (as published in the FY 2011 IRF PPS final rule (75 FR 42836)).

*Step 2.* Calculate the total amount of estimated IRF PPS payments using the FY 2011 standard payment conversion factor and the proposed FY 2012 labor-related share and CBSA urban and rural wage indexes.

*Step 3.* Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY 2012 budget neutral wage adjustment factor of 0.9988 percent.

*Step 4.* Apply the FY 2012 budget neutral wage adjustment factor from step 3 to the FY 2011 IRF PPS standard payment conversion factor after the application of the adjusted market basket update to determine the FY 2012 standard payment conversion factor.

We received 2 comments on the proposed FY 2012 IRF PPS wage index, which are summarized below.

*Comment:* Several commenters recommended that CMS develop a new methodology for area wage adjustment that eventually eliminates hospital wage index reclassifications for all hospitals and that reduces the problems associated with unreasonable annual fluctuations in wage indices and across geographic boundaries. These commenters also recommended that CMS consider wage index policies under the current IPPS because IRFs compete in a similar labor pool as acute care hospitals. The IPPS wage index policies would allow IRFs to benefit from the IPPS reclassification and/or floor policies. The commenters further recommended that until a new wage index system is implemented, CMS institute a ''smoothing'' variable to the current process to reduce the fluctuations IRFs annually experience.

*Response:* We note that the IRF PPS does not account for geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act, and does not apply the ''rural floor'' under section 4410 of the BBA. As we do not have an IRF-specific wage index, we are unable to determine at this time the degree, if any, to which a geographic reclassification adjustment or a ''rural floor'' policy under the IRF PPS is appropriate. The rationale for our current wage index policies is fully described in the FY 2006 final rule (70 FR 47880, 47926 through 47928).

Although some commenters recommended that we adopt the IPPS wage index policies such as reclassification and floor policies, we note that Medicare Payment Advisory Commission (MedPAC's) June 2007 report to the Congress, titled ''Report to Congress: Promoting Greater Efficiency in Medicare,'' recommends that Congress ''repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish new wage index systems.'' We believe that adopting the IPPS wage index policies, such as reclassification or floor, would not be prudent at this time because MedPAC suggests that the reclassification and exception policies in the IPPS wage index alters the wage index values for one-third of IPPS hospitals.

As one commenter noted, we have research currently under way to examine alternatives to the wage index methodology, including the issues the commenters mentioned about ensuring that the wage index minimizes fluctuations, matches the costs of labor in the market, and provides for a single wage index policy. Section 3137(b) of the Affordable Care Act requires CMS to submit a report to Congress by December 31, 2011 that includes a plan to reform the hospital wage index system. That report is to take MedPAC's 2009 recommendations on the Medicare wage index classification system into account, and is to include a proposal to revise the IPPS wage index system. MedPAC's recommendations were presented in the FY 2009 IPPS final rule (*http://edocket.access.gpo.gov/2008/pdf/E8-17914.pdf*). The proposal is to consider each of the following:

- The use of Bureau of Labor Statistics data or other data or methodologies to calculate relative wages for each geographic areas.
- Minimizing variations in wage index adjustments between and within MSAs and statewide rural areas.
- Methods to minimize the volatility of wage index adjustments while maintaining the principle of budget neutrality.
- The effect that the implementation of the proposal would have on health care providers in each region of the country.
- Issues relating to occupational mix, such as staffing practices and any evidence on quality of care and patient safety, including any recommendations for alternative calculations to the occupational mix.
- The provision of a transition period.

CMS enlisted the help of Acumen, LLC to assist us in meeting the requirements of section 106(b)(2) of the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432, enacted on December 2006) (TRCA). In February 2008, we awarded a Task Order under the Expedited Research and Demonstration Contract to Acumen, LLC. Acumen, LLC conducted a study of both the current methodology used to construct the Medicare wage index and the recommendations reported to Congress by MedPAC. Parts 1 and 2 of Acumen's final report, which analyzes the strengths and weaknesses of the data sources used to construct the CMS and MedPAC indexes, is available online at *http://www.acumenllc.com/reports/cms.*

MedPAC's recommendations were presented in the FY 2009 IPPS final rule (*http://edocket.access.gpo.gov/2008/pdf/E8-17914.pdf*). We plan to monitor the efforts to develop an alternative wage index system for the IPPS closely, and determine the impact or influence they may have to the IRF PPS wage index.

*Final Decision:* Having considered the public comments received, we have decided to continue to use the policies and methodologies described in the FY 2009 IRF PPS final rule relating to the labor market area definitions and the wage index methodology for areas without wage data. Therefore, this final rule continues to use the Core-Based Statistical Area (CBSA) labor market area definitions and the pre-reclassification and pre-floor hospital wage index data based on 2007 cost report data. However, we will continue to monitor progress on the revisions to the IPPS wage index to identify any policy changes that may be appropriate for IRFs.

We discuss the calculation of the standard payment conversion factor for FY 2012 in section VI.C of this final rule.

*C. Description of the Final IRF Standard Payment Conversion Factor and Payment Rates for FY 2012*

To calculate the standard payment conversion factor for FY 2012, as illustrated in Table 10, we begin by applying the adjusted market basket increase factor for FY 2012 that was adjusted in accordance with sections 1886(j)(3)(C) and (D) of the Act (1.8 percent, or 2.9 percent less a cumulative total adjustment of 1.1 percentage points, as described in section VI.A.3. of this final rule), to the standard payment conversion factor for FY 2011 ($13,860). Applying the 1.8 percent adjusted market basket increase factor for FY 2012 to the standard payment conversion factor for FY 2011 of $13,860 yields a standard payment amount of $14,109. Then, we apply the budget neutrality factor for the FY 2012 wage index and labor-related share of 0.9988, which results in a standard payment amount of $14,093. Finally, we apply the budget neutrality factor for the revised CMG relative weights of 0.9988, which results in a final standard payment conversion factor of $14,076 for FY 2012.

TABLE 10—CALCULATIONS TO DETERMINE THE FY 2012 STANDARD PAYMENT CONVERSION FACTOR

| Explanation for adjustment | Calculations |
|---|---|
| Standard Payment Conversion Factor for FY 2011 | $13,860 |
| Payment Update Factor for FY 2012 (1.8 percent), which reflects a 2.9 percent market basket increase, reduced by a 1.0 percentage point productivity adjustment, and reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act | ×1.018 |
| Budget Neutrality Factor for the Wage Index and Labor-Related Share | ×0.9988 |
| Budget Neutrality Factor for the Revisions to the CMG Relative Weights | ×0.9988 |
| FY 2012 Standard Payment Conversion Factor | =$14,076 |

After the application of the CMG relative weights described in section IV of this final rule, to the FY 2012 standard payment conversion factor ($14,076), the resulting unadjusted IRF prospective payment rates for FY 2012 are shown in Table 11, ''FY 2012 Payment Rates.''

TABLE 11—FY 2012 PAYMENT RATES

| CMG | Payment rate tier 1 | Payment rate tier 2 | Payment rate tier 3 | Payment rate no comorbidity |
|---|---|---|---|---|
| 0101 | $10,804.74 | $10,109.38 | $9,080.43 | $8,589.18 |
| 0102 | 13,410.21 | 12,545.94 | 11,270.65 | 10,659.75 |
| 0103 | 16,014.27 | 14,982.49 | 13,459.47 | 12,728.93 |
| 0104 | 16,636.42 | 15,565.24 | 13,983.10 | 13,224.40 |
| 0105 | 19,330.57 | 18,086.25 | 16,246.52 | 15,365.36 |
| 0106 | 22,261.19 | 20,826.85 | 18,708.41 | 17,694.94 |
| 0107 | 25,204.49 | 23,581.52 | 21,182.97 | 20,034.37 |
| 0108 | 31,217.75 | 29,206.29 | 26,236.26 | 24,814.58 |
| 0109 | 28,867.06 | 27,009.03 | 24,261.39 | 22,946.70 |
| 0110 | 37,208.50 | 34,811.36 | 31,271.24 | 29,576.49 |
| 0201 | 10,514.77 | 8,631.40 | 7,995.17 | 7,260.40 |
| 0202 | 14,938.86 | 12,263.01 | 11,359.33 | 10,313.49 |
| 0203 | 17,003.81 | 13,959.17 | 12,928.81 | 11,740.79 |
| 0204 | 17,813.18 | 14,622.15 | 13,543.93 | 12,298.20 |
| 0205 | 22,496.26 | 18,467.71 | 17,105.16 | 15,532.87 |
| 0206 | 28,004.20 | 22,988.92 | 21,294.17 | 19,334.79 |
| 0207 | 37,868.66 | 31,086.85 | 28,793.87 | 26,144.76 |
| 0301 | 14,886.78 | 13,391.91 | 11,881.55 | 10,880.75 |
| 0302 | 18,851.99 | 16,958.76 | 15,045.84 | 13,779.00 |
| 0303 | 22,414.62 | 20,163.87 | 17,889.19 | 16,384.46 |
| 0304 | 31,034.76 | 27,918.34 | 24,768.13 | 22,684.88 |
| 0401 | 14,903.67 | 12,407.99 | 11,287.54 | 9,903.87 |
| 0402 | 19,427.70 | 16,174.73 | 14,713.64 | 12,909.10 |
| 0403 | 34,710.01 | 28,896.62 | 26,286.93 | 23,064.93 |
| 0404 | 61,648.66 | 51,322.50 | 46,688.68 | 40,963.98 |
| 0405 | 54,454.41 | 45,333.17 | 41,239.86 | 36,183.77 |
| 0501 | 9,232.45 | 8,863.66 | 7,905.08 | 7,005.63 |

TABLE 11—FY 2012 PAYMENT RATES—Continued

| CMG | Payment rate tier 1 | Payment rate tier 2 | Payment rate tier 3 | Payment rate no comorbidity |
|---|---|---|---|---|
| 0502 | 13,815.59 | 13,263.81 | 11,829.47 | 10,483.80 |
| 0503 | 17,538.70 | 16,837.71 | 15,016.28 | 13,308.86 |
| 0504 | 21,146.37 | 20,301.81 | 18,105.96 | 16,046.64 |
| 0505 | 24,714.64 | 23,726.51 | 21,160.45 | 18,754.86 |
| 0506 | 34,636.81 | 33,253.14 | 29,656.72 | 26,284.11 |
| 0601 | 13,311.67 | 11,249.54 | 10,260.00 | 9,274.68 |
| 0602 | 17,617.52 | 14,888.19 | 13,580.52 | 12,275.68 |
| 0603 | 22,752.45 | 19,227.82 | 17,538.70 | 15,853.80 |
| 0604 | 30,167.68 | 25,494.45 | 23,254.96 | 21,021.10 |
| 0701 | 11,262.21 | 11,087.67 | 10,678.05 | 9,532.27 |
| 0702 | 14,737.57 | 14,508.13 | 13,973.25 | 12,472.74 |
| 0703 | 17,734.35 | 17,457.06 | 16,813.78 | 15,007.83 |
| 0704 | 22,919.95 | 22,562.42 | 21,731.94 | 19,396.73 |
| 0801 | 8,086.66 | 8,086.66 | 7,536.29 | 6,880.35 |
| 0802 | 10,873.71 | 10,873.71 | 10,133.31 | 9,252.15 |
| 0803 | 14,992.35 | 14,992.35 | 13,971.84 | 12,755.67 |
| 0804 | 13,241.29 | 13,241.29 | 12,340.43 | 11,266.43 |
| 0805 | 16,305.64 | 16,305.64 | 15,195.04 | 13,873.31 |
| 0806 | 19,909.09 | 19,909.09 | 18,553.58 | 16,939.06 |
| 0901 | 1,918.15 | 10,500.70 | 9,502.71 | 8,608.88 |
| 0902 | 15,939.66 | 14,045.03 | 12,709.22 | 11,514.17 |
| 0903 | 20,414.42 | 17,987.72 | 16,277.49 | 14,747.43 |
| 0904 | 26,450.21 | 23,305.63 | 21,090.07 | 19,108.17 |
| 1001 | 14,547.55 | 12,790.86 | 11,428.30 | 10,213.55 |
| 1002 | 19,102.54 | 16,794.08 | 15,005.02 | 13,411.61 |
| 1003 | 28,222.38 | 24,813.17 | 22,169.70 | 19,814.79 |
| 1101 | 14,581.33 | 14,581.33 | 13,831.08 | 12,980.89 |
| 1102 | 21,938.85 | 21,938.85 | 20,808.55 | 19,530.45 |
| 1201 | 11,404.38 | 11,404.38 | 11,407.19 | 10,782.22 |
| 1202 | 14,869.89 | 14,869.89 | 14,872.70 | 14,057.70 |
| 1203 | 18,342.44 | 18,342.44 | 18,345.25 | 17,340.22 |
| 1301 | 12,579.72 | 13,673.43 | 13,673.43 | 11,094.70 |
| 1302 | 16,566.04 | 18,006.02 | 18,006.02 | 14,609.48 |
| 1303 | 1,411.00 | 23,271.85 | 23,271.85 | 18,882.95 |
| 1401 | 13,246.92 | 10,606.27 | 9,378.84 | 8,482.20 |
| 1402 | 17,789.25 | 14,242.10 | 12,593.80 | 11,390.30 |
| 1403 | 21,484.20 | 17,200.87 | 15,210.53 | 13,756.47 |
| 1404 | 27,828.25 | 22,279.49 | 19,702.18 | 17,818.81 |
| 1501 | 13,527.04 | 12,630.39 | 10,886.38 | 10,290.96 |
| 1502 | 17,023.51 | 15,896.03 | 13,701.58 | 12,951.33 |
| 1503 | 20,992.95 | 19,602.24 | 16,895.42 | 15,970.63 |
| 1504 | 26,519.18 | 24,762.50 | 21,343.44 | 20,175.13 |
| 1601 | 15,732.75 | 12,384.06 | 10,868.08 | 10,158.65 |
| 1602 | 21,074.59 | 16,588.57 | 14,557.40 | 13,607.27 |
| 1603 | 27,234.24 | 21,437.75 | 18,812.57 | 17,585.15 |
| 1701 | 14,689.71 | 13,075.20 | 11,866.07 | 10,372.60 |
| 1702 | 19,384.06 | 17,251.55 | 15,656.73 | 13,686.09 |
| 1703 | 22,859.42 | 20,345.45 | 18,463.49 | 16,140.95 |
| 1704 | 29,266.82 | 26,047.64 | 23,639.23 | 20,664.98 |
| 1801 | 16,913.72 | 13,876.12 | 13,396.13 | 12,253.16 |
| 1802 | 23,246.51 | 19,070.16 | 18,411.41 | 16,840.53 |
| 1803 | 39,854.79 | 32,695.73 | 31,565.43 | 28,872.69 |
| 1901 | 16,184.58 | 14,257.58 | 12,934.44 | 12,560.01 |
| 1902 | 30,830.66 | 27,161.05 | 24,638.63 | 23,927.79 |
| 1903 | 51,689.89 | 45,537.27 | 41,310.24 | 40,118.01 |
| 2001 | 12,022.31 | 10,623.16 | 9,523.82 | 8,556.80 |
| 2002 | 16,090.28 | 14,216.76 | 12,747.23 | 11,452.23 |
| 2003 | 20,318.71 | 17,953.94 | 16,097.31 | 14,461.68 |
| 2004 | 27,245.51 | 24,075.59 | 21,585.55 | 19,392.51 |
| 2101 | 35,405.36 | 30,644.86 | 24,404.97 | 19,781.00 |
| 5001 | | | | 2,076.21 |
| 5101 | | | | 8,242.91 |
| 5102 | | | | 20,717.06 |
| 5103 | | | | 9,810.97 |
| 5104 | | | | 26,431.91 |

*D. Example of the Methodology for Adjusting the Federal Prospective Payment Rates*

Table 12 illustrates the methodology for adjusting the Federal prospective payments (as described in sections VI.A. through VI.C. of this final rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) appears in Table 11.

*Example:* One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a DSH percentage of 5 percent (which would result in a LIP adjustment of 1.0228), a wage index of 0.8391, and a rural adjustment of 18.4 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0666 percent), a wage index of 0.8896, and a teaching status adjustment of 0.0610.

To calculate each IRF's labor and non-labor portion of the Federal prospective payment, we begin by taking the unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) from Table 11. Then, we multiply the labor-related share for FY 2012 (70.199 percent) described in section VI.A.4 of this final rule by the unadjusted Federal prospective payment rate. To determine the non-labor portion of the Federal prospective payment rate, we subtract the labor portion of the Federal payment from the unadjusted Federal prospective payment.

To compute the wage-adjusted Federal prospective payment, we multiply the labor portion of the Federal payment by the appropriate wage index found in the addendum in Tables A and B. The resulting figure is the wage-adjusted labor amount. Next, we compute the wage-adjusted Federal payment by adding the wage-adjusted labor amount to the non-labor portion.

Adjusting the wage-adjusted Federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted Federal prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0610, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted Federal prospective payment rates. Table 12 illustrates the components of the adjusted payment calculation.

TABLE 12—EXAMPLE OF COMPUTING THE IRF FY 2012 FEDERAL PROSPECTIVE PAYMENT

| Steps | | Rural facility A (Spencer Co., IN) | Urban facility B (Harrison Co., IN) |
|---|---|---|---|
| 1 | Unadjusted Federal Prospective Payment | $29,576.49 | $29,576.49 |
| 2 | Labor Share | × 0.70199 | × 0.70199 |
| 3 | Labor Portion of Federal Payment | = $20,762.40 | = $20,762.40 |
| 4 | CBSA Based Wage Index (shown in the Addendum, Tables 1 and 2) | × 0.8391 | × 0.8896 |
| 5 | Wage-Adjusted Amount | = $17,421.73 | = $18,470.23 |
| 6 | Nonlabor Amount | + $8,814.09 | + $8,814.09 |
| 7 | Wage-Adjusted Federal Payment | = $26,235.82 | = $27,284.32 |
| 8 | Rural Adjustment | × 1.184 | × 1.000 |
| 9 | Wage- and Rural-Adjusted Federal Payment | = $31,063.21 | = $27,284.32 |
| 10 | LIP Adjustment | × 1.0228 | × 1.0666 |
| 11 | FY 2012 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate | = $31,771.45 | = $29,101.46 |
| 12 | FY 2012 Wage- and Rural-Adjusted Federal Prospective Payment | $31,063.21 | $27,284.32 |
| 13 | Teaching Status Adjustment | × 0.0000 | × 0.0610 |
| 14 | Teaching Status Adjustment Amount | = $0.00 | = $1,664.34 |
| 15 | FY2012 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate | + $31,771.45 | + $29,101.46 |
| 16 | Total FY 2012 Adjusted Federal Prospective Payment | = $31,771.45 | = $30,765.80 |

Thus, the adjusted payment for Facility A would be $31,771.45 and the adjusted payment for Facility B would be $30,765.80.

## VII. Update to Payments for High-Cost Outliers Under the IRF PPS

### *A. Update to the Outlier Threshold Amount for FY 2012*

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2010 IRF PPS final rules and the FY 2011 notice (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, and 75 FR 42836, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

To update the IRF outlier threshold amount for FY 2012, we use FY 2010 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2011. Based on an analysis of the most recent FY 2010 IRF claims data, the IRF outlier payments as a percentage of total estimated payments were approximately 2.6 percent in FY 2011.

We received 3 comments on the update to the outlier threshold amount for FY 2012, which are summarized below:

*Comment:* One commenter expressed support for continuing to establish outlier payments at 3 percent of total payments. However, several commenters requested more information on why the proposed outlier threshold increased from $11,410 in FY 2011 to $11,822 in the FY 2012 proposed rule when only 2.7 percent of the 3 percent outlier payments were projected to be paid out in FY 2011.

*Response:* We proposed to move to an un-weighted regression methodology in the FY 2012 proposed rule, which caused a reduction to the LIP and Teaching adjustment factors. Our facility-level adjustment factors are budget neutral, meaning that any reduction in the adjustment factors results in an increase to the standard payment conversion factor. Therefore, the standard payment conversion factor was estimated to increase from $13,860 in FY 2011 to $14,528 in the FY 2012 proposed rule (this has changed to $14,076 in this final rule, as discussed below). The large increase in the proposed standard payment conversion factor resulted in an increase to the outlier threshold, rather than the decrease anticipated by the commenters.

However, as we are not adopting the proposed revisions to the facility-level adjustments in this final rule, the increase in the standard payment conversion factor from FY 2011 to FY 2012 is smaller. The final standard payment conversion factor for FY 2012 is $14,076. Consequently, the FY 2012 outlier threshold that we are finalizing in this final rule is lower than the FY 2011 outlier threshold amount.

*Comment:* One commenter stated that the calculation of the CCRs in other settings has been identified as a potential reason for those settings' difficulties in establishing an appropriate outlier threshold, which may also be the case for the IRF PPS. The commenter suggested that CMS assess whether this is a problem for the IRF PPS and release more information on the role that the CCRs play in establishing the outlier threshold.

*Response:* We appreciate the commenter's concerns. However, we do not believe that the calculation of the CCRs creates a problem in setting the outlier threshold for the IRF PPS. In order to set the outlier threshold, we first estimate the cost of a case in the current fiscal year by multiplying an overall facility-specific cost-to-charge ratio by charges and by the market basket for the current fiscal year (without any adjustments). The outlier threshold for the upcoming fiscal year is then calculated by simulating aggregate payments with and without a change in the outlier threshold, and applying an iterative process that accounts for changes in the market basket, wage index and labor-share, CMG relative weights, and facility-level adjustment factors, to determine a threshold for the upcoming fiscal year that would result in outlier payments being equal to 3 percent of total payments under the simulation.

We note, too, that we implemented a new outlier reconciliation process for IRFs (and other settings) beginning April 1, 2011 that we believe will improve the accuracy and reliability of the IRF CCRs. For more information on the new outlier reconciliation process, please view the ''Outlier Reconciliation'' link on the IRF PPS Web site at (*http://www.cms.gov/InpatientRehabFacPPS/03_OutlierR.asp#TopOfPage*).

*Comment:* One commenter suggested that CMS evaluate the distribution of outlier payments. If CMS determines that low-volume facilities, rather than facilities treating patients of a higher acuity level, are mostly receiving the outlier payments then CMS should reduce the outlier pool and add the amount back to the standard payment conversion factor.

*Response:* We will continue to monitor our IRF outlier policies to ensure that they appropriately compensate IRFs for treating unusually high-cost patients and, thereby, promote access to care of patients who are likely to require unusually high-cost care. At this time, however, we do not find any indications to suggest that low-volume facilities are disproportionately receiving outlier payments. We believe that the outlier policy of 3 percent of total estimated payments optimizes the extent to which we can encourage facilities to continue to take patients that are likely to have unusually high costs, while still providing adequate payment for all other cases. In addition, as we have explained before, we do not make adjustments to PPS payment rates to account for differences between projected and actual outlier payments in a previous year. We believe that our outlier policies are consistent with the statute and the goals of the prospective payment system, and that they are equitable. We will carefully consider the commenter's suggestions, and will consider proposing additional refinements to the IRF outlier policies in the future if we find that such refinements are necessary.

*Final Decision:* After carefully considering all of the comments we received on the proposed update to the outlier threshold amount for FY 2012, we are reducing the outlier threshold amount to $10,660 to maintain estimated outlier payments at 3 percent of total estimated aggregate IRF payments for FY 2012.

*B. Update to the IRF Cost-to-Charge Ratio Ceilings*

In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we apply a ceiling to IRFs' CCRs. Using the methodology described in that final rule, we update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2012, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2012, as discussed below.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2012, the national average CCR for rural IRFs is 0.669, which we calculated by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, the national average CCR for urban IRFs is 0.520, which we calculated by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher costs factor more heavily into the averages than the CCRs of IRFs with lower costs. For this final rule, we used the most recent available cost report data (FY 2009). This includes all IRFs whose cost reporting periods begin on or after October 1, 2008, and before October 1, 2009. If, for any IRF, the FY 2009 cost report was missing or had an ''as submitted'' status, we used data from a previous fiscal year's (that is, FY 2004 through FY 2008) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care.

In accordance with past practice, we set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, the national CCR ceiling is set at 1.55 for FY 2012. This means that, if an individual IRF's CCR exceeds this ceiling of 1.55 for FY 2012, we would replace the IRF's CCR with the appropriate national average CCR (either rural or urban, depending on the geographic location of the IRF). We calculate the national CCR ceiling by:

*Step 1.* Taking the national average CCR (weighted by each IRF's total costs, as discussed above) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

*Step 2.* Calculating the standard deviation of the national average CCR computed in step 1.

*Step 3.* Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

*Step 4.* Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We did not receive any comments on the proposed updates to the IRF CCR Ceilings.

*Final Decision:* We did not receive any comments on the IRF cost-to-charge ratio ceiling. Therefore, we are finalizing the national average urban CCR at 0.520, the national average rural CCR at 0.669, and the national CCR ceiling at 1.55 percent for FY 2012.

## VIII. Impact of the IPPS Data Matching Process Changes on the IRF PPS Calculation of the Low-Income Percentage Adjustment Factor

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate ''by such * * * factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities.'' For example, we adjust the Federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2002 IRF PPS final rule (66 FR 41359 through 41361) that implemented the IRF PPS, we established the IRF LIP adjustment. In that final rule, we said that we would calculate the LIP adjustment by using the same DSH patient percentage used in the acute IPPS DSH adjustment.

The DSH patient percentage is equal to the sum of the ''Supplemental Security Income (SSI) fraction'' and the ''Medicaid Fraction.'' We compute the SSI fraction (also known as the ''SSI ratio'' or the ''Medicare fraction'') by dividing the number of the facility's inpatient days that are furnished to patients who were entitled to both Medicare Part A (including patients who are enrolled in a Medicare Advantage (Part C) plan) and SSI benefits by the facility's total number of patient days furnished to patients entitled to benefits under Medicare Part A (including patients who are enrolled in a Medicare Advantage (Part C) plan). To determine the number of inpatient days for individuals entitled to both Medicare Part A and SSI, as required for calculation of the numerator of the SSI fraction, we match the Medicare records and SSI eligibility records for each IRF's patients during the FY. The data underlying the match process are drawn from: (a) The Medicare Provider Analysis and Review (MedPAR) data file; and (b) SSI eligibility data provided by the Social Security Administration (SSA). We recently revised this data match. See the FY 2011 IPPS final rule (75 FR 50041, 50276).

As previously stated, it is our policy to calculate the LIP adjustment using the same DSH patient percentage used in the acute IPPS DSH adjustment. In keeping with this long-standing policy, we will use the same matching process as IPPS for calculating the SSI fractions for FYs 2011 and beyond. This process is described in the FY 2011 IPPS final rule, and will be used to calculate IRFs' SSI fractions for FY 2011. The FY 2011 IPPS final rule (75 FR 50277 through 50286) gives information on this revised data matching process.

We received 2 comments on our stated policy to use the same data matching process as IPPS for calculating the SSI fractions for FYs 2011 and beyond, which are summarized below.

*Comment:* The commenters supported our use of the same data matching process for IRFs that we use for IPPS. However, one commenter asked whether CMS plans to use the new data matching process for calculating the IRF SSI ratios for any cost reporting periods prior to FY 2011. Specifically, the commenter requested information on whether or not CMS plans to apply the new data matching process to any existing appeals of the IRF SSI ratios, regardless of the cost reporting period.

*Response:* As we discussed in the FY 2012 IRF PPS proposed rule (76 FR 24214 at 24249 through 24250), in keeping with our long-standing policy of using the same DSH patient percentage used in the acute IPPS DSH adjustment, we will use the same matching process as IPPS for calculating the IRF SSI ratios for FYs 2011 and beyond. The comment about the data matching process for existing appeals of the SSI ratio for cost reporting periods prior to FY 2011 is outside the scope of the FY 2012 IRF PPS proposed rule. We will continue our ongoing analysis to determine the most appropriate methodologies to use in addressing open appeals, in both the IPPS and the IRF settings.

## IX. Updates to the Policies in 42 CFR Part 412

Prior to the implementation of the IRF PPS on January 1, 2002, IRFs were paid based on the costs that they reported on their Medicare cost reports, subject to some limits. To simplify the cost reporting process, both for providers and for CMS and the Medicare contractors that monitored the cost reports, regulations were put into place that carefully defined, for example, when and how providers could be considered ''new'' and when and how they could expand their bed size and square footage. Under the IRF PPS, however, Medicare pays IRFs according to Federal prospective payment rates that are no longer tied to an individual IRF's Medicare cost reports. This new payment methodology has made some of the requirements regarding new IRFs and IRF expansions obsolete.

Prior to 2002, the regulations distinguished between freestanding rehabilitation hospitals and rehabilitation units of acute care hospitals, with separate regulatory sections for the two types of facilities even though many of the same requirements applied to both. Under the IRF PPS, the distinctions between freestanding IRFs and IRF units are no longer relevant because both types of facilities are paid the same and are subject to the same rules and requirements. The separation of the regulatory sections resulted in unnecessary repetition and confusion about which regulations applied to which types of facilities.

In addition, we added new IRF coverage requirements to § 412.622(a)(3), (4), and (5) in the FY 2010 IRF PPS final rule (74 FR 39762 at 39811 through 39812) for IRF discharges occurring on or after January 1, 2010. Several of the IRF conditions of payment in the existing § 412.23(b)5 and § 412.29, including the requirements for preadmission screenings to be conducted on all prospective patients, the requirements for IRF patients to receive close medical supervision, the requirements for plans of care to be developed for all IRF patients, and the requirements for patients to receive an interdisciplinary approach to care in the IRF, mirror some of the IRF coverage requirements in § 412.622(a)(3), (4), and (5).

Finally, in recent years, we have observed an increase in the number and complexity of acquisitions and mergers occurring in this industry. In some cases, the Medicare rules and requirements for IRFs did not adequately address the number and complexity of acquisitions and mergers because they simply did not occur when the regulations were written. In other cases, regulations were written to address issues that do not exist today.

For all of these reasons, in this final rule we consolidate, clarify, and revise the regulations for inpatient rehabilitation facilities at § 412.23(b), § 412.25(b), § 412.29, and § 412.30 to update and simplify the policies, to eliminate unnecessary repetition and confusion, and to enhance the consistency with the IRF coverage requirements in § 412.622(a)(3), (4), and (5). The modifications will eliminate regulations that are no longer necessary under the IRF PPS, and they will enable IRFs to more easily adjust to beneficiary changes in demand for IRF services, which will improve beneficiary access to these services. Many of the modifications will also reduce costs for providers and for the government by reducing the amount of time and expenditures devoted to adhering to (for providers) and enforcing (for the government) regulations that are no longer necessary. As we have no way of determining how many IRFs might take advantage of the added flexibility these regulations afford to expand or change their operations, we are not able to quantify the potential savings that may result from these changes. For example, each time an IRF unit submitted a request to add beds to its facility under the prior regulations; the Medicare contractor had to determine whether or not the added IRF beds would be considered ''new.'' To be considered ''new,'' the beds must have been added at the start of a cost reporting period, and the hospital must have ''obtained approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit.'' We believe that the first requirement (that beds can only be added at the start of a cost reporting period) was difficult, and potentially costly, for IRFs that were expanding through new construction because the exact timing of the end of a construction project is often difficult to predict. Construction delays can hamper an IRF's ability to have the construction completed exactly at the start of a cost reporting period, which can lead to significant revenue loss for the facility if the IRF is unable to add beds until the next cost reporting period. We believe that it is no longer necessary to require IRF beds to be added at the start of a cost reporting period. Further, the regulations required Medicare contractors to expend unnecessary resources determining whether the IRF met the second criteria, which required the hospital to have ''obtained approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit.'' The modifications to the regulations in this final rule are designed to simplify the regulations in order to minimize the amount of effort that Medicare contractors would need to spend enforcing them. Finally, the modifications will enhance the consistency between the IRF coverage and payment requirements.

We note that § 412.25(b) applies to both IRFs and inpatient psychiatric facilities (IPFs), so the revisions to § 412.25(b) will also affect IPFs in similar ways.

*A. Consolidation of the Requirements for Rehabilitation Hospitals and Rehabilitation Units*

Under the IRF PPS, rehabilitation hospitals and rehabilitation units of acute care hospitals (and critical access hospitals (CAHs)) are paid the same and, with very few exceptions, are subject to the same Medicare rules and requirements. For this reason, we believe that it is no longer necessary to have separate sections in 42 CFR part 412 that define the requirements for rehabilitation hospitals and rehabilitation units of acute care hospitals (and CAHs). This leads to excessive repetition and potential confusion about which rules apply to which types of facilities.

Thus, we are revising and consolidating the regulations for rehabilitation facilities that are currently in § 412.23(b) (for rehabilitation hospitals), § 412.29 (for rehabilitation units), and § 412.30 (for rehabilitation units) into a revised § 412.29 that contains the requirements for all IRFs, whether they be freestanding rehabilitation hospitals or rehabilitation units of acute care hospitals (or CAHs). We believe that this will simplify the regulations by consolidating the majority of the requirements for IRFs into just one sub-section of 42 CFR part 412.

Although we are making slight modifications to the regulations in § 412.25(b), as discussed in section IX of this final rule, we are not moving the IRF regulations in § 412.25 to § 412.29 in this final rule. The regulations in § 412.25, such as the requirement to have beds that are physically separate from the rest of the hospital, the requirement that the unit be serviced by the same Medicare contractor as the rest of the hospital, and the requirement that the unit be treated as a separate cost center for cost finding and apportionment purposes, by their nature apply uniquely to units that are part of another hospital. While these requirements are not applicable to freestanding IRFs, we do not believe that it would be appropriate to include them with the rest of the IRF regulations in § 412.29 that are intended to apply to both freestanding IRF hospitals and to IRF units of hospitals. Further, we are not making modifications to § 412.25, other than the changes to § 412.25(b) as discussed in section IX of this final rule, because the regulations in § 412.25(a) through (g) (excluding (b)) remain relevant and important for defining IRF units of hospitals for payment purposes.

However, we are replacing the text that was located at § 412.23(b) with text that simply refers the reader to the requirements in § 412.29, and moving the rest of § 412.23(b) and all of § 412.30 to § 412.29. We are leaving text in § 412.23(b) that refers IRFs to the requirements they must meet in § 412.29 only so that we do not disturb the ordering of the rest of § 412.23 that contain the Medicare regulations for inpatient psychiatric facilities, children's hospitals, and long-term care hospitals. Specifically, we are moving all of the text in § 412.23(b) to § 412.29 except for a new paragraph that refers to the requirements in § 412.29, which would read as follows: ''(b) Rehabilitation hospitals. A rehabilitation hospital must meet the requirements specified in § 412.29 to be excluded from the prospective payment systems specified in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(3) and in subpart P of this part.''

*B. Revisions to the Regulations at Proposed § 412.29*

As described in section IX.A. of this final rule, we are replacing the text that was located at § 412.23(b) with text that simply refers the reader to the requirements in § 412.29, and moving the rest of § 412.23(b) and all of § 412.30 to § 412.29. To eliminate any unnecessary repetition, and to update and clarify the regulations, we are also making revisions to the language from all three of the prior sections, § 412.23(b), § 412.29, and § 412.30. As stated in the prior § 412.30, a rehabilitation unit can only be considered ''new'' if the hospital has never had a rehabilitation unit before. We have encountered circumstances in which a hospital closed a rehabilitation unit over 20 years ago and is now seeking to re-open the rehabilitation unit, and we believe that it would be reasonable to consider the rehabilitation unit to be ''new.'' Thus, we are revising the requirements for an IRF to be considered ''new'' to indicate that an IRF can be considered ''new'' if it has not been paid under the IRF PPS in 42 CFR part 412, subpart P for at least 5 calendar years. These requirements will now apply equally to both rehabilitation hospitals and rehabilitation units of acute care hospitals (or CAHs), and will be located in § 412.29(c)(1). We believe that 5 calendar years will allow a sufficient amount of time between an IRF closing and an IRF reopening to prevent IRFs from closing and reopening annually to avoid meeting certain requirements, while allowing IRFs more flexibility to meet changing demand for IRF services.

In addition, we clarify and simplify the rules regarding change of ownership (including mergers) or leasing, as defined in § 489.18. Changes of ownership or leasing, as defined in § 489.18, and mergers in which the new owner(s) accept assignment of the previous owner's provider agreements are transfers of the provider agreement. Therefore, IRFs in these situations will retain their excluded status and will continue to be paid under the IRF PPS before and after the change, as long as the IRF continues to meet all of the requirements specified in § 412.29. However, we clarify that a change of ownership (including merger) or leasing in which the new owner(s) do not accept assignment of the previous owner's provider agreement would be considered a voluntary termination of the provider agreement, and the new owner(s) will need to reapply to the Medicare program as an initial applicant to operate a new IRF. In the case of changes of ownership (including mergers) or leasing, the new owner(s) will not be required to wait for 5 calendar years to reapply to operate a new IRF, but will be required to complete the initial hospital or critical access hospital certification process to participate in Medicare as a new IRF.

Further, we revise the regulations regarding new IRF beds. The regulations formerly in § 412.30(d), which required an IRF to obtain ''approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit,'' have become less and less relevant under a prospective payment system in which payments are no longer based on IRFs' reported costs. Thus, we eliminate these requirements and, instead, state in § 412.29(c)(2) that IRF beds would be considered ''new'' if they meet all applicable State Certificate of Need and State licensure laws and if they get written approval from the appropriate CMS regional office (RO), as described below. New IRF beds can be added one time at any point during a cost reporting period (instead of at the start of a cost reporting period), but we require that a full 12-month cost reporting period elapse before an IRF that has had beds delicensed or decertified can add new beds. The reason for this requirement is to prevent IRFs from decreasing and increasing bed size every year to avoid having to meet certain requirements. We require the IRF to obtain written approval from the appropriate CMS RO for the addition of the new beds in order to allow the CMS RO to verify that a full 12-month cost reporting period has elapsed before an IRF that has had beds delicensed or decertified can add new beds.

*C. Revisions to the Requirements for Changes in Bed Size and Square Footage*

Prior to the IRF PPS and the IPF PPS, excluded units (IRFs and IPFs) were paid based on their costs, as reported on their Medicare cost reports, subject to certain facility-specific cost limits. These cost-based payments were determined separately for operating and capital costs. Thus, under cost-based payments, the facilities' capital costs were determined, in part, by their bed size and square footage. Changes in the bed size and square footage would complicate the facilities' capital cost allocation. Thus, the Medicare regulations at § 412.25 limited the situations under which an IRF or IPF could change its bed size and square footage.

Under the IRF PPS and IPF PPS, however, a facility's bed size and square footage is not relevant for determining the individual facility's Medicare payment. Thus, we believe it is appropriate to modify some of the restrictions on a facility's ability to change its bed size and square footage. We are therefore relaxing the restrictions on a facility's ability to increase its bed size and square footage. Under the revised requirements we are adopting in this final rule in § 412.25(b), an IRF or IPF can change (either increase or decrease) its bed size or square footage one time at any point in a given cost reporting period as long as it notifies the CMS RO at least 30 days before the date of the proposed change, and maintains the information needed to accurately determine costs that are attributable to the excluded units. As we have in prior years, we also include an exception to these requirements for special circumstances. We note that any IRF beds that are added to an existing IRF during the IRF's cost reporting period will only be considered new through the end of that cost reporting period. Further, the new IRF beds will be included in the IRF's compliance review calculations under the 60 percent rule specified in § 412.29(b) beginning on the date that they are first added to the IRF.

*D. Revisions To Enhance Consistency Between the IRF Coverage and Payment Requirements*

In the FY 2010 IRF PPS final rule (74 FR 39762 at 39788 through 39798), we implemented new IRF coverage requirements in § 412.622(a)(3),(4), and (5). These new IRF coverage requirements replaced coverage requirements that were 25 years old and no longer reflected current medical practice. In updating these coverage requirements, we added further specificity to some of the terms that had been discussed in the old coverage requirements. For example, we more clearly defined in the new IRF coverage requirements what we mean by an IRF preadmission screening, care planning, and close medical supervision. In the revisions to § 412.23(b) and § 412.29, we enhance the consistency between the IRF coverage and payment requirements by incorporating some of the added specificity from the coverage requirements into the same requirements for payment. Specifically, we clarify that, as in the IRF coverage requirements, IRF preadmission screenings must be reviewed and approved by a rehabilitation physician prior to each prospective patient's admission to an IRF. As we said in the FY 2010 IRF PPS final rule (74 FR 39791), we believe that it is important to require that a rehabilitation physician document the reasoning behind the decision to admit a patient to an IRF, to enable medical reviewers to understand the rationale for the decision.

Further, we clarify, as we did in the coverage requirements at § 412.622(a)(3)(iv), that close medical supervision in an IRF means that the patient receives at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. As we stated in the FY 2010 IRF PPS final rule (74 FR 39796), we believe that at least 3 face-to-face rehabilitation physician visits per week are necessary to coordinate the patient's medical needs with his or her functional rehabilitation needs while in the facility.

We received 12 comments on the proposed updates to the policies in 42 CFR part 412, which are summarized below.

*Comment:* Several commenters requested that CMS not make the proposed changes to the regulation text in 42 CFR 412.29(d) and (e). Although one commenter agreed with the proposed changes to the regulation text to align portions of the IRF coverage requirements with the corresponding portions of the IRF classification requirements, the rest of the commenters on these provisions expressed concerns. The concerns expressed were primarily that the proposed changes could blur the distinctions between the IRF coverage and the IRF classification requirements, and could potentially lead to inappropriate revocations of an IRF's classification for payment under the IRF PPS based on only a single claim denial (or a small number of claims denials). The commenters suggested that CMS restate its previous position that the failure of an IRF to meet the IRF coverage requirements for one individual case should not be used to declassify an IRF for payment under the IRF PPS. Some of these commenters also asked for further explanation of how these proposed changes would reduce costs for IRFs and for the government.

*Response:* We agree with the commenters that, as we have stated previously, failure to meet the IRF coverage requirements in one individual case should not be used to decertify an entire facility for payment under the IRF PPS. However, the intent of the proposed revisions is to make the 2 sets of requirements consistent with each other to eliminate any potential for confusion or ambiguity. We believe that we would be remiss in not making it clear that, in the IRF context, we require the preadmission screening documentation to be reviewed and approved by a rehabilitation physician prior to the IRF admission. Under the IRF coverage requirements, this is required for all IRF admissions, so it also must be built into the preadmission screening procedures that all IRFs must have in place. Similarly, we believe that we would be remiss in not clarifying that, in the IRF context, we define close medical supervision to mean at least 3 face-to-face visits per week by a rehabilitation physician to assess the patient both medically and functionally. We established this definition for the IRF coverage requirements in the FY 2010 IRF PPS final rule (74 FR 39762 at 39795 through 39796), and we simply proposed to clarify in § 412.29(e) that the term means the same thing in the IRF classification requirements that it means in the IRF coverage requirements.

Reinforcing the identical concepts (and, in most cases, the identical wording) from the IRF coverage criteria to the IRF classification criteria can only serve to clarify exactly what we mean, so that there is no confusion or ambiguity. In our opinion, this aligns with our stated goals in the FY 2012 IRF PPS proposed rule (76 FR 24214 at 24250) of updating and simplifying the policies, eliminating unnecessary repetition and confusion, and enhancing the consistency between the IRF classification and the IRF coverage requirements. This particular change does not reduce costs for IRFs or for the government, but does promote clarity and consistency among Medicare's regulations.

As we do not intend for an IRF to be declassified for the purposes of receiving payment under the IRF PPS based on a small number of IRF claims denials, we agree with some of the commenters who suggested revisions to the language to focus the requirements on whether the IRFs have the correct processes in place to meet the requirements, rather than on whether the IRFs meet the requirements in each individual case. We agree that failure to meet the IRF coverage requirements in one individual case is not a reason to declassify an entire IRF from receiving payment under the IRF PPS. Thus, we are adopting slight revisions to the regulation text, suggested by commenters, that we believe will clarify that an IRF cannot be declassified as an IRF for failing to meet the coverage criteria in just one or two cases. The revised regulation text is included in the ''Regulation Text'' section of this final rule.

Even though we believe that an IRF should not lose its IRF classification because one individual case (or even a small number of cases) fails to meet the IRF coverage requirements, we note that we do believe that it is reasonable to conclude that an IRF's preadmission screening procedure is not adequate if a large percentage of the IRF's claims are denied because the preadmission screening information was not reviewed and approved by a rehabilitation physician prior to the IRF admission. Similarly, we believe that it is reasonable to conclude that an IRF's procedure for ensuring that patients receive close medical supervision is not adequate if a large proportion of the IRF's claims are denied because the patients were not seen and assessed by a rehabilitation physician at least 3 times per week.

*Comment:* Several commenters requested that CMS change the regulations to treat the acquisition of an IRF unit the same as the acquisition of a freestanding IRF hospital.

*Response:* We appreciate the commenters' suggestion and will carefully consider this for the future. However, we believe that this suggestion is outside the scope of the FY 2012 IRF PPS proposed rule (76 FR 24214) because it involves the issue of whether an entity can purchase a hospital's payment status under Medicare. While an entity can purchase physical assets, Medicare payment status is assigned to a particular provider based on a review of the provider's eligibility for payment under a particular Medicare payment system. We do not believe that a facility's Medicare payment status or its provider agreement can be bought, sold, or transferred. If a different hospital other than the one to which the Medicare payment status was assigned wants to obtain the same Medicare payment status, it must apply and demonstrate that it meets the requirements for payment under the particular Medicare payment system.

*Comment:* While several commenters supported the proposed regulations regarding ''new'' IRFs, changes of ownership, and mergers, some of these commenters requested that CMS specify that certain ''internal corporate restructuring transactions'' not involving external entities are not changes of ownership. For example, these commenters said that they do not believe that the purchase of a hospital by another hospital, where both hospitals are owned by the same corporate entity, should be treated as a change of ownership for Medicare purposes.

*Response:* We believe that this suggestion is outside the scope of the FY 2012 IRF PPS proposed rule (76 FR 24214) because it involves how Medicare defines a hospital. For Medicare purposes, hospitals are separate entities if they have separate Medicare provider agreements, regardless of whether they might both be owned by the same corporate entity. If one hospital with a Medicare provider agreement purchases another hospital with a Medicare provider agreement, regardless of whether the hospitals are owned by the same corporate entity or not, Medicare would consider this a change of ownership, which would be governed by the new regulations in 42 CFR 412.29(c)(3) discussed in the ''Regulation Text'' section of this final rule. Similarly, if hospitals with separate Medicare provider agreements merge their operations, regardless of whether they are owned by the same corporate entity or not, then the new regulations regarding mergers in 42 CFR 412.29(c)(4) discussed in the ''Regulation Text'' section of this final rule would apply.

*Comment:* Several commenters agreed with the proposed changes to § 412.25(b) to allow expansions of bed size or square footage at any time during a cost reporting period. However, some commenters suggested that CMS should allow new IRF units or new IPF units to open and begin being paid under their respective IRF PPS or IPF PPS at any time during a cost reporting period, rather than requiring that they could only begin being paid under the IRF PPS or the IPF PPS at the start of a cost reporting period.

*Response:* We appreciate the commenters' suggestion that we relax the requirement that IRF and IPF units can only begin being paid under their respective IRF PPS or IPF PPS at the start of a cost reporting period. However, we believe that this suggestion is outside the scope of the FY 2012 IRF PPS proposed rule (76 FR 24214) because we did not propose any changes to the regulations in § 412.25(c). However, we will consider this suggestion for possible inclusion in future rulemaking.

*Final Decision:* After carefully considering all of the comments we received on the proposed updates to the policies in 42 CFR part 412, we are finalizing the regulation text changes as proposed, except for the following revisions in response to comment:

- Instead of the proposed revision to § 412.29(d), the paragraph will instead read, ''(d) Have in effect a preadmission screening procedure under which each prospective patient's condition and medical history are reviewed to determine whether the patient is likely to benefit significantly from an intensive inpatient hospital program. This procedure must ensure that the preadmission screening is reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF.''
- Instead of the proposed revision to § 412.29(e), the paragraph will instead read, ''(e) Have in effect a procedure to ensure that patients receive close medical supervision, as evidenced by at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.'' The specific changes to the regulations at 42 CFR part 412 are shown in the ''Regulation Text'' of this final rule.

**X. Quality Reporting Program for IRFs**

*A. Background and Statutory Authority*

CMS seeks to promote higher quality and more efficient health care for Medicare beneficiaries. Our efforts are, in part, effectuated by quality reporting programs coupled with the public reporting of data collected under those programs. The quality reporting programs exist for various settings such as hospital inpatient services (the Hospital Inpatient Quality Reporting (Hospital IQR) Program), hospital outpatient services (the Hospital Outpatient Quality Reporting (Hospital OQR) Program), and physicians and other eligible professionals (the Physician Quality Reporting System (formerly called the Physician Quality Reporting Initiative, or PQRI)). We have also implemented quality reporting programs for home health agencies and skilled nursing facilities that are based on conditions of participation, and an end-stage renal disease quality incentive program (ESRD QIP) that links payment to performance.

Section 3004(b) of the Affordable Care Act added section 1886(j)(7) to the Act, which requires the Secretary to implement a quality reporting program for IRFs, including freestanding IRF hospitals and IRF units within hospitals. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the Secretary to reduce the increase factor to a fiscal year by 2 percentage points for any IRFs that do not submit data to the Secretary in accordance with requirements established by the Secretary for that fiscal year. Section 1886(j)(7)(A)(ii) of the Act notes that this reduction may result in the increase factor being less than 0.0 for a fiscal year, and in payment rates under this subsection for a fiscal year being less than the payment rates for the preceding fiscal year. Any reduction based on failure to comply with the reporting requirements is, in accordance with section 1886(j)(7)(B) of the Act, limited to the particular fiscal year involved. The reductions are not to be cumulative and will not be taken into account in computing the payment amount under subsection (j) for a subsequent fiscal year.

Section 1886(j)(7)(C) of the Act requires that each IRF submit data to the Secretary on quality measures specified by the Secretary. The data must be submitted in a form and manner, and at a time, specified by the Secretary. The Secretary is generally required to specify measures that have been endorsed by the entity with a contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). The NQF is a voluntary consensus standard-setting organization with a diverse representation of consumer, purchaser, provider, academic, clinical, and other health care stakeholder organizations. The NQF was established to standardize health care quality measurement and reporting through its consensus development process. We have generally adopted NQF-endorsed measures in our reporting programs. However, section 1886(j)(7)(D)(ii)of the Act provides that ''in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary.'' Under section 1886(j)(7)(D)(iii) of the Act, the Secretary must publish the selected measures that will be applicable to FY 2014 no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making data submitted under the IRF quality reporting program available to the public. The Secretary must ensure that an IRF is given the opportunity to review the data that is to be made public prior to the data being made public. The Secretary must report quality measures that relate to services furnished in inpatient settings in rehabilitation facilities on the CMS Web site.

*B. Quality Measures for IRF Quality Reporting Program for FY 2014*

1. General

As described below, we adopt 2 quality measures for FY 2014. These quality measures are: (1) Urinary Catheter-Associated Urinary Tract Infections (CAUTI); and (2) Pressure Ulcers that are New or Have Worsened. We also discuss below a third measure that we are currently developing and intend to propose to adopt for FY 2014 in future rulemaking. That measure will be the 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure.

2. Considerations in the Selection of the Proposed Quality Measures

In implementing the IRF Quality Reporting Program, we seek to collect data on measures that will provide information on the full spectrum of the quality of care being furnished by IRFs while imposing as little burden as possible on IRFs. We seek to collect data on valid, reliable, and relevant quality measures and to make that data available to the public in accordance with applicable law.

We also seek to align new Affordable Care Act reporting requirements for IRFs with HHS' broader goals of targeting high priority conditions and topics, as reflected in the National Quality Strategy released by the Secretary available at (*http://www.healthcare.gov/center/reports/quality03212011a.html#es*) and, ultimately, to provide a comprehensive assessment of the quality of healthcare delivered. We note that adopting a comprehensive set of measures may take multiple years because of the time, effort and resources required by IRFs and CMS to develop and implement the data collection and reporting infrastructure needed to support an expanded quality reporting program. Current areas of high priority for HHS include patient safety, healthcare associated infections, and reduction of avoidable readmissions. These priorities are consistent with the aim of providing safe, sound care for all patients receiving services in any healthcare setting including IRFs.

In our consideration and selection of a comprehensive set of quality measures, we have several objectives. First, the measures should align with CMS' three-part aim for better care for individuals, better health for populations, and lower cost through improvement. Second, the measures should relate to specific priorities in the care setting for which they are adopted. For IRFs, these include improving patient safety (such as avoiding healthcare associated infections (HAI)), reducing adverse events, and encouraging better coordination of care and person-and-family-centered care. Third, the measures should address improved quality for the primary role of IRFs, which is to address the rehabilitation needs of the individual including improved functional status and achievement of successful return to the community post-discharge.

Other considerations in selecting quality measures include alignment with other Medicare quality reporting programs and other private sector initiatives; suggestions and input received from multiple stakeholders and national subject matter experts; seeking measures that have a low probability of causing unintended adverse consequences; and considering measures that are feasible, that is, measures that can be technically implemented within the capacity of the CMS infrastructure for data collection, analyses, and calculation of reporting and performance rates as applicable.

3. FY 2014 Measure #1: Healthcare Associated Infection Measure (HAI): Urinary Catheter-Associated Urinary Tract Infections (CAUTI)

The first measure we proposed for purposes of calculating the FY 2014 Increase Factor for IRFs is an application of the NQF-endorsed measure developed by the Centers for Disease Control (CDC) for hospitals entitled (NQF# 0138)''Urinary Catheter-Associated Urinary Tract Infection (CAUTI) for Intensive Care Unit Patients'' to the IRF setting. This measure was developed by the CDC to measure the percentage of patients with urinary catheter associated urinary tract infections in the ICU context. We believe that this measure is highly relevant to IRFs in that urinary catheters are commonly used in the IRF setting. Section 1886(j)(7)(D)(ii) of the Act provides that ''in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary.'' We reviewed the NQF's consensus endorsed measures, and were unable to identify any NQF-endorsed measures for catheter-associated urinary tract infections for the IRF setting. We are unaware of any other measures of urinary tract infections that have been approved by voluntary consensus standards bodies. Having given due consideration to other measures that have been endorsed or adopted by a consensus entity, we proposed to adopt an application of the NQF-endorsed CAUTI measure under the Secretary's authority to select non-NQF endorsed measures where NQF-endorsed measures do not exist for a specified area or medical topic. While we proposed to adopt the measure under the exception authority provided in section 1886(j)(7)(D)(ii) of the Act, we noted that we intended to seek formal extension of the existing CAUTI measure to the IRF setting.[1]

Urinary tract infections (UTIs) are a common cause of morbidity and mortality. The urinary tract is the most common site of healthcare-associated infection, accounting for more than 30 percent of infections reported by acute care hospitals [2]. Healthcare-associated UTIs are commonly attributed to catheterization of the urinary tract.

CAUTI can lead to complications such as cystitis, pyelonephritis, gram-negative bacteremia, prostatitis, epididymitis, and orchitis in males and, less commonly, endocarditis, vertebral osteomyelitis, septic arthritis, endophthalmitis, and meningitis in all patients. Complications associated with CAUTI include discomfort to the patient, prolonged hospital stay, and increased cost and mortality. Each year, more than 13,000 deaths are associated with UTIs [3]. Prevention of CAUTIs is discussed in the CDC/HICPAC document, *Guideline for Prevention of Catheter-associated Urinary Tract Infections*[4]. The NQF-endorsed CAUTI

[1] We inadvertently said in the FY 2012 IRF PPS proposed rule (76 FR 24214) that we (CMS) would ask NQF to formally extend its endorsement of the existing CAUTI measure to the IRF setting. We should have stated that we would ask CDC, as the measure steward, to ask NQF to formally extend its endorsement of the existing CAUTI measure to the IRF setting.

[2] Klevens RM, Edward JR, *et al.* Estimating health care-associated infections and deaths in U.S. hospitals, 2002. Public Health Reports 2007;122:160–166.

[3] Ibid.

[4] Wong ES. Guideline for prevention of catheter-associated urinary tract infections. Infect Control 1981;2:126–30.

measure we proposed is currently collected by the CDC's National Healthcare Safety Network (NHSN), a secure Internet-based health surveillance system, and we note that the CDC is also collecting data on this measure from IRFs. NHSN is currently used, in part, as one means by which certain State-mandated reporting and surveillance data are collected.

The HHS National Action Plan to Prevent HAIs located at (*http://www.hhs.gov/ash/initiatives/hai/actionplan/index.html*) identified catheter-associated urinary tract infections as the leading type of HAI that is largely preventable. The technical expert panel (TEP) convened by the CMS measure-developer-contractor on February 4, 2011 *(https://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/)* also identified CAUTI as a high priority quality issue for IRFs.

We received 23 public comments on the Urinary Catheter-Associated Urinary Tract Infections (CAUTI) quality measure, which are summarized below.

*Comment:* Several commenters generally acknowledged CAUTI as an important safety and quality issue across care settings. However, several commenters expressed concern with the applicability of this measure to the IRF setting. They stated that the relatively small number of new UTIs in IRFs may reflect that the indicator is not the best choice as a quality indicator in the IRF setting.

*Response:* Although patients with CAUTI in the IRF setting may be a minority, we believe that the CAUTI measure is an important indicator of quality in IRF settings and that promoting safe care in all settings is an important goal for quality reporting programs. Additionally, it is important to note that the HHS National Action Plan to Prevent HAIs located at *(http://www.hhs.gov/ash/initiatives/hai/actionplan/index.html)* indicated that catheter-associated urinary tract infections are a leading type of HAI that is largely preventable. Also, the technical expert panel that was convened by the CMS contractor that was tasked with assisting with the development of measures identified CAUTI as a high priority issue for IRFs.

*Comment:* One commenter specifically supported the adoption of CAUTI reporting in the IRF context through the National Healthcare Safety Network (NHSN). They noted that hospitals in their State, including IRFs, have been required by State law-based reporting requirements to use NHSN to report all health care-associated infections since February 2008. The commenter also stated that, based on the health care-associated infection data collected and analyzed in that State, urinary tract infection is the most prevalent type of infection reported in that State's IRFs.

*Response:* We appreciate the commenter's observation that UTIs are both the most prevalent and preventable form of infection in the IRF setting, and believe that CAUTI is an important quality measure to adopt for the IRF quality reporting program.

*Comment:* One commenter stated that CAUTI is a much less relevant marker of quality in IRFs with short lengths of stay, where catheters come out almost immediately. The commenter additionally stated that it is sometimes difficult to find supporting documentation of catheter use within transfer documents. The commenter also stated that lack of documentation could lead to additional testing of patients on admission, resulting in increased time burden and cost to IRFs.

*Response:* We acknowledge the challenges providers may initially encounter in finding supporting documentation in transfer documents of catheter use. However, we believe that implementation of this requirement will encourage better documentation of catheter use over time. The CDC provides educational and outreach materials to help promote communication of such information. Additionally, we believe such information may be provided by other sources, such as the patient. Finally, the specifications for the measure, which are available at *http://www.cdc.gov.nhsn/forms/instr/57_114.pdf,* do not require all patients to be tested on admission. We agree with this approach because clinical experts generally agree that identification of CAUTI rests upon a constellation of patient symptoms, as well as on the results of clinical and laboratory data. Quality care in IRFs requires close medical monitoring of all patients, and we believe that such monitoring will appropriately identify the subset of IRF patients who are most at risk for CAUTI and therefore should be tested.

*Comment:* Some commenters expressed concern that the CAUTI measure was originally created for use in the inpatient ICU setting and questioned the use of a measure that was not specifically endorsed for the IRF setting. In contrast, another commenter noted that, although the CAUTI measure was originally created for use in the inpatient ICU setting, its use is also well established in other inpatient settings. Moreover, they asserted that this measure is an appropriate measure for the IRF setting. The commenter also said that they were pleased to see that only indwelling catheters are included for this measure, versus ''straight in-and-out'' (intermittent) catheters which are frequently used by spinal cord injury patients who often require extensive IRF services.

*Response:* We acknowledge that the CAUTI measure, for which CDC is the measure steward, is currently endorsed by NQF for ICUs, and not specifically endorsed for the IRF setting. However, given the importance and preventability of CAUTIs in all settings including IRFs, we proposed to adopt an application of the NQF-endorsed measure under the Secretary's authority to select non-NQF endorsed measures where measures do not exist for a specified area or medical topic. We also noted that we would seek NQF endorsement of the measure for application in the IRF setting.

*Comment:* One commenter urged CMS to refine the CAUTI measure for specific use in IRFs. Additionally this commenter cited the potential need for testing the measure in IRFs and agreed with several other commenters, who recommended delaying reporting CAUTI until CMS obtains NQF endorsement of this measure specifically for the IRF setting.

*Response:* CAUTI has been well tested in the ICU setting, and we see no reason why the IRF setting would produce different results since presence or absence of CAUTI is not dependent upon setting type, but rather clinical findings, signs, and symptoms.

As stated above, we proposed to adopt the measure under the exception authority provided in section 1886(j)(7)(D)(ii) of the Act, and we note that the quality measure steward, the CDC, is seeking NQF's expansion of its endorsement of the CAUTI measure to IRFs.

*Comment:* Several commenters expressed concern with potential erroneous attribution of infections that may have resulted from catheter use in a previous setting. However, one commenter expressed support for the CAUTI measure's ''transfer rule exception,'' defined as transfers within an inpatient facility or transfers to a new facility, which may alleviate some of the perceived issues with attribution.

*Response:* We thank the commenters for their remarks and we acknowledge their concerns. As the commenter noted, the CAUTI measure's ''transfer rule exception'' excludes patients with CAUTI present on admission (POA) or who develop CAUTI within 48 hours of transfer to the IRF setting. Such CAUTIs are attributed to the transferring location, rather than the admitting location. We believe that this appropriately addresses the potential risk of erroneous attribution for transferred patients. Additional information on the ''Transfer Rule'' can be found at *http://www.cdc.gov/nhsn/PDFs/slides/CAUTI.pdf.*

*Comment:* Several commenters also expressed their concern with the lack of a ''present on admission'' (POA) indicator, and stated that the absence of a POA indicator may result in incorrect tallies. Additionally, one commenter recommended that CMS pursue development of a timeline and implementation plan for a POA indicator for CAUTI prior to finalizing the proposed IRF measures.

*Response:* We do not believe that the absence of a POA indicator will lead to erroneous tabulation of UTIs. The ''transfer rule'' that is discussed in the NHSN patient safety module clearly indicates that, ''If the UTI develops in a patient within 48 hours of discharge from a location, indicate the discharging location on the infection report, not the current location of the patient.'' We believe that this guidance allows IRFs to accurately tabulate the number of CAUTIs that develop in the IRF, even without a POA indicator for this measure. However, we will consider working with the CDC to determine whether the application of a claims-based POA indicator in addition to implementation of the ''transfer rule'' would be useful. If our work with the CDC finds that this would potentially be useful, we will consider this for future rulemaking.

*Comment:* One commenter recommended that health care-associated infection rates and standardized infection rates for IRFs be evaluated separately from any data reported by general acute care hospitals and long term care hospitals.

*Response:* We appreciate the commenter's concern that health care-associated infection rates and standardized infection rates for IRFs be evaluated separately from any data reported by general acute care hospitals and long term care hospitals. As the IRF quality reporting program is separate from these other quality reporting programs, we do plan to evaluate CAUTI data reported by IRFs separately from CAUTI data reported by hospitals and long term care hospitals.

*Comment:* Several commenters strongly urged CMS to share how it plans to perform HAI data validation since this was not addressed in the proposed rule.

*Response:* As we agree that data validation is important, we do plan to perform HAI data validation prior to the public reporting of any HAI data, and are actively working with the CDC regarding their data validation process. As part of this process, we are sharing the public comments that we received on this issue with the CDC. We will continue to work with the CDC to develop an HAI data validation strategy, and will address that aspect of the quality reporting program in future rulemaking.

*Comment:* Several commenters highlighted the need to risk adjust the CAUTI measure. They also stated that certain patients, such as those with spinal cord injury or neurogenic bladder, were at much higher risk of developing CAUTI than other lower risk patients. Furthermore, several commenters expressed concern that the lack of risk adjustment could possibly lead to unintended consequences such as reduced access to IRFs for higher risk patients. One commenter also recommended the adoption of the CDC definition of symptomatic UTI.

*Response:* We recognize that risk adjustment is an important consideration for outcome quality measures, and that certain patients may have higher risks for complications such as UTIs. The CAUTI measure specifications use facility type (including IRF) and location type information (including an identifier of whether the facility is a freestanding hospital or a unit of a hospital) for risk adjustment, and these data are captured in the NHSN reporting system. As we take the appropriate access to care in IRFs very seriously, we intend to monitor closely whether the quality reporting program has any unintended consequences on access to care for higher risk patients. Should we find any, we will take appropriate steps to address these issues in future rulemaking. Also, we agree with the commenter's suggestion that we adopt the CDC definition of symptomatic UTI, and are planning to adopt this definition in future rulemaking.

*Final Decision:* Having carefully considered the comments received, we adopt as final an application of the NQF-endorsed measure that was developed by the CDC for ICUs entitled (NQF #0138) ''Catheter-Associated Urinary Tract Infection [CAUTI] for Intensive Care Unit Patients'' for the IRF setting.

4. FY 2014 Measure #2: Percent of Patients With Pressure Ulcers That Are New or Worsened

The second measure we proposed for IRFs for purposes of calculating the FY 2014 increase factor is an application of a CMS-developed NQF-endorsed measure for short-stay nursing home patients; (NQF #0678, formerly assigned as NQF #NH–012–10) ''Percent of Residents with Pressure Ulcers that Are New or Worsened.'' This is the percentage of patients who have one or more stage 2 to 4 pressure ulcers that are new or worsened, when assessed at the time of discharge as compared with the patient's condition at admission. We recognized that NQF endorsement of this measure is currently limited to short-stay nursing home patients in the proposed rule, but we noted our belief that this measure is also highly relevant to patients in any setting who are at risk of pressure ulcer development and a high priority quality issue in the care of IRF patients. Currently, there are no other NQF-endorsed pressure ulcer measures that are applicable to IRFs and we were unable to identify other measures for pressure ulcers that have been endorsed or adopted for the IRF context by a consensus organization. We were also unaware of any other measures of pressure ulcers that had been approved by voluntary consensus standards bodies. For these reasons, we proposed to adopt an application of this NQF-endorsed measure under the Secretary's authority to select non-NQF endorsed measures where measures do not exist for a specified area or medical topic. We also stated that we intend to ask NQF to extend its endorsement of the existing short-stay nursing home pressure ulcer measure to the IRF setting.

Pressure ulcers are high-volume and high-cost adverse events across the spectrum of health care settings from acute hospitals to home health. Patients in the IRF setting may have medically complex conditions and severe functional limitations, and are therefore at high risk for the development, or worsening, of pressure ulcers. Pressure ulcers are serious medical conditions and an important measure of quality. Pressure ulcers can lead to serious, life-threatening infections, which substantially increase the total cost of care. As reported in the August 22, 2007, Inpatient Hospital PPS Final Rule for FY 2008 (72 FR 47205) in 2006 there were 322,946 reported cases of Medicare patients with a pressure ulcer as a secondary diagnosis in acute care hospitals.

We received 26 comments on the Percent of Patients with Pressure Ulcers that are New or Worsening quality measure, which are summarized below.

*Comment:* A few commenters expressed concerns about whether pressure ulcers are really relevant to the IRF setting, citing the small number of

IRF patients that develop a new or worsening pressure ulcer. They stated that more relevant measures were those focusing on the output of the rehabilitative process, such as change in function or discharge to community.

*Response:* We agree that functional restoration and return to community are also key aims for IRFs and central to patient-centered care. We plan to add such measures through future rulemaking, as the measures are further developed.

However, we believe that the percent of patients with new or worsening pressure ulcers is an important indicator of quality in the IRF setting. Even if the proportion of patients in IRFs with new or worsening pressure ulcers is small, any such cases are particularly troubling given the requirement that IRF patients receive an intensive rehabilitation therapy program throughout their IRF stay, which would tend to require patients to be out-of-bed and active throughout their stay.

*Comment:* Some commenters expressed concern over the ambiguity of the definition of ''worsening'' pressure ulcers and requested clarification of the definition. Some commenters cited the difficulty in accurately differentiating between worsening pressure ulcers and pressure ulcers that are changing as part of the healing process. Several commenters suggested that ''worsening'' be removed from the description and CMS base the quality measure solely on the appearance of ''new'' pressure ulcers. Some commenters questioned why unstageable pressure ulcers and suspected deep tissue injuries were not included in the measure.

*Response:* The new or worsening pressure ulcer measure is based on changes in skin integrity between the admission and discharge assessments. Pressure ulcer ''worsening'' is defined in the measure specifications as a pressure ulcer that has progressed to a deeper level of tissue damage and is therefore staged at a higher number using a numerical scale of 1 through 4 (using the staging assessment determinations assigned to each stage; starting at the stage 1, and increasing in severity to stage 4) on the discharge assessment as compared to the admission assessment.

The National Pressure Ulcer Advisory Panel (NPUAP) has specific, well-established clinical criteria for determining the current stage of a wound (stages I through IV). These criteria, which are incorporated into the measure specifications, are used by clinicians in determining whether or not a wound has changed stages, and thereby worsened or improved. We believe that appropriate application of these guidelines should enable clinicians to identify pressure ulcers that have ''worsened''. Thus, we do not believe that the idea of ''worsening'' pressure ulcers should be removed from the measure.

Unstageable wounds, including deep tissue injuries, are not currently included in this measure since the presence of worsening cannot be determined if they are unstageable. Furthermore, a pressure ulcer that presents with slough or eschar cannot be staged, and is not considered worsened. Only after, and if, debridement occurs, whereby dead tissue is removed, can the wound be staged. If after wound debridement, the wound is evaluated to have increased in the stage, the wound is considered worsened.

If the patient was admitted with a deep tissue injury, and/or an unstageable pressure ulcer, the deep tissue injury and/or unstageable pressure ulcer would be documented as present on admission. As stated above, if after debridement the wound is evaluated to have increased in the stage, the wound is considered worsened but is considered to have been present on admission.

Although the presence of new pressure ulcers is an indicator of adverse quality in IRFs, we believe that the presence of worsening pressure ulcers is also an important aspect of the measure because worsening pressure ulcers can indicate a lack of both appropriate medical monitoring and appropriate clinical treatment. In addition, as noted previously, the existence of worsening pressure ulcers in the IRF setting is particularly troubling given the requirement that IRF patients receive an intensive rehabilitation therapy program throughout their IRF stay, which would tend to require patients to be out-of-bed and active throughout their stay. Thus, we believe that it is imperative to include both new and worsening pressure ulcers in the measure.

*Comment:* Several commenters expressed concern that the proposed measure does not adequately address the issue of pressure ulcers that are present on admission. These commenters recommended that CMS develop a timeline and implementation plan for a POA indicator for the pressure ulcer measure, with consideration of an appropriate attribution window to avoid IRFs being penalized for pressure ulcers that were present on admission or acquired from another facility prior to the IRF admission.

*Response:* The measure that we are adopting in this final rule is the Percent of Patients with Pressure Ulcers that are New or Worsening between the IRF admission assessment and the discharge assessment. The measure accounts for any relevant pressure ulcers that were present on admission because it requires IRFs to supply data on the number of stage 2, stage 3, and stage 4 pressure ulcers that were present on admission. In addition, the measure asks IRFs to report any pressure ulcers that were present on admission. Thus, we believe that the pressure ulcer measure that we are adopting in this final rule already contains sufficient present on admission information and will not lead to inappropriate attribution to an IRF of a pressure ulcer that developed in another inpatient setting.

*Comment:* One commenter suggested that CMS harmonize the IRF and the inpatient prospective payment system (IPPS) versions of the pressure ulcer measures so that both capture the same range of wound staging. While the IRF quality reporting program measure includes wound stages 2 though 4, the Hospital IQR Program measure only includes stages 3 through 4.

*Response:* We agree that harmonizing the measures is a good suggestion. This will take significant development work as the data elements, data sources, and measure specifications differ for the IRF and IPPS quality reporting programs. We will take the commenter's suggestions into consideration for future quality measurement development work, which will be considered for implementation through future rulemaking.

*Comment:* One commenter suggested that the Pressure Ulcer Scale for Healing Tool (PUSH) tool, which provides clinicians with a scale for assessing wound healing or deterioration, is more appropriate for recording wounds. Another commenter said that they do not recommend the PUSH tool, but recognized its superiority to the proposed measure in that it allows addressing of wound healing in a standardized manner. This commenter also stated that if measurement of pressure ulcers is a quality measure, that the measure used should incorporate the NPUAP guidelines regarding wound healing.

*Response:* We recognize that the PUSH tool is one of the instruments sometimes used by clinicians to assess healing or deterioration of pressure ulcers. However, CMS developed the New or Worsening Pressure Ulcer measure in consultation with our measure-developer contractor, which further consulted with NPUAP and other nationally recognized subject matter experts. Based on the input we received from these experts, we believe that the pressure ulcer measure that we are requiring IRFs to report beginning October 1, 2012 most appropriately captures this aspect of care provided in IRFs. In response to the commenter that suggested that any measure of pressure ulcers that is used in the IRF setting should be incorporate the NPUAP guidelines regarding wound staging, we note that the ''New or Worsening Pressure Ulcer'' measure that we are adopting in this final rule does incorporate the NPUAP guidelines regarding wound staging.

*Comment:* Several commenters objected to the proposed application of a pressure ulcer measure that has been NQF-endorsed for short-stay residents in nursing homes but has not specifically been endorsed for the IRF setting.

*Response:* We are using the authority to adopt non-NQF endorsed measures in cases where there is not an NQF-endorsed measure for a particular area or topic. We do not believe that there are substantive issues that would make it inappropriate to apply the pressure ulcer measure that has been NQF-endorsed for short-stay nursing home residents to IRFs.

*Comment:* One commenter suggested that CMS include stage 1 wounds in the pressure ulcer measure. They stated that, if stage 1 wounds are not adequately treated, they will progress to more serious wounds.

*Response:* We agree with the commenter about the importance of clinicians recognizing the presence of stage 1 wounds and adequately treating them so that they do not progress to more serious wounds. However, based on the CMS contractor's extensive analysis of the issue, in consultation with national subject matter experts, we believe that the additional burden on providers of collecting and reporting information on stage 1 pressure ulcers outweighs the benefits of requiring such reporting. Thus, in an effort to minimize the reporting burden on providers, we have decided not to require reporting on stage 1 pressure ulcers.

*Comment:* Some commenters stated that patients treated in IRFs have a higher level of medical complexity and receive more intense services than nursing home patients, highlighting the need for CMS to risk adjust the pressure ulcer measure.

*Response:* We agree that some patients are at higher risk for pressure ulcers than others. The pressure ulcer measure (NQF #0678, formerly assigned as NQF #NH–012–10) that we are adopting for the IRF setting already includes a risk adjustment component. For example, the measure accounts for the higher risk of pressure ulcers among patients with low body mass index (BMI), diabetes, Peripheral Vascular Disease, bowel incontinence, and immobility. These clinical factors are known to increase the risk of pressure ulcer development for patients regardless of their setting of care.

*Comment:* Several commenters expressed support of CMS' adoption of the NPUAP stance that measurement of pressure ulcers not be based on ''reverse staging''.

*Response:* We appreciate the commenters for their supportive comments and agree that it is not appropriate to ''reverse-stage'' pressure ulcers because staging only refers to the level of tissue damage. So, for example, a stage 3 pressure ulcer with full thickness tissue loss will always have that amount of damage present. If that pressure ulcer should heal and resurface with a new epithelial layer and later reopen, it is still a stage 3 pressure ulcer, even if it appears to meet the criteria for a stage 2 pressure ulcer.

*Final Decision:* Having carefully considered the comments, we adopt as final an application of the CMS-developed NQF-endorsed measure for short-stay nursing home patients (NQF #0678, formerly assigned as NQF #NH–012–10) for the IRF setting.

5. Potential FY 2014 Measure #3: 30-Day Comprehensive All-Cause Risk-Standardized Readmission Measure

In the proposed rule, we stated our intent to propose a 30-day comprehensive all-cause risk-standardized readmission measure when one is developed. Addressing avoidable hospital readmissions is a high priority for HHS and CMS. We are currently developing setting-specific risk adjusted 30-day all-condition all-cause risk-standardized readmission measures for hospitals, IRFs, long term care hospitals and nursing homes.

The main features of the measure methodology will be consistent with that of the NQF-endorsed CMS hospital risk-adjusted 30-day readmission measures for the Acute Myocardial Infarction (AMI), Heart Failure (HF), Pneumonia and Percutaneous Coronary Intervention (PCI). We plan to cover the maximum number of patient conditions possible in the all-condition measures. We will consult existing literature and solicit input from national experts and conduct analyses on the types and comorbidities of the patients of each setting in order to establish appropriate risk-adjustment for the measures as well as appropriate specification of the meaning/definition of readmission and the appropriate time-window for readmission for each care setting. To expand beyond the condition-specific measures to an all-condition readmission measure for each setting, we will conduct analyses to determine whether it is statistically and clinically sound to derive the all-condition measures from one single risk adjustment model, or if it would be better to form a composite of multiple models for multiple conditions. We plan to use hierarchical logistic regression modeling to take into account the effects of the clustering of patients and the sample size in the IRF setting. The IRF readmission measure is expected to be completed in late 2011, at which time it will be submitted to the entity with a contract under section 1890(a) of the Act for endorsement.

We received 19 comments on our intent to propose a 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure for IRFs, which are summarized below.

*Comment:* Several commenters stated that risk adjustment will be an important consideration as CMS develops this readmission measure. Several commenters suggested that only preventable readmissions should be measured, and that planned readmissions should be excluded. Several commenters also stated that the causes of readmissions are complex and that there are no solutions that could be applied globally to reduce readmissions.

*Response:* We appreciate the input. As indicated, the measure will be risk-standardized. We will take these comments into consideration as we further develop the measure. As part of development, the measure developer will provide an opportunity to the public to comment on specific aspects of the measure, including risk adjustment. Although we agree that the factors that are related to readmission are varied, readmission rates among Medicare beneficiaries are high, and we believe that they can be significantly improved through improved quality.

*C. Data Submission Requirements*

1. Method of Data Submission for HAI Measure (CAUTI)

In the proposed rule, we proposed to require that IRFs submit data on the Catheter-Associated Urinary Tract Infection (CAUTI) measure through the Centers for Disease Control (CDC)/ National Healthcare Safety Network (NHSN). As we noted above, the NHSN is a secure, Internet-based surveillance system maintained by the CDC that can be utilized by all types of healthcare facilities in the United States, including acute care hospitals, long term acute care hospitals, psychiatric hospitals, rehabilitation hospitals, outpatient dialysis centers, ambulatory surgery centers, and long term care facilities. The NHSN enables healthcare facilities to collect and use data about HAIs, including information on clinical practices known to prevent HAIs, information on the incidence or prevalence of multidrug-resistant organisms within their organizations, and information on other adverse events. Some States use the NHSN as a means of collecting State law mandated HAI reporting. NHSN collects data via a Web-based tool hosted by the CDC (*http://www.cdc.gov/*). This reporting service is provided free of charge to healthcare facilities. Additionally, the ability of the CDC to receive NHSN measures data from electronic health records (EHR) may be possible in the near future. Currently, more than 20 States require hospitals to report HAIs using NHSN, and the CDC supports more 4,000 hospitals that are using the NHSN.

We also proposed to require submission of the data elements needed to calculate the Catheter-Associated Urinary Tract Infection measure using the NHSN's standard data submission requirements. The NHSN requires submission of data on HAI events on all patients. Collecting data on all patients will provide CMS with the most robust, accurate reflection of the quality of care delivered to Medicare beneficiaries as compared with non-Medicare patients. Therefore, to measure the quality of care that is delivered to Medicare beneficiaries in the IRF setting, we proposed to collect quality data related to HAI events on all patients regardless of payor.

CDC/NHSN requirements may include adherence to training requirements, use of CDC measure specifications, data element definitions, data submission requirements and instructions, data reporting timeframes, as well as NHSN participation forms and indications to CDC allowing CMS to access data for this measure for the IRF quality reporting program purposes. Detailed requirements for NHSN participation, measure specifications, and data collection can be found at *http://www.cdc.gov/nhsn/*. We proposed to require IRFs to use the specifications and data collection tools for the CAUTI measure as required by CDC as of the time that the data is submitted.

For purposes of calculating the FY 2014 increase factor we proposed to collect data on CAUTI events that occur from October 1, 2012 through December 31, 2012, which we inadvertently misidentified as the ''final fiscal quarter of calendar year 2013.'' We should have identified it as the final quarter of calendar year (CY) 2012. We proposed that all subsequent IRF quality reporting cycles would be based on a full CY cycle (that is January 1 through December 31 of the applicable year). For example, the FY 2015 payment determinations will be made based on CY 2013 data submitted to CDC.

We stated that further details regarding data submission and reporting requirements for this measure would be posted on the CMS Web site *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/* no later than January 31, 2012. IRFs were also encouraged to visit the CDC Web site *http://www.cdc.gov/nhsn/* to review the NHSN enrollment and reporting requirements.

We received 21 comments on the proposed submission requirements for the CAUTI measure, which are summarized below.

*Comment:* Several commenters expressed concerns about the readiness of the CDC's NHSN infrastructure to accept a greater volume of data by adding IRF reporters.

*Response:* As reported to us by CDC, the NHSN has undergone a major architectural redesign over the last year in response to the need to scale up to more users, facilities and functionality. It is our understanding that the addition of IRF quality reporting on the NHSN will not unduly strain the system.

*Comment:* Several commenters expressed concerns with provider burden and resources needed to enroll, train and implement data reporting through the CDC's NHSN. One commenter suggested CMS should move to a single standardized and streamlined quality reporting system and added that training on multiple quality reporting systems would be confusing and time consuming. Another commenter suggested that the IRF–PAI could be modified to collect CAUTI data.

*Response:* We recognize that there are initial start-up costs and time investments to enroll and complete the required training for reporting through CDC's NHSN. We have factored these costs into the provider burden estimates that we provided in both the FY 2012 IRF PPS proposed rule and in this final rule. We believe that safety benefits will result from this new quality reporting requirement such as the ability to track serious, and at times, life threatening infections like CAUTI. As such, the benefits outweigh the costs. In addition, these costs are primarily incurred during the initial phase of the data reporting, and will be lower in subsequent years. For future rulemaking cycles, we will take into consideration the suggestion that CMS should move to a single standardized and streamlined quality reporting system and potentially consider collecting CAUTI data through an additional modification to the IRF–PAI.

*Final Decision:* Having carefully considered the comments received on the method of data submission for the measure, we finalize our proposals to require that IRFs submit data on the measure through the Centers for Disease Control (CDC)/National Healthcare Safety Network (NHSN); to require submission of the data elements needed to calculate the measure using the NHSN's standard data submission requirements; to collect quality data related to HAI events on all patients regardless of payor; and to require IRFs to use the specifications and data collection tools for the measure as required by CDC as of the time that the data is submitted. Data collection for the FY 2014 program will pertain to CAUTI events that occur from October 1, 2012 through December 31, 2012 (the last quarter of CY 2012). All subsequent IRF quality reporting cycles will be based on a full calendar year (CY) cycle (that is January 1 through December 31 of the applicable year). Further details regarding data submission and reporting requirements for this measure will be posted on the CMS Web site *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/* no later than January 31, 2012.

2. Method of Data Submission for the Percent of Patients With New or Worsened Pressure Ulcer Measure

We seek to implement the IRF Quality Reporting Program in a manner that imposes as little burden as possible. IRFs already are required to submit certain data for purposes of determining payment via the current Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). Previously the IRF–PAI included optional ''quality indicators'' (QI). To support the standardized collection and calculation of quality measures specifically focused on IRF services, we proposed to modify the IRF–PAI by replacing the optional pressure ulcer items in the previous QI section of the IRF–PAI with mandatory pressure ulcer data elements.

We proposed that IRFs would be required to submit the data needed to calculate the measure ''Percent of Patients with New or Worsened Pressure Ulcers'' on all Medicare patients. Therefore, to measure the quality of care that is delivered to Medicare beneficiaries in the IRF setting, we proposed to collect quality data related to new or worsening pressure ulcers on all Medicare patients.

We proposed to use the IRF–PAI to collect pressure ulcer data elements that would be similar to those collected through the Minimum Data Set 3.0 (MDS 3.0), which is a reporting instrument that is used in nursing homes. A draft of the proposed IRF–PAI revisions with the new pressure ulcer elements that we are submitting to OMB for approval is available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/04_IRFPAI.asp#TopOfPage.* The current MDS 3.0 pressure ulcer items evolved as an outgrowth of CMS' work to develop a set of standardized patient assessment items, now referred to as CARE (Continuity Assessment Record & Evaluation).

The CARE assessment items were developed and tested in the post-acute care payment reform demonstration (PAC–PRD) which included IRFs as required by section 5008 of the 2005 Deficit Reduction Act (DRA) (Pub. L. 109–171, enacted February 8, 2006) (more information may be found at *http://www.pacdemo.rti.org*). We note that the proposed data elements are supported by the NPUAP. We believe that modifying the current IRF–PAI pressure ulcer items to be consistent with the standardized data elements now used in the MDS 3.0, will drive uniformity across settings that will lead to better quality of care in IRFs and ultimately, across the continuum of care settings. Additional details regarding the use of modified IRF–PAI data elements to calculate this measure will be published on the CMS Web site at *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/by* no later than January 31, 2012.

We received 23 comments on the data collection and reporting of new and worsening pressure ulcers for the IRF quality reporting program, which are summarized below.

*Comment:* One commenter expressed a preference for a claims-based pressure ulcer measure, citing inter-rater reliability concerns with clinicians assessing pressure ulcers at admission and at discharge. Another commenter recommended inclusion of a body diagram to record the location of pressure ulcers. Another commenter expressed concern that the data collection mechanism allows for a count of multiple pressure ulcers and specific stages, but not the sizes of multiple pressure ulcers at the same stage.

*Response:* Although one of the commenters suggested that we consider collecting data on the pressure ulcer measure on the claims form instead of the IRF–PAI, we do not currently collect this type of patient assessment data on the claim form, nor do we have a mechanism for collecting such data through the IRF claims. Furthermore, even if the data were to be collected through the IRF claim, it would still need to be based on a clinician's assessment of the patient at admission and at discharge from the IRF. Since we currently use the IRF–PAI to collect other sorts of patient assessment data, we believe that this is the most appropriate vehicle for collecting data for the pressure ulcer measure.

We agree that it is good clinical practice to record the location of pressure ulcers in the medical record. However, this is not part of the measure specifications because we do not believe that reporting the location of pressure ulcers to CMS will enhance the usefulness of the New or Worsening Pressure Ulcer quality measure for measuring quality in IRFs. We believe, after extensive consultation with national subject matter experts on wound healing, that recording the overall number of new pressure ulcers and presence (or lack thereof) of worsening pressure ulcers, provides an adequate indication of the quality of care provided in IRFs with regard to skin integrity management and wound healing.

*Comment:* Several commenters commended CMS on modifications to the IRF–PAI to include pressure ulcer elements that are consistent with the MDS 3.0. They noted that the elements offer clear ulcer staging definitions consistent with NPUAP and the Wound Ostomy and Continence Nurses Society (WOCN).

*Response:* We thank the commenters for their positive comments with respect to the IRF–PAI modifications.

*Comment:* Several commenters suggested that any plans to incorporate elements from Continuity Assessment Record and Evaluation (CARE), which was developed for and used in the Post-Acute Care Payment Reform Demonstration, be delayed until the demonstration findings have been reported to Congress and the public has had an opportunity to comment on CARE.

*Response:* We did not propose to use the CARE instrument to collect this data. The Pressure Ulcer Measure we are adopting, as noted previously, is based on a similar measure generated from data collected through the current MDS 3.0 instrument. This measure is NQF-endorsed for short-stay nursing home residents. We proposed to amend the IRF PAI to replace the prior quality indicator (QI) elements with the data elements needed to generate the pressure ulcer measure. The IRF–PAI that has been submitted to OMB for approval can be downloaded from the IRF PPS Web site at *http://www.cms.gov/InpatientRehabFacPPS/04_IRFPAI.asp#TopOfPage.*

We concluded the PAC–PRD, and data collection using CARE, in December 2010. We plan to submit our Report to Congress by the close of 2011. As we are not proposing the use of CARE at this time, we do not believe there is a need to defer the start of the new IRF quality reporting program pending delivery of the CARE report.

*Final Decision:* Having carefully considered the comments, we finalize our proposal to require IRFs to submit the data needed to calculate the measure ''Percent of Patients with New or Worsened Pressure Ulcers'' on all Medicare patients to CMS through the modified IRF PAI for all Medicare beneficiaries treated in the IRF setting. Additional details regarding the use of modified IRF–PAI data elements to calculate this measure are currently available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/04_IRFPAI.asp#TopOfPage.* We will publish the electronic specifications related to reporting the pressure ulcer measure on the CMS Web site *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/* no later than January 31, 2012.

3. Potential Method of Data Submission for the 30-Day Comprehensive All-Cause Risk-Standardized Readmission Measure

If we adopt a 30-day comprehensive all-cause risk-standardized readmission measure for the IRF quality reporting program, we anticipate being able to use claims data otherwise submitted by the IRF to construct it. We generally anticipate constructing the measure using 3 years of claims data so that the measure rate captures a sufficient number of discharges.

### *D. Public Reporting*

Under section 1886(j)(7)(E)of the Act, the Secretary is required to establish procedures for making data submitted by IRFs under the IRF quality reporting program available to the public. In accordance with this provision, we proposed to establish procedures to make the data available to the public. As noted in the proposed rule, we do not intend to make individual patient-level data public. We believe that existing laws governing access to agency records will adequately address requests for such data. We will adopt procedures that will ensure that an IRF has the opportunity to review the data to be made public prior to the data being made public. Additionally, as required under section 1886(j)(7)(E) of the Act, we will report quality measures that relate to services furnished in IRFs on CMS' Web site.

We received 3 comments on public reporting, which are summarized below.

*Comment:* One commenter supported CMS' proposal to allow IRFs to preview data and measures prior to any information being posted on a Web site. One commenter suggested that CMS provide IRFs with a 30-day preview period prior to publicly posting the data submitted by IRFs under the quality reporting program and that CMS engage in ''user testing'' procedures before posting the information.

*Response:* We agree with the commenters that it is important to allow IRFs to preview data and measures prior to any information being publicly displayed. We will adopt procedures that will ensure that an IRF has the opportunity to review the data to be made public prior to the data being made public. Additionally, as required under section 1886(j)(7)(E) of the Act, we will report quality measures that relate to services furnished in IRFs on a CMS Web site. We will take the commenter's suggestions regarding ''user testing'' into consideration as we develop procedures to publicly report IRF quality data.

*Comment:* One commenter urged CMS to delay public reporting of the IRF quality data until the second year of reporting to avoid that potential that inaccurate data would be posted based on unintended analytical issues.

*Response:* We have not at this time proposed a specific date to begin publicly reporting IRF quality data. We will take the commenter's suggestions into account as we develop our plans for future public reporting.

### *E. Quality Measures for Future Consideration for Determination of Increase Factors for Future Fiscal Year Payments*

As indicated previously in this section, we ultimately seek to adopt a comprehensive set of quality measures to be available for widespread use for informed decision making and quality improvement. While we are initially adopting a limited set of measures for the IRF quality reporting program, we expect to expand the measure set through rulemaking which will allow us, for example, to assess an IRF patient's functional status and whether he/she has achieved his or her rehabilitation goals and potential.

We intend to propose a more robust set of measures for the IRF quality reporting program in the FY 2013 rulemaking cycle for the determination of the FY 2015 payment increase factor. We are considering the measures listed in Table 13 which include, but are not limited to, measure topics reported by skilled nursing facilities (SNFs) for short stay nursing home patients.

Some quality data on short stay nursing home patients in skilled nursing facilities (SNFs) are collected via the MDS 3.0 data collection vehicle. We are currently analyzing these quality data, and expect to have findings by early 2012. Next steps would include analyzing whether any of these measures would be appropriate for application in the IRF setting.

If any of the short stay nursing home measures are appropriate for application to the IRF setting we intend to propose some or all of these measures in the FY 2013 rulemaking cycle. Any measures that we proposed to adopt in through the FY 2013 rulemaking cycle would apply to the payment determination for FY 2015. We expect that any measures proposed in the FY 2013 rulemaking cycle would be collected via the IRF–PAI, and that further changes to this data collection vehicle and the supporting information technology (IT) infrastructure would be necessary. We expect that it would take providers, vendors, and CMS approximately one year to make the necessary changes to their IT systems to support the collection and reporting of new or modified IRF–PAI data elements. We would expect providers, vendors, and CMS to complete any needed changes to their IT systems by August 2013. We intend to propose that IRFs submit any additional or revised IRF–PAI data elements starting October 1, 2013 through December 31, 2013 for the FY 2015 payment update, but we are considering the possibility of basing future quality measures on data sources or assessment instruments other than the IRF–PAI. As stated earlier, we developed and tested the CARE assessment instrument for the post-acute demonstration under section 5008 of the DRA. We intend to submit a report to Congress by the end of 2011 with findings from the 3-year PAC–PRD and its use of the CARE patient assessment instrument as a data collection vehicle. More details on the PAC–PRD which concluded in late 2010 are available at *http://www.pacdemo.rti.org.* We believe that the data elements that were collected using this CARE standardized assessment instrument could be used across all post-acute care sites to measure functional status and other factors during treatment and at discharge which are key indicators of quality in IRFs and in nursing homes treating short stay patients requiring rehabilitative services. We believe the instrument could be beneficial in supporting the submission of data on quality measures by IRFs and other care settings by using a standardized data collection instrument

During the NQF endorsement process for nursing home quality measures, conducted through the NQF's 2010 measures maintenance cycle, the NQF steering committee pointed to the need for CMS to consider pairing pain measures with a measure or measures that reflect patients' preferences for how their care, treatment and symptoms are managed by healthcare providers. These items, and other items in Table 13, are under consideration for future years.

TABLE 13—POSSIBLE FUTURE MEASURES AND TOPICS FOR THE IRF QUALITY REPORTING PROGRAM

| *Overarching Goal:* Safety and Healthcare Acquired Conditions: Avoidable Adverse Events and Serious Reportable Events * |
|---|
| • Unplanned acute care hospitalizations. |
| • Falls with major injury.* ** |
| • Falls with major injury per 1,000 days. |
| • Incidence of venous thromboembolism (VTE), potentially preventable.* |
| • Poly-pharmacy related injury. |
| • Medication errors.* |
| • Stage III and IV pressure ulcers.** |

TABLE 13—POSSIBLE FUTURE MEASURES AND TOPICS FOR THE IRF QUALITY REPORTING PROGRAM—Continued

| *Overarching Goal:* Safety and Prevention |
| --- |
| • VTE Prophylaxis.<br>• Patient Immunization for Influenza.<br>• Patient Immunization for Pneumonia.<br>• Staff Immunization. |
| *Overarching Goal:* Safety and Healthcare Acquired Conditions—HAIs |
| • Surgical site infections.<br>• Multidrug resistant organism infection. |
| *Overarching Goal:* Better, Person Centered-Care: Care Coordination/Care Outcome |
| • Functional Change: Change in Motor Score.<br>• Change in Cognitive Function: Change in Cognitive Score.<br>• Communication.<br>• Percent of patients whose individually stated goals were met.<br>• Care Transitions Measure–3 (CTM–3).<br>• Discharge Outcome/Discharge disposition:<br>—Home.<br>—Assisted Living.<br>—Nursing Home.<br>—LTCH.<br>—Hospital.<br>—Hospice.<br>• Patient Preferences for care, treatment and management of symptoms by healthcare providers. |
| *Overarching Goal:* Better, Person Centered-Care: Symptom Management |
| • Percent of patients on a scheduled pain management regime on admission who report a decrease in pain intensity or frequency.<br>• Percent of patients with pain assessment conducted and documented prior to therapy.<br>• Percent of patients who self-report moderate to severe pain.<br>• Percent of patients with dyspnea improved within one day of assessment. |
| *Overarching Goal:* Better, Person Centered-Care: Experience of Care |
| • Patient Survey, for example, Hospital Consumer Assessment of Healthcare Providers & Systems.<br>• Percent of patients for whom care delivered was consistent with patient stated care preferences. |

* Consistent with NQF Serious Reportable Events.
** Consistent with Healthcare Acquired Conditions (HAC) Prevalence Measure.

We received 8 comments on CMS' potential future use of the CARE assessment instrument to collect quality reporting data, which are summarized below.

*Comment:* Several commenters said that they recognized the value of standardizing assessment data across settings. However, they expressed concerns about CMS' potential future use of CARE as a data collection vehicle in IRFs. These commenters questioned CARE's ability to accurately document medical severity, functional status and other factors related to quality outcomes. In addition, several commenters suggested the need for additional testing of CARE items in IRFs should CMS elect to use CARE.

*Response:* CARE was developed in response to the Deficit Reduction Act of 2005 which directed CMS to develop a standardized assessment and test it in a demonstration for the purposes of ''costs and outcomes across different post-acute care sites.'' CARE was used in the PAC–PRD to collect over 7,000 assessments in IRFs (as well as long-term care hospitals, nursing homes, home health agencies and acute-care hospitals at discharge) across the country. Items were tested for reliability using two methods—a traditional inter-rater reliability test where 2 clinicians of the same discipline scored the same patient, and a test of reliability examining differences among disciplines in rating the same case. Overall, the vast majority of items had ''good'' to ''very good'' agreement. We will deliver our Report to Congress with findings by the close of 2011.

We received 16 comments on possible Future Measures and Topics for the IRF Quality Reporting Program, which are summarized below.

*Comment:* The majority of the commenters were supportive of the listed possible future quality measures. Many applauded consideration of measures for functional status, discharge to community, falls with major injuries, incidence of venous thromboembolism (VTE), patient preferences and symptom management. The MedPAC expressed support for the development of a limited number of quality measures in the IRF sector that would focus on outcomes measures when possible and patient safety and experience where applicable. Moreover, MedPAC expressed support for CMS developing and including a hospital readmission measure into the IRF quality reporting program, and encouraged CMS to add a measure of functional improvement given its centrality to IRF care.

*Response:* We thank the commenters for their input. We appreciate MedPAC's support of our efforts to develop a quality reporting program for IRFs that focuses on outcome measures and patient safety. We will take all comments into consideration for future expansion of the IRF quality reporting program.

*Final Decision:* After carefully considering the comments we received on the new IRF quality reporting program, we are finalizing the new IRF quality reporting program for the first reporting year, as proposed. In addition, we are submitting the revised IRF–PAI, which can be downloaded from the IRF PPS Web site at *http://www.cms.gov/InpatientRehabFacPPS/04_IRFPAI.asp#TopOfPage,* to OMB for approval.

We are also re-designating the existing paragraph § 412.624(c)(4) as § 412.624(c)(5) and adding a new paragraph § 412.624(c)(4). The specific changes to the regulations at part 412 are shown in the ''Regulation Text'' of this final rule.

## XI. Miscellaneous Comments

*Comment:* Several commenters requested that CMS use the most recent 3 years of data to review and update the list of comorbidities used to determine the tier payments to ensure that the tier list reflects all conditions that contribute significantly to IRF costs of care. Along these same lines, one commenter suggested that additional tier comorbidity codes might be appropriate for the list if CMS were to require IRFs to provide ''present on admission'' information to verify that the condition had been present on admission and did not occur during the IRF stay.

*Response:* We appreciate the commenters' suggestions, and will consider these suggestions for future analyses.

*Comment:* Several commenters requested that CMS provide more data to allow stakeholders to replicate our analyses. Specifically, one commenter requested that CMS amend the MedPAR file to include information on a patient's CMG classification, and provide stakeholders with patient-level IRF–PAI data.

*Response:* We agree that the public should have access to whatever is necessary to review and comment on our proposed policies and evaluate the impacts of these policies. Some commenters have expressed a belief that the MedPAR files could inform their review of our proposals if it included CMGs. While we are unsure how this information would assist commenters, our policy is to supply whatever data is requested if such disclosure is legally permitted. We are therefore working towards including CMG information on the MedPAR, to the extent that such information will not make the MedPAR a patient-identifiable data file. The commenters also requested that we provide public access to patient-identifiable data, such as the IRF–PAI. We are restricted in our ability to release patient-level data under several privacy and security laws, such as the Privacy Act and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the implementing regulations. For example, the HIPAA Privacy Rule provides that we may only disclose the minimum data necessary to accomplish the purpose of the disclosure (45 CFR 164.502(b)). We did not use IRF–PAI data in our analysis for the FY 2012 IRF PPS proposed and final rules. As such, these data are not relevant to the ability of commenters to review or comment on our proposals. We would violate HIPAA's minimum necessary requirements if we were to release these data for purposes of reviewing and responding to these rules. If identifiable data is used in future rulemaking, we will make data available in accordance with applicable law. Further, if commenters wish to request identifiable data for purposes outside the IRF PPS rulemaking process, we encourage them to use CMS' normal data request process. More information on CMS' data distribution policies is available on CMS's Web site at *http://www.cms.gov/IdentifiableDataFiles/.*

*Comment:* One commenter suggested that CMS revise the IRF coverage requirements that are described in chapter 1, section 110 of the Medicare Benefit Policy Manual (Pub. L. 100–02) to allow recreational therapy services to count, on a limited basis, towards the intensive rehabilitation therapy requirement in IRFs and also to state that recreational therapy is a covered service in IRFs when the medical necessity is well-documented by the rehabilitation physician in the medical record and is ordered by the rehabilitation physician as part of the overall plan of care for the patient.

*Response:* As we did not propose any changes to the IRF coverage requirements in § 412.622(a)(3), (4), and (5) that would affect any of the requirements described in chapter 1, section 110 of the Medicare Benefit Policy Manual (Pub. L. 100–02), this comment is outside the scope of the proposed rule. However, as we have indicated before, we do not believe that recreational therapy services should replace the provision of the 4 core skilled therapy services (physical therapy, occupational therapy, speech-language pathology, and prosthetics/orthotics). Thus, we believe it should be left to each individual IRF to determine whether offering recreational therapy is the best way to achieve the desired patient care outcomes. As we have stated previously, recreational therapy is a covered service in IRFs when the medical necessity is well-documented by the rehabilitation physician in the medical record and is ordered by the rehabilitation physician as part of the overall plan of care for the patient.

## XII. Provisions of the Final Regulations

In this final rule, we are adopting the provisions as set forth in the FY 2012 IRF PPS proposed rule (76 FR 24214), except as noted elsewhere in the preamble. Specifically:

### *A. Payment Provision Changes*

- We will update the FY 2012 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget neutral manner, as discussed in section IV. of this final rule.
- We will hold the FY 2012 IRF facility-level adjustments (rural, LIP, and teaching status adjustments) at FY 2011 levels while we conduct further research on the underlying reasons for the fluctuations in the data, as discussed in section V. of this final rule.
- We will implement a temporary cap adjustment policy for the teaching status adjustment to reflect interns and residents displaced due to closure of IRFs or IRF residency training programs, as discussed in section V. of this final rule.
- We will update the FY 2012 IRF PPS payment rates by the market basket increase factor, based upon the most current data available, with a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section VI. of this final rule.
- We will update the wage index and the labor-related share of the FY 2012 IRF PPS payment rates in a budget neutral manner, as discussed in section VI. of this final rule.
- We will calculate the final IRF Standard Payment Conversion Factor for FY 2012, as discussed in section VI. of this final rule.
- We will update the outlier threshold amount for FY 2012, as discussed in section VII. of this final rule.
- We will update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2012, as discussed in section VII. of this final rule.
- We will discuss the impact of the IPPS data matching process changes on the IRF PPS calculation of the Supplemental Security Income (SSI) ratios used to compute the IRF LIP adjustment factor, as discussed in section VIII. of this final rule.
- We will implement the IRF quality reporting program provisions of section 1886(j)(7) of the Act, as discussed in section X. of this final rule.

*B. Proposed Revisions to Existing Regulation Text*

In addition, we will revise the existing requirements at § 412.25(b), § 412.25(b)(1), § 412.25(b)(2), and § 412.25(b)(3) that apply to all units that are excluded from the IPPS, as described in section IX. of this final rule. To amend the regulatory reference to conform with these changes, we will also revise the existing requirements at § 412.25(e)(2)(ii)(A), as described in section IX. of this final rule. With the exception of § 412.25(e)(2)(ii)(A), the revisions affect both IRFs and IPFs.

We will also relocate and revise the existing requirements at § 412.23(b), § 412.29, and § 412.30 that describe the requirements for facilities to qualify to receive payment under the IRF PPS, as described in section IX. of this final rule.

Finally, we will re-designate the existing paragraph § 412.624(c)(4) as § 412.624(c)(5) and add a new paragraph § 412.624(c)(4) to implement the IRF quality reporting program, as described in section X of this final rule.

## XIII. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the OMB for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This final rule does not impose any new information collection requirements as outlined in the regulation text. However, this final rule does make reference to associated information collections that are not discussed in the regulation text contained in this document. The following is a discussion of these information collections, some of which have already received OMB approval.

As stated in section X.B of this final rule, for purposes of calculating the FY 2014 IRF PPS increase factor, we require IRFs to submit data on 2 quality measures beginning October 1, 2012. These quality measures are: (1) Catheter Associated Urinary Tract Infections; and (2) Pressure Ulcers that are New or Have Worsened. The aforementioned measures will be collected via the following respective means.

*A. Catheter Associated Urinary Tract Infections (CAUTI)*

Regarding the collection of data on the first quality measure, Catheter Associated Urinary Tract Infections, we will require as the form and manner of submission for the measure, CAUTI rate per 1,000 urinary catheter days, to be through the Centers for Disease Control (CDC)/National Health Safety Network (NHSN). Data collection by the NHSN occurs via a Web-based tool hosted by the CDC. This reporting service is provided free of charge to healthcare facilities. In fact, some IRFs are already using the NHSN to collect and submit this data. With this final rule, we will impose an information collection requirement for the CAUTI measure. It should be noted that information collection activities associated with the CDC/NHSN are currently approved under OMB control number 0920–0666. Detailed requirements for NHSN participation, measure specifications, and data collection can be found at *http://www.cdc.gov/nhsn/*. IRFs must use the current specifications and data collection tools for Catheter Associated Urinary Tract Infections.

While IRFs were not previously required to report data to NHSN, according to the CDC, there are 26 IRFs that already submit data to NHSN either voluntarily or per State mandate. To report data to NHSN, the CDC requires the facility to enroll into the NHSN and take specified training. According to the NHSN Web site, it will take 240 minutes (4 hours) to register and complete the necessary training provided by the CDC. The estimated annual burden associated with this requirement is 270,000 minutes/4,500 hours (240 minutes x 1,126 IRFs) at an estimated cost of $187,321. This cost is estimated using the average hourly wage of a Registered Nurse which is reported by the U.S. Bureau of Labor Statistics to be $41.59. Once each facility has been properly registered into NHSN and trained, they will need to submit two types of forms in order for CDC to calculate the CAUTI rate per 1,000 urinary catheter days. The first form, the Urinary Tract Infection (UTI) form, is submitted by facilities for each patient with a CAUTI. We estimate that it will take 15 minutes per form per IRF. This time estimate consists of 5 minutes of nursing time needed to collect the clinical data and 10 minutes of clerical time necessary to enter the data into NHSN. We further anticipate that there will be approximately 2.25 forms submitted per IRF per month. Based on this estimate, we expect for each IRF to expend 33.75 minutes (0.5625 hours) per month or 405 minutes (6.75 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 7,776 hours. The estimated cost per IRF is $186.15 per year. Similarly, the estimated total yearly cost across all IRFs is $214,445. These costs are estimated using an hourly wage for a Registered Nurse of $41.59 and a Medical Billing Clerk/Data Entry person of $20.57 as stated by the U.S. Bureau of Labor Statistics. The second form, the denominator form, is used to count daily the number of patients with an indwelling catheter device. These daily counts are summed and only the total for each month is submitted to NHSN. While CDC estimates that the denominator form takes 5 hours per month to complete, we estimate that it will take 2.5 hours per form per IRF per month, as the number of patients with an indwelling catheter is the only part of this form that IRFs will be required to complete. We anticipate that there will be one form submitted per IRF per month. Based on this estimate, we expect for each IRF to expend 150 minutes (2.5 hours) per month and 1,800 minutes (30 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 34,560 hours. The estimated cost per IRF is $1,247.70 per year. Similarly, the estimated total yearly cost across all IRFs is $1,437,350. These costs are estimated using an hourly wage for a Registered Nurse of $41.59.

*B. Pressure Ulcers That Are New or Have Worsened*

As stated in section X.C.2 of this final rule, to support the standardized collection and calculation of quality measures specifically focused on IRF services, we modified the IRF–PAI by replacing and harmonizing the pressure ulcer items with data elements similar to those collected through the MDS 3.0 used in nursing homes. Additionally, the MDS 3.0 pressure ulcer items have been harmonized with the CARE data set, which was developed for and broadly tested in the post-acute demonstration as required by section 5008 of the Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) (DRA). We believe the modified IRF–PAI pressure ulcer items are consistent with the standardized data elements now used in the MDS 3.0, and supported by the NPUAP. They will provide better informed decision making and quality improvement in IRFs and ultimately, across the continuum of care settings.

Since all IRFs are already required to complete and transmit IRF–PAIs on all Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) patients in order to receive payment from Medicare, and the number of IRFs submitting claims to Medicare has remained stable over the past several years, we do not estimate that there are any IRFs that would need to conduct additional training or set-up for completing and transmitting the IRF–PAI. Thus, we do not estimate any additional burden on IRFs for these activities. In addition, we do not estimate any additional burden for IRFs to complete the IRF–PAI with the mandatory quality measures, as the IRF–PAI currently contains a voluntary ''Quality Indicators'' section. We are replacing the voluntary data items with the proposed pressure ulcer question set. When the original burden estimates were completed for the IRF–PAI, we estimated that the ''Quality Indicators'' section of the IRF–PAI would take about 10 minutes to complete, and we assumed that all IRFs would complete the Quality Indicators items, even though completion of this section was voluntary. Thus, removing the Quality Indicators items from the IRF–PAI decreases the total estimated burden of completing each IRF–PAI by about 10 minutes. However, we estimate that it will take about 10 minutes to complete the new pressure ulcer item that we require IRFs to complete as part of the new IRF quality reporting program. Since the time to complete the items that we are removing from the IRF–PAI is the same as the time to complete the new items we added, we estimate no net change in the amount of time associated with completing each IRF–PAI and no net change in burden.

We will be submitting a revision to the IRF–PAI information collection request currently approved under OMB control number 0938–0842 for OMB review and approval.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer, CMS–1349–F, *Fax:* (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

## XIV. Economic Analyses

### *A. Regulatory Impact Analysis*

#### 1. Introduction

We have examined the impacts of this final rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354) (RFA), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated an ''economically'' significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the OMB.

#### 2. Statement of Need

This final rule updates the IRF prospective payment rates for FY 2012 as required under section 1886(j)(3)(C) of the Act. It responds to Section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

This rule also implements some policy changes within the statutory discretion afforded to the Secretary under section 1886(j) of the Act. We believe that the policy changes will better align IRF PPS policies with those of other Medicare payment systems and will clarify the IRF payment regulations. Further, many of the policy changes are designed to promote greater flexibility in the IRF PPS policies.

This final rule also implements section 3401(d) of the Affordable Care Act, which amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to apply a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 through 2019.

Finally, this final rule discusses the IRF quality measures that we are adopting for the first year of implementation of a new IRF quality reporting program, as required by section 3004(b) of the Affordable Care Act.

#### 3. Overall Impacts

We estimate that the total impact of these changes for estimated FY 2012 payments compared to estimated FY 2011 payments would be an increase of approximately $150 million (this reflects a $120 million increase from the update to the payment rates and a $30 million increase due to the update to the outlier threshold amount to increase estimated outlier payments from approximately 2.6 percent in FY 2011 to 3 percent in FY 2012).

#### 4. Detailed Economic Analysis

i. Basis and Methodology of Estimates

This final rule sets forth updates of the IRF PPS rates contained in the FY 2011 notice and updates to the CMG relative weights and average length of stay values, the wage index, and the outlier threshold for high-cost cases. This final rule also implements a 0.1 percentage point reduction to the FY 2012 rebased RPL market basket increase factor (updated from a 2002 base year to a 2008 base year) in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.0 percent reduction to the FY 2012 rebased RPL market basket increase factor for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

We estimate that the FY 2012 impact would be a net increase of $150 million in payments to IRF providers (this reflects a $120 million estimated increase from the update to the payment rates and a $30 million estimated increase due to the update to the outlier threshold amount to increase the estimated outlier payments from approximately 2.6 percent in FY 2011 to 3.0 percent in FY 2012). The impact analysis in Table 14 of this final rule represents the projected effects of the policy changes in the IRF PPS for FY

2012 compared with estimated IRF PPS payments in FY 2011 without the policy changes. We estimate the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in variables, such as the number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2012, we are implementing a number of standard annual revisions and clarifications mentioned elsewhere in this final rule (for example, the update to the wage index and market basket increase factor used to adjust the Federal rates). We estimate that these revisions will increase payments to IRFs by approximately $120 million (all due to the update to the market basket increase factor, since the update to the wage index is done in a budget neutral manner-as required by statute-and therefore neither increases nor decreases aggregate payments to IRFs).

The aggregate change in estimated payments associated with this final rule is estimated to be an increase in payments to IRFs of $150 million for FY 2012. The market basket increase of $120 million and the $30 million increase due to the update to the outlier threshold amount to increase estimated outlier payments from approximately 2.6 percent in FY 2011 to 3.0 percent in FY 2012 result in a net change in estimated payments from FY 2011 to FY 2012 of $150 million.

The effects of the changes that impact IRF PPS payment rates are shown in Table 14. The following changes that affect the IRF PPS payment rates are discussed separately below:

- The effects of the update to the outlier threshold amount, from approximately 2.6 to 3.0 percent of total estimated payments for FY 2012, consistent with section 1886(j)(4) of the Act.
- The effects of the 2.9 percent annual market basket update for FY 2012 (using the rebased RPL market basket) to IRF PPS payment rates, as required by sections 1886(j)(3)(A)(i) and 1886(j)(3)(C) of the Act, including a 0.1 percentage point reduction for FY 2012 in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.0 percent reduction for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the budget-neutral changes to the CMG relative weights and average length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The effect of the data matching process to compute the DSH patient percentage used in the IPPS DSH adjustment that is also used by IRF PPS to compute the low-income percentage adjustment factor.
- The effect of the IRF quality reporting program, beginning in FY 2013.
- The total change in estimated payments based on the FY 2012 policies relative to estimated FY 2011 payments without the policies.

ii. Description of Table 14

Table 14 categorizes IRFs by geographic location, including urban or rural location, and location in one of CMS's 9 census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), by teaching status, and by disproportionate share patient percentage (DSH PP). The top row of the table shows the overall impact on the 1,152 IRFs included in the analysis.

The next 12 rows of Table 14 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 956 IRFs located in urban areas included in our analysis. Among these, there are 752 IRF units of hospitals located in urban areas and 205 freestanding IRF hospitals located in urban areas. There are 195 IRFs located in rural areas included in our analysis. Among these, there are 175 IRF units of hospitals located in rural areas and 20 freestanding IRF hospitals located in rural areas. There are 380 for-profit IRFs. Among these, there are 317 IRFs in urban areas and 63 IRFs in rural areas. There are 718 non-profit IRFs. Among these, there are 596 urban IRFs and 122 rural IRFs. There are 54 government-owned IRFs. Among these, there are 44 urban IRFs and 10 rural IRFs.

The remaining three parts of Table 14 show IRFs grouped by their geographic location within a region, by teaching status, and by DSH PP. First, IRFs located in urban areas are categorized to their location within one of the 9 CMS geographic regions. Second, IRFs located in rural areas are categorized to their location within one of the 9 CMS geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. Third, IRFs are grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to Average Daily Census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent. Finally, IRFs are grouped by DSH PP, including IRFs with zero DSH PP, IRFs with a DSH PP less than 5 percent, IRFs with a DSH PP between 5 percent and 10 percent, IRFs with a DSH PP between 10 percent and 20 percent, and IRFs with a DSH PP greater than 20 percent.

The estimated impacts of each change to the facility categories listed above are shown in the columns of Table 14. The description of each column is as follows:

Column (1) shows the facility classification categories described above.

Column (2) shows the number of IRFs in each category in our FY 2010 analysis file.

Column (3) shows the number of cases in each category in our FY 2010 analysis file.

Column (4) shows the estimated effect of the adjustment to the outlier threshold amount so that estimated outlier payments increase from approximately 2.6 percent in FY 2011 to

3.0 percent of total estimated payments for FY 2012.

Column (5) shows the estimated effect of the rebased market basket update to the IRF PPS payment rates.

Column (6) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget neutral manner.

Column (7) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget neutral manner.

Column (8) compares our estimates of the payments per discharge, incorporating all of the proposed changes reflected in this final rule for FY 2012, to our estimates of payments per discharge in FY 2011 (without these changes).

The average estimated increase for all IRFs is approximately 2.2 percent. This estimated increase includes the effects of the 1.8 percent market basket update, which is derived from a 2.9 percent rebased market basket update reduced by 0.1 percentage point for FY 2012, in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act, and reduced by a 1.0 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act. It also includes the 0.4 percent overall estimated increase (the difference between 2.6 percent in FY 2011 and 3.0 percent in FY 2012) in estimated IRF outlier payments from the update to the outlier threshold amount. Because we are making the remainder of the changes outlined in this final rule in a budget-neutral manner, they will not affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they will affect the estimated distribution of payments among providers.

TABLE 14—IRF IMPACT TABLE FOR FY 2012

| Facility classification | Number of IRFs | Number of cases | Outlier | FY 2012 Adjusted market basket increase factor[1] | FY 2012 CBSA wage index and labor-share | CMG | Total percent change |
|---|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| Total | 1,152 | 397,256 | 0.4% | 1.8% | 0.0% | 0.0% | 2.2 |
| Urban unit | 752 | 200,510 | 0.6 | 1.8 | −0.1 | 0.0 | 2.3 |
| Rural unit | 175 | 27,993 | 0.5 | 1.8 | 0.7 | 0.1 | 3.2 |
| Urban hospital | 205 | 162,121 | 0.2 | 1.8 | 0.0 | 0.0 | 1.9 |
| Rural hospital | 20 | 6,632 | 0.2 | 1.8 | 1.6 | −0.1 | 3.5 |
| Urban For-Profit | 317 | 151,768 | 0.2 | 1.8 | 0.1 | 0.0 | 2.1 |
| Rural For-Profit | 63 | 12,437 | 0.4 | 1.8 | 1.1 | 0.1 | 3.4 |
| Urban Non-Profit | 596 | 199,249 | 0.6 | 1.8 | −0.3 | 0.0 | 2.1 |
| Rural Non-Profit | 122 | 20,437 | 0.5 | 1.8 | 0.8 | 0.0 | 3.1 |
| Urban Government | 44 | 11,614 | 0.7 | 1.8 | 0.2 | 0.0 | 2.8 |
| Rural Government | 10 | 751 | 0.9 | 1.8 | 1.3 | 0.1 | 4.1 |
| Urban | 957 | 362,631 | 0.4 | 1.8 | −0.1 | 0.0 | 2.1 |
| Rural | 195 | 34,625 | 0.5 | 1.8 | 0.9 | 0.1 | 3.2 |
| Urban by region[2] | | | | | | | |
| Urban New England | 32 | 16,385 | 0.4 | 1.8 | −1.2 | 0.1 | 1.1 |
| Urban Middle Atlantic | 142 | 66,330 | 0.3 | 1.8 | −0.7 | 0.0 | 1.4 |
| Urban South Atlantic | 132 | 63,773 | 0.4 | 1.8 | 0.0 | 0.0 | 2.2 |
| Urban East North Central | 188 | 57,251 | 0.6 | 1.8 | 0.0 | 0.0 | 2.4 |
| Urban East South Central | 49 | 26,367 | 0.2 | 1.8 | 0.4 | −0.1 | 2.3 |
| Urban West North Central | 73 | 18,112 | 0.6 | 1.8 | 0.0 | 0.0 | 2.4 |
| Urban West South Central | 169 | 66,296 | 0.4 | 1.8 | 0.5 | 0.0 | 2.7 |
| Urban Mountain | 70 | 23,827 | 0.5 | 1.8 | 0.2 | −0.1 | 2.3 |
| Urban Pacific | 102 | 24,290 | 0.7 | 1.8 | −0.3 | 0.0 | 2.2 |
| Rural by region[2] | .............. | .............. | .............. | .............. | .............. | .............. | .............. |
| Rural New England | 6 | 1,354 | 1.0 | 1.8 | 0.7 | 0.1 | 3.6 |
| Rural Middle Atlantic | 16 | 3,232 | 0.3 | 1.8 | 1.8 | 0.0 | 3.9 |
| Rural South Atlantic | 25 | 5,988 | 0.3 | 1.8 | 0.8 | 0.0 | 2.9 |
| Rural East North Central | 33 | 5,775 | 0.4 | 1.8 | 0.1 | 0.1 | 2.4 |
| Rural East South Central | 23 | 4,016 | 0.2 | 1.8 | 1.4 | 0.0 | 3.4 |
| Rural West North Central | 31 | 3,944 | 0.8 | 1.8 | −0.2 | 0.1 | 2.5 |
| Rural West South Central | 50 | 9,259 | 0.6 | 1.8 | 1.6 | 0.1 | 4.0 |
| Rural Mountain | 7 | 670 | 0.6 | 1.8 | 0.3 | 0.1 | 2.8 |
| Rural Pacific | 4 | 387 | 1.5 | 1.8 | −0.4 | −0.1 | 2.8 |
| Teaching status | | | | | | | |
| Non-teaching | 1,036 | 345,421 | 0.4 | 1.8 | 0.1 | 0.0 | 2.3 |
| Resident to ADC less than 10% | 69 | 36,843 | 0.6 | 1.8 | −0.4 | 0.0 | 2.0 |
| Resident to ADC 10%–19% | 33 | 12,481 | 0.6 | 1.8 | −0.3 | 0.1 | 2.2 |
| Resident to ADC greater than 19% | 14 | 2,511 | 0.7 | 1.8 | −0.7 | 0.0 | 1.9 |
| Disproportionate share patient percentage (DSH PP) | | | | | | | |
| DSH PP = 0% | 39 | 10,532 | 0.5 | 1.8 | 0.4 | 0.0 | 2.7 |
| DSH PP < 5% | 208 | 62,428 | 0.4 | 1.8 | −0.2 | 0.0 | 2.0 |
| DSH PP 5%–10% | 342 | 134,672 | 0.3 | 1.8 | 0.0 | 0.0 | 2.2 |
| DSH PP 10%–20% | 330 | 123,352 | 0.4 | 1.8 | 0.0 | 0.0 | 2.2 |
| DSH PP greater than 20% | 233 | 66,272 | 0.6 | 1.8 | 0.0 | 0.0 | 2.4 |

[1] This column reflects the impact of the rebased RPL market basket increase factor for FY 2012 of 1.8 percent, which includes a market basket update of 2.9 percent, a 0.1 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.0 percent reduction for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

[2] A map of States that comprise the 9 geographic regions can be found at: *http://www.census.gov/geo/www/us_regdiv.pdf*.)

iii. Impact of the Update to the Outlier Threshold Amount

In the FY 2011 IRF PPS notice (75 FR 42836), we used FY 2009 patient-level claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2011 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2011. For this final rule, we update our analysis using more current FY 2010 data. Using the updated FY 2010 data, we now estimate that IRF outlier payments, as a percentage of total estimated payments for FY 2011, decreased from 3 percent using the FY 2009 data to approximately 2.6 percent using the updated FY 2010 data. As a result, we adjust the outlier threshold amount for FY 2012 to $10,660, reflecting total estimated outlier payments equal to 3 percent of total estimated payments in FY 2012.

The impact of the update to the outlier threshold amount (as shown in column 4 of Table 14) is to increase estimated overall payments to IRFs by 0.4 percent. We do not estimate that any group of IRFs would experience a decrease in payments from this update. We estimate the largest increase in payments to be a 1.5 percent increase in estimated payments to rural IRFs in the Pacific region.

iv. Impact of the Market Basket Update to the IRF PPS Payment Rates

The adjusted market basket update to the IRF PPS payment rates is presented in column 5 of Table 14. In the aggregate the update will result in a net 1.8 percent increase in overall estimated payments to IRFs. This net increase reflects the estimated rebased RPL market basket increase factor for FY 2012 of 2.9 percent, reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act, and reduced by a 1.0 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

v. Impact of the CBSA Wage Index and Labor-Related Share

In column 6 of Table 14, we present the effects of the budget neutral update of the wage index and labor-related share. The changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the changes in the two have a combined effect on payments to providers. As discussed in section VI.A.4 of this final rule, the labor-related share decreased from 75.271 percent in FY 2011 to 70.199 percent in FY 2012.

In the aggregate, since these updates to the wage index and the labor-related share are applied in a budget-neutral manner as required under section 1886(j)(6) of the Act, we do not estimate that these updates will affect overall estimated payments to IRFs. However, we estimate that these changes will have small distributional effects. For example, we estimate a 0.9 percent increase in payments to rural IRFs, with the largest increase in payments of 1.8 percent for rural IRFs in the Mid-Atlantic region. We estimate the largest decrease in payments from the update to the CBSA wage index and labor-related share to be a 1.2 percent decrease for urban IRFs in the New England region.

vi. Impact of the Update to the CMG Relative Weights and Average Length of Stay Values

In column 7 of Table 14, we present the effects of the budget neutral update of the CMG relative weights and average length of stay values. In the aggregate we do not estimate that these updates will affect overall estimated payments to IRFs. However, we estimate that these updates will have small distributional effects. The largest decrease in payments as a result of these updates is a 0.1 percent decrease to rural freestanding IRFs, urban IRFs in the East South Central and Mountain regions, and rural IRFs in the Pacific region.

vii. Impact of the IPPS Data Matching Process Changes on the IRF PPS Calculation of the Low-Income Percentage Adjustment Factor

In section VIII of this final rule, we note the recent revision of the data matching process that is used to calculate the DSH patient percentage used in the acute IPPS DSH adjustment. As we have stated previously, it is our policy in calculating the LIP adjustment factor to use the same DSH patient percentage used in the acute IPPS DSH adjustment. This would include the data matching process. We are not able to provide a detailed analysis of the impact of the revised data matching process. That is, it is not possible to determine whether IRF LIP adjustment payments will generally increase or decrease, because IRFs' SSI fractions will vary depending on various factors, including the use of a more updated MedPAR claims data file, use of a more updated SSI eligibility data file, and the other features of the revised data matching process. See the FY 2011 IPPS final rule (75 FR 50663 through 50664) for more information on the revised data matching process.

ix. Impact of the IRF Quality Reporting Program Beginning in FY 2013

As discussed in section X.B of this final rule, we will collect data on 2 quality measures from October 1, 2012 through December 31, 2012 (FY 2013). These quality measures are: (1) Catheter-Associated Urinary Tract Infections; and (2) Pressure Ulcers that are New or Have Worsened. As discussed in section XIII. of this final rule, we estimate that IRFs will incur costs associated with the collection of these data, which we detail below.

a. Catheter Associated Urinary Tract Infections

As stated in section X.C.1. of this final rule, we collect data on the first quality measure, Catheter Associated Urinary Tract Infections, through CDC/NHSN. We do not currently require IRFs to report data to NHSN. However, some IRFs submit data to NHSN either voluntarily or per State mandate. According to the CDC, 26 IRFs already report data to NHSN. We estimate that 1,126 IRFs (1,152 minus the 26 IRFs that are already reporting data to NHSN) will incur costs for registering and completing the necessary training provided by the CDC in FY 2012 in preparation for submitting the data beginning on October 1, 2012 (FY 2013). We estimate that registering and completing the necessary training of the required personnel at each IRF will take 4 hours at a cost of $41.59 per hour, at an estimated cost per IRF of $166.36 and a total estimated cost across all IRFs of $187,321.

Once IRFs begin submitting data to the NHSN on Catheter Associated Urinary Tract Infections by October 1, 2012 (FY 2013), they will need to submit two types of forms in order for CDC to calculate the CAUTI rate per 1,000 urinary catheter days. We estimate that the first form, the UTI form, will take 15 minutes per reporting episode per IRF and that there will be approximately 2.25 NHSN submissions per IRF per month. Based on this estimate, we expect for each IRF to expend 33.75 minutes (0.5625 hours) per month or 405 minutes (6.75 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 7,776 hours. The estimated yearly cost per IRF is $186.15 and the estimated total yearly cost across all IRFs is $214,445. While CDC estimates that the second form, the denominator form used to count daily the number of patients with an indwelling catheter device, will take 5 hours per month to complete, we estimate that it will take 2.5 hours per form per IRF per month as the number of patients with an indwelling catheter is the only part of this form that IRFs will be required to complete. We anticipate that there will be one form submitted per IRF per month and each IRF will expend 150 minutes (2.5 hours) per month and 1,800 minutes (30 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 34,560 hours. The estimated cost per IRF is $1,247.70 per year and the estimated total yearly cost across all IRFs is $1,437,350. These costs are estimated using an hourly wage for a Registered Nurse of $41.59 and a Medical Billing Clerk/Data Entry person of $20.57.

b. Pressure Ulcers That Are New or Have Worsened

As stated in section X.C.2 of this final rule, we modified the IRF–PAI by removing the items previously in the ''Quality Indicators'' section and replacing them with pressure ulcer items similar to elements from the MDS 3.0 nursing home instrument. Since all IRFs are already required to complete and transmit IRF–PAIs on all Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) to receive payment from Medicare, and since the number of IRFs submitting claims to Medicare has remained stable over the past several years, we do not estimate that there are any IRFs that will need to conduct additional training or set-up for completing and transmitting the IRF–PAI. Thus, we do not estimate any additional cost to IRFs in FY 2012 for these activities. While IRFs are already transmitting the IRF–PAI form to CMS, we do not estimate any additional transmission costs associated with the proposed IRF quality reporting program. Further, we do not estimate any additional burden for IRFs to complete an IRF–PAI with mandatory quality measures as the IRF–PAI previously contained a voluntary ''Quality Indicators'' section, which we replaced with the pressure ulcer question set. When the original burden estimates were completed for the IRF–PAI, we estimated that the ''Quality Indicators'' section of the IRF–PAI would take about 10 minutes to complete, and we assumed that all IRFs would complete the Quality Indicators items, even though completion of this section was voluntary. Thus, removing the Quality Indicators items from the IRF–PAI decreases the total estimated burden of completing each IRF–PAI by about 10 minutes. However, we estimate that it will take about 10 minutes to complete the new pressure ulcer item that we are requiring IRFs to complete as part of the new IRF quality reporting program. Since the time to complete the items that we are removing from the IRF–PAI is the same as the time to complete the new items we are adding, we estimate no net change in the amount of time or the costs associated with completing each IRF–PAI.

5. Alternatives Considered

Although we have determined that this final rule will not have a significant economic impact on a substantial number of small entities, we have voluntarily prepared a discussion on the alternatives considered to the IRF PPS.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. Thus, we did not consider alternatives to updating payments using the estimated RPL market basket increase factor for FY 2012. In this final rule, we rebase the RPL market basket for FY 2012, as we typically do every 5 to 7 years, from a 2002 base year to a 2008 base year. We considered not rebasing the RPL market basket for FY 2012; however, periodically rebasing the RPL market basket ensures that it continues to reflect the most accurate account of the cost of relevant goods and services. In accordance with the recently amended section 1886(j)(3)(C) of the Act, we are updating IRF Federal prospective payments in this final rule by 1.8 percent (which equals the 2.9 percent estimated rebased RPL market basket increase factor for FY 2012 reduced by 0.1 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act, and reduced by a 1.0 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2012. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case mix, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We considered adjusting the facility-level adjustments (the rural, LIP, and teaching status adjustment) for FY 2012 using updated data and a revised methodology that would remove a weighting factor from the regression analysis that we believe is no longer appropriate. However, we found that the proposed changes to the adjustment factors would cause unusually large reductions in payment for some facilities that are not clearly justified. Thus, we are freezing the IRF facility-level adjustment factors at FY 2011 levels for FY 2012 while we continue to study the underlying anomalies in the data that may be causing some of the instability in the facility-level adjustments and analyze the most appropriate methodology to use to update the facility-level adjustment factors.

We considered maintaining the existing outlier threshold amount for FY 2012. However, the update to the outlier threshold amount will have a positive impact on IRF providers and, therefore, on small entities (as shown in Table 14, column 4). If we were to maintain the FY 2011 outlier threshold amount, fewer outlier cases would qualify for the additional outlier payments in FY 2012. Analysis of updated FY 2010 data indicates that estimated outlier payments would not equal 3 percent of estimated total payments for FY 2012 unless we update the outlier threshold amount. Thus, we believe that this update is appropriate for FY 2012.

6. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 15, we have prepared an accounting statement showing the classification of the transfers associated with the provisions of this final rule. This table provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the changes presented in this final rule based on the data for 1,152 IRFs in our database.

TABLE 15—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS, FROM THE 2011 IRF PPS FISCAL YEAR TO THE 2012 IRF PPS FISCAL YEAR

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers. | $150 million. |

TABLE 15—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS, FROM THE 2011 IRF PPS FISCAL YEAR TO THE 2012 IRF PPS FISCAL YEAR—Continued

| Category | Transfers |
|---|---|
| From Whom to Whom? | Federal Government to IRF Medicare Providers. |

7. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2012 are projected to increase by 2.2 percent, compared with those in FY 2011, as reflected in column 8 of Table 14. IRF payments are estimated to increase 2.1 percent in urban areas and 3.2 percent in rural areas, per discharge, compared with FY 2011. Payments to rehabilitation units in hospitals in urban areas are estimated to increase 2.3 percent per discharge. Payments to freestanding rehabilitation hospitals in urban areas are estimated to increase 1.9 percent per discharge. Payments to rehabilitation units in hospitals in rural areas are estimated to increase 3.2 percent per discharge, while payments to freestanding rehabilitation hospitals in rural areas are estimated to increase 3.5 percent per discharge.

Overall, the largest payment increase is estimated at 4.1 percent for rural government-owned IRFs and rural IRFs in the West South Central region. We are not estimating any payment decreases for FY 2012.

*B. Regulatory Flexibility Act Analysis*

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IRFs and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $34.5 million in any 1 year. (For details, see the Small Business Administration's Web site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=2465b064ba6965cc1fbd2eae60854b11&rgn=div8&view=text&node=13:1.0.1.1.16.1.266.9&idno=13*) (refer to subsector 622). Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an estimated 1,152 IRFs that are in our analysis file, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The HHS generally uses a revenue or cost impact of 3 to 5 percent as a significance threshold under the RFA. There is no negative estimated impact as a result of this final rule that is within the significance threshold of 3 to 5 percent. As shown in Table 14, we estimate that the net revenue impact of this final rule on all IRFs is to increase estimated payments by about 2.2 percent, with an estimated increase in payments of 3 percent or higher for some categories of IRFs (such as both freestanding rehabilitation hospitals located in rural areas and rehabilitation units in hospitals located in rural areas, rural government-owned IRFS and rural IRFs in the New England, Mid-Atlantic, East South Central, and West South Central) and no estimated decreases in payment. Therefore, we estimate that all IRFs will experience a net positive increase in payments. As a result, the Secretary has determined that this final rule will not have a significant impact on a substantial number of small entities. We present, in the Alternatives Considered section XIV.A.5 of this final rule, an analysis of the alternatives we considered for this final IRF PPS rule. Medicare fiscal intermediaries and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a MSA and has fewer than 100 beds. Based on the data of the 175 rural units and 20 rural hospitals in our database of 1,152 IRFs, we estimate that small rural IRF hospitals will receive between 2.4 percent and 4.1 percent higher net payments in FY 2012 due to the provisions in this final rule, with no rural IRF hospitals estimated to receive negative net payments. Thus, the Secretary has determined that the rates and policies set forth in this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

*C. Unfunded Mandates Reform Act Analysis*

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold level is approximately $136 million. This final rule will not impose spending costs on State, local, or Tribal governments, in the aggregate, or by the private sector, of $136 million.

**XV. Federalism Analysis**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will have no substantial direct effect on State and local governments, preempt State law, or otherwise have Federalism implications.

**List of Subjects in 42 CFR Part 412**

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as follows:

## PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 continues to read as follows:

**Authority:** Sections 1102, 1862, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395y, and 1395hh).

### Subpart B—Hospital Services Subject to and Excluded From the Prospective Payment Systems for Inpatient Operating Costs and Inpatient Capital-Related Costs

■ 2. Section 412.23 is amended by revising paragraph (b) to read as follows:

**§ 412.23 Excluded hospitals: Classifications.**

* * * * *

(b) *Rehabilitation hospitals.* A rehabilitation hospital or unit must meet the requirements specified in § 412.29 of this subpart to be excluded from the prospective payment systems specified in § 412.1(a)(1) of this subpart and to be paid under the prospective payment system specified in § 412.1(a)(3) of this subpart and in subpart P of this part.

* * * * *

■ 3. Section 412.25 is amended by revising paragraphs (b) and (e)(2)(ii)(A) to read as follows:

**§ 412.25 Excluded hospital units: Common requirements.**

* * * * *

(b) *Changes in the size of excluded units.* Except in the special cases noted at the end of this paragraph, changes in the number of beds or square footage considered to be part of an excluded unit under this section are allowed one time during a cost reporting period if the hospital notifies its Medicare contractor and the CMS RO in writing of the planned change at least 30 days before the date of the change. The hospital must maintain the information needed to accurately determine costs that are attributable to the excluded unit. A change in bed size or a change in square footage may occur at any time during a cost reporting period and must remain in effect for the rest of that cost reporting period. Changes in bed size or square footage may be made at any time if these changes are made necessary by relocation of a unit to permit construction or renovation necessary for compliance with changes in Federal, State, or local law affecting the physical facility or because of catastrophic events such as fires, floods, earthquakes, or tornadoes.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(A) For a rehabilitation unit, the requirements under § 412.29 of this subpart; or

* * * * *

■ 4. Section 412.29 is revised to read as follows:

**§ 412.29 Classification criteria for payment under the inpatient rehabilitation facility prospective payment system.**

To be excluded from the prospective payment systems described in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(3), an inpatient rehabilitation hospital or an inpatient rehabilitation unit of a hospital (otherwise referred to as an IRF) must meet the following requirements:

(a) Have (or be part of a hospital that has) a provider agreement under part 489 of this chapter to participate as a hospital.

(b) Except in the case of a ''new'' IRF or ''new'' IRF beds, as defined in paragraph (c) of this section, an IRF must show that, during its most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the Medicare contractor), it served an inpatient population that meets the following criteria:

(1) For cost reporting periods beginning on or after July 1, 2004, and before July 1, 2005, the IRF served an inpatient population of whom at least 50 percent, and for cost reporting periods beginning on or after July 1, 2005, the IRF served an inpatient population of whom at least 60 percent required intensive rehabilitation services for treatment of one or more of the conditions specified at paragraph (b)(2) of this section. A patient with a comorbidity, as defined at § 412.602 of this part, may be included in the inpatient population that counts toward the required applicable percentage if—

(i) The patient is admitted for inpatient rehabilitation for a condition that is not one of the conditions specified in paragraph (b)(2) of this section;

(ii) The patient has a comorbidity that falls in one of the conditions specified in paragraph (b)(2) of this section; and

(iii) The comorbidity has caused significant decline in functional ability in the individual that, even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities paid under subpart P of this part and that cannot be appropriately performed in another care setting covered under this title.

(2) List of conditions.

(i) Stroke.

(ii) Spinal cord injury.

(iii) Congenital deformity.

(iv) Amputation.

(v) Major multiple trauma.

(vi) Fracture of femur (hip fracture).

(vii) Brain injury.

(viii) Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease.

(ix) Burns.

(x) Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.

(xi) Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.

(xii) Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving two or more major weight bearing joints (elbow, shoulders, hips, or knees, but not counting a joint with a prosthesis) with joint deformity and substantial loss of range of motion, atrophy of muscles surrounding the joint, significant functional impairment of ambulation and other activities of daily living that have not improved after the patient has participated in an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but have the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis no longer is considered to have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

(xiii) Knee or hip joint replacement, or both, during an acute hospitalization immediately preceding the inpatient rehabilitation stay and also meet one or more of the following specific criteria:

(A) The patient underwent bilateral knee or bilateral hip joint replacement surgery during the acute hospital admission immediately preceding the IRF admission.

(B) The patient is extremely obese with a Body Mass Index of at least 50 at the time of admission to the IRF.

(C) The patient is age 85 or older at the time of admission to the IRF.

(c) In the case of new IRFs (as defined in paragraph (c)(1) of this section) or new IRF beds (as defined in paragraph (c)(2)of this section), the IRF must provide a written certification that the inpatient population it intends to serve meets the requirements of paragraph (b) of this section. This written certification will apply until the end of the IRF's first full 12-month cost reporting period or, in the case of new IRF beds, until the end of the cost reporting period during which the new beds are added to the IRF.

(1) *New IRFs.* An IRF hospital or IRF unit is considered new if it has not been paid under the IRF PPS in subpart P of

this part for at least 5 calendar years. A new IRF will be considered new from the point that it first participates in Medicare as an IRF until the end of its first full 12-month cost reporting period.

(2) *New IRF beds.* Any IRF beds that are added to an existing IRF must meet all applicable State Certificate of Need and State licensure laws. New IRF beds may be added one time at any point during a cost reporting period and will be considered new for the rest of that cost reporting period. A full 12-month cost reporting period must elapse between the delicensing or decertification of IRF beds in an IRF hospital or IRF unit and the addition of new IRF beds to that IRF hospital or IRF unit. Before an IRF can add new beds, it must receive written approval from the appropriate CMS RO, so that the CMS RO can verify that a full 12-month cost reporting period has elapsed since the IRF has had beds delicensed or decertified. New IRF beds are included in the compliance review calculations under paragraph (b) of this section from the time that they are added to the IRF.

(3) *Change of ownership or leasing.* An IRF hospital or IRF unit that undergoes a change of ownership or leasing, as defined in § 489.18 of this chapter, retains its excluded status and will continue to be paid under the prospective payment system specified in § 412.1(a)(3) before and after the change of ownership or leasing if the new owner(s) of the IRF accept assignment of the previous owners' Medicare provider agreement and the IRF continues to meet all of the requirements for payment under the IRF prospective payment system. If the new owner(s) do not accept assignment of the previous owners' Medicare provider agreement, the IRF is considered to be voluntarily terminated and the new owner(s) may re-apply to participate in the Medicare program. If the IRF does not continue to meet all of the requirements for payment under the IRF prospective payment system, then the IRF loses its excluded status and is paid according to the prospective payment systems described in § 412.1(a)(1).

(4) *Mergers.* If an IRF hospital (or a hospital with an IRF unit) merges with another hospital and the owner(s) of the merged hospital accept assignment of the IRF hospital's provider agreement (or the provider agreement of the hospital with the IRF unit), then the IRF hospital or IRF unit retains its excluded status and will continue to be paid under the prospective payment system specified in § 412.1(a)(3) before and after the merger, as long as the IRF hospital or IRF unit continues to meet all of the requirements for payment under the IRF prospective payment system. If the owner(s) of the merged hospital do not accept assignment of the IRF hospital's provider agreement (or the provider agreement of the hospital with the IRF unit), then the IRF hospital or IRF unit is considered voluntarily terminated and the owner(s) of the merged hospital may reapply to the Medicare program to operate a new IRF.

(d) Have in effect a preadmission screening procedure under which each prospective patient's condition and medical history are reviewed to determine whether the patient is likely to benefit significantly from an intensive inpatient hospital program. This procedure must ensure that the preadmission screening is reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF.

(e) Have in effect a procedure to ensure that patients receive close medical supervision, as evidenced by at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.

(f) Furnish, through the use of qualified personnel, rehabilitation nursing, physical therapy, and occupational therapy, plus, as needed, speech-language pathology, social services, psychological services (including neuropsychological services), and orthotic and prosthetic services.

(g) Have a director of rehabilitation who—

(1) Provides services to the IRF hospital and its inpatients on a full-time basis or, in the case of a rehabilitation unit, at least 20 hours per week;

(2) Is a doctor of medicine or osteopathy;

(3) Is licensed under State law to practice medicine or surgery; and

(4) Has had, after completing a one-year hospital internship, at least 2 years of training or experience in the medical-management of inpatients requiring rehabilitation services.

(h) Have a plan of treatment for each inpatient that is established, reviewed, and revised as needed by a physician in consultation with other professional personnel who provide services to the patient.

(i) Use a coordinated interdisciplinary team approach in the rehabilitation of each inpatient, as documented by the periodic clinical entries made in the patient's medical record to note the patient's status in relationship to goal attainment and discharge plans, and that team conferences are held at least once per week to determine the appropriateness of treatment.

(j) *Retroactive adjustments.* If a new IRF (or new beds that are added to an existing IRF) are excluded from the prospective payment systems specified in § 412.1(a)(1) and paid under the prospective payment system specified in § 412.1(a)(3) for a cost reporting period under paragraph (c) of this section, but the inpatient population actually treated during that period does not meet the requirements of paragraph (b) of this section, we adjust payments to the IRF retroactively in accordance with the provisions in § 412.130.

**§ 412.30 [Removed and Reserved]**

■ 5. Section 412.30 is removed and reserved.

## Subpart P—Prospective Payment for Inpatient Rehabilitation Hospitals and Rehabilitation Units

■ 6. Section 412.624 is amended by

■ A. Redesignating paragraph (c)(4) as paragraph (c)(5).

■ B. Adding a new paragraph (c)(4).

The addition reads as follows:

**§ 412.624 Methodology for calculating the Federal prospective payment rates.**

* * * * *

(c) * * *

(4) Applicable increase factor for FY 2014 and for subsequent FY. Subject to the provisions of paragraphs (c)(4)(i) and (c)(4)(ii) of this section, the applicable increase factor for FY 2014 and for subsequent years for updating the standard payment conversion factor is the increase factor described in paragraph (a)(3) of this section, including adjustments described in paragraph (d) of this section as appropriate.

(i) In the case of an IRF that is paid under the prospective payment system specified in § 412.1(a)(3) of this part that does not submit quality data to CMS, in the form and manner specified by CMS, the applicable increase factor specified in paragraph (a)(3) of this section is reduced by 2 percentage points.

(ii) Any reduction of the increase factor will apply only to the fiscal year involved and will not be taken into account in computing the applicable increase factor for a subsequent fiscal year.

* * * * *

**Authority:** (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 21, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: July 27, 2011.

**Kathleen Sebelius,**

*Secretary, Health and Human Services.*

The following addendum will not appear in the Code of Federal Regulations.

BILLING CODE 4120–01–P

**Addendum**

In this addendum, we provide the wage index tables referred to throughout the preamble to this final rule. The tables presented below are as follows:

Table A.— Inpatient Rehabilitation Facility Wage Index for Urban Areas for Discharges Occurring from October 1, 2011 through September 30, 2012.

Table B—Inpatient Rehabilitation Facility Wage Index for Rural Areas for Discharges Occurring from October 1, 2011 through September 30, 2012.

**TABLE A: INPATIENT REHABILITATION FACILITY WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2011 THROUGH SEPTEMBER 30, 2012**

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 10180 | Abilene, TX<br>Callahan County, TX<br>Jones County, TX<br>Taylor County, TX | 0.8003 |
| 10380 | Aguadilla-Isabela-San Sebastián, PR<br>Aguada Municipio, PR<br>Aguadilla Municipio, PR<br>Añasco Municipio, PR<br>Isabela Municipio, PR<br>Lares Municipio, PR<br>Moca Municipio, PR<br>Rincón Municipio, PR<br>San Sebastián Municipio, PR | 0.3471 |
| 10420 | Akron, OH<br>Portage County, OH<br>Summit County, OH | 0.8843 |
| 10500 | Albany, GA<br>Baker County, GA<br>Dougherty County, GA<br>Lee County, GA<br>Terrell County, GA<br>Worth County, GA | 0.9036 |
| 10580 | Albany-Schenectady-Troy, NY<br>Albany County, NY<br>Rensselaer County, NY<br>Saratoga County, NY<br>Schenectady County, NY<br>Schoharie County, NY | 0.8653 |
| 10740 | Albuquerque, NM<br>Bernalillo County, NM<br>Sandoval County, NM<br>Torrance County, NM<br>Valencia County, NM | 0.9456 |
| 10780 | Alexandria, LA<br>Grant Parish, LA<br>Rapides Parish, LA | 0.7995 |
| 10900 | Allentown-Bethlehem-Easton, PA-NJ<br>Warren County, NJ<br>Carbon County, PA<br>Lehigh County, PA<br>Northampton County, PA | 0.9194 |
| 11020 | Altoona, PA<br>Blair County, PA | 0.8620 |
| 11100 | Amarillo, TX<br>Armstrong County, TX<br>Carson County, TX<br>Potter County, TX<br>Randall County, TX | 0.8644 |
| 11180 | Ames, IA<br>Story County, IA | 0.9970 |
| 11260 | Anchorage, AK<br>Anchorage Municipality, AK<br>Matanuska-Susitna Borough, AK | 1.1964 |
| 11300 | Anderson, IN<br>Madison County, IN | 0.9192 |
| 11340 | Anderson, SC<br>Anderson County, SC | 0.8691 |
| 11460 | Ann Arbor, MI<br>Washtenaw County, MI | 1.0124 |
| 11500 | Anniston-Oxford, AL<br>Calhoun County, AL | 0.7918 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 11540 | Appleton, WI | |
| | Calumet County, WI | |
| | Outagamie County, WI | 0.9361 |
| 11700 | Asheville, NC | |
| | Buncombe County, NC | |
| | Haywood County, NC | |
| | Henderson County, NC | |
| | Madison County, NC | 0.9001 |
| 12020 | Athens-Clarke County, GA | |
| | Clarke County, GA | |
| | Madison County, GA | |
| | Oconee County, GA | |
| | Oglethorpe County, GA | 0.9659 |
| 12060 | Atlanta-Sandy Springs-Marietta, GA | |
| | Barrow County, GA | |
| | Bartow County, GA | |
| | Butts County, GA | |
| | Carroll County, GA | |
| | Cherokee County, GA | |
| | Clayton County, GA | |
| | Cobb County, GA | |
| | Coweta County, GA | |
| | Dawson County, GA | |
| | DeKalb County, GA | |
| | Douglas County, GA | |
| | Fayette County, GA | |
| | Forsyth County, GA | |
| | Fulton County, GA | |
| | Gwinnett County, GA | |
| | Haralson County, GA | |
| | Heard County, GA | |
| | Henry County, GA | |
| | Jasper County, GA | |
| | Lamar County, GA | |
| | Meriwether County, GA | |
| | Newton County, GA | |
| | Paulding County, GA | |
| | Pickens County, GA | |
| | Pike County, GA | |
| | Rockdale County, GA | |
| | Spalding County, GA | |
| | Walton County, GA | 0.9549 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 12100 | Atlantic City-Hammonton, NJ | |
| | Atlantic County, NJ | 1.1129 |
| 12220 | Auburn-Opelika, AL | |
| | Lee County, AL | 0.7190 |
| 12260 | Augusta-Richmond County, GA-SC | |
| | Burke County, GA | |
| | Columbia County, GA | |
| | McDuffie County, GA | |
| | Richmond County, GA | |
| | Aiken County, SC | |
| | Edgefield County, SC | 0.9538 |
| 12420 | Austin-Round Rock, TX | |
| | Bastrop County, TX | |
| | Caldwell County, TX | |
| | Hays County, TX | |
| | Travis County, TX | |
| | Williamson County, TX | 0.9514 |
| 12540 | Bakersfield, CA | |
| | Kern County, CA | 1.1707 |
| 12580 | Baltimore-Towson, MD | |
| | Anne Arundel County, MD | |
| | Baltimore County, MD | |
| | Carroll County, MD | |
| | Harford County, MD | |
| | Howard County, MD | |
| | Queen Anne's County, MD | |
| | Baltimore City, MD | 1.0255 |
| 12620 | Bangor, ME | |
| | Penobscot County, ME | 0.9777 |
| 12700 | Barnstable Town, MA | |
| | Barnstable County, MA | 1.2823 |
| 12940 | Baton Rouge, LA | |
| | Ascension Parish, LA | |
| | East Baton Rouge Parish, LA | |
| | East Feliciana Parish, LA | |
| | Iberville Parish, LA | |
| | Livingston Parish, LA | |
| | Pointe Coupee Parish, LA | |
| | St. Helena Parish, LA | |
| | West Baton Rouge Parish, LA | |
| | West Feliciana Parish, LA | 0.8583 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 12980 | Battle Creek, MI<br>Calhoun County, MI | 0.9656 |
| 13020 | Bay City, MI<br>Bay County, MI | 0.9221 |
| 13140 | Beaumont-Port Arthur, TX<br>Hardin County, TX<br>Jefferson County, TX<br>Orange County, TX | 0.8488 |
| 13380 | Bellingham, WA<br>Whatcom County, WA | 1.1390 |
| 13460 | Bend, OR<br>Deschutes County, OR | 1.1372 |
| 13644 | Bethesda-Frederick-Gaithersburg, MD<br>Frederick County, MD<br>Montgomery County, MD | 1.0525 |
| 13740 | Billings, MT<br>Carbon County, MT<br>Yellowstone County, MT | 0.8674 |
| 13780 | Binghamton, NY<br>Broome County, NY<br>Tioga County, NY | 0.8719 |
| 13820 | Birmingham-Hoover, AL<br>Bibb County, AL<br>Blount County, AL<br>Chilton County, AL<br>Jefferson County, AL<br>St. Clair County, AL<br>Shelby County, AL<br>Walker County, AL | 0.8611 |
| 13900 | Bismarck, ND<br>Burleigh County, ND<br>Morton County, ND | 0.7348 |
| 13980 | Blacksburg-Christiansburg-Radford, VA<br>Giles County, VA<br>Montgomery County, VA<br>Pulaski County, VA<br>Radford City, VA | 0.8314 |
| 14020 | Bloomington, IN<br>Greene County, IN<br>Monroe County, IN<br>Owen County, IN | 0.8989 |
| 14060 | Bloomington-Normal, IL<br>McLean County, IL | 0.9439 |
| 14260 | Boise City-Nampa, ID<br>Ada County, ID<br>Boise County, ID<br>Canyon County, ID<br>Gem County, ID<br>Owyhee County, ID | 0.9273 |
| 14484 | Boston-Quincy, MA<br>Norfolk County, MA<br>Plymouth County, MA<br>Suffolk County, MA | 1.2178 |
| 14500 | Boulder, CO<br>Boulder County, CO | 1.0065 |
| 14540 | Bowling Green, KY<br>Edmonson County, KY<br>Warren County, KY | 0.8666 |
| 14740 | Bremerton-Silverdale, WA<br>Kitsap County, WA | 1.0667 |
| 14860 | Bridgeport-Stamford-Norwalk, CT<br>Fairfield County, CT | 1.2547 |
| 15180 | Brownsville-Harlingen, TX<br>Cameron County, TX | 0.9173 |
| 15260 | Brunswick, GA<br>Brantley County, GA<br>Glynn County, GA<br>McIntosh County, GA | 0.9209 |
| 15380 | Buffalo-Niagara Falls, NY<br>Erie County, NY<br>Niagara County, NY | 0.9530 |
| 15500 | Burlington, NC<br>Alamance County, NC | 0.8863 |
| 15540 | Burlington-South Burlington, VT<br>Chittenden County, VT<br>Franklin County, VT<br>Grand Isle County, VT | 0.9947 |
| 15764 | Cambridge-Newton-Framingham, MA<br>Middlesex County, MA | 1.1250 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 15804 | Camden, NJ | |
| | Burlington County, NJ | |
| | Camden County, NJ | |
| | Gloucester County, NJ | 1.0386 |
| 15940 | Canton-Massillon, OH | |
| | Carroll County, OH | |
| | Stark County, OH | 0.8749 |
| 15980 | Cape Coral-Fort Myers, FL | |
| | Lee County, FL | 0.9195 |
| 16020 | Cape Girardeau-Jackson, MO-IL | |
| | Alexander County, IL | |
| | Bollinger County, MO | |
| | Cape Girardeau County, MO | 0.8983 |
| 16180 | Carson City, NV | |
| | Carson City, NV | 1.0465 |
| 16220 | Casper, WY | |
| | Natrona County, WY | 0.9655 |
| 16300 | Cedar Rapids, IA | |
| | Benton County, IA | |
| | Jones County, IA | |
| | Linn County, IA | 0.8844 |
| 16580 | Champaign-Urbana, IL | |
| | Champaign County, IL | |
| | Ford County, IL | |
| | Piatt County, IL | 1.0235 |
| 16620 | Charleston, WV | |
| | Boone County, WV | |
| | Clay County, WV | |
| | Kanawha County, WV | |
| | Lincoln County, WV | |
| | Putnam County, WV | 0.7895 |
| 16700 | Charleston-North Charleston-Summerville, SC | |
| | Berkeley County, SC | |
| | Charleston County, SC | |
| | Dorchester County, SC | 0.9354 |
| 16740 | Charlotte-Gastonia-Concord, NC-SC | |
| | Anson County, NC | |
| | Cabarrus County, NC | |
| | Gaston County, NC | |
| | Mecklenburg County, NC | |
| | Union County, NC | |
| | York County, SC | 0.9420 |
| 16820 | Charlottesville, VA | |
| | Albemarle County, VA | |
| | Fluvanna County, VA | |
| | Greene County, VA | |
| | Nelson County, VA | |
| | Charlottesville City, VA | 0.9342 |
| 16860 | Chattanooga, TN-GA | |
| | Catoosa County, GA | |
| | Dade County, GA | |
| | Walker County, GA | |
| | Hamilton County, TN | |
| | Marion County, TN | |
| | Sequatchie County, TN | 0.8829 |
| 16940 | Cheyenne, WY | |
| | Laramie County, WY | 0.9392 |
| 16974 | Chicago-Naperville-Joliet, IL | |
| | Cook County, IL | |
| | DeKalb County, IL | |
| | DuPage County, IL | |
| | Grundy County, IL | |
| | Kane County, IL | |
| | Kendall County, IL | |
| | McHenry County, IL | |
| | Will County, IL | 1.0593 |
| 17020 | Chico, CA | |
| | Butte County, CA | 1.1533 |
| 17140 | Cincinnati-Middletown, OH-KY-IN | |
| | Dearborn County, IN | |
| | Franklin County, IN | |
| | Ohio County, IN | |
| | Boone County, KY | |
| | Bracken County, KY | |
| | Campbell County, KY | |
| | Gallatin County, KY | |
| | Grant County, KY | |
| | Kenton County, KY | |
| | Pendleton County, KY | |
| | Brown County, OH | |
| | Butler County, OH | |
| | Clermont County, OH | |
| | Hamilton County, OH | |
| | Warren County, OH | 0.9699 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 17300 | Clarksville, TN-KY<br>Christian County, KY<br>Trigg County, KY<br>Montgomery County, TN<br>Stewart County, TN | 0.7888 |
| 17420 | Cleveland, TN<br>Bradley County, TN<br>Polk County, TN | 0.7731 |
| 17460 | Cleveland-Elyria-Mentor, OH<br>Cuyahoga County, OH<br>Geauga County, OH<br>Lake County, OH<br>Lorain County, OH<br>Medina County, OH | 0.9050 |
| 17660 | Coeur d'Alene, ID<br>Kootenai County, ID | 0.9364 |
| 17780 | College Station-Bryan, TX<br>Brazos County, TX<br>Burleson County, TX<br>Robertson County, TX | 0.9588 |
| 17820 | Colorado Springs, CO<br>El Paso County, CO<br>Teller County, CO | 0.9481 |
| 17860 | Columbia, MO<br>Boone County, MO<br>Howard County, MO | 0.8282 |
| 17900 | Columbia, SC<br>Calhoun County, SC<br>Fairfield County, SC<br>Kershaw County, SC<br>Lexington County, SC<br>Richland County, SC<br>Saluda County, SC | 0.8733 |
| 17980 | Columbus, GA-AL<br>Russell County, AL<br>Chattahoochee County, GA<br>Harris County, GA<br>Marion County, GA<br>Muscogee County, GA | 0.9027 |
| 18020 | Columbus, IN<br>Bartholomew County, IN | 0.9434 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 18140 | Columbus, OH<br>Delaware County, OH<br>Fairfield County, OH<br>Franklin County, OH<br>Licking County, OH<br>Madison County, OH<br>Morrow County, OH<br>Pickaway County, OH<br>Union County, OH | 1.0141 |
| 18580 | Corpus Christi, TX<br>Aransas County, TX<br>Nueces County, TX<br>San Patricio County, TX | 0.8585 |
| 18700 | Corvallis, OR<br>Benton County, OR | 1.0455 |
| 18880 | Crestview-Fort Walton Beach-Destin, FL<br>Okaloosa County, FL | 0.8842 |
| 19060 | Cumberland, MD-WV<br>Allegany County, MD<br>Mineral County, WV | 0.8186 |
| 19124 | Dallas-Plano-Irving, TX<br>Collin County, TX<br>Dallas County, TX<br>Delta County, TX<br>Denton County, TX<br>Ellis County, TX<br>Hunt County, TX<br>Kaufman County, TX<br>Rockwall County, TX | 0.9860 |
| 19140 | Dalton, GA<br>Murray County, GA<br>Whitfield County, GA | 0.8622 |
| 19180 | Danville, IL<br>Vermilion County, IL | 0.9693 |
| 19260 | Danville, VA<br>Pittsylvania County, VA<br>Danville City, VA | 0.8168 |
| 19340 | Davenport-Moline-Rock Island, IA-IL<br>Henry County, IL<br>Mercer County, IL<br>Rock Island County, IL<br>Scott County, IA | 0.8400 |

| | Urban Area<br>(Constituent Counties) | Wage Index |
|---|---|---|
| 19380 | Dayton, OH<br>Greene County, OH<br>Miami County, OH<br>Montgomery County, OH<br>Preble County, OH | 0.9140 |
| 19460 | Decatur, AL<br>Lawrence County, AL<br>Morgan County, AL | 0.7621 |
| 19500 | Decatur, IL<br>Macon County, IL | 0.7916 |
| 19660 | Deltona-Daytona Beach-Ormond Beach, FL<br>Volusia County, FL | 0.8736 |
| 19740 | Denver-Aurora-Broomfield, CO<br>Adams County, CO<br>Arapahoe County, CO<br>Broomfield County, CO<br>Clear Creek County, CO<br>Denver County, CO<br>Douglas County, CO<br>Elbert County, CO<br>Gilpin County, CO<br>Jefferson County, CO<br>Park County, CO | 1.0718 |
| 19780 | Des Moines-West Des Moines, IA<br>Dallas County, IA<br>Guthrie County, IA<br>Madison County, IA<br>Polk County, IA<br>Warren County, IA | 0.9621 |
| 19804 | Detroit-Livonia-Dearborn, MI<br>Wayne County, MI | 0.9699 |
| 20020 | Dothan, AL<br>Geneva County, AL<br>Henry County, AL<br>Houston County, AL | 0.7435 |
| 20100 | Dover, DE<br>Kent County, DE | 0.9921 |
| 20220 | Dubuque, IA<br>Dubuque County, IA | 0.8774 |
| 20260 | Duluth, MN-WI<br>Carlton County, MN<br>St. Louis County, MN<br>Douglas County, WI | 1.0565 |
| 20500 | Durham-Chapel Hill, NC<br>Chatham County, NC<br>Durham County, NC<br>Orange County, NC<br>Person County, NC | 0.9664 |
| 20740 | Eau Claire, WI<br>Chippewa County, WI<br>Eau Claire County, WI | 0.9639 |
| 20764 | Edison-New Brunswick, NJ<br>Middlesex County, NJ<br>Monmouth County, NJ<br>Ocean County, NJ<br>Somerset County, NJ | 1.1006 |
| 20940 | El Centro, CA<br>Imperial County, CA | 0.9258 |
| 21060 | Elizabethtown, KY<br>Hardin County, KY<br>Larue County, KY | 0.8449 |
| 21140 | Elkhart-Goshen, IN<br>Elkhart County, IN | 0.9465 |
| 21300 | Elmira, NY<br>Chemung County, NY | 0.8445 |
| 21340 | El Paso, TX<br>El Paso County, TX | 0.8475 |
| 21500 | Erie, PA<br>Erie County, PA | 0.8360 |
| 21660 | Eugene-Springfield, OR<br>Lane County, OR | 1.1384 |
| 21780 | Evansville, IN-KY<br>Gibson County, IN<br>Posey County, IN<br>Vanderburgh County, IN<br>Warrick County, IN<br>Henderson County, KY<br>Webster County, KY | 0.8433 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 21820 | Fairbanks, AK<br>Fairbanks North Star Borough, AK | 1.1080 |
| 21940 | Fajardo, PR<br>Ceiba Municipio, PR<br>Fajardo Municipio, PR<br>Luquillo Municipio, PR | 0.3883 |
| 22020 | Fargo, ND-MN<br>Cass County, ND<br>Clay County, MN | 0.8064 |
| 22140 | Farmington, NM<br>San Juan County, NM | 0.9339 |
| 22180 | Fayetteville, NC<br>Cumberland County, NC<br>Hoke County, NC | 0.9323 |
| 22220 | Fayetteville-Springdale-Rogers, AR-MO<br>Benton County, AR<br>Madison County, AR<br>Washington County, AR<br>McDonald County, MO | 0.8616 |
| 22380 | Flagstaff, AZ<br>Coconino County, AZ | 1.2443 |
| 22420 | Flint, MI<br>Genesee County, MI | 1.1496 |
| 22500 | Florence, SC<br>Darlington County, SC<br>Florence County, SC | 0.8252 |
| 22520 | Florence-Muscle Shoals, AL<br>Colbert County, AL<br>Lauderdale County, AL | 0.8144 |
| 22540 | Fond du Lac, WI<br>Fond du Lac County, WI | 0.9223 |
| 22660 | Fort Collins-Loveland, CO<br>Larimer County, CO | 0.9892 |
| 22744 | Fort Lauderdale-Pompano Beach-Deerfield Beach, FL<br>Broward County, FL | 1.0160 |
| 22900 | Fort Smith, AR-OK<br>Crawford County, AR<br>Franklin County, AR<br>Sebastian County, AR<br>Le Flore County, OK<br>Sequoyah County, OK | 0.7599 |
| 23060 | Fort Wayne, IN<br>Allen County, IN<br>Wells County, IN<br>Whitley County, IN | 0.9362 |
| 23104 | Fort Worth-Arlington, TX<br>Johnson County, TX<br>Parker County, TX<br>Tarrant County, TX<br>Wise County, TX | 0.9474 |
| 23420 | Fresno, CA<br>Fresno County, CA | 1.1422 |
| 23460 | Gadsden, AL<br>Etowah County, AL | 0.7180 |
| 23540 | Gainesville, FL<br>Alachua County, FL<br>Gilchrist County, FL | 0.9160 |
| 23580 | Gainesville, GA<br>Hall County, GA | 0.9223 |
| 23844 | Gary, IN<br>Jasper County, IN<br>Lake County, IN<br>Newton County, IN<br>Porter County, IN | 0.9084 |
| 24020 | Glens Falls, NY<br>Warren County, NY<br>Washington County, NY | 0.8507 |
| 24140 | Goldsboro, NC<br>Wayne County, NC | 0.9067 |
| 24220 | Grand Forks, ND-MN<br>Polk County, MN<br>Grand Forks County, ND | 0.7717 |
| 24300 | Grand Junction, CO<br>Mesa County, CO | 0.9850 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 24340 | Grand Rapids-Wyoming, MI<br>Barry County, MI<br>Ionia County, MI<br>Kent County, MI<br>Newaygo County, MI | 0.9169 |
| 24500 | Great Falls, MT<br>Cascade County, MT | 0.8289 |
| 24540 | Greeley, CO<br>Weld County, CO | 0.9496 |
| 24580 | Green Bay, WI<br>Brown County, WI<br>Kewaunee County, WI<br>Oconto County, WI | 0.9586 |
| 24660 | Greensboro-High Point, NC<br>Guilford County, NC<br>Randolph County, NC<br>Rockingham County, NC | 0.8882 |
| 24780 | Greenville, NC<br>Greene County, NC<br>Pitt County, NC | 0.9370 |
| 24860 | Greenville-Mauldin-Easley, SC<br>Greenville County, SC<br>Laurens County, SC<br>Pickens County, SC | 0.9644 |
| 25020 | Guayama, PR<br>Arroyo Municipio, PR<br>Guayama Municipio, PR<br>Patillas Municipio, PR | 0.3686 |
| 25060 | Gulfport-Biloxi, MS<br>Hancock County, MS<br>Harrison County, MS<br>Stone County, MS | 0.8877 |
| 25180 | Hagerstown-Martinsburg, MD-WV<br>Washington County, MD<br>Berkeley County, WV<br>Morgan County, WV | 0.9254 |
| 25260 | Hanford-Corcoran, CA<br>Kings County, CA | 1.1205 |
| 25420 | Harrisburg-Carlisle, PA<br>Cumberland County, PA<br>Dauphin County, PA<br>Perry County, PA | 0.9296 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 25500 | Harrisonburg, VA<br>Rockingham County, VA<br>Harrisonburg City, VA | 0.9158 |
| 25540 | Hartford-West Hartford-East Hartford, CT<br>Hartford County, CT<br>Middlesex County, CT<br>Tolland County, CT | 1.0927 |
| 25620 | Hattiesburg, MS<br>Forrest County, MS<br>Lamar County, MS<br>Perry County, MS | 0.7714 |
| 25860 | Hickory-Lenoir-Morganton, NC<br>Alexander County, NC<br>Burke County, NC<br>Caldwell County, NC<br>Catawba County, NC | 0.8693 |
| 25980 | Hinesville-Fort Stewart, GA[1]<br>Liberty County, GA<br>Long County, GA | 0.8958 |
| 26100 | Holland-Grand Haven, MI<br>Ottawa County, MI | 0.8632 |
| 26180 | Honolulu, HI<br>Honolulu County, HI | 1.1807 |
| 26300 | Hot Springs, AR<br>Garland County, AR | 0.9151 |
| 26380 | Houma-Bayou Cane-Thibodaux, LA<br>Lafourche Parish, LA<br>Terrebonne Parish, LA | 0.7852 |
| 26420 | Houston-Sugar Land-Baytown, TX<br>Austin County, TX<br>Brazoria County, TX<br>Chambers County, TX<br>Fort Bend County, TX<br>Galveston County, TX<br>Harris County, TX<br>Liberty County, TX<br>Montgomery County, TX<br>San Jacinto County, TX<br>Waller County, TX | 0.9824 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 26580 | Huntington-Ashland, WV-KY-OH<br>Boyd County, KY<br>Greenup County, KY<br>Lawrence County, OH<br>Cabell County, WV<br>Wayne County, WV | 0.8953 |
| 26620 | Huntsville, AL<br>Limestone County, AL<br>Madison County, AL | 0.9191 |
| 26820 | Idaho Falls, ID<br>Bonneville County, ID<br>Jefferson County, ID | 0.9663 |
| 26900 | Indianapolis-Carmel, IN<br>Boone County, IN<br>Brown County, IN<br>Hamilton County, IN<br>Hancock County, IN<br>Hendricks County, IN<br>Johnson County, IN<br>Marion County, IN<br>Morgan County, IN<br>Putnam County, IN<br>Shelby County, IN | 0.9672 |
| 26980 | Iowa City, IA<br>Johnson County, IA<br>Washington County, IA | 0.9657 |
| 27060 | Ithaca, NY<br>Tompkins County, NY | 0.9842 |
| 27100 | Jackson, MI<br>Jackson County, MI | 0.9155 |
| 27140 | Jackson, MS<br>Copiah County, MS<br>Hinds County, MS<br>Madison County, MS<br>Rankin County, MS<br>Simpson County, MS | 0.8042 |
| 27180 | Jackson, TN<br>Chester County, TN<br>Madison County, TN | 0.8404 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 27260 | Jacksonville, FL<br>Baker County, FL<br>Clay County, FL<br>Duval County, FL<br>Nassau County, FL<br>St. Johns County, FL | 0.8884 |
| 27340 | Jacksonville, NC<br>Onslow County, NC | 0.7807 |
| 27500 | Janesville, WI<br>Rock County, WI | 0.9415 |
| 27620 | Jefferson City, MO<br>Callaway County, MO<br>Cole County, MO<br>Moniteau County, MO<br>Osage County, MO | 0.8434 |
| 27740 | Johnson City, TN<br>Carter County, TN<br>Unicoi County, TN<br>Washington County, TN | 0.8105 |
| 27780 | Johnstown, PA<br>Cambria County, PA | 0.8090 |
| 27860 | Jonesboro, AR<br>Craighead County, AR<br>Poinsett County, AR | 0.7757 |
| 27900 | Joplin, MO<br>Jasper County, MO<br>Newton County, MO | 0.8214 |
| 28020 | Kalamazoo-Portage, MI<br>Kalamazoo County, MI<br>Van Buren County, MI | 1.0292 |
| 28100 | Kankakee-Bradley, IL<br>Kankakee County, IL | 1.0619 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 28140 | Kansas City, MO-KS<br>Franklin County, KS<br>Johnson County, KS<br>Leavenworth County, KS<br>Linn County, KS<br>Miami County, KS<br>Wyandotte County, KS<br>Bates County, MO<br>Caldwell County, MO<br>Cass County, MO<br>Clay County, MO<br>Clinton County, MO<br>Jackson County, MO<br>Lafayette County, MO<br>Platte County, MO<br>Ray County, MO | 0.9652 |
| 28420 | Kennewick-Pasco-Richland, WA<br>Benton County, WA<br>Franklin County, WA | 0.9976 |
| 28660 | Killeen-Temple-Fort Hood, TX<br>Bell County, TX<br>Coryell County, TX<br>Lampasas County, TX | 0.8798 |
| 28700 | Kingsport-Bristol-Bristol, TN-VA<br>Hawkins County, TN<br>Sullivan County, TN<br>Bristol City, VA<br>Scott County, VA<br>Washington County, VA | 0.7588 |
| 28740 | Kingston, NY<br>Ulster County, NY | 0.9075 |
| 28940 | Knoxville, TN<br>Anderson County, TN<br>Blount County, TN<br>Knox County, TN<br>Loudon County, TN<br>Union County, TN | 0.7842 |
| 29020 | Kokomo, IN<br>Howard County, IN<br>Tipton County, IN | 0.9130 |
| 29100 | La Crosse, WI-MN<br>Houston County, MN<br>La Crosse County, WI | 0.9803 |
| 29140 | Lafayette, IN<br>Benton County, IN<br>Carroll County, IN<br>Tippecanoe County, IN | 0.9289 |
| 29180 | Lafayette, LA<br>Lafayette Parish, LA<br>St. Martin Parish, LA | 0.8489 |
| 29340 | Lake Charles, LA<br>Calcasieu Parish, LA<br>Cameron Parish, LA | 0.8196 |
| 29404 | Lake County-Kenosha County, IL-WI<br>Lake County, IL<br>Kenosha County, WI | 1.0781 |
| 29420 | Lake Havasu City-Kingman, AZ<br>Mohave County, AZ | 1.0235 |
| 29460 | Lakeland-Winter Haven, FL<br>Polk County, FL | 0.8447 |
| 29540 | Lancaster, PA<br>Lancaster County, PA | 0.9344 |
| 29620 | Lansing-East Lansing, MI<br>Clinton County, MI<br>Eaton County, MI<br>Ingham County, MI | 1.0298 |
| 29700 | Laredo, TX<br>Webb County, TX | 0.7914 |
| 29740 | Las Cruces, NM<br>Dona Ana County, NM | 0.9296 |
| 29820 | Las Vegas-Paradise, NV<br>Clark County, NV | 1.2099 |
| 29940 | Lawrence, KS<br>Douglas County, KS | 0.8533 |
| 30020 | Lawton, OK<br>Comanche County, OK | 0.8285 |
| 30140 | Lebanon, PA<br>Lebanon County, PA | 0.7807 |
| 30300 | Lewiston, ID-WA<br>Nez Perce County, ID<br>Asotin County, WA | 0.9358 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 30340 | Lewiston-Auburn, ME<br>Androscoggin County, ME | 0.8903 |
| 30460 | Lexington-Fayette, KY<br>Bourbon County, KY<br>Clark County, KY<br>Fayette County, KY<br>Jessamine County, KY<br>Scott County, KY<br>Woodford County, KY | 0.8817 |
| 30620 | Lima, OH<br>Allen County, OH | 0.9271 |
| 30700 | Lincoln, NE<br>Lancaster County, NE<br>Seward County, NE | 0.9617 |
| 30780 | Little Rock-North Little Rock-Conway, AR<br>Faulkner County, AR<br>Grant County, AR<br>Lonoke County, AR<br>Perry County, AR<br>Pulaski County, AR<br>Saline County, AR | 0.8546 |
| 30860 | Logan, UT-ID<br>Franklin County, ID<br>Cache County, UT | 0.8794 |
| 30980 | Longview, TX<br>Gregg County, TX<br>Rusk County, TX<br>Upshur County, TX | 0.8563 |
| 31020 | Longview, WA<br>Cowlitz County, WA | 1.0296 |
| 31084 | Los Angeles-Long Beach-Glendale, CA<br>Los Angeles County, CA | 1.2130 |
| 31140 | Louisville-Jefferson County, KY-IN<br>Clark County, IN<br>Floyd County, IN<br>Harrison County, IN<br>Washington County, IN<br>Bullitt County, KY<br>Henry County, KY<br>Meade County, KY<br>Nelson County, KY<br>Oldham County, KY<br>Shelby County, KY<br>Spencer County, KY<br>Trimble County, KY | 0.8896 |
| 31180 | Lubbock, TX<br>Crosby County, TX<br>Lubbock County, TX | 0.8847 |
| 31340 | Lynchburg, VA<br>Amherst County, VA<br>Appomattox County, VA<br>Bedford County, VA<br>Campbell County, VA<br>Bedford City, VA<br>Lynchburg City, VA | 0.8694 |
| 31420 | Macon, GA<br>Bibb County, GA<br>Crawford County, GA<br>Jones County, GA<br>Monroe County, GA<br>Twiggs County, GA | 0.9202 |
| 31460 | Madera-Chowchilla, CA<br>Madera County, CA | 0.7986 |
| 31540 | Madison, WI<br>Columbia County, WI<br>Dane County, WI<br>Iowa County, WI | 1.1294 |
| 31700 | Manchester-Nashua, NH<br>Hillsborough County, NH | 0.9869 |
| 31740 | Manhattan, KS<br>Geary County, KS<br>Pottawatomie County, KS<br>Riley County, KS | 0.7847 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 31860 | Mankato-North Mankato, MN<br>Blue Earth County, MN<br>Nicollet County, MN | 0.9083 |
| 31900 | Mansfield, OH<br>Richland County, OH | 0.8918 |
| 32420 | Mayagüez, PR<br>Hormigueros Municipio, PR<br>Mayagüez Municipio, PR | 0.3640 |
| 32580 | McAllen-Edinburg-Mission, TX<br>Hidalgo County, TX | 0.8837 |
| 32780 | Medford, OR<br>Jackson County, OR | 1.0061 |
| 32820 | Memphis, TN-MS-AR<br>Crittenden County, AR<br>DeSoto County, MS<br>Marshall County, MS<br>Tate County, MS<br>Tunica County, MS<br>Fayette County, TN<br>Shelby County, TN<br>Tipton County, TN | 0.9268 |
| 32900 | Merced, CA<br>Merced County, CA | 1.2359 |
| 33124 | Miami-Miami Beach-Kendall, FL<br>Miami-Dade County, FL | 1.0128 |
| 33140 | Michigan City-La Porte, IN<br>LaPorte County, IN | 0.9470 |
| 33260 | Midland, TX<br>Midland County, TX | 0.9711 |
| 33340 | Milwaukee-Waukesha-West Allis, WI<br>Milwaukee County, WI<br>Ozaukee County, WI<br>Washington County, WI<br>Waukesha County, WI | 1.0183 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 33460 | Minneapolis-St. Paul-Bloomington, MN-WI<br>Anoka County, MN<br>Carver County, MN<br>Chisago County, MN<br>Dakota County, MN<br>Hennepin County, MN<br>Isanti County, MN<br>Ramsey County, MN<br>Scott County, MN<br>Sherburne County, MN<br>Washington County, MN<br>Wright County, MN<br>Pierce County, WI<br>St. Croix County, WI | 1.1143 |
| 33540 | Missoula, MT<br>Missoula County, MT | 0.8921 |
| 33660 | Mobile, AL<br>Mobile County, AL | 0.7960 |
| 33700 | Modesto, CA<br>Stanislaus County, CA | 1.2104 |
| 33740 | Monroe, LA<br>Ouachita Parish, LA<br>Union Parish, LA | 0.7993 |
| 33780 | Monroe, MI<br>Monroe County, MI | 0.8684 |
| 33860 | Montgomery, AL<br>Autauga County, AL<br>Elmore County, AL<br>Lowndes County, AL<br>Montgomery County, AL | 0.8442 |
| 34060 | Morgantown, WV<br>Monongalia County, WV<br>Preston County, WV | 0.8137 |
| 34100 | Morristown, TN<br>Grainger County, TN<br>Hamblen County, TN<br>Jefferson County, TN | 0.7041 |
| 34580 | Mount Vernon-Anacortes, WA<br>Skagit County, WA | 1.0363 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 34620 | Muncie, IN | |
| | Delaware County, IN | 0.8206 |
| 34740 | Muskegon-Norton Shores, MI | |
| | Muskegon County, MI | 0.9809 |
| 34820 | Myrtle Beach-North Myrtle Beach-Conway, SC | |
| | Horry County, SC | 0.8738 |
| 34900 | Napa, CA | |
| | Napa County, CA | 1.4604 |
| 34940 | Naples-Marco Island, FL | |
| | Collier County, FL | 0.9698 |
| 34980 | Nashville-Davidson—Murfreesboro-Franklin, TN | |
| | Cannon County, TN | |
| | Cheatham County, TN | |
| | Davidson County, TN | |
| | Dickson County, TN | |
| | Hickman County, TN | |
| | Macon County, TN | |
| | Robertson County, TN | |
| | Rutherford County, TN | |
| | Smith County, TN | |
| | Sumner County, TN | |
| | Trousdale County, TN | |
| | Williamson County, TN | |
| | Wilson County, TN | 0.9457 |
| 35004 | Nassau-Suffolk, NY | |
| | Nassau County, NY | |
| | Suffolk County, NY | 1.2315 |
| 35084 | Newark-Union, NJ-PA | |
| | Essex County, NJ | |
| | Hunterdon County, NJ | |
| | Morris County, NJ | |
| | Sussex County, NJ | |
| | Union County, NJ | |
| | Pike County, PA | 1.1460 |
| 35300 | New Haven-Milford, CT | |
| | New Haven County, CT | 1.1515 |
| 35380 | New Orleans-Metairie-Kenner, LA | |
| | Jefferson Parish, LA | |
| | Orleans Parish, LA | |
| | Plaquemines Parish, LA | |
| | St. Bernard Parish, LA | |
| | St. Charles Parish, LA | |
| | St. John the Baptist Parish, LA | |
| | St. Tammany Parish, LA | 0.9070 |
| 35644 | New York-White Plains-Wayne, NY-NJ | |
| | Bergen County, NJ | |
| | Hudson County, NJ | |
| | Passaic County, NJ | |
| | Bronx County, NY | |
| | Kings County, NY | |
| | New York County, NY | |
| | Putnam County, NY | |
| | Queens County, NY | |
| | Richmond County, NY | |
| | Rockland County, NY | |
| | Westchester County, NY | 1.2955 |
| 35660 | Niles-Benton Harbor, MI | |
| | Berrien County, MI | 0.8872 |
| 35840 | North Port-Bradenton-Sarasota-Venice, FL | |
| | Manatee County, FL | |
| | Sarasota County, FL | 0.9481 |
| 35980 | Norwich-New London, CT | |
| | New London County, CT | 1.1215 |
| 36084 | Oakland-Fremont-Hayward, CA | |
| | Alameda County, CA | |
| | Contra Costa County, CA | 1.6354 |
| 36100 | Ocala, FL | |
| | Marion County, FL | 0.8468 |
| 36140 | Ocean City, NJ | |
| | Cape May County, NJ | 1.0879 |
| 36220 | Odessa, TX | |
| | Ector County, TX | 0.9436 |
| 36260 | Ogden-Clearfield, UT | |
| | Davis County, UT | |
| | Morgan County, UT | |
| | Weber County, UT | 0.9267 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 36420 | Oklahoma City, OK | |
| | Canadian County, OK | |
| | Cleveland County, OK | |
| | Grady County, OK | |
| | Lincoln County, OK | |
| | Logan County, OK | |
| | McClain County, OK | |
| | Oklahoma County, OK | 0.8877 |
| 36500 | Olympia, WA | |
| | Thurston County, WA | 1.1269 |
| 36540 | Omaha-Council Bluffs, NE-IA | |
| | Harrison County, IA | |
| | Mills County, IA | |
| | Pottawattamie County, IA | |
| | Cass County, NE | |
| | Douglas County, NE | |
| | Sarpy County, NE | |
| | Saunders County, NE | |
| | Washington County, NE | 0.9583 |
| 36740 | Orlando-Kissimmee, FL | |
| | Lake County, FL | |
| | Orange County, FL | |
| | Osceola County, FL | |
| | Seminole County, FL | 0.9163 |
| 36780 | Oshkosh-Neenah, WI | |
| | Winnebago County, WI | 0.9566 |
| 36980 | Owensboro, KY | |
| | Daviess County, KY | |
| | Hancock County, KY | |
| | McLean County, KY | 0.8370 |
| 37100 | Oxnard-Thousand Oaks-Ventura, CA | |
| | Ventura County, CA | 1.2377 |
| 37340 | Palm Bay-Melbourne-Titusville, FL | |
| | Brevard County, FL | 0.9211 |
| 37380 | Palm Coast, FL | |
| | Flagler County, FL | 0.8405 |
| 37460 | Panama City-Lynn Haven-Panama City Beach, FL | |
| | Bay County, FL | 0.7954 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 37620 | Parkersburg-Marietta-Vienna, WV-OH | |
| | Washington County, OH | |
| | Pleasants County, WV | |
| | Wirt County, WV | |
| | Wood County, WV | 0.7455 |
| 37700 | Pascagoula, MS | |
| | George County, MS | |
| | Jackson County, MS | 0.8299 |
| 37764 | Peabody, MA | |
| | Essex County, MA | 1.0979 |
| 37860 | Pensacola-Ferry Pass-Brent, FL | |
| | Escambia County, FL | |
| | Santa Rosa County, FL | 0.8254 |
| 37900 | Peoria, IL | |
| | Marshall County, IL | |
| | Peoria County, IL | |
| | Stark County, IL | |
| | Tazewell County, IL | |
| | Woodford County, IL | 0.9149 |
| 37964 | Philadelphia, PA | |
| | Bucks County, PA | |
| | Chester County, PA | |
| | Delaware County, PA | |
| | Montgomery County, PA | |
| | Philadelphia County, PA | 1.0803 |
| 38060 | Phoenix-Mesa-Scottsdale, AZ | |
| | Maricopa County, AZ | |
| | Pinal County, AZ | 1.0642 |
| 38220 | Pine Bluff, AR | |
| | Cleveland County, AR | |
| | Jefferson County, AR | |
| | Lincoln County, AR | 0.8012 |
| 38300 | Pittsburgh, PA | |
| | Allegheny County, PA | |
| | Armstrong County, PA | |
| | Beaver County, PA | |
| | Butler County, PA | |
| | Fayette County, PA | |
| | Washington County, PA | |
| | Westmoreland County, PA | 0.8605 |
| 38340 | Pittsfield, MA | |
| | Berkshire County, MA | 1.0371 |

| | Urban Area<br>(Constituent Counties) | Wage Index |
|---|---|---|
| 38540 | Pocatello, ID<br>Bannock County, ID<br>Power County, ID | 0.9507 |
| 38660 | Ponce, PR<br>Juana Díaz Municipio, PR<br>Ponce Municipio, PR<br>Villalba Municipio, PR | 0.4326 |
| 38860 | Portland-South Portland-Biddeford, ME<br>Cumberland County, ME<br>Sagadahoc County, ME<br>York County, ME | 0.9899 |
| 38900 | Portland-Vancouver-Beaverton, OR-WA<br>Clackamas County, OR<br>Columbia County, OR<br>Multnomah County, OR<br>Washington County, OR<br>Yamhill County, OR<br>Clark County, WA<br>Skamania County, WA | 1.1476 |
| 38940 | Port St. Lucie, FL<br>Martin County, FL<br>St. Lucie County, FL | 1.0723 |
| 39100 | Poughkeepsie-Newburgh-Middletown, NY<br>Dutchess County, NY<br>Orange County, NY | 1.1354 |
| 39140 | Prescott, AZ<br>Yavapai County, AZ | 1.2234 |
| 39300 | Providence-New Bedford-Fall River, RI-MA<br>Bristol County, MA<br>Bristol County, RI<br>Kent County, RI<br>Newport County, RI<br>Providence County, RI<br>Washington County, RI | 1.0714 |
| 39340 | Provo-Orem, UT<br>Juab County, UT<br>Utah County, UT | 0.9321 |
| 39380 | Pueblo, CO<br>Pueblo County, CO | 0.8721 |
| 39460 | Punta Gorda, FL<br>Charlotte County, FL | 0.8759 |
| 39540 | Racine, WI<br>Racine County, WI | 1.0580 |
| 39580 | Raleigh-Cary, NC<br>Franklin County, NC<br>Johnston County, NC<br>Wake County, NC | 0.9811 |
| 39660 | Rapid City, SD<br>Meade County, SD<br>Pennington County, SD | 1.0442 |
| 39740 | Reading, PA<br>Berks County, PA | 0.8904 |
| 39820 | Redding, CA<br>Shasta County, CA | 1.4134 |
| 39900 | Reno-Sparks, NV<br>Storey County, NV<br>Washoe County, NV | 1.0419 |
| 40060 | Richmond, VA<br>Amelia County, VA<br>Caroline County, VA<br>Charles City County, VA<br>Chesterfield County, VA<br>Cumberland County, VA<br>Dinwiddie County, VA<br>Goochland County, VA<br>Hanover County, VA<br>Henrico County, VA<br>King and Queen County, VA<br>King William County, VA<br>Louisa County, VA<br>New Kent County, VA<br>Powhatan County, VA<br>Prince George County, VA<br>Sussex County, VA<br>Colonial Heights City, VA<br>Hopewell City, VA<br>Petersburg City, VA<br>Richmond City, VA | 0.9661 |
| 40140 | Riverside-San Bernardino-Ontario, CA<br>Riverside County, CA<br>San Bernardino County, CA | 1.1570 |

| | Urban Area<br>(Constituent Counties) | Wage Index |
|---|---|---|
| 40220 | Roanoke, VA<br>Botetourt County, VA<br>Craig County, VA<br>Franklin County, VA<br>Roanoke County, VA<br>Roanoke City, VA<br>Salem City, VA | 0.8827 |
| 40340 | Rochester, MN<br>Dodge County, MN<br>Olmsted County, MN<br>Wabasha County, MN | 1.0942 |
| 40380 | Rochester, NY<br>Livingston County, NY<br>Monroe County, NY<br>Ontario County, NY<br>Orleans County, NY<br>Wayne County, NY | 0.8595 |
| 40420 | Rockford, IL<br>Boone County, IL<br>Winnebago County, IL | 1.0033 |
| 40484 | Rockingham County-Strafford County, NH<br>Rockingham County, NH<br>Strafford County, NH | 1.0026 |
| 40580 | Rocky Mount, NC<br>Edgecombe County, NC<br>Nash County, NC | 0.9034 |
| 40660 | Rome, GA<br>Floyd County, GA | 0.8635 |
| 40900 | Sacramento-Arden-Arcade-Roseville, CA<br>El Dorado County, CA<br>Placer County, CA<br>Sacramento County, CA<br>Yolo County, CA | 1.4053 |
| 40980 | Saginaw-Saginaw Township North, MI<br>Saginaw County, MI | 0.8728 |
| 41060 | St. Cloud, MN<br>Benton County, MN<br>Stearns County, MN | 1.1042 |
| 41100 | St. George, UT<br>Washington County, UT | 0.9133 |
| 41140 | St. Joseph, MO-KS<br>Doniphan County, KS<br>Andrew County, MO<br>Buchanan County, MO<br>DeKalb County, MO | 1.0302 |
| 41180 | St. Louis, MO-IL<br>Bond County, IL<br>Calhoun County, IL<br>Clinton County, IL<br>Jersey County, IL<br>Macoupin County, IL<br>Madison County, IL<br>Monroe County, IL<br>St. Clair County, IL<br>Crawford County, MO<br>Franklin County, MO<br>Jefferson County, MO<br>Lincoln County, MO<br>St. Charles County, MO<br>St. Louis County, MO<br>Warren County, MO<br>Washington County, MO<br>St. Louis City, MO | 0.9090 |
| 41420 | Salem, OR<br>Marion County, OR<br>Polk County, OR | 1.1133 |
| 41500 | Salinas, CA<br>Monterey County, CA | 1.5686 |
| 41540 | Salisbury, MD<br>Somerset County, MD<br>Wicomico County, MD | 0.9005 |
| 41620 | Salt Lake City, UT<br>Salt Lake County, UT<br>Summit County, UT<br>Tooele County, UT | 0.9266 |
| 41660 | San Angelo, TX<br>Irion County, TX<br>Tom Green County, TX | 0.8303 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 41700 | San Antonio, TX | |
| | Atascosa County, TX | |
| | Bandera County, TX | |
| | Bexar County, TX | |
| | Comal County, TX | |
| | Guadalupe County, TX | |
| | Kendall County, TX | |
| | Medina County, TX | |
| | Wilson County, TX | 0.8998 |
| 41740 | San Diego-Carlsbad-San Marcos, CA | |
| | San Diego County, CA | 1.1979 |
| 41780 | Sandusky, OH | |
| | Erie County, OH | 0.8686 |
| 41884 | San Francisco-San Mateo-Redwood City, CA | |
| | Marin County, CA | |
| | San Francisco County, CA | |
| | San Mateo County, CA | 1.5733 |
| 41900 | San Germán-Cabo Rojo, PR | |
| | Cabo Rojo Municipio, PR | |
| | Lajas Municipio, PR | |
| | Sabana Grande Municipio, PR | |
| | San Germán Municipio, PR | 0.4560 |
| 41940 | San Jose-Sunnyvale-Santa Clara, CA | |
| | San Benito County, CA | |
| | Santa Clara County, CA | 1.6703 |
| 41980 | San Juan-Caguas-Guaynabo, PR | |
| | Aguas Buenas Municipio, PR | |
| | Aibonito Municipio, PR | |
| | Arecibo Municipio, PR | |
| | Barceloneta Municipio, PR | |
| | Barranquitas Municipio, PR | |
| | Bayamón Municipio, PR | |
| | Caguas Municipio, PR | |
| | Camuy Municipio, PR | |
| | Canóvanas Municipio, PR | |
| | Carolina Municipio, PR | |
| | Cataño Municipio, PR | |
| | Cayey Municipio, PR | |
| | Ciales Municipio, PR | |
| | Cidra Municipio, PR | |
| | Comerío Municipio, PR | |
| | Corozal Municipio, PR | |
| | Dorado Municipio, PR | |
| | Florida Municipio, PR | |
| | Guaynabo Municipio, PR | |
| | Gurabo Municipio, PR | |
| | Hatillo Municipio, PR | |
| | Humacao Municipio, PR | |
| | Juncos Municipio, PR | |
| | Las Piedras Municipio, PR | |
| | Loíza Municipio, PR | |
| | Manatí Municipio, PR | |
| | Maunabo Municipio, PR | |
| | Morovis Municipio, PR | |
| | Naguabo Municipio, PR | |
| | Naranjito Municipio, PR | |
| | Orocovis Municipio, PR | |
| | Quebradillas Municipio, PR | |
| | Río Grande Municipio, PR | |
| | San Juan Municipio, PR | |
| | San Lorenzo Municipio, PR | |
| | Toa Alta Municipio, PR | |
| | Toa Baja Municipio, PR | |
| | Trujillo Alto Municipio, PR | |
| | Vega Alta Municipio, PR | |
| | Vega Baja Municipio, PR | |
| | Yabucoa Municipio, PR | 0.4296 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 42020 | San Luis Obispo-Paso Robles, CA<br>San Luis Obispo County, CA | 1.2915 |
| 42044 | Santa Ana-Anaheim-Irvine, CA<br>Orange County, CA | 1.2162 |
| 42060 | Santa Barbara-Santa Maria-Goleta, CA<br>Santa Barbara County, CA | 1.1909 |
| 42100 | Santa Cruz-Watsonville, CA<br>Santa Cruz County, CA | 1.6740 |
| 42140 | Santa Fe, NM<br>Santa Fe County, NM | 1.0847 |
| 42220 | Santa Rosa-Petaluma, CA<br>Sonoma County, CA | 1.6143 |
| 42340 | Savannah, GA<br>Bryan County, GA<br>Chatham County, GA<br>Effingham County, GA | 0.8907 |
| 42540 | Scranton--Wilkes-Barre, PA<br>Lackawanna County, PA<br>Luzerne County, PA<br>Wyoming County, PA | 0.8238 |
| 42644 | Seattle-Bellevue-Everett, WA<br>King County, WA<br>Snohomish County, WA | 1.1556 |
| 42680 | Sebastian-Vero Beach, FL<br>Indian River County, FL | 0.9097 |
| 43100 | Sheboygan, WI<br>Sheboygan County, WI | 0.9233 |
| 43300 | Sherman-Denison, TX<br>Grayson County, TX | 0.8279 |
| 43340 | Shreveport-Bossier City, LA<br>Bossier Parish, LA<br>Caddo Parish, LA<br>De Soto Parish, LA | 0.8536 |
| 43580 | Sioux City, IA-NE-SD<br>Woodbury County, IA<br>Dakota County, NE<br>Dixon County, NE<br>Union County, SD | 0.9091 |
| 43620 | Sioux Falls, SD<br>Lincoln County, SD<br>McCook County, SD<br>Minnehaha County, SD<br>Turner County, SD | 0.9299 |
| 43780 | South Bend-Mishawaka, IN-MI<br>St. Joseph County, IN<br>Cass County, MI | 0.9948 |
| 43900 | Spartanburg, SC<br>Spartanburg County, SC | 0.9383 |
| 44060 | Spokane, WA<br>Spokane County, WA | 1.0571 |
| 44100 | Springfield, IL<br>Menard County, IL<br>Sangamon County, IL | 0.9130 |
| 44140 | Springfield, MA<br>Franklin County, MA<br>Hampden County, MA<br>Hampshire County, MA | 1.0251 |
| 44180 | Springfield, MO<br>Christian County, MO<br>Dallas County, MO<br>Greene County, MO<br>Polk County, MO<br>Webster County, MO | 0.8371 |
| 44220 | Springfield, OH<br>Clark County, OH | 0.9234 |
| 44300 | State College, PA<br>Centre County, PA | 0.8779 |
| 44600 | Steubenville-Weirton, OH-WV<br>Jefferson County, OH<br>Brooke County, WV<br>Hancock County, WV | 0.7315 |
| 44700 | Stockton, CA<br>San Joaquin County, CA | 1.2644 |
| 44940 | Sumter, SC<br>Sumter County, SC | 0.7860 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 45060 | Syracuse, NY<br>Madison County, NY<br>Onondaga County, NY<br>Oswego County, NY | 0.9905 |
| 45104 | Tacoma, WA<br>Pierce County, WA | 1.1343 |
| 45220 | Tallahassee, FL<br>Gadsden County, FL<br>Jefferson County, FL<br>Leon County, FL<br>Wakulla County, FL | 0.8806 |
| 45300 | Tampa-St. Petersburg-Clearwater, FL<br>Hernando County, FL<br>Hillsborough County, FL<br>Pasco County, FL<br>Pinellas County, FL | 0.9054 |
| 45460 | Terre Haute, IN<br>Clay County, IN<br>Sullivan County, IN<br>Vermillion County, IN<br>Vigo County, IN | 0.9205 |
| 45500 | Texarkana, TX-Texarkana, AR<br>Miller County, AR<br>Bowie County, TX | 0.7748 |
| 45780 | Toledo, OH<br>Fulton County, OH<br>Lucas County, OH<br>Ottawa County, OH<br>Wood County, OH | 0.9432 |
| 45820 | Topeka, KS<br>Jackson County, KS<br>Jefferson County, KS<br>Osage County, KS<br>Shawnee County, KS<br>Wabaunsee County, KS | 0.8952 |
| 45940 | Trenton-Ewing, NJ<br>Mercer County, NJ | 1.0150 |
| 46060 | Tucson, AZ<br>Pima County, AZ | 0.9480 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 46140 | Tulsa, OK<br>Creek County, OK<br>Okmulgee County, OK<br>Osage County, OK<br>Pawnee County, OK<br>Rogers County, OK<br>Tulsa County, OK<br>Wagoner County, OK | 0.8793 |
| 46220 | Tuscaloosa, AL<br>Greene County, AL<br>Hale County, AL<br>Tuscaloosa County, AL | 0.8843 |
| 46340 | Tyler, TX<br>Smith County, TX | 0.8065 |
| 46540 | Utica-Rome, NY<br>Herkimer County, NY<br>Oneida County, NY | 0.8471 |
| 46660 | Valdosta, GA<br>Brooks County, GA<br>Echols County, GA<br>Lanier County, GA<br>Lowndes County, GA | 0.7941 |
| 46700 | Vallejo-Fairfield, CA<br>Solano County, CA | 1.4931 |
| 47020 | Victoria, TX<br>Calhoun County, TX<br>Goliad County, TX<br>Victoria County, TX | 0.8219 |
| 47220 | Vineland-Millville-Bridgeton, NJ<br>Cumberland County, NJ | 1.0534 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 47260 | Virginia Beach-Norfolk-Newport News, VA-NC | |
| | Currituck County, NC | |
| | Gloucester County, VA | |
| | Isle of Wight County, VA | |
| | James City County, VA | |
| | Mathews County, VA | |
| | Surry County, VA | |
| | York County, VA | |
| | Chesapeake City, VA | |
| | Hampton City, VA | |
| | Newport News City, VA | |
| | Norfolk City, VA | |
| | Poquoson City, VA | |
| | Portsmouth City, VA | |
| | Suffolk City, VA | |
| | Virginia Beach City, VA | |
| | Williamsburg City, VA | 0.8961 |
| 47300 | Visalia-Porterville, CA | |
| | Tulare County, CA | 1.0738 |
| 47380 | Waco, TX | |
| | McLennan County, TX | 0.8403 |
| 47580 | Warner Robins, GA | |
| | Houston County, GA | 0.8028 |
| 47644 | Warren-Troy-Farmington Hills, MI | |
| | Lapeer County, MI | |
| | Livingston County, MI | |
| | Macomb County, MI | |
| | Oakland County, MI | |
| | St. Clair County, MI | 0.9648 |
| 47894 | Washington-Arlington-Alexandria, DC-VA-MD-WV | |
| | District of Columbia, DC | |
| | Calvert County, MD | |
| | Charles County, MD | |
| | Prince George's County, MD | |
| | Arlington County, VA | |
| | Clarke County, VA | |
| | Fairfax County, VA | |
| | Fauquier County, VA | |
| | Loudoun County, VA | |
| | Prince William County, VA | |
| | Spotsylvania County, VA | |
| | Stafford County, VA | |
| | Warren County, VA | |
| | Alexandria City, VA | |
| | Fairfax City, VA | |
| | Falls Church City, VA | |
| | Fredericksburg City, VA | |
| | Manassas City, VA | |
| | Manassas Park City, VA | |
| | Jefferson County, WV | 1.0723 |
| 47940 | Waterloo-Cedar Falls, IA | |
| | Black Hawk County, IA | |
| | Bremer County, IA | |
| | Grundy County, IA | 0.8462 |
| 48140 | Wausau, WI | |
| | Marathon County, WI | 0.9563 |
| 48300 | Wenatchee-East Wenatchee, WA | |
| | Chelan County, WA | |
| | Douglas County, WA | 0.9615 |
| 48424 | West Palm Beach-Boca Raton-Boynton Beach, FL | |
| | Palm Beach County, FL | 0.9934 |
| 48540 | Wheeling, WV-OH | |
| | Belmont County, OH | |
| | Marshall County, WV | |
| | Ohio County, WV | 0.6675 |
| 48620 | Wichita, KS | |
| | Butler County, KS | |
| | Harvey County, KS | |
| | Sedgwick County, KS | |
| | Sumner County, KS | 0.8898 |

| | Urban Area (Constituent Counties) | Wage Index |
|---|---|---|
| 48660 | Wichita Falls, TX<br>Archer County, TX<br>Clay County, TX<br>Wichita County, TX | 0.9566 |
| 48700 | Williamsport, PA<br>Lycoming County, PA | 0.7256 |
| 48864 | Wilmington, DE-MD-NJ<br>New Castle County, DE<br>Cecil County, MD<br>Salem County, NJ | 1.0580 |
| 48900 | Wilmington, NC<br>Brunswick County, NC<br>New Hanover County, NC<br>Pender County, NC | 0.9202 |
| 49020 | Winchester, VA-WV<br>Frederick County, VA<br>Winchester City, VA<br>Hampshire County, WV | 1.0002 |
| 49180 | Winston-Salem, NC<br>Davie County, NC<br>Forsyth County, NC<br>Stokes County, NC<br>Yadkin County, NC | 0.8939 |
| 49340 | Worcester, MA<br>Worcester County, MA | 1.1012 |
| 49420 | Yakima, WA<br>Yakima County, WA | 1.0067 |
| 49500 | Yauco, PR<br>Guánica Municipio, PR<br>Guayanilla Municipio, PR<br>Peñuelas Municipio, PR<br>Yauco Municipio, PR | 0.3536 |
| 49620 | York-Hanover, PA<br>York County, PA | 0.9983 |
| 49660 | Youngstown-Warren-Boardman, OH-PA<br>Mahoning County, OH<br>Trumbull County, OH<br>Mercer County, PA | 0.8625 |
| 49700 | Yuba City, CA<br>Sutter County, CA<br>Yuba County, CA | 1.1043 |
| 49740 | Yuma, AZ<br>Yuma County, AZ | 0.9283 |

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

**TABLE B: INPATIENT REHABILITATION FACILITY WAGE INDEX FOR RURAL AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2011 THROUGH SEPTEMBER 30, 2012**

| State Code | Nonurban Area | Wage Index |
|---|---|---|
| 1 | Alabama | 0.7380 |
| 2 | Alaska | 1.2626 |
| 3 | Arizona | 0.9095 |
| 4 | Arkansas | 0.7222 |
| 5 | California | 1.2056 |
| 6 | Colorado | 0.9933 |
| 7 | Connecticut | 1.1128 |
| 8 | Delaware | 0.9757 |
| 10 | Florida | 0.8409 |
| 11 | Georgia | 0.7566 |
| 12 | Hawaii | 1.1189 |
| 13 | Idaho | 0.7556 |
| 14 | Illinois | 0.8343 |
| 15 | Indiana | 0.8391 |
| 16 | Iowa | 0.8545 |
| 17 | Kansas | 0.7981 |
| 18 | Kentucky | 0.7830 |
| 19 | Louisiana | 0.7712 |
| 20 | Maine | 0.8588 |
| 21 | Maryland | 0.9175 |
| 22 | Massachusetts[1] | 1.1769 |
| 23 | Michigan | 0.8555 |
| 24 | Minnesota | 0.9038 |
| 25 | Mississippi | 0.7620 |
| 26 | Missouri | 0.7655 |

| State Code | Nonurban Area | Wage Index |
|---|---|---|
| 27 | Montana | 0.8517 |
| 28 | Nebraska | 0.8911 |
| 29 | Nevada | 0.9350 |
| 30 | New Hampshire | 1.0207 |
| 31 | New Jersey[1] | ----- |
| 32 | New Mexico | 0.8911 |
| 33 | New York | 0.8185 |
| 34 | North Carolina | 0.8359 |
| 35 | North Dakota | 0.6831 |
| 36 | Ohio | 0.8561 |
| 37 | Oklahoma | 0.7860 |
| 38 | Oregon | 1.0029 |
| 39 | Pennsylvania | 0.8480 |
| 40 | Puerto Rico[1] | 0.4047 |
| 41 | Rhode Island[1] | ----- |
| 42 | South Carolina | 0.8413 |
| 43 | South Dakota | 0.8536 |
| 44 | Tennessee | 0.7886 |
| 45 | Texas | 0.7806 |
| 46 | Utah | 0.8649 |
| 47 | Vermont | 0.9591 |
| 48 | Virgin Islands | 0.7993 |
| 49 | Virginia | 0.7841 |
| 50 | Washington | 1.0184 |
| 51 | West Virginia | 0.7474 |
| 52 | Wisconsin | 0.9186 |
| 53 | Wyoming | 0.9528 |
| 65 | Guam | 0.9611 |

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2011. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2010.

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Part IV

## Environmental Protection Agency

40 CFR Part 745

Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 745**

**[EPA–HQ–OPPT–2005–0049; FRL–8881–8]**

**RIN 2070–AJ57**

## Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program

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

**ACTION:** Final rule.

**SUMMARY:** As part of a settlement of litigation over certain post-renovation cleaning requirements of the 2008 Lead Renovation, Repair, and Painting Program (RRP) rule, the EPA agreed to propose a number of revisions to the 2008 RRP rule that established accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities and to subsequently take final action on the proposed rule by July 15, 2011. The proposed rule published on May 6, 2010. EPA has decided not to promulgate dust wipe testing and clearance requirements as proposed. However, EPA is promulgating several other revisions to the RRP rule, including a provision allowing a certified renovator to collect a paint chip sample and send it to a recognized laboratory for analysis in lieu of using a lead test kit, minor changes to the training program accreditation application process, standards for e-learning in accredited training programs, minimum enforcement provisions for authorized state and tribal renovation programs, and minor revisions to the training and certification requirements for renovators. EPA is also promulgating clarifications to the requirements for vertical containment on exterior renovation projects, the prohibited or restricted work practice provisions, and the requirements for high-efficiency particulate air (HEPA) vacuums. Today's action is EPA's final action on all aspects of the May 6, 2010 proposal.

**DATES:** This final rule is effective October 4, 2011.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2005–0049. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Hearing- or speech-impaired persons may reach the above telephone numbers through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Cindy Wheeler, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (202) 566–0484; *e-mail address: wheeler.cindy@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; *e-mail address: TSCA-Hotline@epa.gov.* Hearing- or speech-impaired persons may reach the above telephone number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Does this action apply to me?

You may be potentially affected by this action if you perform renovations of target housing or child-occupied facilities for compensation, dust sampling, or dust testing. You may also be affected by this action if you perform lead-based paint inspections, lead hazard screens, risk assessments or abatements in target housing or child-occupied facilities or if you operate a training program for individuals who perform any of these activities. ''Target housing'' is defined in section 401 of TSCA as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child under age 6 resides or is expected to reside in such housing) or any 0-bedroom dwelling. Under this rule, a child-occupied facility is a building, or a portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least 2 different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours.

Potentially-affected entities may include, but are not limited to:

• Building construction (NAICS code 236), *e.g.,* single family housing construction, multi-family housing construction, residential remodelers.

• Specialty trade contractors (NAICS code 238), *e.g.,* plumbing, heating, and air-conditioning contractors, painting and wall covering contractors, electrical contractors, finish carpentry contractors, drywall and insulation contractors, siding contractors, tile and terrazzo contractors, glass and glazing contractors.

• Real estate (NAICS code 531), *e.g.,* lessors of residential buildings and dwellings, residential property managers.

• Child day care services (NAICS code 624410).

• Elementary and secondary schools (NAICS code 611110), *e.g.,* elementary schools with kindergarten classrooms.

• Other technical and trade schools (NAICS code 611519), *e.g.,* training providers.

• Engineering services (NAICS code 541330) and building inspection services (NAICS code 541350), *e.g.,* dust sampling technicians.

• Lead abatement professionals (NAICS code 562910), *e.g.,* firms and supervisors engaged in lead-based paint activities.

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

## II. Background

### *A. What action is the agency taking?*

On May 6, 2010, EPA proposed a number of revisions to the 2008 Lead Renovation, Repair, and Painting Program (RRP) rule that established accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities (Ref. 1). Specifically, EPA proposed requirements for dust wipe testing, clearance, allowing a certified renovator to collect a paint chip sample and send it to a recognized laboratory for analysis, minor changes to the training program accreditation application process, standards for e-learning in accredited training programs, minimum enforcement provisions for authorized state and tribal renovation programs, and minor revisions to the training and certification requirements for renovators. EPA has decided not to promulgate dust wipe testing and clearance requirements as proposed. However, EPA is promulgating several of the other proposed revisions to the RRP rule, including a provision allowing a certified renovator to collect a paint chip sample and send it to a recognized laboratory for analysis in lieu of using a lead test kit, minor changes to the training program accreditation application process, standards for e-learning in accredited training programs, minimum enforcement provisions for authorized state and tribal renovation programs, and minor revisions to the training and certification requirements for renovators. EPA is also promulgating clarifications to the requirements for vertical containment on exterior renovation projects, the prohibited or restricted work practice provisions, and the requirements for high-efficiency particulate air (HEPA) vacuums. Today's action is EPA's final action on all aspects of the May 6, 2010 proposal.

### *B. What is the agency's authority for taking this action?*

These work practice, training, certification and accreditation requirements, and the State, Territorial and Tribal authorization provisions are being promulgated under the authority of sections 402(c)(3), 404, and 407 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2682(c)(3), 2684, and 2687.

### *C. What are the specific provisions of this action?*

1. *Clearance and dust wipe testing requirements for renovations.* As discussed in this unit, EPA has decided not to promulgate clearance and dust wipe testing requirements as proposed in May 2010 for certain renovations covered by the 2008 Lead Renovation, Repair, and Painting (RRP) rule (Ref. 2).

a. *Background.* In promulgating the final 2008 RRP rule, EPA determined that renovation, repair, and painting activities, when performed in the presence of lead-based paint, create lead-based paint hazards. Section 402(c)(3) of TSCA directs EPA to revise its regulations governing lead-based paint inspections, risk assessments, and abatements (the Lead-based Paint Activities Regulations, or abatement regulations, Ref. 3) to apply to renovation and remodeling activities that create lead-based paint hazards. Accordingly, the 2008 RRP rule established accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing renovations for compensation in most pre-1978 housing and child-occupied facilities. Among other things, the work practice standards require renovation firms to follow specific requirements for containing the work area, refrain from using certain high-dust-generating work practices, and follow a specific cleaning protocol, including a step called ''cleaning verification,'' after concluding the paint-disturbing tasks involved in a renovation.

As discussed in the preamble to the 2010 proposal, EPA is particularly concerned about dust-lead hazards generated by renovations because of the well-documented toxicity of lead, especially to younger children. For a more detailed discussion of the health effects of lead exposure, refer to information in the 2010 proposal (Ref. 1) and the 2008 RRP final rule (Ref. 2).

One of the more difficult issues in the 2008 RRP rulemaking was the issue of determining when a renovation work area has been properly cleaned and is ready for reoccupancy. After a lead-based paint abatement project, EPA's Lead-Based Paint Activities Regulations require the abatement contractor to achieve clearance. This means that the contractor must demonstrate, through dust wipe testing, that dust lead levels remaining in the abatement work area are below the clearance levels established in the 2001 rulemaking entitled ''Identification of Dangerous Levels of Lead'' under section 403 of the Toxic Substances Control Act (Ref. 4). Dust wipe samples for clearance purposes must be collected by a certified individual and analyzed by an entity recognized under the National Lead Laboratory Accreditation Program (NLLAP).

When promulgating the 2008 RRP rule, EPA considered requiring a similar process after renovations, but for various reasons, did not do so. EPA did not interpret its statutory mandate under TSCA section 402(c)(3) as simply expanding the scope of the Lead-based Paint Activities Regulations to also cover renovation activities. Rather, EPA stated, in the final 2008 RRP rule, its belief that Congress intended for EPA to make revisions to those existing regulations to adapt them to a different set of activities and a very different regulated community. In establishing the cleaning element of the work practice requirements for renovations, EPA primarily relied on the results of two studies, the ''Electrostatic Cloth and Wet Cloth Field Study in Residential Housing'' (Ref. 5) and the ''Characterization of Dust Lead Levels after Renovation, Repair, and Painting Activities'' (the ''Dust Study,'' Ref. 6) to determine that the full suite of RRP work practice requirements, including containment, cleaning, and cleaning verification, was effective at minimizing exposure to lead-based paint hazards created by renovation, repair, and painting activities.

EPA also considered various other factors as well as issues raised by commenters. Among these were the differences between abatement and renovation, the costs of dust wipe testing and clearance, the potential delay in obtaining results, and the likelihood that renovation firms would become liable for pre-existing dust-lead hazards. Abatements have only one purpose, to permanently eliminate lead-based paint or lead-based paint hazards, while renovations are performed for many reasons that often have nothing to do with lead-based paint. Concerns about the costs of dust wipe testing and clearance were brought to EPA's attention during stakeholder input opportunities provided by EPA before the proposed RRP rule was issued in 2006 and echoed by commenters on the 2006 proposed RRP rule. If EPA had required dust wipe testing and clearance after every renovation project, it would have made up a significant portion of the cost of smaller projects. In addition, dust wipe testing results may not be available for several days. If EPA had required traditional abatement-style clearance after renovations, the work area would not be able to be re-occupied while waiting for the laboratory results.

Commenters also noted that requiring clearance after renovation jobs could, in some instances, result in the renovation firm being held responsible for abating all dust-lead hazards, including such hazards that may have existed in the area before the renovation commenced.

Other commenters on the 2006 proposed RRP rule thought that renovation work areas ought to be tested and cleared for re-occupancy in the same way that abatement work areas are cleared through the clearance process, including dust wipe testing. Many commenters believed that renovation firms should be required to demonstrate that no dust-lead hazards had been left behind in the work area. These commenters contended that the only effective way to do this is through dust wipe testing and clearance. While EPA understood the issues raised by these commenters, and agreed with some of the points that they made, EPA remained convinced that the suite of RRP work practices would be practical for renovation firms to implement while effectively minimizing exposure to dust-lead hazards created by renovations. The RRP work practices are, in essence, requirements to ensure that renovators undertake traditional renovation activities—*e.g.,* removal or modification of existing surfaces, containment and cleanup of dust and debris, and ensuring the job site is cleaned up—in a lead-safe way. EPA believes the RRP rule effectively minimizes exposure to hazards generated by renovation activities without imposing practices and disciplines that are outside the scope of traditional renovation activities. More information on the comments received and EPA's decisions can be found in the preamble to the final 2008 RRP rule (Ref. 2).

b. *2010 Proposal.* Based on additional stakeholder input received after the final rule was issued, and an August 2009 agreement entered into with several environmental and children's health advocacy groups in settlement of their lawsuit challenging the final 2008 RRP rule, EPA agreed to consider whether some of the decisions made in 2008 with regard to dust wipe testing and clearance should be modified.

Accordingly, on May 6, 2010, EPA proposed to require dust wipe testing after many renovations covered by the RRP rule (Ref. 1). Under the 2010 proposal, dust wipe testing would have been required on uncarpeted floors, windowsills, and window troughs in the work area after the following types of interior renovations:

- Use of a heat gun at temperatures below 1100 degrees Fahrenheit.
- Removal or replacement of window or door frames.
- Scraping 60 $ft^2$ or more of painted surfaces.
- Removing more than 40 $ft^2$ of trim, molding, cabinets, or other fixtures.

After these renovations, the renovation firm would have been required to collect dust wipe samples and have them analyzed for lead content by an entity recognized under NLLAP. The renovation firm would then have been required to provide these results to the owners and occupants of the renovated property.

For another subset of jobs involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation, such as power sanders or abrasive blasters, EPA proposed to require the renovation firm to achieve clearance. This would have involved a demonstration, through dust wipe testing, that dust-lead levels remaining on uncarpeted floors, windowsills, and window troughs in the work area were below regulatory clearance levels. These clearance levels would have been identical to the clearance levels established for the lead-based paint abatement program, which are codified at 40 CFR 745.227(e)(8)(viii), *i.e.,* 40 µg/$ft^2$ on floors, 250 µg/$ft^2$ on interior windowsills, and 400 µg/$ft^2$ on window troughs, based on wipe samples. These additional requirements in the 2010 proposal were designed to ensure that lead-based paint hazards generated by renovation work are adequately cleaned after renovation work is finished and before the work areas are re-occupied.

c. *This final rule.* Maintaining the distinction between abatement and renovation activities has been an important issue throughout the rulemaking process for the 2008 RRP rule. As discussed in the preamble to the 2008 RRP rule, abatements and renovations are performed by different contractors for different purposes, although similar activities, such as window replacements, may be involved. Typically, when an abatement is performed, the housing is either unoccupied or the occupants are temporarily relocated to lead-safe housing until the abatement has been demonstrated to have been properly completed through the clearance process. Carpet in the housing is usually removed as part of the abatement because it is difficult to demonstrate that it is free of lead-based paint hazards. Uncarpeted floors that have not been replaced during the abatement may need to be refinished or sealed in order to achieve clearance. Abatements have only one purpose—to permanently eliminate lead-based paint and lead-based paint hazards. In contrast, renovations other than interim controls are performed for reasons unrelated to lead-based paint or lead-based paint hazards. Renovations may be performed while the property is occupied or unoccupied, but occupants do not typically relocate pending the completion of the project.

EPA did not design or intend the RRP rule to address cleanup of pre-existing dust-lead hazards. While the cleaning requirements of the RRP rule will, in some cases, have the ancillary benefit of removing some pre-existing dust-lead hazards, the cleaning requirements were designed to effectively clean-up lead-based paint hazards created during renovation activities without changing the scope of the renovation activity itself. Accordingly, the RRP rule does not require cleaning of dust or any other possible lead sources in portions of target housing or child-occupied facilities beyond locations in and around the work area. Nor does the RRP rule require the replacement of carpets in the area of the renovation or the refinishing or sealing of uncarpeted floors. The approach in the RRP rule was designed to address the lead-based paint hazards created during the renovation while not requiring renovation firms to remediate or eliminate hazards beyond the scope of the work they were hired to do.

In addition, EPA has interpreted practicality in implementation to be an element of the statutory directive to take into account effectiveness and reliability. As discussed in the preamble to the final 2008 RRP rule, EPA believes that, given the highly variable nature of the regulated community, the work practices required by the RRP rule should be simple to understand and easy to use. EPA is cognizant of the fact that the RRP rule applies to a range of individuals from day laborers to property maintenance staff to master craftsmen performing a range of activities from simple drywall repair to window replacement to complete kitchen and bath renovations to building additions and everything in between. Work practices that are easy and practical to use are more likely to be followed by all of the persons who perform renovations, and, therefore, more likely to be reliable and effective in minimizing exposure to lead-based paint hazards created by renovation activities.

The 2010 proposal for this rule was EPA's attempt to explore whether clearance and dust wipe testing requirements should be added to the

RRP rule to provide additional protection for some renovations. EPA's intention was to do this without generally holding renovation firms responsible for abating pre-existing dust-lead hazards or creating requirements that would impair the overall reliability and effectiveness of the work practice requirements.

EPA received over 300 comments on its 2010 proposal. Members of the regulated community and other industry commenters were generally concerned that EPA had upset the balance it had struck in the 2008 RRP rule, arguing that a dust wipe testing or clearance requirement would have the effect of holding renovation firms responsible for pre-existing hazards, whether directly by regulation, in the case of the proposed clearance requirements, or indirectly by requiring firms to provide information on post-renovation dust lead levels to the property owner and occupant. While there was little support for dust wipe testing alone, commenters that supported the 2010 proposal generally thought that a clearance requirement should be imposed and expanded to most, if not all, renovations.

After carefully weighing the issues at stake and considering the concerns raised by commenters, and as explained in greater detail below, EPA has concluded that, on balance, the information before the Agency does not support imposing a dust wipe testing or clearance requirement on renovations. In particular, EPA is convinced that the work practices established in the 2008 RRP rule are reliable, effective, and safe, and that imposing a dust wipe testing or clearance requirement is unwarranted.

Almost all of the commenters were opposed to the proposed provisions requiring only dust wipe testing after certain renovations. Members of the regulated community and other industry commenters argued that a dust wipe testing requirement would have the effect of holding renovation firms responsible for pre-existing hazards, albeit indirectly, by requiring firms to provide information on post-renovation dust lead levels to the property owner and occupant. This requirement would also have the effect of adding an element that is not generally considered a renovation activity, *i.e.,* taking samples for laboratory analysis, and indeed, would have to be performed by a third party or only after a renovator received training in a separate and distinct discipline—either as a dust wipe sample technician or a lead-based paint inspector. In addition, many argued that the Dust Study generally shows that the RRP work practices are effective at minimizing occupant exposure to dust-lead hazards created by renovations, so additional dust wipe testing or clearance requirements are unnecessary. These commenters noted that this is particularly true for the renovations for which EPA proposed to require only dust wipe testing, because those renovations were specifically tested in the Dust Study. In addition, commenters suggested that the categories of jobs for which dust wipe testing or clearance would be required were arbitrary and not based on sufficient evidence.

Some commenters, including several states, also questioned the utility and value of dust wipe testing in the absence of a clearance requirement. Some were concerned that property owners and occupants would not understand the significance of the results of dust wipe samples that exceed the clearance standards or what steps they should take to protect themselves and their families. One argued that, in the absence of standards and required remedial actions, dust wipe testing would add expense and time to a renovation project without providing a concrete increase in protection for occupants. On the other hand, other commenters contended that the feedback provided by numerical dust wipe testing results would result in improved cleaning performance on the part of renovation firms. Some cited anecdotal evidence of poor contractor performance in other programs, such as the abatement program, in support of a contention that the RRP rule work practices would not be as effective at minimizing dust-lead hazards as they were in the Dust Study.

Additionally, after considering previous interpretations of the statutory requirements and the comments received on this specific issue, EPA is not convinced that dust wipe testing in the absence of a clearance requirement would be a safe, reliable and effective work practice within the meaning of TSCA Section 402. As commenters noted, provision of dust wipe testing results in the absence of a clearance requirement does not by itself reduce the amount of dust generated during or left behind following a renovation. Furthermore, dust wipe testing results alone are not part of the information that must be provided at the pre-renovation stage under Section 406(b) of TSCA, and providing this type of information is not typically considered a renovation work practice. Again, the dust wipe testing would either have to be done by a third party or by a renovator who has taken a course and been trained in a completely different discipline.

EPA believes these commenters raise valid considerations. In particular, EPA agrees that the Dust Study demonstrates that with respect to these very activities, the suite of RRP work practices reliably addressed the hazards created by the renovation. In addition, although EPA attempted in its 2010 proposal to distinguish renovation activities that it thought warranted the addition of a dust wipe testing requirement from those that did not (and from those that warranted imposition of a clearance requirement), EPA acknowledges that its 2010 proposal lacked a strong basis for drawing these lines—a point made by many commenters. While some commenters urged the point that dust wipe testing would encourage better cleanup, and provided anecdotal support for that view, EPA has no record basis to judge the likelihood or frequency of this potential impact. This logic could potentially lead to requiring dust wipe testing for all jobs—a significant change in the existing rule that EPA is not prepared to make without better supporting evidence. Accordingly, upon the information before it, the Agency does not believe that a dust testing requirement alone is warranted. EPA notes that homeowners can arrange to have dust wipe testing done as part of a renovation (or at any time) if they would like information about dust-lead levels in their homes. EPA also notes that property owners can contractually elect clearance testing at the completion of a project. EPA's Web site has a page homeowners can use to locate certified lead inspection and abatement professionals and accredited training providers in their state (*http://www.epa.gov/lead/pubs/locate.htm*).

EPA also proposed to require that renovation firms achieve clearance for a subset of jobs involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation, such as power sanders or abrasive blasters. Nonetheless, EPA remained concerned about promulgating a requirement that could make renovation firms responsible for pre-existing conditions and fundamentally change the scope of the renovation activity itself. Therefore, to avoid making renovation firms replace carpets or refinish floors when they were not hired to do so, EPA proposed to allow a renovation firm to stop after two failed dust wipe tests on a particular surface if the firm was not hired to refinish or replace that surface.

EPA was particularly concerned about these types of jobs because it had evidence that the work practices were not effective when machines designed to remove paint through high speed operation were operated without HEPA shrouds and created large quantities of dust. EPA was concerned that even if such machines were equipped with HEPA shrouds, the RRP work practices may not be effective at minimizing exposure to lead hazards created by the renovation. Additionally, EPA stated its belief that dust created by the demolition or removal of plaster was similarly difficult to clean and therefore the RRP work practices might not be effective at minimizing exposure to lead hazards created by the renovation.

With respect to the proposed clearance requirements, commenters generally fell into two camps. Commenters who were in ''favor'' of the 2010 proposal nonetheless generally argued that the proposed clearance requirements should be expanded to cover most if not all renovation activities because clearance is the only method to ensure that no lead hazards remain upon the completion of a renovation job. Commenters who opposed any type of clearance requirement argued again that it erased the distinction between renovations and abatements and made renovation firms responsible for pre-existing conditions. These commenters also questioned the relevance of the studies EPA cited in support of its 2010 proposal to require clearance after renovations involving demolition or removal of plaster through destructive means or the disturbance of paint using machines designed to remove paint through high-speed operation. The cited studies include EPA's Environmental Field Sampling Study (EFSS, Ref. 7) and studies examining the effectiveness of HEPA exhaust control on power tools (Ref. 8). Many of the HEPA exhaust control studies addressed dusts not typically created during renovations regulated by the RRP rule, such as crystalline silica dust resulting from the grinding of concrete. Others addressed surfaces and surface coatings not typically encountered during renovations covered by the RRP rule; one involved paint removal from automobiles. Notwithstanding EPA's 2010 proposal and requests for comment, EPA did not receive any additional information or data with respect to the dust or hazards created by these activities. Finally, on both sides of the issue, commenters did not favor the proposed provision allowing renovation firms to stop after two failed dust wipe tests, and, although some alternative suggestions were offered, none effectively addressed the competing considerations of occupant protection and not expanding the scope of the renovation work.

EPA recognizes that imposing a clearance requirement would be a departure from the balance struck in the RRP rule with respect to the distinction between abatement and renovations. Accordingly, in EPA's judgment, the Agency should be in a position to conclude with a fair amount of certainty that doing so was necessary in light of its obligation to promulgate work practices that take into account reliability, effectiveness, and safety. Here, EPA acknowledges that it does not have data to support its concern that dust created by destructive demolition of plaster may be similar in nature to dust generated by machines designed to remove paint through high speed operation, and thus would have the potential to overwhelm the RRP cleaning protocol. EPA also recognizes that the data on the efficiency of HEPA is only suggestive that there might be an issue concerning these practices. Again, the studies EPA reviewed suggested that HEPA exhaust control could reduce the airborne dust levels by 90–95%. As commenters pointed out, it is not clear the results of these studies are applicable to the home renovation setting, given the differences between the surfaces and paints in residential settings and the surfaces and paints involved in the studies. Even if the results were applicable, there is no direct evidence that the RRP lead safe work practices could not reliably address the dust hazards created by the use of such power tools. Having received no additional information in this regard, EPA has determined that, among other things, the available information does not support a clearance requirement. Nevertheless, as discussed further in Unit II.C.7. of this preamble, EPA is adding a requirement that power tools be operated so that no visible dust or release of air occurs outside of the shroud or containment system. This requirement will work to mitigate the concerns EPA had with respect to the efficiency of power tool dust collection systems and the possibility that such tools might overwhelm the containment and specialized cleaning protocols of the RRP work practices.

In an effort to ensure that the proposed clearance requirement would not typically result in holding renovation firms responsible for abating pre-existing dust-lead hazards, EPA included a provision to allow firms to stop the clearance procedure after two failed clearance tests on a particular surface unless they had also contracted to refinish the surface. Upon further reflection, EPA is concerned about the potential ineffectiveness of this effort, because it would likely still result in some renovation firms having to clean up pre-existing dust-lead hazards. At the same time, the proposed provision would not result in the certainty regarding elimination of dust-lead hazards that is the defining characteristic of a clearance requirement. In addition, the practical effect of such a provision is that the proposed clearance requirement would, in fact, often result in a dust wipe testing requirement. As such, it raises many of the same issues and concerns that ultimately persuaded EPA not to promulgate just dust wipe testing requirements.

Furthermore, as stated above, EPA does not believe the record before it strongly supports the line-drawing in its 2010 proposal, which would have resulted in a clearance requirement for some renovations, a dust wipe testing requirement for others, and no testing for the rest of the renovations covered by the RRP rule.

In revising the abatement regulations to apply to renovations, EPA has sought to keep the renovation requirements relatively simple and easy to apply, while attaining the overall objective of minimizing exposure to dust-lead hazards generated by renovation activities. EPA is concerned that the proposed three-tier system would add a level of complexity to the rule that is undesirable. While EPA could potentially draw different lines in this final rule, or promulgate a requirement that all jobs achieve clearance, EPA does not believe it has a strong basis to do so.

The combination of these factors has convinced EPA that imposing a clearance requirement is unwarranted. The best evidence that EPA has of the effectiveness of the work practice standards is the Dust Study, and it demonstrates that overall the full suite of RRP work practices is effective at minimizing exposure to dust-lead hazards created by renovations. Without more, EPA is unable to conclude that the RRP work practice promulgated in 2008 should be significantly altered.

Additionally, a variety of commenters, including industry representatives and some states, suggested that EPA had issued its 2010 proposal to require dust wipe testing and clearance too soon after promulgation of the 2008 RRP rule. At the time that the 2010 proposal was issued, full implementation of the 2008 RRP rule had only just begun. Commenters contended that renovation firms were still in the process of working through how to achieve compliance with the rule on a daily basis and that EPA should wait to add new requirements until firms were generally comfortable with the requirements promulgated in 2008. Commenters also argued that EPA should not make a determination that additional requirements are needed without first carefully assessing the status and impact of the existing RRP rule when fully implemented. EPA agrees with the general principle expressed by these commenters—that it is premature to impose significant additional work practice requirements for renovations already covered by the RRP rule, particularly given the information before the Agency. EPA also agrees that many renovation firms are still determining what the RRP rule requires from them on renovation projects. EPA also acknowledges that there are practical implementation issues with promulgating a significant change so soon after thousands of renovators have become certified renovators, and have taken the required training, which did not include information on the proposed dust wipe testing or clearance requirements.

Some commenters suggested that EPA concentrate on RRP education and outreach at this time, rather than on additional requirements. EPA agrees that outreach and education on lead poisoning in general, and the link between renovations and increased blood lead levels in particular, continues to be important. As part of the RRP program's Lead-Safe Certified media campaign, EPA developed and made available to the public outreach materials aimed at both contractors and consumers. The materials include a Public Service Advertising (PSA) advertisement aimed at contractors, banners for *Web site*s, sample articles for magazines, newsletters or other publications to help inform contractors about the rule, post cards and buck slips to stuff into mailers, as well as an informational brochure about the rule for building managers. EPA has also developed fact sheets about the RRP rule that hardware or paint supply stores can hand out to their customers to inform them of the regulatory requirements. All of this information is available to the public on EPA's *Web site* at *http://epa.gov/lead/pubs/lscp-press-materials.htm.*

The Agency has also developed outreach materials for consumers in order to build demand for lead-safe certified firms among the public. The consumer outreach materials include consumer print advertisements, PSA radio advertisements in English and Spanish, and a fact sheet about the RRP rule that contractors can provide to consumers to inform them about the advantages of hiring lead-safe renovation firms. The consumer outreach materials are also downloadable from EPA's *Web site* at *http://epa.gov/lead/pubs/lscp-consumers.htm.*

Finally, in an effort to raise awareness of the consequences of lead poisoning among parents and pregnant women who live in homes built before 1978, the Coalition to End Childhood Lead Poisoning, EPA and HUD joined the Ad Council in April 2010 to launch a national multimedia PSA campaign. As stated in the PSA campaign press release, the most common pathways for lead poisoning are deteriorating lead-based paint (on older windows, doors and trim, or walls) or improperly-performed renovation, repair and painting activities that cause paint to chip, peel, or flake.

EPA will continue to evaluate and consider additional outreach and educational opportunities to improve property owner and occupant understanding of dust-lead hazards created by renovations. EPA also will continue to monitor implementation of the RRP rule. If future information, studies, or data indicate that the existing RRP rule work practices are not reliable, safe, and effective, EPA will consider whether additional requirements should be proposed.

2. *Elimination of provision allowing clearance in lieu of cleaning verification.* In the 2010 proposal, EPA proposed to eliminate the existing provision that allows renovation firms to skip the cleaning verification part of the mandatory cleaning protocol if another Federal, State, or local law or regulation, or the contract between the renovation firm and the property owner requires the renovation firm to use qualified entities to perform dust wipe testing and requires the renovation firm to achieve clearance. The rationale for eliminating this provision was based on the fact that, as discussed in the preamble to the 2010 proposal and the preamble to the 2008 RRP final rule, cleaning verification is an integral part of the whole suite of RRP work practices. The Dust Study demonstrates that these practices, when observed as a whole, are effective at minimizing exposure to dust-lead hazards generated by renovations.

EPA received only a handful of comments on this aspect of the 2010 proposal. Commenters thought that removing this provision from the RRP rule would make the rule inconsistent with the HUD regulations or State or local laws. Some believed that requiring both cleaning verification and clearance was unnecessarily burdensome, and pointed out that persons trained in lead-safe work practices had been achieving clearance without cleaning verification for a number of years now. While EPA does not agree with all of these assertions, EPA does agree that it is unnecessary to require renovation firms who must achieve clearance to follow the specific cleaning verification protocol. After all, these firms must continue to clean until they achieve the clearance standards. As discussed in the preamble to the 2010 Proposal, and mentioned by some commenters specifically in reference to this provision, contractors who receive the regular feedback provided by a clearance requirement have learned how to clean so that they typically achieve clearance on the first attempt. Specifically, in its Evaluation of the HUD Lead-Based Paint Hazard Control Grant Program (Ref. 10), HUD noted that the rate of passing initial clearance was associated with repetition of lead hazard control activities. Therefore, EPA is retaining the provision that allows the cleaning verification step to be skipped if the renovation firm must also achieve clearance. However, EPA believes that renovation firms whose projects are subject to clearance only as a result of contractual requirements are less likely to gain the repetitive experience of cleaning sufficiently so as to meet clearance with few cleaning cycles, so EPA encourages property owners who include clearance in their renovation contracts to also require renovation firms to perform cleaning verification. EPA also notes that States and Tribes are free to include both clearance and cleaning verification in their laws and regulations.

3. *Paint chip sample collection.* In May 2010, EPA proposed to give certified renovators another option for determining whether lead-based paint is present on components to be affected by a renovation. This option would allow certified renovators to collect paint chip samples from components to be affected by a renovation instead of using test kits to test the paint on the components. The samples would be required to be sent to an entity recognized under the NLLAP for analysis. In issuing this 2010 proposal, EPA reasoned that it would be easy to teach certified renovators to collect paint chip samples in the renovator course and this would provide maximum flexibility for certified renovators and renovation firms.

EPA received a number of comments on this part of its 2010 proposal. Some commenters supported this option because they felt that it is easy to properly collect a paint chip sample, and they agreed that this would provide additional needed flexibility for certified renovators and renovation firms. One commenter stated that, as a homeowner, he had been instructed by an NLLAP laboratory over the telephone on how to properly collect a paint chip sample and forward it to the laboratory for analysis. This experience led him to believe that it would be feasible to include in the renovator course instruction on how to collect a paint chip sample and forward it for analysis. Other commenters did not support this aspect of the 2010 proposal because they believe that only certified inspectors or risk assessors should be permitted to collect paint chip samples or make determinations about the presence or absence of lead-based paint. Several noted that this would conflict with State laws that prohibit anyone other than a certified inspector or risk assessor from sampling for lead-based paint. Some commenters expressed concern about the length of the renovator course, and the ability to add the additional information on paint chip collection, including information on chain-of-custody issues and laboratory submission procedures, without lengthening the course beyond 8 hours. Others noted that renovators are already being taught many of the necessary skills during instruction on how to properly use test kits.

Because renovator training courses are already required to include training in how and where to use test kits, and the associated recordkeeping requirements, EPA agrees with those commenters who believed that it would take very little additional time to also provide renovators with specific training in how to collect a chip sample and submit it for analysis. The selection of locations to test and the recordkeeping requirements would be identical whether test kits or paint chip sampling is used, except that the laboratory report would also have to be maintained along with the records associated with the renovation. EPA also agrees with those commenters who thought that this option would provide additional important flexibility. EPA is promulgating the proposed option allowing certified renovators to collect paint chip samples from painted components that will be disturbed by a renovation and submit those samples to an NLLAP-recognized entity for analysis. EPA will modify the model certified renovator training course to add the necessary information on sample collection, chain-of-custody, and laboratory submission procedures. One commenter wondered how renovators who have already taken the training to become certified would learn about this option and how to use it. EPA will post the information developed for the renovator training course on its Web site. EPA will also e-mail this information to certified renovation firms that provided an e-mail address on their certification applications. As pointed out by several commenters, paint chip sample collection, by itself, is a relatively simple thing to learn and EPA believes that certified renovators who have already been trained in how to properly use a test kit will be able to learn how to properly collect a paint chip sample and submit it to an NLLAP-recognized entity from the material EPA posts on its Web site.

At least one commenter pointed out that EPA would also have to modify the recordkeeping requirements to accommodate this option and include information specific to paint chip sample collection, such as component and location tested, identity of the NLLAP entity analyzing the samples, and the sample results. Accordingly, EPA is modifying 40 CFR 745.86(b)(1) to add a new subparagraph (iii) that requires records pertaining to paint chip sample collection and analysis, including a description of the components that were sampled, and the locations sampled, the name and address of the NLLAP-recognized entity performing the analysis, and the results for each sample. EPA is also modifying 40 CFR 745.86(b)(6) to include a certification by the certified renovator that, if paint chip samples were collected, that the samples were collected from the components in the locations specified, that the samples were submitted for analysis to the identified NLLAP-recognized entity, and that the sample results were as specified.

This option does not make certified renovator the equivalent of a certified lead-based paint inspector. Certified renovators must still test each affected component, they are not permitted to exclude components based on similar painting histories or perform random paint sampling in multi-unit buildings. Just as with the current provisions for test kit use, in those states that do not permit persons other than certified inspectors or risk assessors to sample or test for lead-based paint, certified renovators will not be able to exercise this option.

4. *Training provider accreditation.* In May 2010, EPA proposed a number of minor changes to the training provider accreditation provisions. EPA received very little public comment on these proposed amendments, and EPA is promulgating these amendments as proposed.

a. *Documentation of personnel qualifications.* The first of these minor amendments involves submission of documentation of training program manager and principal instructor qualifications along with training provider applications for accreditation. Training providers who wish to provide renovator, dust sampling technician, or lead-based paint activities training for Federal certification purposes must apply for and receive accreditation from EPA. To become accredited, a provider must employ a training program manager as well as principal instructor(s) who meet certain education, training and work experience requirements. The training provider must indicate on its application for accreditation that the training program manager and principal instructor(s) meet these requirements; however, the 2008 RRP rule did not require documentation (*e.g.,* resumes) regarding the qualifications of these individuals to be submitted to EPA. The Agency believes it is important to review this information when determining whether to approve a training provider application. When EPA reviews applications for accreditation, it is common for the Agency to request this documentation from training providers in order to verify that the training program manager and principal instructor(s) have the proper qualifications. Requesting this information takes time and can delay the review of an application. Therefore, the Agency will now require training providers to submit documentation regarding the qualifications of the education, training and work experience of training managers and principal instructors with their applications for accreditation. Only one commenter commented on this provision, expressing general support for the change.

b. *Submission of training course materials.* EPA is also promulgating other proposed changes to the required materials that must be submitted along with an accreditation application. EPA received only one comment expressing general support for this proposed change. Specifically, to become accredited, a training provider must submit a copy of its training course materials with its application for accreditation for review by the Agency. If a training provider chooses to use the model course developed by EPA or a course approved by an authorized State or Indian Tribe, then the provider is not currently required to submit the course materials with its application. Instead, the training provider indicates on its application that it will use the EPA model course or a course approved by an authorized State or Indian Tribe. Authorized States and Indian Tribes can have renovation or abatement programs that are significantly different from the EPA-administered program which would be reflected in their approved course materials. In these instances, a training course approved by the State or Indian Tribe may not be sufficient for the purposes of training someone on the requirements of the Federal program.

Accordingly, the Agency proposed to require training providers who apply to EPA for accreditation and wish to use a course approved by an authorized State or Indian Tribe to submit the course materials for EPA review. EPA reasoned that this will give the Agency the opportunity to identify and address any significant differences between the requirements of EPA and the authorized program that may appear in the course so the Agency can ensure that EPA-accredited training providers are using appropriate course materials.

EPA is promulgating this provision as proposed. This provision only applies to those training providers who wish to use a training course approved by an authorized State or Indian Tribe that is different from the EPA model training course. Training providers wishing to use the EPA model courses need not submit those materials with their applications.

c. *Role of principal instructor.* EPA is promulgating a proposed minor amendment involving a clarification of the role of principal instructors in teaching courses. The regulation, at 40 CFR 745.225(c)(3), states that principal instructors are responsible for the organization of their courses and oversight of the teaching of all course material. The regulations also define ''principal instructor'' as ''the individual who has the primary responsibility for organizing and teaching a particular course.'' Nonetheless, the rule also allows training program managers to designate experts in a particular field (*e.g.,* doctors or lawyers) as guest instructors, on an as needed basis, to teach discrete portions of the course. EPA interprets these provisions to require a principal instructor to be present and primarily responsible for teaching the course, although guest instructors may be used to teach some portion(s) of the course. Principal instructors are also responsible for the quality of the instruction delivered by the guest instructors. To ensure that the regulation is clear on this point, EPA proposed to amend 40 CFR 745.225(c)(3) to state that principal instructor(s) are primarily responsible for teaching the course materials and must be present to provide instruction (or oversight of portions of the course taught by guest instructors) for the course for which he has been designated the principal instructor. EPA received two comments on this provision, both supported the change, and one specifically stated a belief that having principal instructors present while guest lecturers teach would improve the content of many courses. EPA agrees with these commenters and EPA is promulgating this provision as proposed.

d. *Application amendments.* EPA is promulgating as proposed another minor amendment involving a specific provision requiring training providers to amend their accreditation application whenever there is a change to the information presented in their most recent accreditation or re-accreditation application. The RRP rule includes requirements for amending the certification of a renovation firm. Firms must submit an amendment within 90 days of the date that a change occurs to information in its most recent application for certification or re-certification. Examples of amendments include a change in the firm's name without transfer of ownership, or a change of address or other contact information. To amend its certification, a firm must submit an application, noting on the form that it was submitted as an amendment. The firm must complete the sections of the application pertaining to the new information, and sign and date the form. EPA has interpreted the training provider accreditation regulations to require accredited training providers to submit amended applications whenever there is a change to the information provided in the training provider's most recent application for accreditation or re-accreditation, including information regarding the training manager and any principal instructor(s) teaching courses offered by the training provider. However, the existing regulations do not specify a time limit for submitting an amendment, so EPA proposed to require training providers to submit amendments within 90 days of the date a change occurs to information in each provider's most recent application. As proposed, if the training provider does not amend its most recent accreditation application within the 90-day time period, it must stop providing training until the accreditation application is amended. EPA also proposed to approve or disapprove amendments for a new training manager, any new or additional principal instructors, or any new permanent training location within 30 days of the date EPA receives the amendment. This 30-day time period will give EPA time to check the qualifications of the training manager(s) or principal instructor(s) before the training manager begins managing or the principal instructor begins teaching a course. This 30-day time period also gives EPA time to verify the suitability of a new permanent training location by visiting the location. As proposed, the training provider would not be permitted to provide training under the new training manager or offer courses taught by any new principal instructor(s) or at the new training location until EPA either approves the amendment or 30 days has passed. EPA also proposed to clarify that no fee will be charged for accreditation application or certification amendments. EPA received no comments on this proposed amendment.

Because qualified training managers and principal instructors are critical to ensuring effective training, it is important for EPA to have the ability to review their qualifications before they begin to provide training. If unqualified individuals provide training, it could be very difficult to determine whether the trainees received adequate training and resolve any concerns over the quality of the training. Requiring retraining would not only inconvenience the training provider, it would also be burdensome for the trainees themselves. Therefore, EPA is promulgating the 30-day review period for new training managers and principal instructors as proposed, with several modifications. The first relates to the calculation of the 30-day review period. EPA is clarifying that the 30-day period begins upon submission of a complete application for amendment. Thus, if the amendment involves a new training manager or principal instructor, the training provider must fill out the section of the application that identifies the training provider and the sections that pertain to the new training manager or principal instructor, sign the application, and include the individual's qualifications along with the application for amendment. If the application does not include these items, then the 30-day review period would not begin until the missing information is submitted.

In addition, in further reviewing this proposed provision, EPA has decided that additional flexibility would be beneficial for training providers. If the training provider wishes to use a training manager or principal instructor who has already been reviewed by EPA as part of a successful application for training provider accreditation under 40 CFR 745.225, whether for that training provider or another, the training provider may do so on an interim basis without delay. The training manager or principal instructor must still meet the qualifications for the position as described in 40 CFR 745.225(c)(1)–(2). If, within 30 days of the date that the training provider begins using such an individual as a new training manager or principal instructor, EPA determines that the individual should not be used in such a capacity, EPA will provide written notice to the training provider. The training provider must stop providing training under the new training manager or principal instructor upon receipt of written notice from EPA.

With respect to new permanent training locations, EPA is also concerned that a poor choice of location could negatively affect the quality of training. For example, if a location is chosen that does not have a suitable surface for performing cleaning verification, trainees would be unable to experience actually doing, during the hands-on portion of the course, something that will be an important part of their responsibilities as certified renovators. However, EPA believes that the choice of training location does not, in most cases, have as big of an impact on the quality of training as the training manager or the principal instructor. During the accreditation process for new training providers, it has been EPA's practice to review the qualifications for each and every training manager and principal instructor named on an application. In contrast, where a training provider has identified multiple permanent training locations in its application, EPA has chosen to visit a sample of locations, rather than each and every location. In addition, EPA has been approving traveling training providers based on the criteria that the providers will use to select a training location, a demonstration of the hands-on training, and an examination of the equipment the providers plan to use in training. Therefore, EPA will allow training providers to use new permanent training locations on an interim basis for 30 days. If, during that 30 days, EPA determines that the location is not adequate, the training provider must stop using that location upon written notice from EPA.

e. *Hands-on training requirements.* Another minor amendment involves the topics for which hands-on training is required in the renovator and dust sampling technician courses. The regulations at 40 CFR 745.225 includes requirements and procedures that training programs must follow to become accredited in order to provide instruction in lead-based paint courses. Minimum requirements for training curricula are found in this section, which lists course topics that must be included in the different training courses with an indication of the topics that require hands-on instruction. However, EPA inadvertently omitted indicating which course topics required hands-on training for the renovator and dust sampling technician disciplines. Accordingly, EPA proposed to identify in 40 CFR 745.225(d) which topics in the renovator and dust sampling technician courses require hands-on training. In further clarification, EPA also proposed to add a sentence to 40 CFR 745.225(e)(2) stating that refresher courses for all disciplines except project designer must include a hands-on component.

EPA received several comments on this aspect of the 2010 proposal. Two commenters supported the proposed topics for hands-on training for renovators and dust sampling technicians. Another commenter wondered why report preparation would be a required hands-on topic for dust sampling technicians when it has never been a hands-on topic for the other disciplines that must prepare reports. While it is true that hands-on training in report preparation is not required for most lead training disciplines, it is required for the inspector discipline. Thus, certified inspectors and certified risk assessors, who must successfully complete both the inspector course and the risk assessor course, receive hands-on training in report preparation. EPA believes that report preparation for dust sampling technicians is likewise important enough to warrant hands-on training in how to do it properly. Accordingly, EPA is finalizing the required hands-on training topics as proposed. Renovator trainees must receive hands-on training in using test kits, renovation methods that minimize creation of dust and lead-based paint hazards, containment and cleanup methods, and cleaning verification. Dust sampling technician trainees must receive hands-on training in dust sampling methodologies and report preparation.

EPA received two comments specifically on the proposed addition of a statement that all refresher training courses, with the exception of the project designer refresher course, must include hands-on training. One commenter was an environmental advocacy group, the other an industry trade association. Neither commenter supported this aspect of the 2010 proposal; they thought that requiring hands-on training for renovator refresher courses would limit the availability of refresher training and increase costs unnecessarily. Both commenters thought that enough information could probably be conveyed in a distance learning or e-learning setting to warrant dispensing with the hands-on requirement for renovator courses. The environmental advocacy group pointed out that EPA's current model refresher training course for renovators contains two required hands-on skill sets—test kit usage and cleaning verification. This commenter felt that this was appropriate, given that previously-trained individuals are still taking advantage of the ''grandfathering'' provision that allows them to successfully complete an accredited renovator refresher course to become certified renovators. Those individuals would not have had previous training in those two skills, so hands-on training would be necessary. However, once the grandfathering provision is no longer available, as discussed later in this section of the preamble, all certified renovators would have had hands-on training in these skills. While EPA agrees with this commenter that, for now, it is particularly important for renovator refresher courses to include hands-on training in test kit use and in cleaning verification, EPA disagrees that hands-on refresher training is unnecessary. A hands-on component for refresher courses will help ensure that certified renovators remain competent in the skills needed to comply with the RRP rule, including test kit use, containment, and cleaning (including cleaning verification). Therefore, EPA is finalizing the proposed amendment to 40 CFR 745.225(e)(2) that specifically states that hands-on training is required for all refresher courses except project designer. EPA plans to re-evaluate the renovator refresher course after the grandfathering provision sunsets, but before the currently-certified renovators are due for refresher training. At that time, EPA will consider whether hands-on training is still necessary and appropriate for renovator refresher training.

f. *E-learning.* As stated in the 2010 proposal, Web-based training and other types of alternative training delivery are permitted under both the Lead-based Paint Activities Regulations and the RRP rule. An EPA model on-line renovator course that may be used to deliver the classroom portion of the renovator course is available. While such alternative training delivery options cannot be used to deliver required hands-on training, EPA encourages training providers to make use of such options where appropriate to increase access to training and make it more affordable. Web-based training courses are considered separate courses and a separate application fee is required for each.

EPA's model electronic training course contains certain basic administration and delivery requirements. These include assigning a unique identifier to each student, to allow the training provider to track student course progress and completion. In addition, there are knowledge checks for each chapter, which must be completed before the student can go on to the next chapter, and a final test for the electronic learning portion which consists of at least 20 questions. Finally, students must be able to save or print an uneditable copy of a record showing completion of the electronic learning portion of the course. In May 2010, EPA proposed to incorporate these requirements into 40 CFR 745.225 to ensure that all training providers wishing to use electronic learning for the classroom portions of lead-based paint courses are aware of these requirements and plan their course development accordingly. EPA requested comment on a variety of topics, including the number of questions in the course test and the score required to pass.

EPA received several comments on this aspect of the 2010 proposal. Some commenters were concerned with verifying the identity of persons logging into e-learning courses. Several noted that, because it is impossible to verify with certainty the identity of persons completing online training, an in-person final course test is necessary to ensure that the trainee is adequately trained. In this final rule, EPA is amending 40 CFR 745.225(c)(6) to explicitly require e-learning training providers to assign a unique identifier to each student in order to track the student's progress through the course. EPA believes that this requirement, along with the existing requirement that the trainee participate in the hands-on training and take the final course test in person, will provide reasonable assurance that the same person has completed all of the portions of the course. In response to these commenters, EPA is modifying the regulations to specifically state that e-learning or other alternative delivery methods cannot be used for the hands-on training, the final course test, or the proficiency test, if one is given.

Commenters also expressed concern that the EPA model online course could be completed in as little as one hour, which could mean that a person could become a certified renovator with only 3 hours of training. EPA disagrees with these commenters. The current model course posted on the EPA Web site is not a functioning course and does not contain the background learning management system (LMS) which tracks the student's progress and requires satisfactory completion of the knowledge checks and the final test. Therefore, the time it takes to page through the model course is not representative of the time it would take to successfully complete an accredited e-learning course. Assuming that 2 training hours are spent on hands-on training, 40 CFR 745.225(c)(6)(vi) requires a minimum of six 50 minute training hours or 5 hours of classroom time for renovators. This requirement applies equally to traditional classroom settings as well as to e-learning courses offered for accreditation. While EPA realizes that renovator trainees will not all proceed through an e-learning course at the same pace, an e-learning course offered for accreditation must be generally designed so that an average trainee takes approximately 5 hours to proceed through the course, including all of the knowledge checks and the course test.

One commenter thought that EPA's proposed requirement of an 80% minimum passing score on the course test for the online course was too restrictive. Another commenter disagreed, reasoning that an 80% minimum passing score was reasonable but that a 100% passing score would be too restrictive, because it would likely result in students being penalized for poorly-worded questions or alternate interpretations, regardless of the state of the student's knowledge. This commenter thought that it was appropriate to have a higher passing score requirement for the e-learning portion of a training course, because the student would have an opportunity to review the material and retake the test. EPA agrees with the second commenter. The 80% minimum passing score is intended to demonstrate mastery of the subject and lower scores do not achieve this goal. If students do not pass the test, they must review the material and try again. To ensure that, just as in conventional testing, students using electronic means to take the test do not receive feedback on their answers until after they complete and submit the test, the electronic testing provision at 40 CFR 745.225(c)(6)(viii)(D) explicitly prohibits such interim feedback, a feature contained in some Web sites.

One commenter suggested that EPA consider separately accrediting entities that provide online training and entities that provide hands-on training. The commenter argued that developing an online course is a capital-intensive project that requires a large number of trainees to recover the costs, so relatively few entities are likely to undertake online course development. In contrast, the commenter stated that the delivery of hands-on training must be more local and mobile, it requires a smaller capital investment, and each entity may have relatively few trainees. EPA recognizes that this may be the case, at least for now, while EPA is administering the RRP program in most States. However, this may change as more States become authorized and impose requirements for training that may differ from the EPA requirements. In any event, as the commenter notes, EPA has developed a streamlined process to allow accredited training providers to add an e-learning component to their accreditation by using an already developed and accredited online course. This allows accredited training providers to offer online training without having to make a large capital outlay to develop a course. EPA continues to believe that the training provider who issues the final course completion certificate to a trainee, thus conferring certified renovator status on the trainee, must be responsible for ensuring that the student has completed all of the required training. EPA does not offer partial accreditations, or accreditation for a portion of a course.

On a related topic, this commenter thought that it would be burdensome to require the hands-on training provider to maintain records of the specific times each student logged in to the online portion of the course, each student's progress, and completion data. The commenter believed that, in the case where the online provider and the hands-on provider are separate entities, working under a contractual agreement to present an entire training course, it would be relatively easy for the online provider to maintain the records. In contrast, the commenter thought that it would be much more burdensome for EPA to require that the hands-on provider download or otherwise take possession of these records. EPA disagrees with this commenter, because EPA believes that the amount of data associated with this particular requirement for each trainee is not substantial. However, if a particular accredited training provider felt otherwise, the provider could contract with the provider of the online training to store the records. Although the accredited training provider would remain ultimately responsible for being able to produce those records, as long as the training provider is able to produce them in response to a request from EPA, EPA would consider the training provider in compliance with the recordkeeping requirements.

One commenter provided a number of specific comments on EPA's proposed requirements for e-learning courses. First, the commenter thought that the requirement for knowledge checks for each module of the course was too inflexible, and that it could be difficult to determine what a module is for purposes of knowledge checks. The commenter suggested that EPA instead require periodic knowledge checks. EPA agrees with this comment and is promulgating a requirement for periodic knowledge checks equivalent to the number and content of the knowledge checks contained in EPA's model course. This would be 16–24 knowledge checks over the entire course. This commenter also thought that the requirement that a student be able to generate an uneditable copy of an e-learning course completion certificate too stringent. The commenter pointed out that almost anyone reasonably familiar with computers could alter a secure PDF, image, or word processing file through the print function. EPA will add language to the proposed provision at 40 CFR 745.225(c)(6)(viii)(E) to clarify that EPA merely meant that the certificate must not be susceptible to easy editing. A secure PDF file would comply with these requirements. Allowing students to generate and print the course completion certificate provides them with reasonable certainty that they have completed the e-learning portion of the course before attempting the hands-on portion. EPA recommends that accredited training providers verify through other means, such as the e-learning progress records, that each student who completes the hands-on training has also completed the online portion of the course before training providers issue the final course completion certificate.

g. *Combined refresher courses.* In the 2010 proposal, EPA requested comment on whether training providers should be allowed to provide a combined Abatement Worker/Renovator refresher course or a combined Abatement Supervisor/Renovator refresher course or both. After the 2008 RRP rule was promulgated, EPA received input from the regulated community and others indicating that many abatement contractors are likely to also become certified renovation firms. If this is the case, it would be advantageous for such firms to be able to send their employees to combined refreshers so that the employees would more readily be able to keep up their dual certifications. EPA requested comment on the likelihood that this will be the case, and, if combined refreshers are desirable, whether the different certification time periods for individual abatement certification (3 years) and individual renovator certification (5 years) should be harmonized and, if so, how. EPA received two comments on this topic; both commenters supported the idea of combined refresher courses and thought they would provide increased flexibility for industry. One commenter thought that the certification time periods should be harmonized to 3 years for all disciplines because the commenter believed that 5 years was too long to go without a refresher. The other commenter did not think that harmonization was necessary, because the abatement worker or supervisor would just take the combined refresher every 3 years to meet the shorter certification periods in the Lead-based Paint Activities Rule. EPA agrees with these commenters that combined refresher courses may be beneficial. While the current regulations permit training providers to offer refresher courses sequentially, *e.g.,* a 4-hour renovator course on the afternoon of one day, followed by an 8-hour worker course the next day, taking the courses sequentially would result in some duplication of training topics for persons certified as both renovators and abatement workers. On the other hand, EPA is not certain that appropriate refresher topics for both disciplines could be covered in a single 8-hour day. EPA plans to evaluate the content of its supervisor, worker, and renovator refresher courses to determine what an appropriate combined course length might be. Depending on the results of this evaluation, EPA will consider amending these regulations to establish course length requirements for combined refresher courses.

h. *Recordkeeping.* Another amendment proposed in May 2010 involves recordkeeping requirements for training providers. Previously, training providers were required to keep training records for 3 years and 6 months. This length of time was chosen because of the length of individual certification periods for lead-based paint activities, which can be as long as 3 years and 6 months including interim certification. However, the renovator and dust sampling technician certification periods are 5 years, with no interim certification. Therefore, in order to ensure that the training records from the previous training course are available for certified renovators and dust sampling technicians taking refresher courses, EPA proposed to increase the recordkeeping period applicable to these disciplines to 5 years. EPA received two comments on this aspect of the 2010 proposal, both commenters thought that the recordkeeping requirements for all disciplines should be increased to 5 years. These commenters thought it would be less confusing for training providers if there was one period applicable to all. One commenter pointed out that EPA had extended the certification period for renovators trained before April 22, 2010 to July 1, 2015, so the training records for those trainees ought to be kept for as long as their certification lasts. This commenter suggested that EPA require training records to be kept for 5 years or until the expiration of certification resulting from the training, whichever is longer. While EPA agrees that it may be easier for training providers to keep records for the same length of time regardless of the discipline, EPA does not believe that it is necessary to make this a requirement. Training providers who prefer to have one single recordkeeping process can always choose to maintain their records for 5 years across the board. Therefore, EPA is promulgating the increased recordkeeping requirement for providers of accredited renovator and dust sampling technician training as proposed. EPA also agrees with the commenter who suggested that there be a longer recordkeeping requirement for renovator training courses offered before April 22, 2010. Accordingly, EPA is also promulgating a requirement that records for renovator training courses completed before April 22, 2010 must be kept until July 1, 2015.

i. *Trainee photographs.* EPA also proposed certain minimum standards for the trainee photographs that must appear on renovator and dust sampling technician course completion certificates. Accredited training programs are required to issue a course completion certificate for each person who passes a training course. A variety of information is required to be on the certificate including the name of the course, the name and address of the student, and contact information for the training program. Course certificates for renovators or dust sampling technicians must include a photograph of the student, but the regulation does not include size requirements or other specifications for the photograph. Since publishing the 2008 RRP rule, the Agency has been asked if there is a minimum size for the photograph. EPA believes that it would be beneficial to have minimum standards for the photograph in order to ensure that the person in the photograph is recognizable. EPA proposed to require that the photographs on course completion certificates be an accurate and recognizable image of the trainee and at least one square inch in size. EPA also requested comments on whether the image quality requirements should be more specific, *e.g.,* more quantitative. EPA received several comments on this provision. Commenters generally supported the proposed requirements, but did not favor additional requirements, such as quantitative requirements for image quality, as they were concerned about the burden associated with such additional requirements. EPA agrees with these commenters that the proposed requirements are sufficient. Therefore, EPA is promulgating the image quality requirements as proposed.

j. *Clarifying changes to 40 CFR 745.225.* Finally, as stated previously, 40 CFR 745.225 includes requirements and procedures that training programs must follow to become accredited in order to provide instruction in renovator, dust sampling technician, and lead-based paint activities courses. The final 2008 RRP rule amended § 745.225 to cover persons who provide or wish to provide renovator or dust sampling technician training for the purposes of the RRP rule. There are some instances where the regulations do not specifically mention the renovator or dust sampling technician courses even though the regulations apply to those courses. For example, 40 CFR 745.225(c)(14) explains the requirements which a training provider must follow when submitting notification to EPA after the completion of a training. However, the conforming changes, *i.e.,* to replace ''lead-based paint activities courses'' with ''renovator, dust sampling technician, and lead-based paint activities courses,'' were not made to every subparagraph even though all the requirements of that section apply to those courses. Consequently, EPA proposed to clarify that the requirements in 40 CFR 745.225 apply to renovator and dust sampling technician courses in addition to lead-based paint activities courses. EPA received one comment offering general support for these proposed revisions. EPA is promulgating these revisions as proposed.

5. *State and Tribal program authorization.* Under the RRP rule, interested States, Territories, and Indian Tribes may apply for, and receive authorization to administer and enforce all of the elements of the RRP program. In May 2010, EPA proposed several changes to the State and Tribal program authorization regulations. The first was a clarification that State and Tribal programs do not need to include requirements for the accreditation of dust sampling technicians if they require dust sampling to be performed only by a certified inspector or risk assessor. EPA received only one comment relating to this proposed revision, and that commenter thought that EPA should require States and Tribes to allow dust sampling technicians to collect samples. However, EPA does not have the authority to prohibit States and Tribes from having a more stringent program than the EPA's, *e.g.,* requiring more training for persons collecting dust wipe samples than EPA requires. It would not make sense for EPA to require States and Tribes to establish the dust sampling technician discipline if those trainees would not be allowed to perform any duties under State or Tribal law. Therefore, EPA is promulgating this change to the text of the regulation as proposed.

Along these same lines, EPA proposed to add a provision requiring State or Tribal programs to have procedures and requirements for on-the-job training of renovation workers who do not receive accredited training. EPA neglected to include such a provision in the 2008 RRP Rule. As with the dust sampling technician discipline, State and Tribal programs are only required to have these provisions if they permit on-the-job training for renovation workers. If, for example, a State or Tribal program only allows certified renovators to perform renovation activities within a regulated renovation work area, then no provisions for on-the-job training would be required for that State or Tribal program. EPA received one comment generally supporting this change. EPA is promulgating this revision as proposed.

EPA also proposed to amend the State and Tribal program requirements to clarify that both individuals and firms must receive certification. Only one comment was received on this topic, pointing out that EPA's proposed regulatory text at 40 CFR 745.326(e)(1) did not accomplish that objective. EPA agrees with this commenter, and has revised the regulatory text throughout this section accordingly to ensure that EPA's requirements are clear. EPA requires both renovators and renovation firms to be certified. A renovator becomes certified by successfully completing an accredited renovator training class. A renovation firm becomes certified by submitting an application to EPA, attesting that it and its employees will follow the work practice standards at 40 CFR 745.85 for conducting renovations, and paying a certification fee. EPA believes that, in order for a State or Tribal program to be at least as protective as EPA's program, the State or Tribal program must, at a minimum, require formal certification for renovation firms. States and Tribes may, but are not required to, formally certify renovators. The certified renovation firm is responsible not only for the behavior of its certified renovators but also for the other workers that have been trained by the certified renovators. Thus, the renovation firm is ultimately responsible for the proper performance of the renovation. Requiring formal certification for renovation firms facilitates compliance monitoring and enforcement for EPA as well as for State and Tribal programs. A program that only required formal certification for individual renovators and not firms would not be as protective.

In addition, as pointed out by several State commenters, EPA inadvertently included the wrong provisions in the proposed regulatory text for revising authorized State and Tribal programs to conform to revisions to the 2008 RRP rule. The existing provisions at 40 CFR 745.326(f) give authorized State and Tribal programs 2 years from the effective date of any EPA revisions to the 2008 RRP rule to demonstrate that the State or Tribal program meets the requirements of the revised 2008 RRP rule. This 2 year period is also afforded to States and Tribes that submit applications for authorization before the effective date of any EPA revisions. EPA did not intend to make any changes to this provision and States and Tribes still have 2 years to make changes to their programs necessitated by revisions to the Federal RRP program.

Finally, EPA proposed to require that, in order to be authorized for any of the lead-based paint programs, State or Tribal programs demonstrate that: (1) The State or Tribe is able to sue to obtain penalties, (2) civil and criminal penalties of at least $10,000 are assessable for each instance of violation, (3) if violations are continuous, the penalties are assessable up to the maximum amount for each day of violation, and (4) the burden of proof and degree of knowledge or intent of the respondent is no greater than it is for EPA under TSCA. EPA also requested comment on what criteria States or Tribes should consider in assessing penalties and whether the $10,000 minimum penalty authority level should be periodically adjusted for inflation. As discussed in the preamble to the proposed rule, in choosing the proposed minimum penalty authority of $10,000 per violation per day, EPA looked to other programs that States and Tribes may be authorized to administer. Some of these programs have minimum penalty authority requirements for State and Tribal programs and some do not. For example, under the Clean Air Act (CAA) implementing regulations at 40 CFR 70.11(a)(3) and the Resource Conservation and Recovery Act (RCRA) implementing regulations at 40 CFR 271.16(a)(3), State programs must have the authority to assess civil and criminal fines of at least $10,000 per day per violation. Other programs have established lower minimum penalty authority requirements. The implementing regulations for the Safe Drinking Water Act (SDWA) require State programs to have the authority to impose a penalty of at least $1,000 per day per violation on public water systems serving a population of more than 10,000 individuals. Some EPA programs have set no minimum penalty authority requirements for States and Tribes; these programs include the Asbestos Hazard Emergency Response Act program and the State pesticide applicator certification program under the Federal Insecticide, Fungicide, and Rodenticide Act.

EPA received a number of comments on this provision. Six State commenters opposed the proposed provisions. Several argued that their legislatures had already created the authority to establish an RRP program, but the maximum penalty amount was less than $10,000. Five States described their existing penalty authorities—one already has a minimum penalty authority of $10,000, one has $5,000, and the other three have $1,000. These States did not believe that they would be able to increase the maximum penalty authority, because it was comparable to other programs administered by the State, or that it would take several years to get an increase through the legislature, during which time EPA would have to administer the program in their jurisdictions. At least two already-authorized State RRP programs pointed out that they had been authorized with maximum penalty authorities of less than $10,000. One State noted that it could assess penalties of up to $750 or $1,000 under its EPA-authorized RRP program, the other's maximum RRP penalty authority ranged from $1,00 to $1,000. One of these States also noted that it had been effectively enforcing the Lead-based Paint Activities Program and the Pre-Renovation Education Program for years now, and the State did not believe that an increase in its maximum penalty authority would improve the effectiveness of its programs in any way. Another State commented that it has penalty authority of $10,000, but that limit is for each enforcement case, not per violation per day. Some of the State commenters also noted that most enforcement actions in an RRP program would be against very small companies or individuals, and penalties of less than $10,000 per violation per day would still be very effective deterrents for such entities.

Two environmental advocacy groups supported EPA's proposed minimum penalty authority of $10,000, arguing that substantial penalties are necessary to get the attention of the regulated community and meaningful enforcement is critical to the rule's success at protecting individuals from exposures to dangerous levels of lead.

EPA agrees with these commenters on the importance of an effective enforcement program. Strong enforcement of the lead-based paint regulations by authorized State and Tribal programs is critical to ensuring the safety of the occupants of target housing and child occupied facilities undergoing lead abatement, renovation, repair or painting. However, EPA also agrees with those States that argued that most of the enforcement actions in authorized lead-based paint programs would be against very small entities. Although small entities also violate the CAA and RCRA, it is likely that the regulated community in the lead-based paint programs consists of smaller entities than the other programs for which EPA has established minimum penalty authorities. Therefore, EPA is establishing a minimum penalty authority for State and Tribal programs of $5,000. Because it is especially important to deter multiple violations and continuing violations, this final rule retains the ''per violation, per day'' requirement.

In response to the related requests for comment, State commenters did not favor adding a mechanism for adjusting these minimum penalty authorities for inflation. One environmental advocacy group supported the idea, but thought that it should not be a barrier to State and Tribal program authorization. EPA agrees with these commenters and no mechanism for adjusting these minimums for inflation is included in this final rule.

Commenters suggested a number of factors that should be considered by States and Tribes when imposing penalties for violations of their authorized programs. Several favored enforcement history and risk, but not to the extent of treating first-time offenders too lightly. A handful of commenters argued that size of business, and ability to stay in business should not be considered, because small companies can cause as much harm as large companies. EPA believes that States and Tribes may legitimately consider any of the factors that EPA typically considers, such as nature, circumstances, and extent of the violation, the culpability of the violator, history of prior violations, ability to pay or continue in business, voluntary disclosure, and attitude of the violator. However, EPA will not require States and Tribes to consider any of these factors.

Finally, EPA received no comments on the proposed addition of an explicit requirement that States and Tribes have the ability to sue violators to collect penalties and that the burden of proof for enforcement be no more rigorous than the EPA standard under TSCA. EPA believes that these two elements are important elements of an effective enforcement program. Therefore, EPA is promulgating these additional requirements as proposed.

6. *Vertical containment.* EPA's 2010 proposal included more specific language on vertical containment requirements for exterior projects. As proposed, the rule would specifically state that vertical containment is required for exterior renovation projects that are covered by the rule and that affect painted surfaces within 10 feet of the property line. In such cases, vertical containment is necessary to ensure that adjacent buildings or properties are not contaminated by leaded dust or debris generated by the renovation. EPA's Dust Study demonstrates that leaded dust and debris from exterior renovations can be found 10 feet away from activities disturbing leaded paint, even if no prohibited or restricted practices are used. For example, in an experiment involving the dry scraping of paint from a single story garage, significant dust-lead levels were detected on collection trays at distances from 9 to 11 feet from the scraping activity (Ref. 6, page 6–25). These levels ranged from 7,500 $\mu g/ft^2$ to more than 16,500 $\mu g/ft^2$. The RRP rule, at 40 CFR 745.85(a)(2), requires renovation firms to isolate the work area so that no dust or debris leaves the work area while the renovation is being

performed. The rule further states, at 40 CFR 745.85(a)(2)(ii)(D), that, in certain situations, the renovation firm must take extra precautions in containing the work area to ensure that dust and debris from the renovation does not migrate to adjacent properties. EPA knows of no work practice other than a system of vertical containment or equivalent extra precautions in containing the work area that would universally and effectively prevent the migration of dust and debris from renovations performed within 10 feet of the property line to adjacent properties.

EPA also proposed to clarify, in the regulatory text itself, that windy conditions may also necessitate the use of vertical containment to prevent contamination of other buildings, other areas of the property, or adjacent buildings or properties. Specific mention of windy conditions was made in the preamble to the final 2008 RRP rule, although it was not included in the regulatory text. Nevertheless, EPA expects atmospheric conditions to be one of several factors that renovation firms consider when designing containment systems. Other factors would include the height of the building and the paint disturbance and the type of renovation activity planned. EPA thought that specifically including windy conditions as a factor to consider when designing an effective containment system would serve as an important reminder for renovation firms. Including the mention of windy conditions in the proposed regulatory text did not mean that vertical containment would be required for any particular renovations. The 2010 proposal also included a definition of the term ''containment'' in order to clarify what is meant by the term. The proposed definition was based on the definition of ''Worksite preparation level'' from the Department of Housing and Urban Development's ''Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing'' (HUD Guidelines, Ref. 11). The proposed definition included additional information on what constitutes vertical containment.

Some commenters supported the proposed revisions to the vertical containment requirements. One thought that contamination of neighboring properties is a common and serious problem. Other commenters did not support the proposed revisions. These commenters thought that the proposed revisions were too inflexible and unnecessary. EPA disagrees with these commenters. As discussed, the Dust Study shows that dust and debris from exterior renovations travels at least 10 feet from the activity. The RRP rule requires the ground to be covered with plastic sheeting or other impermeable material extending 10 feet beyond the surfaces being renovated or a sufficient distance to collect falling paint debris, whichever is greater, unless prevented by the property line. In the absence of a system of vertical containment or equivalent extra precautions in containing the work area, EPA knows of no work practice that would universally and effectively ensure that adjacent properties are not contaminated when work disturbs lead-based paint within 10 feet of the property line. One commenter thought that it should be sufficient to require the renovation firm to inform the neighbors to keep their windows and doors closed while the renovation is ongoing. While this might prevent leaded dust from drifting into the interiors of adjacent buildings, it does not address contamination of the neighboring porches, balconies, or yards. This does not meet the standard already present in the RRP rule, that dust and debris not be permitted to leave the work area while the renovation is ongoing. EPA is also concerned about the ability of renovation firms to affect the behavior of neighbors whose homes are not being renovated.

Several commenters expressed concern about the safety of workers and vertical containment. One argued that OSHA has said that vertical containment is not required in situations where worker safety would be compromised, such as in windy conditions. EPA agrees that erecting extensive scaffolding to support a large vertical containment system in some windy conditions may be unsafe for workers. If such a vertical containment system would be necessary to ensure containment of the dust generated by a particular renovation, EPA knows of no alternative but to reschedule the renovation for a more clement day. The HUD Guidelines state that exterior renovation work should not be conducted when the wind speed is greater than 20 miles per hour (Ref. 11). The Guidelines also state that work must cease and cleanup be completed before rain begins. EPA has not imposed these specific requirements, but renovation firms should consider this guidance when deciding how to proceed.

Other commenters were concerned about the additional costs that the revisions to the vertical containment provisions would impose on renovations and the potential negative impact on affordable housing and weatherization programs. EPA agrees that it is more expensive to conduct exterior renovations with vertical containment than without. In EPA's economic analysis for the 2008 RRP rule, EPA addressed those situations where the renovation firm must take extra precautions to effectively contain dust and debris, including work areas in close proximity to other buildings, work areas that abut a property line, and windy conditions. The 2008 economic analysis specifically notes that it is sometimes necessary to erect a system of vertical containment to prevent paint dust and debris from contaminating the ground or any object beyond the work area. To account for these situations, EPA estimated that approximately 2% of exterior jobs would use exterior containment, and the incremental cost of vertical containment varies from $330 per wall to $1,640 per wall, depending on the size of the job. Thus, EPA has already accounted for the additional costs incurred for using vertical containment systems on renovations performed within 10 feet of the property line.

Because EPA does not know of any effective alternatives to the vertical containment requirement for exterior renovations performed within 10 feet of the property line, EPA is promulgating a requirement that vertical containment or equivalent extra precautions in containing the work area be used on exterior renovations performed within 10 feet of the property line. This requirement is intended to provide flexibility for certified renovators to design effective containment systems based on the renovation activity and the work site. To ensure that renovation firms understand that the requirement refers to a wide variety of effective work area containment systems, EPA is including the phrase ''or equivalent extra precautions in containing the work area'' in this requirement. Effective work area containment can span a range from simple barriers to more extensive scaffolding, depending on the size of the job and other relevant factors. Complex vertical containment systems with extensive scaffolding are often not necessary to effectively contain the dust generated by a renovation. An example of a simple barrier system, on a job requiring hand scraping within a few feet of the ground and within a few feet of the property line, would be laying plastic or other impermeable material on the ground between the paint-disturbing activity and the property line, anchoring it to the house, and then extending the material up and over the fence at the property line. A slightly more extensive containment approach could involve the use of a triangular eave/soffit ''lean-to'' system. In this system, plastic or other impermeable material could be spread out on the ground 5–10 feet out from the exterior side wall, depending upon the available space. The same impermeable material could be attached to the eave or soffit area at the roofline, and held away from the building by an extension ladder temporarily fastened to where the wall meets the eave or soffit. The material would then be fastened and sealed onto the ground cover. A variation of this system would involve draping the plastic or impermeable material over a frame consisting of commercially-available tension rods or strong painter's extension tubes. Effective containment could also consist of plastic or other impermeable material draped from outriggers, or framework secured to the roofline, taped to the sides of the building to surround the work area, and fastened and sealed to the ground cover. Yet another containment system could involve a rigid box-like framework, constructed out of commercially-available tension rods or painter's extension tubes, wrapped in impermeable sheeting and anchored to the ground cover and the sides of the building. EPA believes that these measures, in most cases, should be sufficient to contain dust and debris where extra containment measures are needed, such as work that creates large amounts of dust or work performed within 10 feet of the property line.

EPA realizes that it may be costly or impracticable to deploy an elaborate vertical containment system, for example, in high rise multi-story buildings. The Agency, furthermore does not wish to create hazardous situations for workers that would outweigh the benefit of capturing the dust with scaffolding-based vertical containment systems. EPA believes that equally effective systems may exist. Thus, EPA added language indicating that ''equivalent extra precautions in containing the work area'' will also satisfy the requirement to contain dust on the worksite of exterior renovations performed within 10 feet of the property line.

EPA continues to believe that it is important to remind renovation firms that there may be other situations where vertical containment or equivalent extra precautions in containing the work area would be required in order to prevent dust and debris from leaving the work area. However, because some commenters appeared to believe that EPA's mention of windy conditions amounted to a requirement to use vertical containment in windy conditions, EPA is deleting the phrase ''such as in windy conditions.'' The complete provision, as promulgated, reads: ''If the renovation will affect surfaces within 10 feet of the property line, the renovation firm must erect vertical containment or equivalent extra precautions in containing the work area to ensure that dust and debris from the renovation does not contaminate adjacent buildings or migrate to adjacent properties. Vertical containment or equivalent extra precautions in containing the work area may also be necessary in other situations in order to prevent contamination of other buildings, other areas of the property, or adjacent buildings or properties.'' EPA wishes to encourage innovation in designing effective containment systems or measures, so EPA will consider any information or data made available to it that could be used to determine the equivalence of extra containment precautions in containing the work area. For example, the Department of Energy (DOE) suggested that an equivalent containment system could involve the use of a trough-like system beneath the paint-disturbing work. The trough would consist of polyethylene and tubing fabricated in a U-shape configuration, extending 1 to 2 feet from the exterior side of the building. According to DOE, the bottom of the trough could be weighted down with scrap lumber and sprayed with water enabling it to capture the falling dust and debris. DOE suggested that this trough, especially if combined with dust minimization techniques such as wet methods, the use of dust-capturing shrouds, and HEPA vacuums, would be equally effective at containing dust and debris as vertical containment. EPA cannot determine that the trough, by itself, provides effective containment of dust and debris, but will be examining this in the future. Similarly, DOE suggested that another possible method for the dust that is generated during an exterior renovation to be captured could involve the use of a shroud attached to a power tool with a HEPA vacuum, also attached to the shroud, where the dust and debris is captured right at the source—thereby not allowing it to fall onto polyethylene, workers clothing, equipment, and tools. EPA seeks data or other information upon which to evaluate that the following are effective at containing dust and debris: the trough in combination with dust minimization techniques; the use of a shroud attached to a power tool with a HEPA vacuum; or other alternative methods. EPA will review and issue guidance as appropriate. EPA intends to work collaboratively with DOE and HUD and other agencies and stakeholders as appropriate to develop further guidance on equivalent extra precautions in containing the work area.

In addition, since promulgation of the 2008 RRP rule, EPA has received several inquiries from the regulated community on the rule's containment provisions. In particular, EPA has been asked to address the problem of obstacles that prevent renovation firms from using 6 feet of plastic sheeting or other impermeable material on interior floors or 10 feet of material on the ground. EPA believes that the proper use of vertical containment measures may be a more effective method for containing the work area than use of traditional floor or ground containment alone, especially where obstacles prevent or make it impractical to install floor or ground containment to the extent required by the RRP rule. Therefore, EPA is amending the containment provisions for both interior and exterior renovations to permit renovation firms to erect vertical containment closer to the renovation activity than the minimum floor or ground containment distance specified in the RRP rule to give renovation firms more flexibility in designing effective containment strategies for particular work sites. For exterior renovations, this amendment would allow a renovation firm to construct vertical containment less than 10 feet from the renovation activity. If a renovation firm chooses to take advantage of this provision, the ground containment may extend less than 10 feet, stopping just outside the edge of the vertical containment, as long as the distance is sufficient to contain all dust and debris during the renovation and post-renovation cleanup. For example, a renovation firm erects an exterior vertical containment system consisting of a rigid box-like framework wrapped in impermeable plastic sheeting and anchored to the ground and home. If this containment system is erected 5 feet from the side of the home, and placed on top of ground containment, such containment should effectively limit the travel of dust and debris to the interior of the enclosure. Under the amended containment provisions, the renovation firm would not be required to extend plastic sheeting or other impermeable material another 5 feet beyond the vertical containment system in order to meet the 10 foot minimum ground containment requirement promulgated in the 2008 RRP rule.

EPA is also providing increased flexibility for renovation firms by allowing firms the option to use vertical containment measures in combination with reduced floor containment on interior renovations. However, to qualify for reduced floor containment requirements, vertical containment systems for interior renovations must consist of impermeable barriers that extend from the floor to the ceiling and are tightly sealed at joints with the floor, ceiling and walls (*e.g.* through the use of tape, foam or other means which create tight seals), thus effectively creating a separate enclosure. This type of vertical containment acts as the functional equivalent of a wall for purposes of defining the work area and, if the vertical containment meets these criteria, the floor containment measures may stop at the edge of the vertical barrier. However, unlike permanent walls, vertical containment barriers are subject to all containment cleaning requirements including misting, inward folding, sealing, and proper disposal following the renovation. A firm must also thoroughly clean an additional two feet beyond the vertically-contained work area. Finally, during ingress or egress from the vertical enclosure, a firm must take precaution to ensure that dust and debris on personnel, tools, and other items do not escape the work area.

Upon further consideration of the proposed definition of containment, particularly in light of the comments received on the proposed vertical containment requirements, EPA has determined that a broader definition of containment is unnecessary, and may even be confusing, but a definition of vertical containment would help to clarify the vertical containment requirements. In addition, EPA believes that there may be confusion among the regulated community and other stakeholders about what EPA means when it uses the term ''vertical containment.'' As previously discussed, vertical containment can span the range from simple barriers to box-like structures to more extensive scaffolding. Accordingly, EPA is promulgating a definition of ''vertical containment'' that is similar to the last sentence of the proposed definition of ''containment.'' Vertical containment is defined as a vertical barrier consisting of plastic sheeting or other impermeable material over scaffolding or a rigid frame, or an equivalent system of containing the work area. The definition further states that vertical containment is required for some exterior renovations but it may be used on any renovation. EPA encourages members of the regulated community, or other stakeholders, who have questions on the work area containment requirements or any other aspect of the RRP rule to consult the Frequent Question database accessible from EPA's primary lead Web page at *http://www.epa.gov/lead* or contact the National Lead Information Center by calling 1(800) 424–LEAD [5323]. Hearing- or speech-impaired persons may reach the National Lead Information Center through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

7. *Prohibited or restricted practices.* In May 2010, EPA proposed to make a number of minor revisions to clarify the prohibitions and restrictions on work practices in 40 CFR 745.85(a)(3). The first was a clarification that these prohibitions and restrictions, *e.g.,* the prohibition on open flame burning or torching, apply to all painted surfaces, not just surfaces where the presence of lead-based paint has been confirmed. The term ''lead-based paint'' was incorrectly and inadvertently used in this subparagraph, making it inconsistent with the rest of the RRP rule, which applies in the presence of known lead-based paint as well as paint that has not been tested for lead content. Accordingly, EPA proposed to replace the term ''lead-based paint'' with ''painted surfaces'' in this subparagraph. Of course, if the painted surface has been tested and found to be free of lead-based paint, the prohibitions and restrictions on work practices in the final RRP rule do not apply. Commenters generally supported this revision, although two commenters noted that EPA uses the term ''painted surfaces'' throughout the RRP rule and it is unclear whether this refers just to paint or to other surface coatings as well. These commenters noted that the definition of ''lead-based paint'' includes paint and other surface coatings but there is no definition of the term ''painted surfaces.'' These commenters observed that other surface coatings, such as varnish, can contain significant amounts of lead. The commenters suggested that EPA address this issue throughout the RRP rule. EPA agrees with these commenters. In using the term ''painted surfaces,'' EPA has always meant component surfaces that are covered in whole or in part with a coating that could be lead-based paint. The term was designed to encompass situations where the surface is covered with lead-based paint as defined by the regulation as well as situations where the lead content of the surface coating had not been determined. EPA never intended to exclude varnishes or other surface coatings from the coverage of the RRP rule. In fact, the applicability section of the RRP rule, 40 CFR 745.82, limits the exclusions for testing to those situations where the components to be disturbed by a renovation have been demonstrated to be free of paint and other surface coatings that contain lead at levels equal to or exceeding the regulatory threshold. Therefore, EPA is promulgating this revision as proposed and EPA is also adding a clarifying definition of ''painted surface'' to 40 CFR 745.83. This definition states that painted surface means a component surface covered in whole or in part with paint or other surface coatings.

In addition, EPA proposed to clarify that the restriction in this section on the use of machines that remove paint through high speed operation applies anywhere painted surfaces are being disturbed by such machines; the restriction is not limited to situations where all of the paint is removed by such machines. EPA received no comments specifically on this proposed revision, although the comments on the general issue of paint including other surface coatings are also applicable here. EPA is promulgating this revision as proposed, with the addition of the phrase ''or other surface coatings'' after the term ''paint,'' because EPA never intended to create a loophole that would allow someone to remove some or most of the paint or other surface coating from a component without complying with the restriction.

Finally, EPA proposed to clarify what was meant by HEPA exhaust control. In order to better express what is required when machines designed to remove paint through high speed operation are used, EPA consulted the Occupational Safety and Health Administration's Technical Manual (Ref. 12). The use of shrouded tools to remove lead-based paint is discussed in Chapter 3 of Section V, entitled ''Controlling Lead Exposures in the Construction Industry: Engineering and Work Practice Controls.'' Using language from this reference, EPA proposed to amend 40 CFR 745.85(a)(3)(ii) to read, ''The use of machines designed to remove paint through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting, is prohibited on painted surfaces unless such machines are used shrouded and equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation.'' EPA received several comments on this topic. The commenters generally supported the change, but two thought that there should be a performance standard included in the provision, a visible standard that warns the workers that the shroud or containment system is not working properly. EPA agrees with these commenters. Another commenter thought that the term ''shrouded'' in the proposed revision would make the RRP rule more stringent than the requirements applicable to abatement contractors. After consulting the abatement chapter of the HUD Guidelines, EPA has determined that the proposed language could potentially be read to exclude one of the two types of sanders described by HUD as appropriate for abatement work because they provide HEPA exhaust control. Accordingly, EPA is promulgating the revision as proposed, except that the regulatory language will read ''* * * unless such machines have shrouds or containment systems and are equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation. Machines must be operated so that no visible dust or release of air occurs outside the shroud or containment system.''

8. *HEPA vacuums.* In May 2010, EPA proposed to clarify that vacuums qualifying as HEPA vacuums for the purposes of this rule must be operated and maintained in accordance with the manufacturer's instructions in order to continue to qualify as HEPA vacuums. This includes following the manufacturer's filter change interval recommendations. EPA also proposed to clarify that the standard for HEPA filters, that they be capable of capturing particles of 0.3 microns with 99.97% efficiency, means that the filters must have a Minimum Efficiency Reporting Value (MERV) of 17 or greater. At the time, EPA also recommended that renovation firms have information from the manufacturer that the particular model of vacuum that the renovation firm intends to use, or the vacuum's HEPA filter, has been tested in accordance with an applicable test method, such as ASTM F1471–09, ''Standard Test Method for Air Cleaning Performance of a High-Efficiency Particulate Air-Filter System,'' and has been determined to meet this standard (Ref. 13).

EPA received a number of comments on these proposed revisions. Commenters specifically addressing the requirement that vacuums be operated in accordance with the manufacturer's instructions, including filter change interval recommendations, were in general agreement with the requirement. Other commenters expressed a general concern that these revisions would prohibit the use of consumer-grade HEPA vacuums that renovation firms had recently purchased to comply with the RRP rule. Some argued that the proposed language regarding the MERV was too stringent, given industry practice for high-efficiency vacuums. One commenter cited research they had done on the efficiency of HEPA vacuums to argue that the HEPA vacuums used in EPA's Dust Study would not have met the MERV standard proposed by EPA. However, the commenter did not provide sufficient information to support this assertion. Several commenters echoed comments EPA received during the rulemaking process for the 2008 RRP rule, arguing that HEPA vacuums are too expensive and are not necessary. Other commenters believed that additional requirements should be added, such as a requirement to field test the efficiency of the vacuums on a regular basis or after filter changes.

EPA continues to believe that HEPA vacuums are a necessary part of the required RRP work practices. In addition, the OSHA Lead in Construction standard requires the use of HEPA vacuums whenever vacuums are used. However, EPA also understands the concerns of those commenters who had already purchased HEPA vacuums for purposes of the RRP rule as well as those others who thought that the proposed MERV value of 17 would be too stringent. In balancing these concerns, EPA has decided to promulgate the requirement that HEPA vacuums be operated in accordance with manufacturer's instructions, but not the requirement that compliant vacuums be rated at a MERV value of 17 or higher.

In addition, in response to EPA's recommendation that renovation firms obtain information from the manufacturer that the efficiency of their particular model of HEPA vacuum or HEPA filter has been tested in accordance with an applicable test method, some commenters noted that this information may not be readily available to renovation firms. These commenters suggested that EPA maintain a list of HEPA vacuums that have been tested and found to meet the HEPA vacuum requirements.

9. *On-the-job training.* EPA's 2010 proposal included a clarification regarding the required elements of on-the-job training provided by renovators. Specifically, EPA proposed to clarify that the RRP rule requires certified renovators to train other renovation workers in only the work practices required by the RRP rule that the workers will be using in performing their assigned tasks. As discussed in the 2010 proposal, EPA did not intend to require training in any other subjects, such as how to paint or how to connect pipes. EPA is promulgating the clarification as proposed and amending 40 CFR 745.90(b)(2) and (b)(4) to refer specifically to the work practice requirements in 40 CFR 745.85(a). Two comments were received on this proposed clarification, both commenters expressed support for the change.

10. *Grandfathering.* Under the final 2008 RRP rule, individuals who successfully completed an accredited abatement worker or supervisor course, and individuals who successfully completed the HUD, EPA, or the joint EPA/HUD model renovation training courses may take an accredited refresher renovation training course in lieu of the initial renovation training to become a certified renovator. In addition, individuals who have successfully completed an accredited lead-based paint inspector or risk assessor course, but are not currently certified in the discipline, may take an accredited refresher dust sampling technician course in lieu of the initial training to become a certified dust sampling technician. As discussed in the 2010 proposal, EPA inadvertently failed to include in the 2008 RRP rule a time limit for taking the refresher in lieu of the initial course. Many of the commenters who addressed the issue of grandfathering in the 2008 RRP rulemaking contended that there should be restrictions based on how much time elapsed since the training was taken. In addition, under the lead-based paint activities regulations at 40 CFR 745.226, EPA allowed a similar grandfathering provision but only for a limited time. Accordingly, EPA proposed to set a limit on when an individual can take advantage of the grandfathering provision under the RRP rule. The preamble to the 2010 proposal stated that the limit would be July 31, 2011, such that renovators and dust sampling technicians who take the appropriate prerequisite course before that date would be permitted to take an accredited refresher training course in lieu of the initial training. EPA received three comments on this provision. One commenter helpfully pointed out that, while the preamble said that the limit would be July 31, 2011, the proposed regulatory text said that it would be April 22, 2011. The three commenters supported the limit of July 31, 2011, one noting that EPA should not continue to encourage renovators to take lead-safe work practices courses that do not meet the requirements for certified renovator training. EPA generally agrees with these commenters and is promulgating a provision that allows renovators and dust sampling technicians who take the appropriate prerequisite course before the effective date of this rule to take an

accredited refresher training course in lieu of the initial training.

EPA also proposed a clarification regarding the grandfathering provision as it applies to the dust sampling technician discipline. Individuals who successfully complete an accredited lead-based paint inspector or risk assessor course, but are not currently certified in the discipline, may take an accredited refresher dust sampling technician course in lieu of the initial training before the effective date of this rule to become a certified dust sampling technician. Inspectors and risk assessors who are certified by EPA or an authorized state program are qualified to perform dust sampling as part of lead hazard screens, risk assessments, or abatements as well as for other purposes, such as post-renovation dust sampling. Therefore, it would be unnecessary for a certified inspector or risk assessor to seek certification as a dust sampling technician. The 2008 RRP rule explains who is eligible to take the refresher dust sampling technician course in lieu of the initial training. However, the regulations as promulgated did not explicitly say that a certified inspector or risk assessor may perform dust sampling. In order to clarify the intent of the regulation, EPA proposed to amend 40 CFR 745.90(a)(3) to specifically state that a certified inspector or risk assessor may act as a dust sampling technician. EPA is promulgating this provision as proposed. One comment was received on this topic expressing general support for the amendment.

## III. References

As indicated under **ADDRESSES**, a docket has been established for this rulemaking under docket ID number EPA–HQ–OPPT–2005–0049. The following is a listing of the documents that are specifically referenced in this final rule. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical contact listed under **FOR FURTHER INFORMATION CONTACT.**

1. U.S. Environmental Protection Agency (EPA). Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Proposed Rule. **Federal Register** (75 FR 25038, May 6, 2010) (FRL–8823–5).
2. EPA. Lead; Renovation, Repair, and Painting Program; Final Rule. **Federal Register** (73 FR 21692, April 22, 2008) (FRL–8355–7).
3. EPA. Lead; Requirements for Lead-based Paint Activities; Final Rule. **Federal Register** (61 FR 45778), August 29, 1996) (FRL–5389–9).
4. EPA. Lead; Identification of Dangerous Levels of Lead; Final Rule. **Federal Register** (66 FR 1206, January 5, 2001) (FRL–6763–5).
5. EPA. Electrostatic Cloth and Wet Cloth Field Study in Residential Housing (September 2005).
6. EPA. Characterization of Dust Lead Levels After Renovation, Repair, and Painting Activities. (November 13, 2007).
7. EPA. Lead Exposure Associated With Renovation and Remodeling Activities: Phase I, Environmental Field Sampling Study (EPA 747–R–96–007, May 1997).
8. EPA. Reviewed Studies Pertaining to HEPA Shroud Effectiveness. (2009).
9. EPA. Office of Pollution Prevention and Toxics (OPPT). ''Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities'' (March 2008).
10. U.S. Department of Housing and Urban Development (HUD). Evaluation of the HUD Lead-Based Paint Hazard Control Grant Program: Final Report. May 1, 2004.
11. HUD. Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995).
12. U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). Technical Manual TED 01–00–015 [TED 1–0.15A]. Revised June 24, 2008.
13. ASTM International. Standard Test Method for Air Cleaning Performance of a High-Efficiency Particulate Air-Filter System (F1471–09).
14. EPA. OPPT. ''Discussion of Potential Costs and Benefits Associated with the Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program Final Rule'' (July 2011).
15. EPA. OPPT. ''Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Final Rule for Target Housing and Child-Occupied Facilities'' (April 2010).
16. EPA. Final Clearance Rule ICR Addendum for the rulemaking entitled Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Final Rule. (July 2011).
17. EPA. Report of the Small Business Advocacy Review Panel on the Lead-based Paint Certification and Training; Renovation and Remodeling Requirements. (March 3, 2000).
18. EPA. Lead; Renovation, Repair, and Painting Program; Proposed Rule. **Federal Register** (71 FR 1588, January 10, 2006) (FRL–7755–5).

## IV. Statutory and Executive Order Reviews

### *A. Regulatory Planning and Review*

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563, entitled *Improving Regulation and Regulatory Review* (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared a document discussing the potential costs and benefits associated with this final rule. This document, entitled ''Discussion of Potential Costs and Benefits Associated with the Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program Final Rule'' (Ref. 14), is available in the docket for this action and is briefly summarized here.

For the most part, the amendments to the RRP rule contained in this final rule impose only minimal incremental costs. For example, the requirement for training course providers to submit copies of personnel qualifications along with their applications will result in providers making copies of and submitting with their application 2–4 additional pieces of paper that they are already required to have in their possession before submitting the application. The requirement to submit copies of State training course materials, if used, could add significantly to the size of the training provider's application. However, EPA believes that it will be a rare occurrence for training providers to use State-approved training course materials, when EPA model training course materials are readily available. Likewise, the provision allowing certified renovators to collect paint chip samples in lieu of using test kits adds no additional costs, because certified renovators are not required to take this step in addition to existing activities—it is an added option from which they may choose. Similarly, the minimum enforcement provisions and other requirements for State and Tribal programs imposes no costs because States and Tribes are not required to have authorized programs, nor are they required to revise their programs to incorporate EPA revisions. While EPA is requiring specific recordkeeping for training providers who wish to provide e-learning courses, e-learning courses are not required from any training provider. In addition, EPA believes that the recordkeeping requirements for e-learning courses are comparable to, and no more burdensome than, the ordinary recordkeeping already required for courses provided in traditional formats.

Many of the amendments are merely clarifications of existing regulatory language and implementation of policy and impose no additional costs. Examples of these amendments include the clarifications on the role of the principal instructor in an accredited training program, the requirement that the trainee photograph on a course completion certificate be an accurate representation of the trainee and no smaller than one square inch, and the clarification that certified renovators are only required to provide on-the-job training in the RRP work practices to other renovation workers.

With respect to the vertical containment requirements of this final rule, EPA has already accounted for the costs of those requirements. In EPA's economic analysis for the 2008 RRP rule, EPA addressed those situations where the renovation firm must take extra precautions to effectively contain dust and debris, including work areas in close proximity to other buildings, work areas that abut a property line, and windy conditions. The 2008 economic analysis specifically notes that it is sometimes necessary to erect a system of vertical containment to prevent paint dust and debris from contaminating the ground or any object beyond the work area. To account for these situations, EPA estimated that approximately 2% of exterior jobs would use exterior containment, and the incremental cost of vertical containment varies from $330 per wall to $1,640 per wall, depending on the size of the job. Thus, EPA has already accounted for the additional costs incurred for using vertical containment systems on renovations performed within 10 feet of the property line.

This final rule extends the recordkeeping requirement for providers of certified renovator and certified dust sampling technician training from 3 years and 6 months to 5 years in general and slightly more than 5 years for training providers who offered accredited courses in these disciplines before April 22, 2010. The recordkeeping extension does not affect recordkeeping requirements associated with obtaining and maintaining accreditation. This extension only affects those records pertaining to training courses, specifically notifications. Pro-rating the recordkeeping cost estimates from EPA's economic analysis for the Opt-Out and Recordkeeping Final Rule, also published in the **Federal Register** on May 6, 2010 (Ref. 15), shows that the recordkeeping burden for courses provided during the first year the rule was effective increases from $43.68 to $61.88 per training provider. For courses provided in subsequent years, the recordkeeping burden per training provider increases from $4.80 to $6.80. These estimates are for the entire 5 years that the records would have to be kept. For the 2008 RRP rule, EPA estimated that there would be approximately 1.4 million children under the age of 6 and 5.4 million adults who would be affected by having their exposure to lead dust minimized due to the rule. The analysis for the 2010 final Opt-Out rule estimated that an additional 5.2 million older children and adults would be affected by reduced lead exposure due to the rule.

*B. Paperwork Burdens*

The information collection requirements contained in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* EPA has prepared an Information Collection Request (ICR) document to amend an existing ICR that is approved under OMB Control No. 2070–0155 (EPA ICR No. 1715). The ICR amendment, entitled ''ICR Addendum for Final Rule entitled ''Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Final Rule (RIN 2070–AJ57)'' and identified under EPA ICR No. 2381.02, has been placed in the docket for this rule (Ref. 16).

This regulatory action contains only two amendments to the approved existing information collection: Amendments to the requirement for the training provider to submit documentation of training manager and principal instructor qualifications; and a requirement for providers of renovator and dust sampling technician training to maintain training records for these courses for 5 years, rather than 3 years and 6 months. These requirements add only negligible paperwork burden hours to the existing burden estimate.

EPA previously estimated for the final 2008 RRP rule (Ref. 9) and the final Opt-out rule (Ref. 15) that 170 training providers would be accredited to provide renovator training. These training providers will now have to submit an additional 2–4 photocopies along with their applications for accreditation. EPA estimates that each photocopy costs $0.09 to generate, for a maximum of $0.36 additional cost for training providers with one training manager and one principal instructor. Each of these 170 training providers is also required to provide training course notifications under the existing RRP rule. These notifications will now have to be kept for 5 years instead of 3 years and 6 months. EPA has also estimated that each of these training providers would offer on average a total of 86 renovator or dust sampling technician courses in the first year, and 20 per year thereafter. This would require a total of 182 single-page notifications in the first year, and 42 each year thereafter.

Under PRA, burden is defined at 5 CFR 1320.3(b) and means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations codified in 40 CFR chapter I, after appearing in the preamble of the final rule, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, as applicable.

*C. Small Entity Impacts*

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Agency hereby certifies that this final rule will not have a significant adverse economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this final rule on small entities, small entity is defined in accordance with RFA section 601 as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201.
2. A small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000.
3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The small entities directly regulated by this final rule are providers of lead-based paint related training, renovation firms, individuals who perform renovations, and any small governmental jurisdictions or not-for-profit enterprises that provide lead-based paint training or renovation services. As discussed previously, EPA has decided not to promulgate the clearance and clearance testing requirements, and is instead promulgating minor amendments to the requirements for lead-based paint training providers and renovation firms that will have only negligible adverse impacts on any small entities.

In addition, RFA states that agencies ''may consider a series of closely related rules as one rule for the purposes of [an IRFA]'' in order to avoid ''duplicative action.'' 5 U.S.C. 605(c). This rulemaking is closely related to the 2008 RRP rule. Indeed, the proposed rule addressed one of the major issues in the 2008 rulemaking and some of the provisions finalized in the 2008 RRP rule. Accordingly, EPA was not required to complete a regulatory flexibility analysis for this rulemaking. Nonetheless, EPA exercised its discretion to complete an Initial Regulatory Flexibility Analysis (IRFA) for the 2010 proposal (see 75 FR 25038). The IRFA considered the potential adverse economic impacts of the 2010 proposed rule on affected small entities, primarily those related to the proposed clearance and clearance testing requirements. The proposed provisions analyzed for purposes of the IRFA are not part of this final rule.

Moreover, as discussed in the 2010 proposed rule in more detail, the Small Business Advocacy Review (SBAR) Panel that was conducted in connection with the 2006 RRP proposal is equally applicable to this closely related amendment to the 2008 RRP rule. The SBAR Panel discussed all major aspects of the 2006 proposal to regulate renovation and remodeling activities, including issues related to ensuring that proper cleanup occurs after renovation activities. As a part of the panel process, EPA ''collect[ed] advice and recommendations'' from several Small Entity Representatives (SERs) on the 2006 proposal to regulate renovation and remodeling activities. 5 U.S.C. 609(b). The SBAR Panel report, entitled *Report of the Small Business Advocacy Review Panel on The Lead-base Painting; Certification and Training; Renovation and Remodeling Requirements* (March 3, 2000), expressly addressed containment and dust clearance testing requirements (Ref. 18). Thus, the primary issues considered in this rulemaking are wholly within the scope of the issues EPA considered as part of the 2008 RRP rule and were within the scope of the issues considered by the SBAR Panel. Reconvening the RRP Panel for the 2010 proposed rule would be procedurally duplicative and unnecessary.

### *D. Unfunded Mandates*

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule includes only minor amendments to the requirements for providers of lead-based paint training and for renovation firms. Thus, this rule is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538).

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Small governments are only regulated by this action to the extent that they engage in providing lead-based paint training or renovation services.

### *E. Federalism*

Pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), EPA has determined that this final rule does not have ''federalism implications,'' because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this final rule. Nevertheless, in the spirit of the objectives of this Executive Order, and consistent with EPA policy to promote communications between the Agency and State and local governments, EPA consulted with representatives of State and local governments during the rulemaking process for the 2008 RRP rule. These consultations are as described in the preamble to the 2006 RRP proposed rule (Ref. 18).

### *F. Indian Tribal Government Implications*

As required by Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (59 FR 22951, November 9, 2000), EPA has determined that this final rule does not have tribal implications because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified in the Executive Order. Thus, Executive Order 13175 does not apply to this final rule. Although Executive Order 13175 does not apply to this final rule, EPA consulted with Tribal officials and others by discussing potential renovation regulatory options at several national lead program meetings hosted by EPA and other interested Federal agencies.

### *G. Protection of Children*

Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997) does not apply to this final rule because it is not an ''economically significant regulatory action'' as defined by Executive Order 12866. While the environmental health or safety risk addressed by the 2008 RRP rule does have a disproportionate effect on children, this final rule makes only minor changes in the administrative requirements for accredited training providers and includes minor amendments to the requirements for renovation firms.

EPA has evaluated the environmental health or safety effects of renovation, repair, and painting projects on children. Various aspects of this evaluation are discussed in the preamble to the 2006 proposed RRP rule (Ref. 18). The primary purpose of the final 2008 RRP rule is to minimize exposure to lead-based paint hazards created during renovation, repair, and painting activities in housing where children under age 6 reside and in housing or other buildings frequented by children under age 6. In the absence of the final 2008 RRP rule, adequate work practices are not likely to be employed during renovation, repair, and painting activities. EPA's analysis indicates that there will be approximately 1.4 million children under age 6 affected by the RRP rule. These children are projected to receive considerable benefits due to the RRP rule. In addition, older children will also benefit from the protections afforded by the RRP rule.

### *H. Effect on Energy Supply, Distribution, or Use*

This final rule is not a ''significant energy action'' as defined in Executive Order 13211, entitled *Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) because it is not likely to have any adverse effect on the supply, distribution, or use of energy.

*I. Technical Standards*

This regulatory action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), 15 U.S.C. 272 note. Section 12(d) of NTTAA directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

*J. Environmental Justice*

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

While EPA has not assessed the potential impact of this final rule on minority and low-income populations, EPA did assess the potential impact of the final 2008 RRP rule as a whole. As a result of the final 2008 RRP rule assessment, contained in the economic analysis for the final 2008 RRP rule, EPA has determined that the RRP rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population (Ref. 9).

**V. Congressional Review Act**

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

**List of Subjects in 40 CFR Part 745**

Environmental protection, Child-occupied facility, Housing renovation, Lead, Lead-based paint, Renovation, Reporting and recordkeeping requirements.

Dated: July 15, 2011.

**Lisa P. Jackson,**

*Administrator.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 745—[AMENDED]

■ 1. The authority citation for part 745 continues to read as follows:

**Authority:** 15 U.S.C. 2605, 2607, 2681–2692 and 42 U.S.C. 4852d.

■ 2. In § 745.82, add a new paragraph (a)(3) to read as follows.

**§ 745.82 Applicability.**

(a) * * *

(3) Renovations in target housing or child-occupied facilities in which a certified renovator has collected a paint chip sample from each painted component affected by the renovation and a laboratory recognized by EPA pursuant to section 405(b) of TSCA as being capable of performing analyses for lead compounds in paint chip samples has determined that the samples are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm² or 0.5% by weight. If the components make up an integrated whole, such as the individual stair treads and risers of a single staircase, the renovator is required to test only one of the individual components, unless the individual components appear to have been repainted or refinished separately.

* * * * *

■ 3. In § 745.83, revise the definition of ''HEPA vacuum'' and add the definition ''Painted surface'' and the definition ''Vertical containment'' in alphabetical order to read as follows:

**§ 745.83 Definitions.**

* * * * *

*HEPA vacuum* means a vacuum cleaner which has been designed with a high-efficiency particulate air (HEPA) filter as the last filtration stage. A HEPA filter is a filter that is capable of capturing particulates of 0.3 microns with 99.97% efficiency. The vacuum cleaner must be designed so that all the air drawn into the machine is expelled through the HEPA filter with none of the air leaking past it. HEPA vacuums must be operated and maintained in accordance with the manufacturer's instructions.

* * * * *

*Painted surface* means a component surface covered in whole or in part with paint or other surface coatings.

* * * * *

*Vertical containment* means a vertical barrier consisting of plastic sheeting or other impermeable material over scaffolding or a rigid frame, or an equivalent system of containing the work area. Vertical containment is required for some exterior renovations but it may be used on any renovation.

* * * * *

■ 4. Section 745.85 is amended as follows:

■ a. Revise paragraphs (a)(2)(i)(D) and (a)(2)(ii)(C) and (D);

■ b. Revise paragraph (a)(3);

The revisions read as follows:

**§ 745.85 Work practice standards.**

(a) * * *

(2) * * *

(i) * * *

(D) Cover the floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area 6 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater. Floor containment measures may stop at the edge of the vertical barrier when using a vertical containment system consisting of impermeable barriers that extend from the floor to the ceiling and are tightly sealed at joints with the floor, ceiling and walls.

* * * * *

(ii) * * *

(C) Cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering. Ground containment measures may stop at the edge of the vertical barrier when using a vertical containment system.

(D) If the renovation will affect surfaces within 10 feet of the property line, the renovation firm must erect vertical containment or equivalent extra precautions in containing the work area to ensure that dust and debris from the renovation does not contaminate adjacent buildings or migrate to adjacent properties. Vertical containment or equivalent extra precautions in containing the work area may also be necessary in other situations in order to prevent contamination of other buildings, other areas of the property, or adjacent buildings or properties.

(3) *Prohibited and restricted practices.* The work practices listed below are prohibited or restricted during a renovation as follows:

(i) Open-flame burning or torching of painted surfaces is prohibited.

(ii) The use of machines designed to remove paint or other surface coatings through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting, is prohibited on painted surfaces unless such machines have shrouds or containment systems and are equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation. Machines must be operated so that no visible dust or release of air occurs outside the shroud or containment system.

(iii) Operating a heat gun on painted surfaces is permitted only at temperatures below 1,100 degrees Fahrenheit.

* * * * *

■ 5. Section 745.86 is amended as follows:

a. Add paragraph (b)(1)(iii).

b. Redesignate paragraphs (b)(6)(iv) through (vii) as paragraphs (b)(6)(v) through (viii), respectively.

c. Add new paragraph (b)(6)(iv).

The additions and revisions read as follows:

**§ 745.86 Recordkeeping and reporting requirements.**

* * * * *

(b) * * *

(1) * * *

(iii) Records prepared by a certified renovator after collecting paint chip samples, including a description of the components that were tested including their locations, the name and address of the NLLAP-recognized entity performing the analysis, and the results for each sample.

* * * * *

(6) * * *

(iv) If paint chip samples were collected, that the samples were collected at the specified locations, that the specified NLLAP-recognized laboratory analyzed the samples, and that the results were as specified.

* * * * *

■ 6. Section 745.90 is amended as follows:

■ a. Revise paragraphs (a)(2) and (a)(3).

■ b. Revise paragraphs (b)(2), (b)(4), and (b)(8).

**§ 745.90 Renovator certification and dust sampling technician certification.**

(a) * * *

(2) Individuals who have successfully completed an accredited abatement worker or supervisor course, or individuals who successfully completed an EPA, HUD, or EPA/HUD model renovation training course before October 4, 2011 may take an accredited refresher renovator training course in lieu of the initial renovator training course to become a certified renovator.

(3) Individuals who have successfully completed an accredited lead-based paint inspector or risk assessor course October 4, 2011 may take an accredited refresher dust sampling technician course in lieu of the initial training to become a certified dust sampling technician. Individuals who are currently certified as lead-based paint inspectors or risk assessors may act as certified dust sampling technicians without further training.

* * * * *

(b) * * *

(2) Must provide training to workers on the work practices required by § 745.85(a) that they will be using in performing their assigned tasks.

* * * * *

(4) Must regularly direct work being performed by other individuals to ensure that the work practices required by § 745.85(a) are being followed, including maintaining the integrity of the containment barriers and ensuring that dust or debris does not spread beyond the work area.

* * * * *

(8) Must prepare the records required by § 745.86(b)(1)(ii) and (6).

* * * * *

■ 7. In § 745.92, add paragraph (b)(3) to read as follows:

**§ 745.92 Fees for the accreditation of renovation and dust sampling technician training and the certification of renovation firms.**

* * * * *

(b) * * *

(3) *Accreditation or certification amendments.* No fee will be charged for accreditation or certification amendments.

* * * * *

■ 8. Revise § 745.225 to read as follows:

**§ 745.225 Accreditation of training programs: target housing and child occupied facilities.**

(a) *Scope.* (1) A training program may seek accreditation to offer courses in any of the following disciplines: Inspector, risk assessor, supervisor, project designer, abatement worker, renovator, and dust sampling technician. A training program may also seek accreditation to offer refresher courses for each of the above listed disciplines.

(2) Training programs may first apply to EPA for accreditation of their lead-based paint activities courses or refresher courses pursuant to this section on or after August 31, 1998. Training programs may first apply to EPA for accreditation of their renovator or dust sampling technician courses or refresher courses pursuant to this section on or after April 22, 2009.

(3) A training program must not provide, offer, or claim to provide EPA-accredited lead-based paint activities courses without applying for and receiving accreditation from EPA as required under paragraph (b) of this section on or after March 1, 1999. A training program must not provide, offer, or claim to provide EPA-accredited renovator or dust sampling technician courses without applying for and receiving accreditation from EPA as required under paragraph (b) of this section on or after June 23, 2008.

(b) *Application process.* The following are procedures a training program must follow to receive EPA accreditation to offer lead-based paint activities courses, renovator courses, or dust sampling technician courses:

(1) A training program seeking accreditation shall submit a written application to EPA containing the following information:

(i) The training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for accreditation. For the purposes of this section, courses taught in different languages and electronic learning courses are considered different courses, and each must independently meet the accreditation requirements.

(iii) The name and documentation of the qualifications of the training program manager.

(iv) The name(s) and documentation of qualifications of any principal instructor(s).

(v) A statement signed by the training program manager certifying that the training program meets the requirements established in paragraph (c) of this section. If a training program uses EPA-recommended model training materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under subpart Q of this part, the training program manager shall include a statement certifying that, as well.

(vi) If a training program does not use EPA-recommended model training materials, its application for accreditation shall also include:

(A) A copy of the student and instructor manuals, or other materials to be used for each course.

(B) A copy of the course agenda for each course.

(C) When applying for accreditation of a course in a language other than English, a signed statement from a qualified, independent translator that they had compared the course to the English language version and found the translation to be accurate.

(vii) All training programs shall include in their application for accreditation the following:

(A) A description of the facilities and equipment to be used for lecture and hands-on training.

(B) A copy of the course test blueprint for each course.

(C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course.

(D) A copy of the quality control plan as described in paragraph (c)(9) of this section.

(2) If a training program meets the requirements in paragraph (c) of this section, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may also request additional materials retained by the training program under paragraph (i) of this section. If a training program's application is disapproved, the program may reapply for accreditation at any time.

(3) A training program may apply for accreditation to offer courses or refresher courses in as many disciplines as it chooses. A training program may seek accreditation for additional courses at any time as long as the program can demonstrate that it meets the requirements of this section.

(4) A training program applying for accreditation must submit the appropriate fees in accordance with § 745.238.

(c) *Requirements for the accreditation of training programs.* For a training program to obtain accreditation from EPA to offer lead-based paint activities courses, renovator courses, or dust sampling technician courses, the program must meet the following requirements:

(1) The training program shall employ a training manager who has:

(i) At least 2 years of experience, education, or training in teaching workers or adults; or

(ii) A bachelor's or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, business administration or program management or a related field; or

(iii) Two years of experience in managing a training program specializing in environmental hazards; and

(iv) Demonstrated experience, education, or training in the construction industry including: Lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health, or industrial hygiene.

(2) The training manager shall designate a qualified principal instructor for each course who has:

(i) Demonstrated experience, education, or training in teaching workers or adults; and

(ii) Successfully completed at least 16 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training for instructors of lead-based paint activities courses or 8 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training for instructors of renovator or dust sampling technician courses; and

(iii) Demonstrated experience, education, or training in lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health, or industrial hygiene.

(3) The principal instructor shall be responsible for the organization of the course, course delivery, and oversight of the teaching of all course material. The training manager may designate guest instructors as needed for a portion of the course to provide instruction specific to the lecture, hands-on activities, or work practice components of a course. However, the principal instructor is primarily responsible for teaching the course materials and must be present to provide instruction (or oversight of portions of the course taught by guest instructors) for the course for which he has been designated the principal instructor.

(4) The following documents shall be recognized by EPA as evidence that training managers and principal instructors have the education, work experience, training requirements or demonstrated experience, specifically listed in paragraphs (c)(1) and (c)(2) of this section. This documentation must be submitted with the accreditation application and retained by the training program as required by the recordkeeping requirements contained in paragraph (i) of this section. Those documents include the following:

(i) Official academic transcripts or diploma as evidence of meeting the education requirements.

(ii) Resumes, letters of reference, or documentation of work experience, as evidence of meeting the work experience requirements.

(iii) Certificates from train-the-trainer courses and lead-specific training courses, as evidence of meeting the training requirements.

(5) The training program shall ensure the availability of, and provide adequate facilities for, the delivery of the lecture, course test, hands-on training, and assessment activities. This includes providing training equipment that reflects current work practices and maintaining or updating the equipment and facilities as needed.

(6) To become accredited in the following disciplines, the training program shall provide training courses that meet the following training requirements:

(i) The inspector course shall last a minimum of 24 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the inspector course are contained in paragraph (d)(1) of this section.

(ii) The risk assessor course shall last a minimum of 16 training hours, with a minimum of 4 hours devoted to hands-on training activities. The minimum curriculum requirements for the risk assessor course are contained in paragraph (d)(2) of this section.

(iii) The supervisor course shall last a minimum of 32 training hours, with a minimum of 8 hours devoted to hands-on activities. The minimum curriculum requirements for the supervisor course are contained in paragraph (d)(3) of this section.

(iv) The project designer course shall last a minimum of 8 training hours. The minimum curriculum requirements for the project designer course are contained in paragraph (d)(4) of this section.

(v) The abatement worker course shall last a minimum of 16 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the abatement worker course are contained in paragraph (d)(5) of this section.

(vi) The renovator course must last a minimum of 8 training hours, with a minimum of 2 hours devoted to hands-on training activities. The minimum curriculum requirements for the renovator course are contained in paragraph (d)(6) of this section.

(vii) The dust sampling technician course must last a minimum of 8 training hours, with a minimum of 2 hours devoted to hands-on training activities. The minimum curriculum requirements for the dust sampling technician course are contained in paragraph (d)(7) of this section.

(viii) Electronic learning and other alternative course delivery methods are permitted for the classroom portion of renovator, dust sampling technician, or lead-based paint activities courses but not the hands-on portion of these courses, or for final course tests or proficiency tests described in paragraph (c)(7) of this section. Electronic learning courses must comply with the following requirements:

(A) A unique identifier must be assigned to each student for them to use to launch and re-launch the course.

(B) The training provider must track each student's course log-ins, launches, progress, and completion, and maintain these records in accordance with paragraph (i) of this section.

(C) The course must include periodic knowledge checks equivalent to the number and content of the knowledge checks contained in EPA's model course, but at least 16 over the entire course. The knowledge checks must be successfully completed before the student can go on to the next module.

(D) There must be a test of at least 20 questions at the end of the electronic learning portion of the course, of which 80% must be answered correctly by the student for successful completion of the electronic learning portion of the course. The test must be designed so that students to do not receive feedback on their test answers until after they have completed and submitted the test.

(E) Each student must be able to save or print a copy of an electronic learning course completion certificate. The electronic certificate must not be susceptible to easy editing.

(7) For each course offered, the training program shall conduct either a course test at the completion of the course, and if applicable, a hands-on skills assessment, or in the alternative, a proficiency test for that discipline. Each student must successfully complete the hands-on skills assessment and receive a passing score on the course test to pass any course, or successfully complete a proficiency test.

(i) The training manager is responsible for maintaining the validity and integrity of the hands-on skills assessment or proficiency test to ensure that it accurately evaluates the trainees' performance of the work practices and procedures associated with the course topics contained in paragraph (d) of this section.

(ii) The training manager is responsible for maintaining the validity and integrity of the course test to ensure that it accurately evaluates the trainees' knowledge and retention of the course topics.

(iii) The course test shall be developed in accordance with the test blueprint submitted with the training accreditation application.

(8) The training program shall issue unique course completion certificates to each individual who passes the training course. The course completion certificate shall include:

(i) The name, a unique identification number, and address of the individual.

(ii) The name of the particular course that the individual completed.

(iii) Dates of course completion/test passage.

(iv) For initial inspector, risk assessor, project designer, supervisor, or abatement worker course completion certificates, the expiration date of interim certification, which is 6 months from the date of course completion.

(v) The name, address, and telephone number of the training program.

(vi) The language in which the course was taught.

(vii) For renovator and dust sampling technician course completion certificates, a photograph of the individual. The photograph must be an accurate and recognizable image of the individual. As reproduced on the certificate, the photograph must not be smaller than 1 square inch.

(9) The training manager shall develop and implement a quality control plan. The plan shall be used to maintain and improve the quality of the training program over time. This plan shall contain at least the following elements:

(i) Procedures for periodic revision of training materials and the course test to reflect innovations in the field.

(ii) Procedures for the training manager's annual review of principal instructor competency.

(10) Courses offered by the training program must teach the work practice standards contained in § 745.85 or § 745.227, as applicable, in such a manner that trainees are provided with the knowledge needed to perform the renovations or lead-based paint activities they will be responsible for conducting.

(11) The training manager shall be responsible for ensuring that the training program complies at all times with all of the requirements in this section.

(12) The training manager shall allow EPA to audit the training program to verify the contents of the application for accreditation as described in paragraph (b) of this section.

(13) The training manager must provide notification of renovator, dust sampling technician, or lead-based paint activities courses offered.

(i) The training manager must provide EPA with notification of all renovator, dust sampling technician, or lead-based paint activities courses offered. The original notification must be received by EPA at least 7 business days prior to the start date of any renovator, dust sampling technician, or lead-based paint activities course.

(ii) The training manager must provide EPA updated notification when renovator, dust sampling technician, or lead-based paint activities courses will begin on a date other than the start date specified in the original notification, as follows:

(A) For renovator, dust sampling technician, or lead-based paint activities courses beginning prior to the start date provided to EPA, an updated notification must be received by EPA at least 7 business days before the new start date.

(B) For renovator, dust sampling technician, or lead-based paint activities courses beginning after the start date provided to EPA, an updated notification must be received by EPA at least 2 business days before the start date provided to EPA.

(iii) The training manager must update EPA of any change in location of renovator, dust sampling technician, or lead-based paint activities courses at least 7 business days prior to the start date provided to EPA.

(iv) The training manager must update EPA regarding any course cancellations, or any other change to the original notification. Updated notifications must be received by EPA at least 2 business days prior to the start date provided to EPA.

(v) Each notification, including updates, must include the following:

(A) Notification type (original, update, cancellation).

(B) Training program name, EPA accreditation number, address, and telephone number.

(C) Course discipline, type (initial/refresher), and the language in which instruction will be given.

(D) Date(s) and time(s) of training.

(E) Training location(s) telephone number, and address.

(F) Principal instructor's name.

(G) Training manager's name and signature.

(vi) Notification must be accomplished using any of the following methods: Written notification, or electronically using the Agency's Central Data Exchange (CDX). Written notification of lead-based paint activities course schedules can be accomplished by using either the sample form titled ''Lead-Based Paint Training Notification'' or a similar form containing the information required in paragraph (c)(13)(v) of this section. All written notifications must be delivered to EPA by U.S. Postal Service, fax, commercial delivery service, or hand delivery (persons submitting notification by U.S. Postal Service are reminded that they should allow 3 additional business days for delivery in order to ensure that EPA receives the notification by the required date). Instructions and sample forms can be obtained from the NLIC at 1–800–424–LEAD(5323), or on the Internet at *http://www.epa.gov/lead.* Hearing- or speech-impaired persons may reach the above telephone number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

(vii) Renovator, dust sampling technician, or lead-based paint activities courses must not begin on a date, or at a location other than that specified in the original notification unless an updated notification identifying a new start date or location is submitted, in which case the course must begin on the new start date and/or location specified in the updated notification.

(viii) No training program shall provide renovator, dust sampling technician, or lead-based paint activities courses without first notifying EPA of such activities in accordance with the requirements of this paragraph.

(14) The training manager must provide notification following completion of renovator, dust sampling technician, or lead-based paint activities courses.

(i) The training manager must provide EPA notification after the completion of any lead-based paint activities course. This notice must be received by EPA no later than 10 business days following course completion.

(ii) The notification must include the following:

(A) Training program name, EPA accreditation number, address, and telephone number.

(B) Course discipline and type (initial/refresher).

(C) Date(s) of training.

(D) The following information for each student who took the course:

(*1*) Name.

(*2*) Address.

(*3*) Date of birth.

(*4*) Course completion certificate number.

(*5*) Course test score.

(*6*) For renovator or dust sampling technician courses, a digital photograph of the student.

(E) Training manager's name and signature.

(iii) Notification must be accomplished using any of the following methods: Written notification, or electronically using the Agency's Central Data Exchange (CDX). Written notification following renovator, dust sampling technician, or lead-based paint activities training courses can be accomplished by using either the sample form titled ''Lead-Based Paint Training Course Follow-up'' or a similar form containing the information required in paragraph (c)(14)(ii) of this section. All written notifications must be delivered to EPA by U.S. Postal Service, fax, commercial delivery service, or hand delivery (persons submitting notification by U.S. Postal Service are reminded that they should allow 3 additional business days for delivery in order to ensure that EPA receives the notification by the required date). Instructions and sample forms can be obtained from the NLIC at 1–800–424–LEAD (5323), or on the Internet at *http://www.epa.gov/lead.*

(d) *Minimum training curriculum requirements.* To become accredited to offer lead-based paint courses in the specific disciplines listed in this paragraph, training programs must ensure that their courses of study include, at a minimum, the following course topics.

(1) *Inspector.* Instruction in the topics described in paragraphs (d)(1)(iv), (v), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of an inspector.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertains to lead-based paint and lead- based paint activities.

(iv) Lead-based paint inspection methods, including selection of rooms and components for sampling or testing.

(v) Paint, dust, and soil sampling methodologies.

(vi) Clearance standards and testing, including random sampling.

(vii) Preparation of the final inspection report.

(viii) Recordkeeping.

(2) *Risk assessor.* Instruction in the topics described in paragraphs (d)(2)(iv), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of a risk assessor.

(ii) Collection of background information to perform a risk assessment.

(iii) Sources of environmental lead contamination such as paint, surface dust and soil, water, air, packaging, and food.

(iv) Visual inspection for the purposes of identifying potential sources of lead-based paint hazards.

(v) Lead hazard screen protocol.

(vi) Sampling for other sources of lead exposure.

(vii) Interpretation of lead-based paint and other lead sampling results, including all applicable Federal or State guidance or regulations pertaining to lead-based paint hazards.

(viii) Development of hazard control options, the role of interim controls, and operations and maintenance activities to reduce lead-based paint hazards.

(ix) Preparation of a final risk assessment report.

(3) *Supervisor.* Instruction in the topics described in paragraphs (d)(3)(v), (vii), (viii), (ix), and (x) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of a supervisor.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Liability and insurance issues relating to lead-based paint abatement.

(v) Risk assessment and inspection report interpretation.

(vi) Development and implementation of an occupant protection plan and abatement report.

(vii) Lead-based paint hazard recognition and control.

(viii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.

(ix) Interior dust abatement/cleanup or lead-based paint hazard control and reduction methods.

(x) Soil and exterior dust abatement or lead-based paint hazard control and reduction methods.

(xi) Clearance standards and testing.
(xii) Cleanup and waste disposal.
(xiii) Recordkeeping.

(4) *Project designer.* (i) Role and responsibilities of a project designer.

(ii) Development and implementation of an occupant protection plan for large-scale abatement projects.

(iii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices for large-scale abatement projects.

(iv) Interior dust abatement/cleanup or lead hazard control and reduction methods for large-scale abatement projects.

(v) Clearance standards and testing for large scale abatement projects.

(vi) Integration of lead-based paint abatement methods with modernization and rehabilitation projects for large scale abatement projects.

(5) *Abatement worker.* Instruction in the topics described in paragraphs (d)(5)(iv), (v), (vi), and (vii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibilities of an abatement worker.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Lead-based paint hazard recognition and control.

(v) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.

(vi) Interior dust abatement methods/cleanup or lead-based paint hazard reduction.

(vii) Soil and exterior dust abatement methods or lead-based paint hazard reduction.

(6) *Renovator.* Instruction in the topics described in paragraphs (d)(6)(iv), (vi), (vii), and (viii) of this section must be included in the hands-on portion of the course.

(i) Role and responsibility of a renovator.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on EPA, HUD, OSHA, and other Federal, State, and local regulations and guidance that pertains to lead-based paint and renovation activities.

(iv) Procedures for using acceptable test kits to determine whether paint is lead-based paint.

(v) Procedures for collecting a paint chip sample and sending it to a laboratory recognized by EPA under section 405(b) of TSCA.

(vi) Renovation methods to minimize the creation of dust and lead-based paint hazards.

(vii) Interior and exterior containment and cleanup methods.

(viii) Methods to ensure that the renovation has been properly completed, including cleaning verification and clearance testing.

(ix) Waste handling and disposal.

(x) Providing on-the-job training to other workers.

(xi) Record preparation.

(7) *Dust sampling technician.* Instruction in the topics described in paragraphs (d)(6)(iv) and (vi) of this section must be included in the hands-on portion of the course.

(i) Role and responsibility of a dust sampling technician.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertains to lead-based paint and renovation activities.

(iv) Dust sampling methodologies.

(v) Clearance standards and testing.

(vi) Report preparation.

(e) *Requirements for the accreditation of refresher training programs.* A training program may seek accreditation to offer refresher training courses in any of the following disciplines: Inspector, risk assessor, supervisor, project designer, abatement worker, renovator, and dust sampling technician. To obtain EPA accreditation to offer refresher training, a training program must meet the following minimum requirements:

(1) Each refresher course shall review the curriculum topics of the full-length courses listed under paragraph (d) of this section, as appropriate. In addition, to become accredited to offer refresher training courses, training programs shall ensure that their courses of study include, at a minimum, the following:

(i) An overview of current safety practices relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(ii) Current laws and regulations relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(iii) Current technologies relating to lead-based paint in general, as well as specific information pertaining to the appropriate discipline.

(2) Refresher courses for inspector, risk assessor, supervisor, and abatement worker must last a minimum of 8 training hours. Refresher courses for project designer, renovator, and dust sampling technician must last a minimum of 4 training hours. Refresher courses for all disciplines except project designer must include a hands-on component.

(3) Except for project designer courses, for all other courses offered, the training program shall conduct a hands-on assessment, and at the completion of the course, a course test.

(4) A training program may apply for accreditation of a refresher course concurrently with its application for accreditation of the corresponding training course as described in paragraph (b) of this section. If so, EPA shall use the approval procedure described in paragraph (b) of this section. In addition, the minimum requirements contained in paragraphs (c)(1) through (c)(5) and (c)(7) through (c)(14), and (e)(1),through (e)(3) of this section shall also apply.

(5) A training program seeking accreditation to offer refresher training courses only shall submit a written application to EPA containing the following information:

(i) The refresher training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for accreditation.

(iii) The name and documentation of the qualifications of the training program manager.

(iv) The name(s) and documentation of the qualifications of the principal instructor(s).

(v) A statement signed by the training program manager certifying that the refresher training program meets the minimum requirements established in paragraph (c) of this section, except for the requirements in paragraph (c)(6) of this section. If a training program uses EPA-developed model training materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under § 745.324 to develop its refresher training course materials, the training manager shall include a statement certifying that, as well.

(vi) If the refresher training course materials are not based on EPA-developed model training materials, the training program's application for accreditation shall include:

(A) A copy of the student and instructor manuals to be used for each course.

(B) A copy of the course agenda for each course.

(vii) All refresher training programs shall include in their application for accreditation the following:

(A) A description of the facilities and equipment to be used for lecture and hands-on training.

(B) A copy of the course test blueprint for each course.

(C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course (if applicable).

(D) A copy of the quality control plan as described in paragraph (c)(9) of this section.

(viii) The requirements in paragraphs (c)(1) through (c)(5), and (c)(7) through (c)(14) of this section apply to refresher training providers.

(ix) If a refresher training program meets the requirements listed in this paragraph, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the refresher training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may also request additional materials retained by the refresher training program under paragraph (i) of this section. If a refresher training program's application is disapproved, the program may reapply for accreditation at any time.

(f) *Re-accreditation of training programs.* (1) Unless re-accredited, a training program's accreditation, including refresher training accreditation, shall expire 4 years after the date of issuance. If a training program meets the requirements of this section, the training program shall be reaccredited.

(2) A training program seeking re-accreditation shall submit an application to EPA no later than 180 days before its accreditation expires. If a training program does not submit its application for re-accreditation by that date, EPA cannot guarantee that the program will be re-accredited before the end of the accreditation period.

(3) The training program's application for re-accreditation shall contain:

(i) The training program's name, address, and telephone number.

(ii) A list of courses for which it is applying for re-accreditation.

(iii) The name and qualifications of the training program manager.

(iv) The name(s) and qualifications of the principal instructor(s).

(v) A description of any changes to the training facility, equipment or course materials since its last application was approved that adversely affects the students' ability to learn.

(vi) A statement signed by the program manager stating:

(A) That the training program complies at all times with all requirements in paragraphs (c) and (e) of this section, as applicable; and

(B) The recordkeeping and reporting requirements of paragraph (i) of this section shall be followed.

(vii) A payment of appropriate fees in accordance with § 745.238.

(4) Upon request, the training program shall allow EPA to audit the training program to verify the contents of the application for re-accreditation as described in paragraph (f)(3) of this section.

(g) *Suspension, revocation, and modification of accredited training programs.* (1) EPA may, after notice and an opportunity for hearing, suspend, revoke, or modify training program accreditation, including refresher training accreditation, if a training program, training manager, or other person with supervisory authority over the training program has:

(i) Misrepresented the contents of a training course to EPA and/or the student population.

(ii) Failed to submit required information or notifications in a timely manner.

(iii) Failed to maintain required records.

(iv) Falsified accreditation records, instructor qualifications, or other accreditation-related information or documentation.

(v) Failed to comply with the training standards and requirements in this section.

(vi) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(vii) Made false or misleading statements to EPA in its application for accreditation or re-accreditation which EPA relied upon in approving the application.

(2) In addition to an administrative or judicial finding of violation, execution of a consent agreement in settlement of an enforcement action constitutes, for purposes of this section, evidence of a failure to comply with relevant statutes or regulations.

(h) *Procedures for suspension, revocation or modification of training program accreditation.* (1) Prior to taking action to suspend, revoke, or modify the accreditation of a training program, EPA shall notify the affected entity in writing of the following:

(i) The legal and factual basis for the suspension, revocation, or modification.

(ii) The anticipated commencement date and duration of the suspension, revocation, or modification.

(iii) Actions, if any, which the affected entity may take to avoid suspension, revocation, or modification, or to receive accreditation in the future.

(iv) The opportunity and method for requesting a hearing prior to final EPA action to suspend, revoke or modify accreditation.

(v) Any additional information, as appropriate, which EPA may provide.

(2) If a hearing is requested by the accredited training program, EPA shall:

(i) Provide the affected entity an opportunity to offer written statements in response to EPA's assertions of the legal and factual basis for its proposed action, and any other explanations, comments, and arguments it deems relevant to the proposed action.

(ii) Provide the affected entity such other procedural opportunities as EPA may deem appropriate to ensure a fair and impartial hearing.

(iii) Appoint an official of EPA as Presiding Officer to conduct the hearing. No person shall serve as Presiding Officer if he or she has had any prior connection with the specific matter.

(3) The Presiding Officer appointed pursuant to paragraph (h)(2) of this section shall:

(i) Conduct a fair, orderly, and impartial hearing within 90 days of the request for a hearing.

(ii) Consider all relevant evidence, explanation, comment, and argument submitted.

(iii) Notify the affected entity in writing within 90 days of completion of the hearing of his or her decision and order. Such an order is a final agency action which may be subject to judicial review.

(4) If EPA determines that the public health, interest, or welfare warrants immediate action to suspend the accreditation of any training program prior to the opportunity for a hearing, it shall:

(i) Notify the affected entity of its intent to immediately suspend training program accreditation for the reasons listed in paragraph (g)(1) of this section. If a suspension, revocation, or modification notice has not previously been issued pursuant to paragraph (g)(1) of this section, it shall be issued at the same time the emergency suspension notice is issued.

(ii) Notify the affected entity in writing of the grounds for the immediate suspension and why it is necessary to suspend the entity's accreditation before an opportunity for a suspension, revocation or modification hearing.

(iii) Notify the affected entity of the anticipated commencement date and duration of the immediate suspension.

(iv) Notify the affected entity of its right to request a hearing on the immediate suspension within 15 days of the suspension taking place and the procedures for the conduct of such a hearing.

(5) Any notice, decision, or order issued by EPA under this section, any transcripts or other verbatim record of oral testimony, and any documents filed by an accredited training program in a hearing under this section shall be available to the public, except as otherwise provided by section 14 of TSCA or by 40 CFR part 2. Any such hearing at which oral testimony is presented shall be open to the public, except that the Presiding Officer may exclude the public to the extent necessary to allow presentation of information which may be entitled to confidential treatment under section 14 of TSCA or 40 CFR part 2.

(6) The public shall be notified of the suspension, revocation, modification or reinstatement of a training program's accreditation through appropriate mechanisms.

(7) EPA shall maintain a list of parties whose accreditation has been suspended, revoked, modified or reinstated.

(i) *Training program recordkeeping requirements.* (1) Accredited training programs shall maintain, and make available to EPA, upon request, the following records:

(i) All documents specified in paragraph (c)(4) of this section that demonstrate the qualifications listed in paragraphs (c)(1) and (c)(2) of this section of the training manager and principal instructors.

(ii) Current curriculum/course materials and documents reflecting any changes made to these materials.

(iii) The course test blueprint.

(iv) Information regarding how the hands-on assessment is conducted including, but not limited to:

(A) Who conducts the assessment.

(B) How the skills are graded.

(C) What facilities are used.

(D) The pass/fail rate.

(v) The quality control plan as described in paragraph (c)(9) of this section.

(vi) Results of the students' hands-on skills assessments and course tests, and a record of each student's course completion certificate.

(vii) Any other material not listed in paragraphs (i)(1)(i) through (i)(1)(vi) of this section that was submitted to EPA as part of the program's application for accreditation.

(viii) For renovator refresher and dust sampling technician refresher courses, a copy of each trainee's prior course completion certificate showing that each trainee was eligible to take the refresher course.

(ix) For course modules delivered in an electronic format, a record of each student's log-ins, launches, progress, and completion, and a copy of the electronic learning completion certificate for each student.

(2) The training program must retain records pertaining to renovator, dust sampling technician and lead-based paint activities courses at the address specified on the training program accreditation application (or as modified in accordance with paragraph (i)(3) of this section) for the following minimum periods:

(i) Records pertaining to lead-based paint activities courses must be retained for a minimum of 3 years and 6 months.

(ii) Records pertaining to renovator or dust sampling technician courses offered before April 22, 2010 must be retained until July 1, 2015.

(iii) Records pertaining to renovator or dust sampling technician courses offered on or after April 22, 2010 must be retained for a minimum of 5 years.

(3) The training program shall notify EPA in writing within 30 days of changing the address specified on its training program accreditation application or transferring the records from that address.

(j) *Amendment of accreditation.* (1) A training program must amend its accreditation within 90 days of the date a change occurs to information included in the program's most recent application. If the training program fails to amend its accreditation within 90 days of the date the change occurs, the program may not provide renovator, dust sampling technician, or lead-based paint activities training until its accreditation is amended.

(2) To amend an accreditation, a training program must submit a completed ''Accreditation Application for Training Providers,'' signed by an authorized agent of the training provider, noting on the form that it is submitted as an amendment and indicating the information that has changed.

(3) *Training managers, principal instructors, permanent training locations.* If the amendment includes a new training program manager, any new or additional principal instructor(s), or any new permanent training location(s), the training provider is not permitted to provide training under the new training manager or offer courses taught by any new principal instructor(s) or at the new training location(s) until EPA either approves the amendment or 30 days have elapsed, whichever occurs earlier. Except:

(i) If the amendment includes a new training program manager or new or additional principal instructor that was identified in a training provider accreditation application that EPA has already approved under this section, the training provider may begin to provide training under the new training manager or offer courses taught by the new principal instructor on an interim basis as soon as the provider submits the amendment to EPA. The training provider may continue to provide training under the new training manager or offer courses taught by the new principal instructor if EPA approves the amendment or if EPA does not disapprove the amendment within 30 days.

(ii) If the amendment includes a new permanent training location, the training provider may begin to provide training at the new permanent training location on an interim basis as soon as the provider submits the amendment to EPA. The training provider may continue to provide training at the new permanent training location if EPA approves the amendment or if EPA does not disapprove the amendment within 30 days.

■ 9. In § 745.238, add paragraph (c)(5) to read as follows:

**§ 745.238 Fees for accreditation and certification of lead-based paint activities.**

* * * * *

(c) * * *

(5) *Accreditation amendment fees.* No fee will be charged for accreditation amendments.

* * * * *

■ 10. In § 745.326, revise paragraphs (a)(2)(i), (a)(2)(ii), (d), (e)(1), and (e)(3) to read as follows:

**§ 745.326 Renovation: State and Tribal program requirements.**

(a) * * *

(2) * * *

(i) Procedures and requirements for the accreditation of renovation and dust sampling technician training programs. A State and Tribal program is not required to include procedures and requirements for the dust sampling technician training discipline if the State or Tribal program requires dust sampling to be performed by a certified lead-based paint inspector or risk assessor.

(ii) Procedures and requirements for accredited initial and refresher training for renovators and dust sampling technicians and on-the-job training for other individuals who perform renovations.

* * * * *

(d) *Certification of individuals and/or renovation firms.* To be considered at least as protective as the Federal program, the State or Tribal program must:

(1) Establish procedures and requirements that ensure that individuals who perform or direct renovations are properly trained. These procedures and requirements must include:

(i) A requirement that renovations be performed and directed by at least one individual who has been trained by an accredited training program.

(ii) Procedures and requirements for accredited refresher training for these individuals.

(iii) Procedures and requirements for individuals who have received accredited training to provide on-the-job training for those individuals who perform renovations but do not receive accredited training. A State and Tribal program is not required to include procedures and requirements for on-the-job training for renovation workers if the State or Tribal program requires accredited initial and refresher training for all persons who perform renovations.

(2) Establish procedures and requirements for the formal certification and re-certification of renovation firms.

(3) Establish procedures for the suspension, revocation, or modification of certifications.

(e) * * *

(1) Renovations must be conducted only by certified renovation firms, using trained individuals.

* * * * *

(3) Certified individuals and/or renovation firms must retain appropriate records.

* * * * *

■ 11. In § 745.327, revise paragraphs (b)(1), (b)(2), (b)(3), and (c)(2) to read as follows:

**§ 745.327 State or Indian Tribal lead-based paint compliance and enforcement programs.**

* * * * *

(b) * * *

(1) *Lead-based paint activities or renovation requirements.* State or Tribal lead-based paint compliance and enforcement programs will be considered adequate if the State or Indian Tribe demonstrates, in its application at § 745.324(b)(2), that it has established a lead-based paint program that contains all of the elements specified in § 745.325 or § 745.326, or both, as applicable.

(2) *Authority to enter.* State or Tribal officials must be able to enter, through consent, warrant, or other authority, premises or facilities where lead-based paint violations may occur for purposes of conducting inspections.

(i) State or Tribal officials must be able to enter premises or facilities where those engaged in training for lead-based paint activities or renovations conduct business.

(ii) For the purposes of enforcing a renovation program, State or Tribal officials must be able to enter a firm's place of business or work site.

(iii) State or Tribal officials must have authority to take samples and review records as part of the lead-based paint inspection process.

(3) *Flexible remedies.* A State or Tribal lead-based paint compliance and enforcement program must provide for a diverse and flexible array of enforcement statutory and regulatory authorities and remedies. At a minimum, these authorities and remedies, which must also be reflected in an enforcement response policy, must include the following:

(i) The authority to issue warning letters, Notices of Noncompliance, Notices of Violation, or the equivalent;

(ii) The authority to assess administrative or civil fines, including a maximum penalty authority for any violation in an amount no less than $5,000 per violation per day;

(iii) The authority to assess the maximum penalties or fines for each instance of violation and, if the violation is continuous, the authority to assess penalties or fines up to the maximum amount for each day of violation, with all penalties assessed or collected being appropriate for the violation after consideration of factors as the State or Tribe determine to be relevant, including the size or viability of the business, enforcement history, risks to human health or the environment posed by the violation, and other similar factors;

(iv) The authority to commence an administrative proceeding or to sue in courts of competent jurisdiction to recover penalties;

(v) The authority to suspend, revoke, or modify the accreditation of any training provider or the certification of any individual or firm;

(vi) The authority to commence an administrative proceeding or to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, without the necessity of a prior suspension or revocation of a trainer's accreditation or a firm's or individual's certification;

(vii) The authority to apply criminal sanctions, including recovering fines; and

(viii) The authority to enforce its authorized program using a burden of proof standard, including the degree of knowledge or intent of the respondent that is no greater than it is for EPA under TSCA.

* * * * *

(c) * * *

(2) *Compliance assistance.* A State or Tribal lead-based paint compliance and enforcement program must provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with State or Tribal requirements governing the conduct of lead-based paint activities or renovations. The type and nature of this assistance can be defined by the State or Indian Tribe to achieve this goal.

* * * * *

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Part V

## Securities and Exchange Commission

17 CFR Parts 229, 230, 239, *et al.*

Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities; Proposed Rule

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 229, 230, 239 and 249**

**[Release Nos. 33–9244; 34–64968; File No. S7–08–10]**

**RIN 3235–AK37**

## Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Re-proposed rule.

**SUMMARY:** We are revising and re-proposing certain rules that were initially proposed in April 2010 related to asset-backed securities in light of the provisions added by the Dodd-Frank Wall Street Reform and Consumer Protection Act and comments received on our April 2010 proposals. Specifically, we are re-proposing registrant and transaction requirements related to shelf registration of asset-backed securities and changes to exhibit filing deadlines. In addition, we are requesting additional comment on our proposal to require asset-level information about the pool assets. We continue to consider the other matters in our April 2010 proposing release.

**DATES:** Comments should be received on or before October 4, 2011.

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

### Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–08–10 on the subject line; or

• Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

### Paper Comments

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

All submissions should refer to File Number S7–08–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Rolaine Bancroft, Senior Special Counsel, Robert Errett, Special Counsel, or Jay Knight, Special Counsel, in the Office of Structured Finance, at (202) 551–3850, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

**SUPPLEMENTARY INFORMATION:** We are proposing amendments to Item 601[1] of Regulation S–K;[2] Items 1100, 1101, 1109, 1119, and 1121[3] of Regulation AB[4] (a subpart of Regulation S–K); Rules 401 and 415,[5] under the Securities Act of 1933 (''Securities Act''); [6] and Form 10–D[7] under the Securities Exchange Act of 1934 (''Exchange Act'').[8] We also are proposing to add Form SF–3[9] under the Securities Act.

### Table of Contents



### I. Background

In April 2010, we proposed rules that would revise the disclosure, reporting and offering process for asset-backed securities (''ABS'').[10] In light of the problems exposed by the financial crisis, we had proposed significant revisions to our rules governing offers, sales and reporting with respect to asset-backed securities. These 2010 ABS Proposals were designed to improve investor protection and promote more efficient asset-backed markets.

Among other things, in the 2010 ABS Proposing Release we proposed eligibility requirements to replace the current credit rating references in shelf eligibility criteria for asset-backed security issuers. We also proposed to require that, with some exceptions, prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool in a standardized tagged data format. Our proposal also included disclosure requirements as conditions to exemptions from offering registration. Further, we proposed to require asset-backed issuers to provide investors with more time to consider

[1] 17 CFR 229.601.

[2] 17 CFR 229.10 *et al.*

[3] 17 CFR 229.1100, 17 CFR 229.1101, 17 CFR 229.1109, 17 CFR 229.1119, 17 CFR 229.1121.

[4] 17 CFR 229.1100 through 17 CFR 229.1123.

[5] 17 CFR 230.401 and 17 CFR 230.415.

[6] 15 U.S.C. 77a *et seq.*

[7] 17 CFR 249.312.

[8] 15 U.S.C. 78a *et seq.*

[9] 17 CFR 239.45.

[10] *See Asset-Backed Securities,* SEC Release No. 33–9117 (April 7, 2010) [75 FR 23328] (the ''2010 ABS Proposing Release'' or the ''2010 ABS Proposals'').

transaction-specific information about the pool assets.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Act'') was enacted in July 2010.[11] The April 2010 ABS proposals sought to address a number of concerns about the ABS offering process and ABS disclosures that were subsequently addressed in the Act, while others were not referenced in the Act. Specifically, two of the proposed requirements—risk retention [12] and continued Exchange Act reporting [13]—will be required for most registered ABS offerings as a result of changes mandated by provisions of the Act. We are re-proposing some of the 2010 ABS Proposals at this time in light of the changes made by the Act and comments we received.

Our re-proposals for ABS shelf registration eligibility are also part of several rule revisions we are considering in connection with Section 939A of the Act. Section 939A of the Act requires that we ''review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.'' Once we have completed that review, the statute provides that we modify any regulations identified in our review to ''remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness'' as we determine to be appropriate. In that connection, we take into account the context and purposes of the affected rules.

Our re-proposals today for shelf eligibility would require:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization.
- Provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events and provisions requiring repurchase request dispute resolution;
- A provision in an underlying transaction agreement to include in ongoing distribution reports on Form 10–D a request by an investor to communicate with other investors; and
- An annual evaluation of compliance with the registrant requirements.

We are also re-proposing revised filing deadlines for exhibits in shelf offerings to require that the underlying transaction agreements, in substantially final form, be filed and made part of a registration statement by the date the preliminary prospectus is required to be filed under the 2010 ABS Proposal.[14]

We are requesting additional comment on our 2010 ABS Proposals relating to asset-level data in light of Section 942(b) of the Act and comments we received on the 2010 ABS Proposals. Section 942(b) of the Act adds Section 7(c) of the Securities Act to require the Commission to adopt regulations requiring an issuer of an asset-backed security to disclose, for each tranche or class of security, certain loan level information regarding the assets backing that security.[15] Lastly, we are requesting additional comment on our 2010 ABS Proposals relating to privately-offered structured finance products.

## II. Securities Act Shelf Registration

Securities Act shelf registration provides important timing and flexibility benefits to issuers. An issuer with an effective shelf registration statement can conduct delayed offerings ''off the shelf'' under Securities Act Rule 415 without staff action.[16] Under our current rules, asset-backed securities may be registered on a Form S–3 registration statement and later offered ''off the shelf'' if, in addition to meeting other specified criteria,[17] the securities

[11] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[12] In the 2010 ABS Proposing Release, we proposed to require sponsors of ABS transactions retain a specified amount of each tranche of the securitization, net of hedging. Section 941 of the Act added new Section 15G of the Exchange Act. Section 15G generally requires the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commission and in the case of the securitization of any ''residential mortgage asset,'' together with the Department of Housing and Urban Development and the Federal Housing Finance Agency, to jointly prescribe regulations relating to risk retention. In March 2011, the agencies proposed rules to implement Section 15G of the Exchange Act. *See Credit Risk Retention*, SEC Release No. 34–64148 (March 30, 2011) [76 FR 24090] (the ''Risk Retention Proposing Release'' or ''Risk Retention Proposals'').

[13] The Commission proposed in the 2010 ABS Proposals to require that an ABS issuer undertake to file Exchange Act reports with the Commission on an ongoing basis as a condition to shelf eligibility. The 2010 ABS Proposals also proposed to require an issuer to confirm, among other things, whether Exchange Act reports required pursuant to the undertaking were current as of the end of the quarter in order to be eligible to use the effective registration statement for takedowns. Section 942(a) of the Act eliminated the automatic suspension of the duty to file under Section 15(d) of the Exchange Act for ABS issuers, and granted authority to the Commission to issue rules providing for the suspension or termination of such duty. Due to the amendment to Section 15(d), the proposed shelf eligibility requirement to undertake to file Exchange Act reports is no longer necessary, including the quarterly evaluation by issuers of compliance with the undertaking. In January 2011, we proposed rules to provide for suspension of the reporting obligations for asset-backed securities issuers when there are no asset-backed securities of the class sold in a registered transaction held by non-affiliates of the depositor. *See Suspension of the Duty to File Reports for Classes of Asset-Backed Securities Under Section 15(d) of the Securities Exchange Act of 1934*, Release No. 34–63652 (Jan. 6, 2011) [76 FR 2049].

[14] *See* discussion regarding proposed Rules 424(h) and 430D below in Section II.

[15] *See* Section 7(c) of the Securities Act.

[16] As discussed in the 2010 ABS Proposing Release, contemporaneous with the enactment of Secondary Mortgage Market Enhancement Act of 1984 (SMMEA), which added the definition of ''mortgage related security'' to the Exchange Act, we amended Securities Act Rule 415 to permit mortgage related securities to be offered on a delayed basis, regardless of which form is utilized for registration of the offering (Public Law 98–440, 98 Stat. 1689). SMMEA was enacted by Congress to increase the flow of funds to the housing market by removing regulatory impediments to the creation and sale of private mortgage-backed securities. An early version of the legislation contained a provision that specifically would have required the Commission to create a permanent procedure for shelf registration of mortgage related securities. The provision was removed from the final version of the legislation, however, as a result of the Commission's decision to adopt Rule 415, implementing a shelf registration procedure for mortgage related securities. *See* H.R. Rep. No. 994, 98th Cong., 2d Sess. 14, reprinted in 1984 U.S. Code Cong. & Admin. News 2827; *see also Shelf Registration*, Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889], at n. 30 (noting that mortgage related securities were the subject of pending legislation). In 1992, in order to facilitate registered offerings of asset-backed securities and eliminate differences in treatment under our registration rules between mortgage related asset-backed securities (which could be registered on a delayed basis) and other asset-backed securities of comparable character and quality (which could not), we expanded the ability to use ''shelf offerings'' to other asset-backed securities. *See Simplification of Registration Procedures for Primary Securities Offerings*, Release No. 33– 6964 (Oct. 22, 1992) [57 FR 32461]. Under the 1992 amendments, offerings of asset-backed securities rated investment grade by an NRSRO (typically one of the four highest categories) could be shelf eligible and registered on Form S–3. The eligibility requirement's definition of ''investment grade'' was largely based on the definition in the existing eligibility requirement for non-convertible corporate debt securities.

[17] In addition to investment grade rated securities, an ABS offering is eligible for Form S–3 registration only if the following conditions are met: (i) Delinquent assets must not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and (ii) with respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date. *See* General Instruction I.B.5 of Form S–3. Moreover, to the extent the depositor or any issuing entity previously established, directly or indirectly,

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are rated investment grade by a nationally recognized statistical rating organization (NRSRO). As we explained in the 2010 ABS Proposing Release, we recognize that asset-backed issuers have expressed the need to use shelf registration to access the capital markets quickly.[18] Our re-proposed shelf eligibility requirements are designed to help ensure a certain quality and character for asset-backed securities that are eligible for delayed shelf registrations given the speed of these offerings. We discuss our proposed revisions to the registrant and transaction requirements for shelf eligibility below.[19]

*A. Proposed Form SF–3*

In the 2010 ABS Proposing Release, given the distinctions between ABS offerings and other registered securities offerings, we proposed to add new registration forms that would be used for any sale of a security that meets the definition of an asset-backed security,[20] as defined in Item 1101 of Regulation AB.[21] The proposed new forms, which would be named Form SF–1 and Form SF–3,[22] would require disclosure in accordance with all the items applicable to ABS offerings that are currently required in Form S–1 and Form S–3 as modified by the 2010 ABS Proposals. Offerings that qualify for delayed shelf registration[23] would be registered on proposed Form SF–3, and all other ABS offerings would be registered on Form SF–1.[24]

With respect to proposed Form SF–3, we are only re-proposing certain registrant and transaction requirements contained in the instructions to the Form. The other parts of proposed Form SF–3, which include, among other things, disclosure requirements and instructions for signatures, remain unchanged and outstanding.[25]

*B. Shelf Eligibility for Delayed Offerings*

Under the 2010 ABS Proposals, ABS issuers would no longer establish shelf eligibility through an investment grade credit rating.[26] The proposals were part of our broad ongoing effort to remove references to NRSRO credit ratings from our rules in order to reduce the risk of undue ratings reliance and eliminate the appearance of an imprimatur that such references may create.[27] In place of credit ratings, we had proposed to establish four shelf eligibility criteria that would apply to mortgage-related securities and other asset-backed securities alike:

• A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor that the assets in the pool have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows to service any payments on the securities as described in the prospectus;

• Retention by the sponsor of a specified amount of each tranche of the securitization,[28] net of the sponsor's hedging (also known as ''risk retention'' or ''skin-in-the-game'');

• A provision in the pooling and servicing agreement that requires the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased; and

• An undertaking by the issuer to file Exchange Act reports so long as non-affiliates of the depositor hold any securities that were sold in registered transactions backed by the same pool of assets.[29]

Similar to the existing requirement that the securities must be investment grade, the 2010 ABS Proposals for registrant and transaction requirements were designed to provide that asset-backed securities that are eligible for delayed shelf-registrations have certain quality and character.

Our re-proposal for registrant and transaction requirements for shelf does not contain a requirement for risk retention because, as noted above in Section I, the Risk Retention Proposals are currently being considered by the joint regulators.[30] The Risk Retention Proposals would apply to both registered and non-registered ABS. Although we may consider whether additional risk retention requirements for shelf eligibility are appropriate after the risk retention rules are adopted by the joint regulators, at this point we believe that it would be preferable not to have different risk retention requirements for our shelf eligibility rules. We had proposed that the sponsor of any securitization retain risk in each tranche of the securitization as a partial replacement for the investment grade ratings requirement because we believe that securitizations with sponsors that have continuing risk exposure would likely be higher quality than those without, and we anticipate that the final risk retention rules adopted by the joint regulators should also promote that goal. In addition, we believe disparate risk retention requirements could be

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by the depositor or any affiliate of the depositor are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on Form S–3 subject to the requirements of Section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to Section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). Such material (except for certain enumerated items) must have been filed in a timely manner. *See* General Instruction I.A.4 of Form S–3. We are not proposing changes to these other eligibility conditions.

[18] According to EDGAR, in 2006 and 2007, only three ABS issuers filed registration statements on Form S–1 that went effective. See the 2010 ABS Proposing Release at 23334.

[19] In addition to the removal of references to ratings from the shelf eligibility requirements, we note that our 2010 ABS Proposing Release included proposals to increase the amount of time that investors are required to be provided to review information regarding a particular shelf takedown and, therefore, promote analysis of asset-backed securities in lieu of undue reliance on security ratings for shelf offerings. New Rule 424(h), as proposed in the 2010 Proposing Release, would require an ABS issuer using a shelf registration statement on proposed Form SF–3 to file a preliminary prospectus containing transaction-specific information at least five business days in advance of the first sale of securities in the offering. Proposed new Rule 430D would require the framework for shelf registration of ABS offerings and related Rule 424(h) filing requirements for a preliminary prospectus. Under proposed Rule 430D, the Rule 424(h) preliminary prospectus must contain substantially all the information for the specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement, except for pricing information. These proposals remain outstanding. *See* the 2010 ABS Proposing Release at 23335.

[20] *See* the ABS 2010 ABS Proposing Release at 23337.

[21] 17 CFR 229.1101(c).

[22] The proposed forms would be referenced in 17 CFR 239.44 and 17 CFR 239.45.

[23] In this release, we also refer to such offerings on current Form S–3 and proposed Form SF–3 as ''shelf offerings.'' Note that in the 2010 ABS Proposing Release, we proposed to limit the registration of continuous ABS offerings to ''all or none'' offerings on Form SF–3. That proposal remains unchanged and outstanding. See the 2010 ABS Proposing Release at 23350.

[24] We are not re-proposing any part of Form SF–1 today. Therefore, our 2010 ABS Proposal for Form SF–1 remains outstanding.

[25] The proposed text of the entire Form SF–3 is included in Section XI of this release, as proposed in the 2010 ABS Proposing Release and revised for the registrant and transaction requirements that we are re-proposing today.

[26] *See* the 2010 ABS Proposing Release at 23338.

[27] *See* the Security Ratings Release.

[28] We use the term ''sponsor'' to mean the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. *See* Item 1101(l) of Regulation AB.

[29] *See* the 2010 ABS Proposing Release at 23338–23348.

[30] *See* fn. 12.

confusing and impose unnecessary burdens on the ABS markets. Consequently, we are eliminating the risk retention requirement from our proposal at this time.

Further, our re-proposal for registrant and transaction requirements for shelf does not contain a requirement to include an undertaking to provide Exchange Act reports because, as noted above in Section I, Section 942(a) of the Act eliminated the automatic suspension of the duty to file under Section 15(d) of the Exchange Act for ABS issuers and granted the Commission the authority to issue rules providing for the suspension or termination of such duty.[31] As a result, ABS issuers with Exchange Act Section 15(d) reporting obligations will continue to report without regard to the shelf eligibility requirements.

As noted above, our re-proposals are limited to certain registrant and transaction requirements contained in the instructions to the Form. The other parts of proposed Form SF–3, such as disclosure and instructions for signatures, remain unchanged and outstanding. We believe that the re-proposed transaction requirements described below would allow ABS issuers to access the market quickly, while providing improved investor protections that would be indicative of a higher quality security, making them appropriate replacements for the investment grade rating condition to eligibility for a delayed shelf offering.

1. Revised and Re-Proposed Transaction Requirements

We are revising and re-proposing certain transaction requirements for shelf to replace the current investment grade rating criterion. As noted above, in light of the Act, our re-proposal does not include a risk retention requirement or a requirement that the issuer undertake to continue Exchange Act reporting. As explained in further detail below, under the re-proposal, the proposed transaction requirements for shelf offerings would include:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization;
- Provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to review the underlying assets upon the occurrence of certain trigger events and provisions requiring repurchase request dispute resolution; and
- A provision in an underlying transaction agreement to include in ongoing distribution reports on Form 10–D a request by an investor to communicate with other investors.

In the 2010 ABS Proposing Release, we did not propose to change the other current ABS shelf offering transaction requirements related to the amount of delinquent assets in the asset pool and residual values of leases and we are not proposing to change these requirements in this release.[32]

*(a) Certification*

We are re-proposing the transaction requirement, which partially replaces the investment grade ratings criterion for shelf eligibility, for ABS shelf offerings to require that a certification be provided by either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor. In the 2010 ABS Proposing Release, we proposed that the depositor's chief executive officer certify that to his or her knowledge, the assets have characteristics that provide a reasonable basis to believe they will produce, taking into account internal credit enhancements,[33] cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus.[34]

This officer would also certify that he or she has reviewed the prospectus and the necessary documents for this certification.[35] We believe, as we did when we proposed the certification for Exchange Act periodic reports, that a certification may cause these officials to review more carefully the disclosure, and in this case, the transaction, and to participate more extensively in the oversight of the transaction, which is intended to result in shelf eligible ABS being of a higher quality than ABS structured without such oversight.[36] In response to the 2010 ABS Proposing Release, the investor members of one commentator agreed and emphasized that the certification would be a valuable and appropriate requirement for shelf eligibility, encouraging more careful issuer review of securitizations.[37] Other commentators, however, expressed concern regarding the certification and suggested that the certification instead just relate to disclosure.[38]

Although integrally related to the disclosure about the structure, assets and securities, we preliminarily believe the certification should not be limited to

[31] *See* fn. 13.

[32] *See* fn. 17.

[33] We note internal credit enhancement would include guarantees applicable to the underlying loans. See letter from Sallie Mae on the 2010 ABS Proposing Release (requesting that the Commission clarify that internal credit enhancement should include all guarantees applicable to government guaranteed student loans). The public comments we received are available on our Web site at *http://www.sec.gov/comments/s7-08-10/s70810.shtml.*

[34] As we explained in the 2010 ABS Proposing Release, this condition is similar to the current disclosure requirements for asset-backed issuers in the European Union. Annex VIII, Disclosure Requirements for the Asset-Backed Securities Additional Building Block, Section 2.1 (European Commission Regulation (EC) No. 809/2004 (April 29, 2004). The EU requires asset-backed issuers to disclose in each prospectus that the securitized assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities. Similarly, under the North American Securities Administrator's Association (NASAA)'s guidelines for registration of asset-backed securities, sponsors are required to demonstrate that for securities without an investment grade rating, based on eligibility criteria or specifically identified assets, the eligible assets being pooled will generate sufficient cash flow to make all scheduled payments on the asset-backed securities after taking certain allowed expenses into consideration. The guidelines are available at *http://www.nasaa.org.* In the 2010 ABS Proposing Release, we explained that because the certification is framed as an ABS shelf eligibility condition instead of a disclosure requirement, we proposed slightly different language than a similar EU disclosure requirement in order to more precisely outline what the officer is certifying to. We proposed a certification rather than a disclosure requirement because we believe the potential focus on the transaction and the disclosure that may result from an individual providing a certification should lead to enhanced quality of the securitization.

[35] As we noted in the 2010 ABS Proposing Release, a depositor's chief executive officer may conclude that in order to provide the certification, he or she must analyze a structural review of the securitization. Rating agencies also typically conduct a structural review of the securitization when issuing a rating on the securities.

[36] *See Certification of Disclosure in Companies' Quarterly and Annual Reports,* Release No. 34–46079 June 14, 2002. *See also* Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 by William H. Donaldson, Chairman U.S. Securities and Exchange Commission Before the Senate Committee on Banking, Housing and Urban Affairs (September 9, 2003) (noting that a consequence of ''the combination of the certification requirements and the requirement to establish and maintain disclosure controls and procedures has been to focus appropriate increased senior executive attention on disclosure responsibilities and has had a very significant impact to date in improving financial reporting and other disclosure'').

[37] *See* letter from Securities Industry Financial Markets Association (SIFMA) (investors) on the 2010 ABS Proposing Release.

[38] Several commentators offered, as an alternative, that the CEO of the depositor certify to the adequacy and accuracy of the disclosure in the offering documents. *See* letters from American Bar Association (ABA); American Bankers Association and ABA Securities Association (ABASA); American Securitization Forum (ASF); Australian Securitisation Forum (AusSF); Bank of America (BOA); CNH Capital America (CNH); Financial Services Roundtable (FSR); J.P. Morgan Chase & Co. (JP Morgan); Mortgage Bankers Association (MBA); SIFMA (dealers and sponsors); Sallie Mae; and Wells Fargo on the 2010 ABS Proposing Release.

disclosure. An asset-backed security is the product of multiple and varied contracts. The certification is designed to encourage better oversight by an executive officer of the securitization process. The certification also is proposed as a partial substitute for the investment grade rating. As such, we believe it is appropriate to require that the depositor have some belief that the securities being offered and sold pursuant to a shelf registration are of a certain quality. The proposed certification is not a condition for selling or registering asset-backed securities and, in fact, as is the case today, securities that are part of the same transaction may be privately offered and sold and thus would not be subject to the certification. For these reasons, we are not limiting the proposed certification to disclosure as suggested by some commentators. However, we agree that having the certification address disclosure more directly may also improve the oversight and therefore the quality of the securities. Consequently, we are proposing to revise the certification to explicitly address disclosure matters, as described below.

We anticipate that in order to provide the proposed certification, a certifier could rely, in part, on the review that would already be required in order for an issuer to comply with recently adopted Rule 193.[39] Rule 193 implements Section 945 of the Act by requiring that any issuer registering the offer and sale of an ABS perform a review of the assets underlying the ABS. Under the rule, at a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the prospectus is accurate in all material respects. In addition to a review of the assets, the proposed certification, however, would require a review of the structure of the securitization.

Several commentators on the 2010 ABS Proposing Release opposed the certification requirement because they argued, in general, that the depositor's chief executive officer could not be expected to have the knowledge necessary to certify the performance of the securities.[40] We understand that an executive officer of the depositor may rely on the work of other parties to assist him or her with structuring an ABS transaction. We do believe however, that the chief executive officer of a depositor should provide appropriate oversight so that he or she would be able to make the certification.

In the 2010 ABS Proposing Release, we also explained that the certification would be a statement of what is known by the signatory at the time of the offering and would not serve as a guarantee of payment of the securities. However, we received comment letters expressing general concern that the text of the proposed certification could be viewed as a guarantee of the future performance of the assets underlying the ABS.[41] In contrast, one investor commentator noted that the certification would not serve as a guarantee, but instead would serve to create accountability and align interests, much like other certification requirements that already exist in the securities regulation and accounting practices.[42] To address commentators' concerns, we are re-proposing the requirement to revise the text of the certification to state that the securitization is not guaranteed by this certification to produce cash flows at times and amounts sufficient to service the expected payments on the asset-backed securities. Furthermore, we have revised the language so that it no longer addresses how the securities ''will'' pay or perform but instead focuses on the design of the transaction.

We are also re-proposing the requirement in order to allow either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor to sign the certification. In the 2010 ABS Proposing Release, we had proposed that the chief executive officer of the depositor sign the certification. We explained that the chief executive officer of the depositor is already responsible as signatory of the registration statement for the issuer's disclosure in the prospectus and is subject to liability for material misstatements or omissions under the federal securities laws.[43] We would expect that chief executive officers of depositors, as signatories to the registration statement, would have reviewed the necessary documents regarding the assets, transactions and disclosures.[44] We believe that requiring the chief executive officer of the depositor to sign the certification is consistent with other signature requirements for asset-backed securities.[45]

In the 2010 ABS Proposing Release, we asked whether an individual in a different position should be required to provide the certification, and in particular, whether the senior officer in charge of securitization for the depositor should sign the certification. Moreover, the 2010 ABS Proposals included a requirement that the senior officer in charge of the securitization of the depositor sign the registration statement for ABS issuers, instead of the principal accounting officer or controller of the depositor.[46] Several commentators suggested that the proposed certification be signed by the senior officer in charge of securitization of the depositor in order to provide consistency with our outstanding signature page proposal.[47] We agree with commentators' suggestions and believe that requiring such individual to sign the certification would serve the goal of encouraging more extensive oversight of ABS transaction as well as being consistent with our other signature requirements for ABS issuers. However, we believe the officer signing the certification should be an executive officer. The definition of ''executive officer'' is already provided in Securities Act Rule 405.[48] ''Executive officer in charge of

[39] 17 CFR 230.193. In that rulemaking, we also added new Item 1111(a)(7) to Regulation AB [17 CFR 229.1111(a)(7)] to require disclosure in prospectuses of the nature of the review of the assets performed by an issuer, including whether the issuer of any ABS engaged a third party for purposes of performing the review of the pool assets underlying an ABS and the findings and conclusions of the review of the assets. *See Issuer Review of Assets in Offerings of Asset-Backed Securities,* Release No. 33–9176 (Jan. 20, 2011) [76 FR 4231] the ''January 2011 ABS Issuer Review Release'').

[40] *See* letters from ABA; ABASA; Association of Mortgage Investors (AMI); ASF; BOA; CNH; Discover Financil Services (Discover); FSR; JP Morgan; Sallie Mae; SIFMA (dealers and sponsors); and Wells Fargo on the 2010 ABS Proposing Release.

[41] *See* letters from ASF (issuer members), ABASA, CRE Finance Council (CREFC) and Wells Fargo on the 2010 ABS Proposing Release.

[42] *See* letter from Vanguard on the 2010 ABS Proposing Release.

[43] *See* Securities Act Section 11 (15 U.S.C. 77k(a)) and Exchange Act Section 10(b) (15 U.S.C. 78j(b)).

[44] We also noted that an officer providing a false certification potentially could be subject to Commission action for violating Securities Act Section 17 (15 U.S.C. 77q(a)).

[45] *See, e.g.,* Item 601(b)(31)(ii) of Regulation S–K (exhibit requirement for ABS regarding certification required by Exchange Act Rules 13a–14(d) and 15d–14(d)).

[46] In the 2010 ABS Proposing Release, we recognized that providing signatures of the principal accounting officer or controller of the depositor appears to serve no purpose because ABS issuers are not required to file financial statements under our rules or pursuant to their governing documents, and ABS issuers do not employ a principal accounting officer or controller. Thus, we stated our belief that requiring the senior officer in charge of the securitization to sign the registration statement would be more meaningful in the context of ABS offerings because it is more consistent with our other signature requirements for ABS issuers for Form 10–K. See the 2010 ABS Proposing Release at 23354.

[47] See letters from ABA; ABASA; ASF; JP Morgan; MBA and Wells Fargo on the 2010 ABS Proposing Release.

[48] The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such

securitization'' rather than ''senior officer in charge of securitization'' is more consistent with our other regulations requiring executive officers be signators and our view that more extensive oversight by an executive officer may improve the quality of the securities. Therefore, we are proposing to require that an executive officer in charge of securitization be permitted to sign the certification.

Similar to the 2010 ABS Proposal, under the re-proposal, the statements required in the certification would be made based on the knowledge of the certifying person. We would expect that a chief executive officer and executive officer in charge of securitization of the depositor would have reviewed the necessary documents regarding the assets, transactions and disclosures. Under current requirements, the registration statement for an ABS offering is required to include a description of the material characteristics of the asset pool,[49] as well as information about the flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement and any other structural features in the transaction.[50] The proposed certification would be an explicit representation by the certifying person of what is implicit in what should already be disclosed in the registration statement.[51] If the certifying person did not believe the securitization was designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities being registered, disclosure about such insufficiency would be required under Securities Act Rule 408 and Exchange Act Rule 10b–5.[52]

Similarly, the executive officer would not be able to sign the certification if he or she knew or expected that the design of the securitization would not produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities.

Commentators also were concerned about the scope of the certification because, as proposed, the certification would apply to ''any payments of the securities as described in the prospectus.'' A few commentators raised the point that the lower or junior tranches of a securitization are offered at steep discounts because investors expect that the assets will *not* produce the cash flows necessary to service any payments of those securities.[53] Those lower tranches typically have not been sold in registered transactions because they did not satisfy the current investment grade ratings transaction requirement. In order to provide clarity, we are re-proposing the text of the certification so that the certification would apply to the securities offered and sold pursuant to the registration statement and thus would not apply to privately offered and sold securities even if issued by the same issuing entity. Under our re-proposal, this certification would be an additional exhibit requirement for the shelf registration statement that would not be applicable to the non-shelf registration statement, proposed Form SF–1. We are proposing the certification be dated as of the date of the final prospectus under Rule 424 and would be required to be filed by the time the final prospectus is required to be filed under Rule 424.[54]

Reflecting revisions in response to comments, as described above, the revised proposed certification would be required to be provided by the CEO or the executive officer in charge of securitization for the depositor and would state that,

- The executive officer has reviewed the prospectus and is familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements, and the material terms of all contracts and other arrangements entered in to effect the securitization;
- Based on the executive officer's knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- Based on the executive officer's knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus; and
- Based on the executive officer's knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement.[55]

Request for Comment

1. Is our proposal to require a certification by the chief executive officer of the depositor or the executive officer in charge of securitization appropriate as a condition to shelf eligibility? Would the proposed certification encourage more extensive oversight of the transaction, and, therefore, be a partial indicator of an ABS that is a higher quality security?

2. Does the re-proposed language clarify that the certification does not constitute a guarantee?

3. Are the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor the appropriate parties that should

as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant. [17 CFR 230.405].

[49] *See* Item 1111 of Regulation AB [17 CFR 229.1111].

[50] *See* Item 202 of Regulation S–K [17 CFR 229.202] and Item 1113 of Regulation AB [17 CFR 229.1113].

[51] This approach is somewhat similar to the approach we took with Regulation AC, which requires certifications from analysts. We noted there that Regulation AC makes explicit the representations that are already implicit when an analyst publishes his or her views—that the analysis of a security published by the analyst reflects the analyst's honestly held views. Section II of *Regulation Analyst Certification,* Release No. 33–8193 (Feb. 23, 2003) [68 FR 9482].

[52] 17 CFR 230.408 and 17 CFR 240.10b–5.

[53] *See* letters from ABA, ASF, and Sallie Mae on the 2010 ABS Proposing Release.

[54] *See* proposed revision to Item 601(b) of Regulation S–K.

[55] We note that an executive officer in delivering the certificate is precluded from taking into account external credit enhancements because the certification is expressly directed to the design of the securitization and whether or not taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, such securitization is designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement. An example of an external credit enhancement is a third party insurance to reimburse losses on the pool assets or the securities.

provide the certification, as proposed? Some of our signature requirements related to ABS refer to ''senior officer in charge of securitization.'' [56] Should we revise all of those references to conform so that they refer to executive officer in charge of securitization?

4. Is the text of the proposed certification appropriate? Would having an executive officer certify that taking into account the structure of the transaction, the disclosure in the prospectus, the exhibits to the registration statement, and the information currently known to the executive officer about the securitized assets backing the securities offered and sold pursuant to the registration statement, there is a reasonable basis to conclude that those assets will generate cash flows in amounts and at times that will permit those securities to make the payments described in the transaction documents, achieve the same result as the proposed certification? Would this certification be appropriate if it also stated that this certification is only an expression of the executive officer's current belief and is not a guarantee that those assets will generate such cash flows, and there may be current facts not known to the executive officer and there may be future developments that would cause his or her opinion to change or that would result in those assets not generating such cash flows?

5. Would it be more appropriate to tie the certification to current investment grade rating standards? For instance, should the executive officer certify that the securities being offered and sold under the registration statement have adequate capacity to meet financial commitments, similar to some definitions of investment grade securities?

6. Are there other certifications that would more effectively promote accountability and oversight of the transaction by the executive officer, resulting in shelf eligible ABS being of a higher quality?

7. Would a certification limited to the disclosure in the prospectus effectively promote accountability and oversight of the transaction by the executive officer resulting in shelf-eligible ABS being of higher quality? If so, would the following language be appropriate: I, [certifying individual], certify that:

1. I have reviewed the prospectus relating to [title of securities the offer and sale of which are registered] and am familiar with the structure of the securitization, including the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization];

2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus.

8. We note above that the proposed certification would be an explicit representation of the certifying person of what is already implicit in the disclosure contained in the registration statement and that as a signatory of the registration statement for the issuer's disclosure in the prospectus, the executive officer can be liable for material misstatements or omissions under the federal securities laws. Would the certification create new potential liability for the certifier?

9. If the CEO or executive officer in charge of securitization of the depositor provides the certification, as proposed, and obtains assistance from a third party, should we require disclosure about the third party? Should the disclosure requirement be the same as or similar to the possible disclosures regarding an independent evaluator that we describe below? If not the same, what disclosures about the third party should be required?

10. Is it appropriate to require the certification be made as of the date of the final prospectus, as proposed? Should it instead be made as of the date when the securities are first sold? [57] Or should it be made as of the date of the Rule 424(h) preliminary prospectus?

11. Is it appropriate to require the certification be filed as an exhibit to the registration statement at the time of the final prospectus by means of a Form 8–K, as proposed? Or would it be more appropriate to require the certification be filed at the same time as the proposed Rule 424(h) preliminary prospectus? [58]

12. In lieu of the requirement that the chief executive officer or executive officer in charge of securitization of the depositor provide a certification, should we allow an opinion to be provided by an ''independent evaluator'' regarding the ABS that would provide the same assurances as the certification? Would permitting such an opinion encourage appropriate oversight of the transaction structure for purposes of determining shelf eligibility? Would allowing an opinion by an independent evaluator give issuers the flexibility to engage a third party to give the certification that would otherwise be required of the CEO or the executive officer in charge of securitization? If we permit an independent evaluator to provide an opinion in lieu of an officer certification, would it be appropriate for us to require that the text of the opinion be the same as the proposed text for the certification by the CEO or executive officer in charge of securitization of the depositor?

13. We note that if we permit an opinion to be provided, we anticipate that the opinion would need to be filed as an exhibit to the registration statement and the independent evaluator would need to consent to being named as an ''expert'' in the registration statement and be subject to

[56] The Form 10–K [17 CFR 249.310] report for ABS issuers must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing. In addition, the certifications for ABS issuers that are required under Section 302 of the Sarbanes-Oxley Act must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10–K report, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10–K report.

[57] [17 CFR 230.159]. Rule 159 provides the following: (a) For purposes of section 12(a)(2) of the Securities Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account and (b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

[58] *See* discussion below in Section III.A.

the liability provisions of Section 11 of the Securities Act.[59] Would these requirements be appropriate? Would third parties be willing to act as independent evaluators on this basis?

14. How would we define an independent evaluator for purposes of providing the opinion? For example, would it be appropriate to define an independent evaluator as a person who: (i) Has expertise and experience in structuring and evaluating asset-backed securities; (ii) is not affiliated with the issuer or any person involved in the organization or operation of the issuer;[60] (iii) itself, and any of its affiliates, does not knowingly have, or does not have the intention to acquire, any direct or indirect beneficial interest in any securities issued or assets held by the issuer, and (iv) does not have any other material business or financial relationship with the issuer or any person involved in the organization or operation of the issuer.[61] Should we impose any additional or different requirements on an independent evaluator?

15. What steps should the issuer (or another person on behalf of the issuer) need to take to determine whether a prospective independent evaluator meets specified criteria? Should it be able to rely on a statement of the evaluator, for example, that it has the required expertise and experience?

16. Would a provision prohibiting ownership of beneficial interests in securities issued by the issuer or assets held by the issuer and any other material business or financial relationships facilitate the evaluator's independence?

17. Should we place limits on whether an independent evaluator in one transaction could serve as an independent evaluator in other ABS transactions of the same sponsor or depositor?

18. What types of entities are likely to serve as independent evaluators? We anticipate that firms, such as asset management firms, consultants, credit enhancement providers and rating agencies could serve as independent evaluators. Should any types of persons or entities be excluded from being independent evaluators?

19. Should rating agencies be permitted to serve as independent evaluators? If so, should a rating agency hired to issue a credit rating on an ABS also be able to serve as an independent evaluator on the same transaction?

20. Would it be appropriate for a duly authorized person of the independent evaluator to sign on behalf of the independent evaluator? Should the signature of an individual from the independent evaluator be required?

21. Should we require that if an opinion is provided by an independent evaluator, that the prospectus include specific information about the independent evaluator such as the name of the independent evaluator, its form of organization, its experience with evaluating ABS, the manner in which the independent evaluator was compensated for the certification, and to the extent material, any affiliations between the independent evaluator and the issuer as well as other transaction parties? In addition, should we add a requirement to describe the basis on which the person responsible for selecting the independent evaluator determined that the evaluator selected has the requisite expertise and experience? Should we require disclosure regarding the process undertaken by the opinion provider and the factual and analytical bases for such opinion? Should we require any additional disclosure?

*(b) Credit Risk Manager and Repurchase Request Dispute Resolution Provisions*

Commentators on the 2010 ABS Proposing Release suggested that a different third party mechanism for investigating and resolving breaches of representations and warranties concerning the pool assets would better serve the interests of investors than the proposed shelf eligibility criterion regarding representations and warranties.[62] Based on comments received on the 2010 ABS Proposing Release, we are proposing, as a second transaction requirement for ABS shelf offerings, that the underlying transaction documents of an ABS include provisions requiring that the trustee of the issuing entity appoint a credit risk manager to review the underlying assets upon the occurrence of certain trigger events and provide its report to the trustee of the findings and conclusions of the review of the assets. We are also proposing as a part of this shelf eligibility condition to require certain provisions in the underlying transaction agreements in order to resolve repurchase request disputes. As we explain further below, these proposals would be in lieu of the proposed shelf eligibility condition to require a provision in the pooling and servicing agreement to require the party obligated to repurchase assets for breach of representations and warranties to periodically furnish an opinion of an independent third party. We believe that this revised proposal would better strengthen the enforceability of contract terms surrounding the representations and warranties regarding the pool assets for ABS shelf transactions and incentivize obligated parties to better consider the characteristics and quality of the assets underlying the securities, making it an appropriate partial replacement for investment grade ratings.

We have noted in previous Commission releases that in the underlying transaction agreements for an asset securitization, sponsors or originators typically make representations and warranties relating to the pool assets and their origination, including representations about the quality of the pool assets.[63] For instance, in the case of residential mortgage-backed securities, one typical representation and warranty is that each of the loans has complied with

[59] Section 7 of the Securities Act requires the consent of any person, whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement. *See also* Securities Act Section 11 [15 U.S.C. 77k].

[60] An ''affiliate'' of, or a person ''affiliated'' with, a specified person, is defined in Commission rules to mean ''a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' *See, e.g.,* Securities Act Rule 405 and Exchange Act Rule 12b–2. The term ''control'' also is defined in those rules as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.''

[61] This requirement would not preclude an independent evaluator to serve as an independent evaluator in other ABS transactions of the same sponsor or depositor.

[62] *See* letters from ABASA; ASF; BOA; JPMorgan; Metlife; Prudential Investment Management (Prudential); SIFMA; Group of 16 Vehicle ABS Issuers (Vehicle ABS Group); Vanguard; Wells Fargo on the 2010 ABS Proposing Release. As we noted in previous Commission releases, the effectiveness of the contractual provisions related to representations and warranties has been questioned and the lack of responsiveness by sponsors to potential breaches of representations and warranties in the pool assets has been the subject of investor complaint. Transaction agreements typically have not included specific mechanisms to identify breaches of representations and warranties or to resolve a question as to whether a breach of the representations and warranties has occurred. Thus, these contractual agreements have frequently been ineffective because, without access to documents relating to each pool asset, it can be difficult for the trustee, which typically notifies the sponsor of an alleged breach, to determine whether or not a representation or warranty relating to a pool asset has been breached. *See* the 2010 ABS Proposing Release and Disclosure for *Asset Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC Release No. 33–9175 (January 20, 2011) [76 FR 4489] (the ''943 Release'') at 4490.

[63] *See* the 2010 ABS Proposing Release. *See also* the 943 Release.

applicable federal, state and local laws, including truth-in-lending, consumer credit protection, predatory and abusive laws and disclosure laws. Another representation that may be included is that no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets. Upon discovery that a pool asset does not comply with the representation or warranty, under transaction covenants, an obligated party, typically the sponsor, must repurchase the asset or substitute a different asset that complies with the representations and warranties for the non-compliant asset.

In January 2011, we adopted new rules to implement Section 943 of the Act, requiring disclosure related to representations and warranties in ABS offerings (the ''943 Release''). While our new rules under Section 943 require disclosure of fulfilled and unfulfilled repurchase request activity, they do not directly address the enforceability, as a practical matter, of put back provisions in the underlying transaction agreements. As we noted in the 943 Release, the effectiveness of the contractual provisions related to representations and warranties has been questioned and lack of responsiveness by sponsors to potential breaches of the representations and warranties relating to the pool assets has been the subject of investor complaint.[64]

In order to address this investor concern, in the 2010 ABS Proposing Release, we proposed a condition to shelf eligibility that would require a provision in the pooling and servicing agreement that would require the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased.[65] Several commentators from both the issuer and investor community were concerned that this proposal was unduly complex, costly, and would not achieve its goals. Instead, commentators generally suggested that a better way to address the concern regarding enforceability of repurchase obligations related to breaches of representations and warranties would be to require a review of the underlying assets by an independent third party, or ''credit risk manager''.[66] After considering the comment letters received, we are proposing as the second transaction requirement for shelf offerings to replace investment grade ratings, in lieu of the proposed requirement for a third-party opinion, that the underlying transaction documents include provisions requiring a credit risk manager to review the underlying assets upon the occurrence of certain trigger events that are described below. Under the proposal, the credit risk manager[67] would be appointed by the trustee,[68] not be affiliated with any sponsor, depositor or servicer in the transaction, and would have authorization to access the underlying loan documents.[69] By requiring that the trustee appoint the credit risk manager and requiring that there be no affiliation with the sponsor, depositor or servicer, we are attempting to address any potential conflicts that could arise between the credit risk manager and the obligated party. In addition, we are requiring that the credit risk manager have access to copies of the underlying loan documents so it can perform its duties under the proposed requirement.

We are proposing that the credit risk manager review the underlying assets of the ABS for compliance with the representations and warranties on the underlying pool assets upon the occurrence of trigger events which would be specified in the transaction agreements. We are proposing to require that the transaction agreements require, at a minimum, review by the credit risk manager (1) when the credit enhancement requirements, such as required reserve account amounts or overcollateralization percentages, as specified in the underlying transaction agreements, are not met; and (2) at the direction of investors pursuant to the processes provided in the transaction agreement and disclosed in the prospectus. These two trigger events should facilitate the ability of transaction parties to pursue transaction remedies, which we believe would be a feature of a higher quality security, as well as directly address commentators' concerns related to representations, warranties and enforcement mechanisms in underlying transaction agreements for the reasons we describe below. At the same time, we are not proposing to mandate that transaction parties follow specific procedures related to the review or repurchase process because we preliminarily believe transaction parties should have the flexibility to tailor the procedures to each ABS transaction, taking into account the specific features of the transaction and/or asset class. Our proposal would require that the transaction agreements require a review by the credit risk manager, at a minimum, in certain specified instances described below. However, the transaction agreements could, at the election of the transaction parties, specify additional triggers for a credit risk manager review. We also expect that the transaction parties may develop more specific and robust procedures for monitoring and reviewing the assets that support the ABS.[70]

Credit enhancement or other structural support for asset-backed securities can be provided in a variety of ways, including both internally structured support as well as externally provided enhancement or support.[71] For example, internal credit enhancement is structured into the transaction to increase the likelihood that one or more classes of asset-backed securities will pay in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts. Accordingly, the underlying transaction agreements typically require that internal credit enhancement be maintained at a specified amount. We believe it would be appropriate for the credit risk manager to review defaulted assets when the credit enhancements (including structural supports, such as subordination), fall below the required target levels, as specified in the

[64] *See* the 943 Release at 4490.

[65] *See* the 2010 ABS Proposing Release at 23344.

[66] *See* letters from ASF, ABASA, BOA, Vanguard, SIFMA, Wells Fargo, Metlife, Prudential, JPMorgan on the 2010 ABS Proposing Release.

[67] *See* proposed Item 1101(m) of Regulation AB.

[68] *See* letter from Prudential on the 2010 ABS Proposing Release.

[69] Under our proposal, the credit risk manager could also be the same party serving another role in the same transaction, such as the trustee, custodian or an operating advisor (as proposed in the Risk Retention Proposals) as long as it is not affiliated with the sponsor, depositor or servicer. *See* the Risk Retention Proposing Release at 24109. *See also* letters from ASF, BOA and SIFMA.

[70] Some commentators suggested that the credit risk manager be required to review the assets at other trigger events. ASF (investor members) and Metlife suggested that review be required at objectively defined trigger events such as when loans default shortly after origination, when loans become seriously delinquent (60 days), or when the servicer or trustee suspects a breach. ASF (sponsor members) suggested that review be required by terms of the transaction agreement only or when a bona fide and substantiated allegation of breach by a security holder is received. SIFMA suggested that review be required when the credit risk manager determines it is appropriate to assert a claim for breach on behalf of the securitization trust, in the interests of all investors in the aggregate, or as directed by an investor subject to certain standards. We request comment below on whether we should require any of these suggestions in addition to our proposals or as alternatives to our proposal.

[71] *See* the 2004 ABS Adopting Release at 1548.

underlying transaction agreements, because if that happens, then losses may be higher than originally expected, thereby calling into question whether the defaulted assets met the representations and warranties provided in the underlying transaction documents.[72]

As we explained in the 943 Release, investors have demanded that trustees enforce repurchase covenants because transaction agreements do not typically contain a provision for an investor to directly make a repurchase demand.[73] However, many investors have been frustrated with the structure and process because, as discussed above, trustees have not enforced repurchase rights and investors have been unable to locate other investors in order to force trustees to do so.[74] In response to this concern, we are proposing as a part of the second shelf eligibility condition that the transaction agreements be required to provide a process whereby investors are able to direct the credit risk manager to review assets for potential breaches of a representation or warranty because we believe that such a requirement facilitates an investor's ability to pursue remedies under the transaction agreement, contributing to a higher quality security. As noted above, we are allowing for flexibility by not specifying the procedural requirements by which investors may make the request. However, because commentators on the 2010 ABS Proposing Release suggested several mechanisms that could be appropriate for investor-directed review of assets and requests for repurchase, we are requesting comment on whether we should specify those procedures as conditions to shelf eligibility.[75] Under the proposal, transaction parties would retain the flexibility to determine the appropriate procedures and times for investor-directed review of underlying assets for each ABS and whatever mechanism is provided would be described in the prospectus.

We are also proposing to require as part of the second shelf eligibility condition that the underlying transaction agreements require that the credit risk manager provide its report to the trustee of the findings and conclusions of its review of the assets.[76] The trustee could then use the report to determine whether a repurchase request would be appropriate under the terms of the transaction agreements, thereby enhancing the effectiveness of the contract provisions of the ABS contributing to the higher quality of the securities. Although we are not proposing to specify the format of the report, we are requesting comment on whether specifying the format of the report is necessary.

We are proposing disclosure requirements in prospectuses and in ongoing reports about the credit risk managers. In prospectuses, we are proposing to require disclosure of the name of the credit risk manager, its form of organization, the extent of its experience serving as a credit risk manager for ABS transactions involving similar pool assets, and the manner and amount in which the credit risk manager is compensated for its services.[77] In addition, disclosure would be required about the credit risk manager's duties and responsibilities under the governing documents and under applicable law, any limitations on the credit risk manager's liability under the transaction agreements, any indemnification provisions, and any contractual provisions or understanding regarding the credit risk manager's removal, replacement or resignation, as well as how any related expenses would be paid.[78] Further, disclosure would be required, to the extent material, about any affiliations and relationships between the credit risk manager and other transaction parties.[79] These disclosure requirements are similar to current disclosure requirements for trustees.[80]

In ongoing reports on Form 10–D, if during the distribution period the credit risk manager is required to review the assets, we are proposing to require disclosure of the event(s) that triggered the review by the credit risk manager during the distribution period. We are also proposing that if a report by the credit risk manager of the findings and conclusions of its review of assets that is provided to the trustee during the distribution period, that the full report be filed as an exhibit to the Form 10–D.[81] In addition, we are proposing that if, during the distribution period, a credit risk manager has resigned, or has been removed, replaced or substituted, or if a new credit risk manager has been appointed, disclosure would be required of the date the event occurred, and the circumstances surrounding the change. If a new credit risk manager has been appointed, disclosure required by proposed Item 1109(b) of Regulation AB would be required.

In order to provide a timely mechanism for enforcement of repurchase requirements, we are also proposing to require as a part of the second condition to shelf eligibility that the underlying transaction documents include repurchase request dispute resolution procedures. Under the proposal, the transaction agreements would be required to provide that if an asset, subject to a repurchase request pursuant to the terms of the transaction agreements, is not repurchased by the end of the 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.[82] Our proposal would give a requesting party the ability to compel the obligated party to submit to dispute resolution if the obligor did not repurchase the assets. However, because we understand that a party obligated to repurchase will need the time to investigate a repurchase request, our proposal would allow 180

[72] For example, if the overcollateralization target amount specified in the transaction document is 3%, then the credit risk manager would be required to conduct a review of the defaulted assets for compliance with representations and warranties when it falls below 3%.

[73] *See* the 943 Release at 4498.

[74] Typically, investor rights require a minimum percentage of investors acting together in order to enforce the representation and warranty provisions contained in the underlying transaction agreements. We discuss our ABS shelf proposal related to investor communication in Section II.B.1.c. below. *See also* Alex Ulam, ''Investors Try to Use Trustees as Wedge in Mortgage Put-Back Fight,'' *American Banker* (Jun. 27, 2011) (noting that investor votes are required in order to force a trustee to take action).

[75] *See* letter from Metlife on the 2010 ABS Proposing Release (suggesting that bondholders representing 5% or more of a transaction be able to direct the trustee to poll investors on whether to initiate a review of assets. Following such a vote, the sponsor would need to repurchase any non-compliant asset and if the sponsor did not comply, then disputes would be submitted to independent arbitration). *See also* letters from ASF and SIFMA on the 2010 ABS Proposing Release.

[76] A ''report of findings and conclusions'' of a review is similar in concept to the requirements of new Rule 193 and Item 1111(a)(7) of Regulation AB. As discussed above, those new rules will require the issuer of an ABS to conduct a review of the pool assets underlying an ABS at the time of securitization and disclose of the findings and conclusions of the review of the assets. *See* Section II.B.1.a. and fn. 39. We note that the issuer review would be performed at the time of securitization, while the proposed credit risk manager review would be performed pursuant the processes provided in an underlying transaction agreement.

[77] *See* proposed Item 1109(c) of Regulation AB in the 2010 ABS Proposing Release.

[78] *See* proposed Item 1109(c) of Regulation AB in the 2010 ABS Proposing Release.

[79] *See* proposed Item 1119(a)(7) of Regulation AB in the 2010 ABS Proposing Release.

[80] *See* Item 1109 of Regulation AB [17 CFR 229.1109].

[81] The report would be filed as an additional exhibit under Exhibit 99. *See* Item 601(b)(99) of Regulation S–K [17 CFR 229.601(b)(99)].

[82] *See, e.g.*, letters from Center for Audit Quality (CAQ), Group of 14 CMBS investors (CMBS Investors), Ernst & Young (E&Y), Prudential on the 2010 ABS Proposing Release.

days before a requesting party had the right to compel mediation or arbitration.[83] Of course, the transaction agreements could call for a period shorter than 180 days.

We believe that investors and issuers should both benefit from our proposals to require a credit risk manager and the proposed repurchase request dispute resolution provisions because they are designed to facilitate a timely resolution of repurchase claims. We also believe that these mechanisms are appropriate as one of the requirements for shelf eligibility because they provide enhanced mechanisms for transaction parties to pursue contract remedies, thereby contributing to the quality of the security. Our proposal does not specify whether mediation or arbitration must be agreed to by the obligated party in the dispute resolution provision. We preliminarily believe that the requesting party should have the flexibility to select the appropriate mechanism to resolve repurchase disputes, although we request comment on whether we should mandate one or the other.

Request for Comment

22. Is the requirement of a credit risk manager review of the underlying assets appropriate as a condition for shelf eligibility, as proposed? Is it appropriate to require certain terms requiring repurchase dispute resolution in the underlying transaction documents, as a condition for shelf eligibility, as proposed?

23. Is it appropriate to require that the trustee appoint the credit risk manager, as proposed? Should another party be able to appoint the credit risk manager? Should we specify terms for removal and re-appointment of the credit risk manager?

24. Is it appropriate to require that the credit risk manager not be an affiliate of any sponsor, depositor, or servicer, as proposed? Would an affiliate of the sponsor, depositor or servicer be able to objectively perform the credit risk manager review function? Should we require that the credit risk manager be required to represent that no conflict of interest exists between itself and any transaction party, including investors?[84] Would it be appropriate for the trustee to also be the credit risk manager?

25. Is it appropriate to require that the credit risk manager be given access to copies of the underlying documents related to the pool assets, as proposed? Should the requirement be limited in any way? Are there any privacy considerations? If so, should we require a covenant in the underlying transaction documents that all information be kept confidential?

26. Should we specify an additional requirement that the credit risk manager be given access to all underwriting guidelines and any other documents necessary to evaluate the loans?[85]

27. What types of entities are likely to serve as credit risk managers? Should any types of persons or entities be excluded from being credit risk managers?

28. Are the proposed triggers for review by the credit risk manager appropriate? Is it appropriate to require review when a transaction's required credit enhancement falls below defined target levels, as proposed? Should we specify which types of credit enhancement would be subject to the requirement (*e.g.,* overcollateralization, reserve account)? If so, what types of credit enhancement features should we specify and why? Are there any asset classes, or securitization structures, where no target credit enhancement is specified? Is it appropriate that triggers relating to credit enhancement include structural supports, such as subordination? Are there any other features that should be or should not be included as credit enhancement for purposes of triggering a credit risk manager review?

29. As noted above, we intend that shelf-eligible transaction agreements, at a minimum, provide for the specified trigger events for a credit risk manager review. Will market practice develop to add additional triggers, if any, as circumstances warrant?

30. Is it appropriate to require review by the credit risk manager at the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus? Should we specify the procedures for the investor directed review process? If so, what should the requirements be and why? For example, should we require that investors representing 5% or more of investors in interest (*i.e.,* investors that are not affiliates of the sponsor or servicer) be able to direct a review? Should the percentage of investors required to initiate a review be higher or lower? If the percentage is higher, such as 25%, should we require that investors representing 5% or more of investors in interest first be able to direct the trustee to poll investors on whether to initiate a review of assets?[86] As an alternative to specifying procedures, would it be appropriate to specify certain maximum conditions, where the percentage of investors required to direct review could be no more than a certain percentage, such as 5%, 10%, or 25%?

31. Is our proposal to require a provision that the credit risk manager provide its report to the trustee of the findings and conclusions of its review of the assets appropriate? Should we specify the format of the report?

32. Is our proposal to require the report of the credit risk manager be filed as an exhibit to the Form 10–D filing covering the period in which the report is given to the trustee appropriate? Should it be filed sooner, such as on a Form 8–K within four business days of receipt by the trustee? Should we also require that a summary of the report by the credit risk manager of the findings and conclusions of its review of assets be included in the Form 10–D?

33. Are the proposed disclosure requirements in prospectuses regarding credit risk managers appropriate? Should we require any additional disclosure?

34. Should our rules include any other specific triggers for review? Should we require review based on specific triggers, such as the occurrence of delinquency of a specified duration, such as 60, 90, or 120 days? Should we require review of early payment defaults, (*e.g.,* loans that become delinquent within the first 60, 90 or 120 days past origination)?[87] Should we require review of all loans for which the servicer or trustee suspects a breach? If so, how should we define this trigger? Would any of these requirements be in addition to, or as an alternative to the proposed requirements?

35. Should we require that the credit risk manager have discretion to assert a claim for breach on behalf of the securitization trust, in the interests of all investors in the aggregate?[88] Would this requirement be in addition to, or as an alternative to the proposed requirements? Should we specify some or all of the procedures related to the review or repurchase process?

[83] *See* letter from Prudential on the 2010 ABS Proposing Release (suggesting that a sponsor should have a specified amount of time to challenge any third party claim). See also letter from SIFMA on the 2010 ABS Proposing Release (suggesting that arbitration be available if the parties do not resolve the repurchase request within 180 days).

[84] *See* letter from Prudential on the 2010 ABS Proposing Release.

[85] *See* letter from SIFMA on the 2010 ABS Proposing Release.

[86] *See* letter from Metlife on the 2010 ABS Proposing Release.

[87] *See* letter from Metlife on the 2010 ABS Proposing Release.

[88] *See* letter from SIFMA on the 2010 ABS Proposing Release.

36. Is our proposal to require ongoing disclosure about the credit risk manager and its activities in Form 10–D appropriate? Is our proposal to require disclosure about the event(s) that triggered a credit risk manager review appropriate? Is it appropriate to require the disclosure only with respect to those triggers that are proposed for shelf eligibility (*i.e.,* credit enhancement trigger and investor directed review), as proposed? Or should disclosure be required with respect to any review undertaken by a credit risk manager, pursuant to the provisions in the agreement?

37. Is it appropriate to require disclosure in the Form 10–D of a change of credit risk manager as proposed?

38. In addition to the proposed shelf eligibility and disclosure requirements, should we require that each party with a repurchase obligation provide an annual certificate to the trustee and noteholders certifying that all loans required to be repurchased under the transaction documents have been repurchased or detail why any loans identified as breaching a representation or warranty were not removed.[89]

39. Is our proposal to require dispute resolution provisions in the underlying transaction documents as a shelf eligibility condition, appropriate? Is it appropriate to require that requesting parties wait 180 days until they can force the obligated part to submit to dispute resolution? Should the period be longer or shorter? Should we not specify a particular period, but instead require there to be a set time period in the transaction agreements? Is it appropriate to require that the obligated party agree to either mediation or arbitration, as proposed? Should we require that all the parties agree to either mediation or arbitration? Or should we require one or the other? Is it appropriate to require that the transaction documents provide that investors, in their sole discretion, may elect whether to refer a disputed repurchase request to arbitration or mediation? Would it be more appropriate to require that the transaction documents provide for a mandatory dispute resolution mechanism (specifying mediation or arbitration) after 180 days, and disclose the mandatory dispute resolution mechanism in the prospectus, without mandating the details of those provisions?

40. Should we specify who should pay the expenses for mediation or arbitration of the repurchase request? For example, should we require that expenses related to the mediation or arbitration of a repurchase request be paid by the obligated party, the person(s) requesting repurchase, or the issuing entity? Or should expenses be the responsibility of the losing party, or should costs be shared? Is it clear who the losing party would be in mediation? Or should costs be determined by the mediator or arbitrator? Would specifying that the obligated party is required to cover all costs associated with mediation or arbitration of the repurchase request provide further incentive for the obligated party to resolve the request within 180 days? If so, do the benefits of this additional incentive justify the potential costs imposed on the obligated party? If a trustee is the requesting party, and it is determined that the trustee is obligated to pay expenses (by the terms of transaction agreement, the outcome of the dispute resolution procedures, or otherwise) how would the trustee pay for the expenses? Would the possible obligation to pay for the expenses, be yet another disincentive for trustees so they would not initiate a repurchase request?

41. Should we require that if the obligated party fails to agree to mediation or arbitration of any unresolved repurchase dispute within such period, the obligated party would be required to honor the repurchase request? [90]

*(c) Investor Communication*

As we discussed above, we are aware that investors have had difficulty enforcing rights contained in transactions agreements, and in particular, those relating to the repurchase of underlying assets for breach of representations and warranties. Investors have raised concerns regarding the inability to locate other investors in order to enforce these rights.[91] Frequently, these investor rights require a minimum percentage of investors acting together. In response to the 2010 ABS Proposing Release, one commentator noted that because most ABS are held by custodians or brokers in ''street name'' through the Depository Trust Company, as a practical matter it is very difficult for ABS investors to communicate with each other in order to jointly exercise any of their substantive protections or rights provided in the transaction documents.[92] Another commentator expressed that given the complexity of securitization structures and the underlying collateral it is important for investors who have identified concerns with the collateral or any structural issue to be able to effectively communicate with other investors in the transaction and to either prompt the trustee to take action or solicit further direction from investors.[93]

In connection with these concerns, we are proposing, as a third shelf eligibility requirement, that an underlying transaction agreement include a provision to require the party responsible for making periodic filings on Form 10–D to include in the Form 10–D any request from an investor to communicate with other investors related to an investor's rights under the terms of the ABS that was made during the reporting period received by the party responsible for making the Form 10–D filings where the request is received on or before the end date of a reporting period.[94] By requiring the provision be included in an underlying agreement, the party responsible for making Form 10–D filings would be

[89] *See* letter from Sallie Mae on the 2010 ABS Proposing Release.

[90] *See* letter from Prudential on the 2010 ABS Proposing Release.

[91] *See* Alex Ulam, ''Investors Try to Use Trustees as Wedge in Mortgage Put-Back Fight,'' *American Banker* (Jun. 24, 2011) (noting that many attempted put-backs have ''flamed out after investor coalitions failed to get the 25% bondholder votes that pooling and servicing agreements require for a trustee to be forced to take action against a mortgage servicer''). *See also* Tom Hals and Al Yoon, ''Mortgage Investors Zeroing in on Subprime Lender,'' *Thomson Reuters* (May 9, 2011) (noting that gathering the requisite number of investors needed to demand accountability for faulty loans pooled into investments is a ''laborious'' task).

[92] *See* letter from Metlife on the 2010 ABS Proposing Release (suggesting that the Commission mandate that one ABS transaction party have real-time knowledge of the legal names and contact information of the beneficial owners of each of the bonds in the issuance so that bondholders could request that such transaction party (likely the trustee) send communications to the other bondholders notifying them of suspected breaches of representations and warranties, thus protecting investor identity, but also addressing the collective action problem). The Depository Trust Company provides custody and book-entry transfer services of securities transactions in the U.S. market involving equities, corporate and municipal debt, money market instruments, American depositary receipts, and exchange-traded funds. In accordance with its rules, DTC accepts deposits of securities from its participants (*i.e.,* broker-dealers and banks), credits those securities to the depositing participants' accounts, and effects book-entry movements of those securities.

[93] *See* letter from Prudential on the 2010 ABS Proposing Release (suggesting that a group of 10% investor interest should be able to initiate communication with others through the trustee).

[94] Most ABS issuers report and distribute payments to investors on a monthly basis. The Form 10–D is required to be filed within fifteen days after a required distribution date, and a distribution date is typically two weeks after the end of a reporting period. For example, for the month of June, under our proposal a request from an investor would have to be received prior to the close of the reporting period on June 30, a distribution would be due to investors by July 15, and the Form 10–D filing due date would be July 30.

contractually obligated to disclose an investor's desire to communicate. We preliminarily believe this is an appropriate requirement for shelf eligibility because facilitating communication among investors enables them to exercise the rights included in the underlying transaction agreements, which we believe would address a specific concern about enforceability of representations and warranties raised in ABS transactions and would help to distinguish higher quality ABS from other ABS.

We are also proposing to revise Regulation AB and Form 10–D to include the disclosure requirements related to the investor communication shelf eligibility condition. The disclosure requirements would only apply if the transaction was a registered shelf offering. We are proposing that the disclosure on Form 10–D be required to include the name of the investor making the request; the date the request was received; and a description of the method by which other investors may contact the requesting investor.[95] Under the proposal, we are including an instruction to Item 1121(g) to define the type of communications that may be facilitated as a result of the required notices on Form 10–D. The Form 10–D would be required to include disclosure of only those notices of an investor's desire to communicate where the communication relates to investors exercising their rights under the terms of the ABS. Thus, an ABS investor would not be permitted to use this mechanism for other purposes, such as identifying potential customers, marketing efforts, or the like.[96]

We understand that transaction parties might want to specify procedures for verifying the identity of a beneficial owner in a particular ABS prior to including the proposed notice in a Form 10–D. While we are not proposing specific procedural requirements, we believe the procedures should be simple for an investor to follow so that the party responsible for making the disclosure could verify the interest of an investor in the ABS. Therefore, we are proposing an instruction to the shelf eligibility requirement to make clear that the verification requirements that could be contained in the transaction documents, may require no more than the following: (1) If the investor is a record holder of the securities at the time of a request to communicate, then the investor would not have to provide verification of ownership because the person obligated to make the disclosure will have access to a list of record holders and (2) if the investor is not the record holder of the securities at the time of the request to communicate, the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, the investor beneficially held the securities.

Requests for Comment

42. Is our proposal to require a provision in the transaction agreements to require an investor's request to communicate with other investors to be included on Form 10–D reports an appropriate condition to shelf eligibility? Would investors find the provision valuable?

43. Is the proposed disclosure requirement on Form 10–D appropriate? Should it require different information? Should we prescribe a pre-set list of objective categories that an investor could choose from for the purpose of indicating why it is requesting communication with other investors? If so, what should be the list of defined categories? Would the following be an appropriate list of present categories: Servicing, trustee, representations and warranties, voting matters, pool assets, and other?

44. Under the proposal, the Form 10–D would be required to include requests received during the reporting period for the form. Are there any timing concerns? Should the request to communicate instead be required to be filed on Form 8–K?

45. Is the proposed instruction clarifying the maximum type of verification procedures that may be included in the underlying transaction documents appropriate? Are they reasonable requirements to demonstrate ownership? Is the limitation on requirements proving ownership, assuming the holder is not the record holder, necessary or appropriate? Are there other procedures that we should require, or limitations we should impose? Would those be in addition to or in lieu of those described in the proposed instruction? Are there procedures that would be easier for investors to meet but would have the same effect?

46. We understand that investors are often able to obtain reports related to an ABS they own by accessing a password protected Web site, usually maintained by the trustee. Should the list of investors that have access to the Web site be enough to verify the interest of an investor?

47. Relatedly, investors have advised us that they sometimes have difficulty receiving notices for investor votes, and, therefore, have not been able to participate in that process. Should we require a Form 8–K be filed to disclose that an investor vote has been noticed? Should the Form 8–K include a copy of the notice? Should the Form 8–K be filed within a specified minimum period of the notice, such as two days? Or would a shorter or longer due date be more appropriate? What other mechanisms would be appropriate to facilitate the ability of an investor to exercise their right to vote and at the same time be appropriate requirements for shelf eligibility?

48. We understand that a number of privately placed CMBS transactions have included more extensive means for investor communication. The following requests for comment are based on our understanding of those transactions. Are these types of arrangements prevalent in CMBS deals? Are they used with other asset classes?

49. Instead of allowing verification of an investor's interest at the time a request to communicate is made, should we instead require as a condition to shelf eligibility that an underlying transaction agreement require the trustee, or some other transaction party, to maintain a list of investors and require the request to be included in the Form 10–D only if the investor is included on the list? If so, how would the person responsible for maintaining the list of investors obtain and maintain the information? Should a form of investor verification be required to be specified in the underlying transaction agreement in connection with this shelf eligibility condition? If so, when should the investor be required to provide the completed form?

50. Should we require, as a condition to shelf eligibility, that the investor communication notice be distributed in any other way, in addition to, or instead of the Form 10–D? For instance, should we require that the notice be posted on a designated Web site? If so, when should it be posted? Alternatively, should the notice be required to be distributed to investors by the trustee or some other transaction party? If so, should the notice be required to be distributed only to those investors that voluntarily provide their contact information to the trustee or a person responsible for maintaining an investor

[95] *See* proposed Item 1121(f) and Item 1.B. of Form 10–D.

[96] To the extent an investor wishes to communicate with other investors about other matters, the investor must consider the potential applicability of other regulatory provisions under the federal securities laws. For example, an investor proposing to commence a tender offer for securities in the ABS class must evaluate whether such a communication is subject to Exchange Act Sections 14(d) and 14(e) and Regulations 14D and 14E thereunder.

list? Would there be any reason that an investor would not provide their contact information? If all investors did not provide their contact information, we expect there would be a possibility that the list of investors would not be complete. Would that frustrate the purposes of this approach?

2. Revised and Re-Proposed Registrant Requirements

In the 2010 ABS Proposals, we proposed to add new registrant requirements related to compliance with the four proposed transaction requirements (*i.e.,* risk retention, third party opinion provision in transaction agreements, officer certification, and an undertaking to file ongoing Exchange Act reports).[97] We also proposed to retain the existing registrant requirement in Form S–3 relating to delinquent filings of the depositor or an affiliate of the depositor for purposes of proposed Form SF–3. Similar to existing requirements, we proposed that prior to filing a registration statement on proposed Form SF–3, to the extent the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor are or were at any time during the twelve month look-back period required to file Exchange Act reports with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed during the twelve months (or shorter period that the entity was required to have filed such materials).[98] Also, such material, other than certain specified reports on Form 8–K, must have been filed in a timely manner.[99] This proposal remains unchanged and outstanding. In the 2010 ABS Proposal, we also proposed to repeal the existing exception from the filing timeliness requirement for Item 6.05 Form 8–K reports. Item 6.05 Form 8–K reports are required to be filed if there is a change in the asset pool characteristics from the description of the asset pool provided in the final prospectus and, thereby, provide important information regarding the composition of the assets.[100] The proposal to require the timely filings of Item 6.05 Form 8–K reports remains unchanged and outstanding. The revised and re-proposed registrant requirements for shelf eligibility are described below.

In light of the changes to the proposed amendments to the transaction requirements described in Section II.B.1. above, we are revising and re-proposing the other registrant requirements to make conforming changes. Specifically, we are proposing to require that to the extent the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor is or was at any time during the twelve month look-back period required to comply with the proposed transaction requirements of Form SF–3, with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements would apply:

- Such depositor and each such issuing entity must have timely filed all the required certifications of the depositor's chief executive officer or the depositor's executive officer in charge of securitization;
- Such depositor and each such issuing entity must have timely filed all the transaction agreements that contain the required provisions relating to the credit risk manager and repurchase request disputes; and
- Such depositor and each such issuing entity must have timely filed all the transaction agreements that contain the required provision relating to investor communication.

In addition, in the 2010 ABS Proposing Release, we proposed to include as a separate registrant requirement that there be disclosure in the registration statement stating that the proposed registrant requirements have been complied with. We continue to believe disclosure of compliance with the registrant requirements would provide a means for market participants (as well as the Commission and its staff) to better oversee compliance with the proposed shelf eligibility conditions of Form SF–3. We believe that the requirement is more appropriately located in the instructions to the requirements rather than as a registrant requirement and, therefore, are proposing to include this requirement as an instruction.

Request for Comment

51. Are our re-proposed registrant requirements appropriate?

52. Is the twelve-month look-back period appropriate for compliance with the certification, credit risk manager and repurchase dispute resolution transaction requirements, and the investor communication provision? Should it be longer or shorter?

53. Is our proposed instruction to require disclosure in a registration statement of compliance with the registrant requirements appropriate? Should we specify a location in the registration statement for such disclosure?

54. Should we require that registrants provide a ''yes'' or ''no'' answer to whether it has complied with all the registrant requirements? If so, should the data be tagged in XML so that it could be an electronically searchable piece of data?[101]

3. Annual Evaluation of Form SF–3 Eligibility in Lieu of Section 10(a)(3) Update

*(a) Annual Compliance Check Related to Timely Exchange Act Reporting*

In the 2010 ABS Proposing Release, we proposed to require annual and quarterly evaluations of compliance with the registrant requirements for ABS shelf eligibility. For the evaluation of compliance with the Exchange Act reporting registrant requirement, we proposed to require an annual evaluation of whether the Exchange Act reporting registrant requirement has been satisfied in lieu of a Securities Act Section 10(a)(3) update.[102] Under the 2010 ABS Proposal, an ABS issuer wishing to conduct a takedown off an effective shelf registration statement would be required to evaluate whether the depositor and any affiliated issuing entity of the depositor that were required to report under Sections 13(a) or 15(d) of the Exchange Act during the previous twelve months, have filed such reports on a timely basis, as of ninety days after the end of the depositor's

[97] *See* proposed General Instructions I.A.1. to I.A.4. of proposed Form SF–3 in the 2010 ABS Proposing Release.

[98] For Form S–3, an issuer is not eligible for registration on the form if the depositor or an affiliate of the depositor, with respect to a class of asset-backed securities involving the same asset class, has not filed the Exchange Act reports required to be filed or has not filed such reports in a timely manner for a period of twelve months prior to the filing of the registration statement. *See* General Instruction I.A.4 of Form S–3.

[99] *See* proposed General Instruction I.A.3 to Form SF–3.

[100] In the 2010 ABS Proposing Release, we also proposed to lower the threshold amount of change that would trigger a filing requirement for Item 6.05 Form 8–K reports from five percent of any material pool characteristic to one percent. That proposal remains outstanding. *See* the 2010 ABS Proposing Release at 23392.

[101] We briefly discuss XML tagging below in Section III.B.

[102] As noted in the 2010 ABS Proposing Release, Form S–3 eligibility under the current rules is determined at the time of filing the registration statement and at the time of updating that registration statement under Securities Act Section 10(a)(3) [15 U.S.C. 77j(a)(3)] by filing audited financial statements. Because ABS registration statements do not contain financial statements of the issuer, a periodic determination of whether the issuer can continue to use the shelf would need to be specified by rule. *See* Securities Act Rule 401(b) [17 CFR 230.401(b)].

fiscal year end.[103] This proposal remains unchanged and outstanding.

*(b) Annual Compliance Check Related to the Fulfillment of the Transaction Requirements in Previous ABS Offerings*

In the 2010 ABS Proposing Release, we also proposed to require that in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to conduct an evaluation at the end of the fiscal quarter prior to the takedown of whether the ABS issuer was in compliance with the previously proposed registrant requirements relating to risk retention, third party opinions, the depositor's chief executive officer certification, and the undertaking to file ongoing reports.[104] In response to our proposal, we received four comment letters that did not support the quarterly requirement.[105] One commentator urged us to consider whether penalty options less severe than the loss of shelf eligibility for a year would be appropriate for a single violation but did not suggest specific alternatives.[106] Another commentator suggested that shelf eligibility should be suspended only if the staff determines it is appropriate, and only a full year in egregious cases.[107]

In light of the changes we are proposing to the transaction requirements to shelf eligibility described above, and taking into consideration the comments we received, we are revising and re-proposing the registrant requirement to require an annual evaluation of compliance with the transaction requirements of shelf registration. Under the re-proposal, notwithstanding that the registration statement may have been previously declared effective, in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to evaluate, as of ninety days after the end of the depositor's fiscal year end, whether it continues to meet the registrant requirements, which would be the same as our 2010 ABS Proposal for Exchange Act reporting described above. In order to make the provision more workable and to simplify the evaluation for shelf compliance we are revising our proposal from a quarterly evaluation to an annual evaluation.[108] Under the re-proposal, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor, is or was at any time during the previous twelve months, required to comply with the proposed new transaction requirements related to the certification, credit risk manager and repurchase dispute resolution provisions, and investor communication provision, with respect to a previous offering of ABS involving the same asset class, such depositor and each issuing entity must have filed on a timely basis, at the required time for each takedown, all transaction agreements containing the provisions that are required by the proposed transaction requirements as well as all certifications.

In response to commentators' concerns that the one-year penalty for missed transaction requirements was too extreme, we are revising and re-proposing to allow depositors and issuing entities to cure any failure to meet the transaction requirements, or failure to file the required certification or transaction agreements at the required time for purposes of ABS shelf eligibility. Under the re-proposal, a depositor and issuing entity could cure the deficiency if it subsequently files the information that was required and after a waiting period, it would be permitted to continue to use its shelf registration statement.[109] Under the proposed cure mechanism, the depositor and issuing entity would be deemed to have met the registrant requirements, for purposes of this Form, 90 days after the date all required filings are filed.

For example, a depositor with a December 31 fiscal year end has an effective shelf registration statement. On March 30, it evaluates compliance with all registrant requirements under proposed Rule 401 (90 days after the last fiscal year end) and determines that it is in compliance. The depositor then offers ABS and does not timely file the required transaction agreements required to be filed on June 20. The depositor would be able to continue to use its existing shelf until it is required to perform the annual evaluation required by proposed Rule 401(g), on March 30 of the following year. After March 30 of Year 2 and until June 20 of Year 2, the depositor would not be able to offer ABS off of the shelf registration statement. Further, the depositor or its affiliates would not be permitted to file a new shelf registration statement after the missed filing on June 20, Year 1 because they could not meet the registrant requirement of timely filing of the transaction agreements containing the provisions required for any shelf offering for the prior twelve months. But, if the depositor had cured the defect, for example, on July 1 of Year 1, under the proposal, a new registration statement could be filed 90 days after July 1 of Year 1 (or September 29 of Year 1), instead of waiting until June 20 of Year 2 (when it otherwise would meet the twelve month timely filing requirement). Further, at the time of the next annual evaluation for the old shelf (noted above as March 30 of Year 2), the depositor would be deemed to have met the registrant requirements after 90 days after it had cured the defect on July 1 of Year 1, and the depositor could continue to use its old shelf registration statement (instead of waiting until June 20 of Year 2, as noted above).

Our approach is an attempt to strike a balance between encouraging issuers' compliance with the proposed shelf transaction requirements and commentator's concerns that the one-year penalty period was too long.

Requests for Comment

55. Should we add, as proposed, registrant requirements that would require, as a condition to form eligibility, affiliated issuers of the depositor that had offered securities of the same asset class that were registered on Form SF–3 to have complied with the certification, credit risk manager review and repurchase dispute resolution eligibility and investor communication conditions that replace the investment grade ratings

[103] As noted in the 2010 ABS Proposing Release, under this proposal the related registration statement could not be utilized for subsequent offerings for at least one year from the date the depositor or the affiliated issuing entity that had failed to file Exchange Act reports then became current in its Exchange Act reports (and the other requirements had been met).

[104] In the 2010 ABS Proposing Release, we had proposed that in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to evaluate at the end of the fiscal quarter prior to the takedown whether, during the previous twelve months, the depositor and its affiliates had filed on a timely basis all of the certifications and transaction agreements required by the shelf eligibility transaction requirements of a previous offering. If they had not, then the depositor could not utilize the registration statement or file a new registration statement on Form SF–3 until one year after the required filings were filed. *See* 2010 ABS Proposing Release at 23348.

[105] *See* letters from ASF, BOA, MBA and SIFMA on the 2010 ABS Proposing Release.

[106] *See* letter from MBA on the 2010 ABS Proposing Release.

[107] *See* letter from SIFMA on the 2010 ABS Proposing Release.

[108] Although we are revising our proposal, we emphasize that failure to file the information required by the registrant requirements would be a violation of our rules, and subject to liability accordingly. Furthermore, failing to provide disclosure at the required time periods may raise serious questions about whether all required disclosure was provided to investors prior to investing in the securities.

[109] Curing the deficiency would also allow the depositor, or its affiliates to file a new registration statement, if it also meets the other registrant requirements. *See* proposed General Instruction I.A.1. to proposed Form SF–3.

requirement? Will these requirements lead to better compliance by ABS issuers with the new shelf eligibility conditions that we are proposing? If not, what other mechanisms can we use to ensure compliance?

56. Is it appropriate to require, as proposed, that the certifications and the transaction agreement(s) containing the credit risk manager and repurchase dispute provisions and investor communication provision be required to be filed pursuant to our proposed shelf eligibility conditions and also filed on a timely basis?

57. Should we revise Rule 401, as proposed, to require that as a condition to continued use of an existing shelf registration statement for takedowns, an issuer conduct a periodic evaluation of form eligibility? If not, how should we approach the updating issue since ABS issuers are not required to file amendments for purposes of Section 10(a)(3)?

58. Should we require that the annual evaluation of all the registrant requirements of affiliated issuers have been filed on a timely basis be made as of the 90 days after the depositor's fiscal year, as proposed? Should the evaluation be made on a different timeframe, such as the last day of the most recent fiscal quarter, consistent with our previous proposals?

59. Should we include, as proposed, an ability to cure an issuer's non-timely filing of the certification and agreements containing the credit risk manager review and repurchase dispute resolution and investor communication provisions? Should we require issuers to wait 90 days after curing the defect, as proposed, to be deemed to meet the registrant requirements? Should the period be shorter (*e.g.,* 30 or 45 days) or longer (*e.g.,* 180 or 270 days)?

60. Should we require additional requirements for evaluating compliance with registrant requirements, or an additional penalty for non-compliance with the registrant requirements?

4. General Requests for Comment on Shelf Eligibility

We request comment on our proposals for shelf-eligibility for asset-backed securities.

61. Are all of the proposed shelf eligibility conditions necessary? Would one condition or a combination of fewer conditions be sufficient? As noted above, the 2010 ABS Proposals included risk retention and continued Exchange Act reporting as two of the four proposed requirements for shelf eligibility. In light of the fact that the Risk Retention proposals will apply to both registered and unregistered transactions, and ABS issuers with Exchange Act reporting obligations will continue to report without regard to shelf eligibility requirements, should we require the proposed requirements for shelf eligibility discussed above? Put another way, are risk retention and continued Exchange Act reporting together, sufficient replacements for the investment grade rating condition to eligibility for shelf offerings, so that no other conditions are necessary or appropriate?

62. We are also considering whether an additional or alternative shelf eligibility condition based on previous offerings should be included in our final rules. In this regard, would an ABS issuer having sufficient experience in the ABS market be an appropriate criterion for shelf registration? For example, would an additional or alternative shelf eligibility condition that would restrict shelf eligibility to depositors with a history of similar prior ABS issuances (*e.g.,* a requirement based on the number of past ABS transactions within the same asset class and similar structure within a specified period of time) be appropriate? What would be the economic impact of such a shelf eligibility condition? Should such a shelf eligibility condition require the registrant and its affiliates, as of a date within 60 days prior to the filing of the registration statement, to have engaged in at least three primary offerings of asset-backed securities in the last three years, provided the following criteria are met: (i) At least one of the previous offerings was registered under the Securities Act of 1933; (ii) the asset-backed securities issued in the previous offerings are of the same asset class as the asset-backed securities registered on the registration statement; and (iii) the structures of the transactions of the previous offerings are similar to the structure of each transaction registered on the registration statement. If so, should the requirement be an additional shelf eligibility condition, or should it replace one or more of the proposed conditions? Are the criteria described above appropriate? In particular, should we use a different measurement period than the 60 days prior to filing? Would a three year look-back time period be appropriate, or should it be less time (such as 2 years) or more time (such as 4 years)? What should be the required minimum number of transactions? Should all the transactions used for measuring be required to have been registered under the Securities Act? Are the requirements related to the same asset class and similar structure appropriate? Do we need to provide guidance on what is a similar structure, and if so, what kind of guidance? If private or offshore offerings are permitted to count for purposes of this possible shelf eligibility condition, should we require disclosure in the registration statement of these transactions for the purpose of monitoring compliance with the shelf eligibility condition? If so, what disclosure should be required? In order to prevent parties that may otherwise fail this shelf eligibility condition from simply using the registration statement of an unaffiliated eligible depositor (*e.g.,* rent-a-shelf transactions), should the condition also require the registrant to be affiliated with a sponsor and depositor in each of the previous transactions as well as affiliated with a sponsor and depositor in the offerings conducted off the shelf registration statement? Commentators are requested to provide empirical data and other factual support for their views, if possible.

63. Asset-backed issuers may rely on the exclusion from the definition of investment company in Section 3(c)(5) of the Investment Company Act rather than on Rule 3a–7 under the Investment Company Act.[110] Section 3(c)(5) was intended to exclude from the definition of investment company certain factoring, discounting and mortgage companies. However, Rule 3a–7 contains substantive conditions designed to address, among other things, conflicts of interest concerning ABS and Section 3(c)(5) does not contain the same substantive conditions. Would it be appropriate to require, as an additional transaction requirement for ABS shelf eligibility, that the ABS issuer of the transaction meet the requirements of Rule 3a–7? We note that the practical effect of such a requirement would be that transactions excluded from the definition of

[110] Section 3(c)(5) of the Investment Company Act excludes from the definition of investment company any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance and services; (B) making loans to manufacturers, wholesalers and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. Certain asset-backed issuers, including those that securitize retail automobile installment contracts, credit card receivables, trade receivables, boat loans or equipment leases, have sought to rely on the provisions of Section 3(c)(5)(A) or (B).

investment company under Section 3(c)(5) of the Investment Company Act would not be eligible for shelf registration unless they satisfy Rule 3a–7. Would restricting shelf eligibility to those issuers that meet the requirements of Rule 3a–7 give equal access to shelf for all issuers of ABS across asset classes? Should we require disclosure of the basis for the exclusion from the definition of investment company in the prospectus?

## III. Disclosure Requirements

### *A. Exhibits To Be Filed With Rule 424(h) Filing*

We are proposing to require ABS issuers to file copies of the underlying transaction agreements, including all attached schedules, and other agreements that are referenced (such as those containing representations and warranties regarding the underlying assets), at the same time as a preliminary prospectus that would be required under proposed Rule 424(h).[111]

In the 2010 ABS Proposing Release, we proposed to revise the filing deadlines in shelf offerings to provide investors with additional time to analyze transaction-specific information prior to making an investment decision. Under the proposed ABS shelf procedures, an ABS issuer would be required to file a preliminary prospectus with the Commission for each takedown off of the proposed new shelf registration form for ABS (Form SF–3) at least five business days prior to the first sale in the offering.[112] We proposed to require that such information be filed at least five business days before the first sale of securities in the offering in an effort to balance the interest of ABS issuers in quick access to the capital markets and the need of investors to have more time to consider transaction-specific information. Given many ABS investors' stated desire for more time to consider the transaction and for more detailed information regarding the pool assets, the proposed new filing deadlines were designed to promote independent analysis of ABS by investors rather than reliance on credit ratings. While commentators generally either supported[113] or did not object to this proposed approach, some commentators asked that we shorten the five-day period. For example, several commentators generally suggested the period be reduced to two days.[114] We have not reached a conclusion on that aspect of the proposal and it remains outstanding.

Related to the proposal to require the preliminary prospectus be made available in time to facilitate independent analysis by investors, commentators on the 2010 ABS Proposal requested that investors also have access to copies of the underlying agreements on a more timely basis given the importance of the final documents to an investor's understanding of the actual contractual provisions.[115] In the staff's experience with the filing of these documents, ABS issuers have delayed filing such material agreements with the Commission until several days or even weeks after the offering of securities off of a shelf registration statement, even though these transaction agreements and other documents provide important information regarding the terms of the transactions, representations and warranties about the assets, servicing terms, and many other rights that would be material to an investor.[116] In light of these concerns, we had proposed to amend Item 1100(f) of Regulation AB[117] to clarify the existing exhibit filing requirements by making explicit that the exhibits filed with respect to an ABS offering, registered on proposed Form SF–3, must be on file and made part of the registration statement at the latest by the date the final prospectus is required to be filed pursuant to Rule 424.[118]

As noted above, commentators urged that we should ensure that the exhibits be available for investor review prior to making an investment decision.[119] In light of these concerns, we are re-proposing Item 1100(f) of Regulation AB to also require that the underlying transaction documents, in substantially final form, be filed and made part of the registration statement by the date the Rule 424(h) prospectus is required to be filed. This requirement, if adopted, would allow investors additional time to analyze the actual underlying agreements containing the specific structure, assets, and contractual rights regarding each transaction. If the exhibits filed with the Rule 424(h) prospectus remain unchanged at the time final prospectus under Rule 424(b) is required to be filed, then an issuer would not be required to re-file the same exhibits.[120]

Request for Comment

64. Is our proposed amendment to Item 1100(f) appropriate? Is there any reason that exhibits, in substantially final form, could not be filed by the time the preliminary prospectus is required to be filed under proposed Rule 424(h)?

65. Is it appropriate to require that exhibits be filed in ''substantially final form'' at the time of filing the Rule 424(h) prospectus, as proposed? If we require something other than ''substantially final form'' what information should we require, and what information may be omitted?

[111] *See* Section II. above and fn. 19. *See* also the 2010 ABS Proposing Release at 23335.

[112] We proposed new Rule 430D to provide the framework for shelf registration of ABS offerings and related Rule 424(h) filing requirements for a preliminary prospectus. Under proposed Rule 430D, the Rule 424(h) preliminary prospectus must contain substantially all the information for the specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement, except for pricing information. *See* the 2010 ABS Proposing Release at 23335.

[113] *See* letters from AMI; California Public Employees' Retirement System (CalPERS); CREFC; Rylee Houseknecht; Jamie L. Larson; Investment Company Institute (ICI); AFL–CIO; CFA Institute; Metlife; Prudential and Realpoint on the 2010 ABS Proposing Release.

[114] *See* letters from ABA; AmeriCredit; ASF; BOA; CNH; Vanguard; Vehicle ABS Group; and Wells Fargo on the 2010 ABS Proposing Release.

[115] *See* letter from CMBS investors on the 2010 ABS Proposing Release (suggesting that the rules require that key disclosures, including the pooling and servicing agreement, be made available to investors during the marketing period so that investors have adequate time to review prior to making an investment decision). *See also* letter from Prudential on the 2010 ABS Proposing Release (stating that last minute financial engineering may occur, thereby contributing to poor understanding, and in some instances, misunderstanding of the transaction).

[116] In the 2004 ABS Adopting Release we stated that consistent with Item 601 of Regulation S–K, governing documents and material agreements for an ABS offering such as the pooling and servicing agreement, the indenture and related documents must be filed as an exhibit.

[117] Item 1100(f) of Regulation AB allows ABS issuers to file agreements or other documents as exhibits on Form 8–K and, in the case of offerings on Form S–3, incorporate the exhibits by reference instead of filing a post-effective amendment.

[118] We stated in the 2010 ABS Proposing Release that ABS shelf offerings were designed to mirror non-shelf offerings in terms of filing exhibits and final prospectuses. We also noted that the filing requirements for Form S–3 are consistent with Form S–1 because all exhibits to Form S–1 must be filed by the time of effectiveness. *See* 2010 ABS Proposing Release at 23388.

[119] *See* fn. 116.

[120] Under this proposal, any change to the agreement could only be minor. As we explained in the 2010 ABS Proposing Release, a material change in the information provided in the Rule 424(h) filing, other than offering price, would require a new Rule 424(h) filing. *See* the 2010 ABS Proposing Release at 23335. Finalized agreements at the time of the offering may be filed as provided by Instruction 1 to Item 601 of Regulation S–K. The filing requirement for an exhibit (other than opinions and consents) may be satisfied by filing the final form of the document to be used; the final form must be complete, except that prices, signatures and similar matters may be omitted. *See Elimination of Certain Pricing Amendments and Revision of Prospectus Filing Procedures,* Release No. 33–6714 (June 5, 1987) [52 FR 21252]. We also note that filing of final agreements at the time the final prospectus is due will be after the time of sale of the security for purposes of Rule 159 and Securities Act Section 12(a)(2), and that information conveyed to the investor after the time of sale will not be taken into account for purposes of Section 12(a)(2) of the Securities Act. *See* Rule 159.

66. Should we require the final form of the exhibits to be filed at the same time as the Rule 424(b) prospectus, if the exhibits have not changed since the 424(h) filing?

67. One commentator also suggested that we require issuers provide investors with a copy of the representations, warranties, remedies and exceptions marked to show how it compares with model provisions developed by the Commercial Real Estate Finance Council (CREFC).[121] Should we require that issuers file as an exhibit a copy of the representations, warranties, remedies and exceptions marked to show how it compares to an industry developed model provisions? If so, should we require that the industry developed model provisions be developed by an industry group whose membership includes issuers, investors, and other market participants? Do such model provisions exist for other asset classes? Should we require that the marked copy be filed at the same time as the Rule 424(h) prospectus? Should we require an updated marked copy be filed at the same time as the Rule 424(b) prospectus if they have not changed since the 424(h) filing?

*B. Requests for Comment on Asset-Level Information*

1. Section 7(c) of the Securities Act

Section 942(b) of the Act added Section 7(c) to the Securities Act requiring the Commission to adopt regulations requiring an issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.[122] It specifies that in adopting regulations, the Commission shall:

(A) Set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate the comparison of such data across securities in similar types of asset classes; and

(B) Require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence including—

(i) Data having unique identifiers relating to loan brokers and originators;

(ii) The nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) The amount of risk retention by the originator and the securitizer of such assets.[123]

In the 2010 ABS Proposing Release, to augment our current principles-based pool-level disclosure requirements, we had proposed new requirements to disclose asset-level information in prospectuses and in periodic reports. We believe that our proposal for asset-level data for registered offerings, which remains outstanding, would implement the requirements of Section 7(c) because our proposal would set standards that would facilitate the comparison of data across asset classes, and within the same asset class. Further, our proposals require issuers to disclose asset-level data, which we believe are necessary for investors to independently perform due diligence.

In the 2010 ABS Proposing Release, we explained that investors, market participants, policy makers and others have increasingly noted that asset-level information is essential to evaluating an asset-backed security.[124] We proposed to require, with some exceptions, that prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool.[125] Because we believe that issuers should provide transparent and comparable data, we proposed to require asset-level information in a standardized format to be included in the prospectus and periodic reports and filed on EDGAR. Our proposal specifies and defines each item that must be disclosed for each asset in the pool and requires that the asset-level information be provided in a tagged data format using Extensible Markup Language (XML) in order to facilitate data analysis, consistent with the requirements of Section 7(c).[126]

Section 7(c) also requires that we require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including data having unique identifiers relating to loan brokers and originators. The 2010 ABS Proposal would require disclosure of the name of the originator of an asset for all asset classes.[127] If the asset is a residential mortgage, and a MERS number for the originator is available, we proposed to require that the MERS number for the originator be provided.[128]

In addition, for residential mortgages only, we proposed that issuers be required to disclose unique identifiers related to loan originators and company, as required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, otherwise known as the NMLS numbers.[129] We note that the NMLS numbers for ''originator'' and company refer to the individual and company taking the loan application, which would include loan brokers and the company that the broker works for.[130]

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[121] *See* letter from CMBS investors on the 2010 ABS Proposing Release. CREFC is a trade organization for the commercial real estate finance industry.

[122] *See* Section 7(c) of the Securities Act, as added by Section 942(b) of the Act.

[123] *See* Section 7(c)(2) of the Securities Act, as added by Section 942(b) of the Act.

[124] *See* the 2010 ABS Proposing Release at 23355.

[125] We proposed that all asset classes, except for stranded cost and credit cards issuers, provide asset-level data. For credit card and charge card ABS, we proposed that issuers be required to provide grouped account data. *See* 2010 ABS Proposing Release at 23355.

[126] By proposing to require the asset-level data file in XML, a machine-readable language, we anticipate that users of the data will be able to download the disclosure directly into spreadsheets and databases, analyze it using commercial off-the-shelf software, or use it within their own models in other software formats. As we explained in the 2010 ABS Proposing Release, XML is an open standard that defines or ''tags'' data using standard definitions. The term ''open standard'' is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of XML, software applications, such as databases, financial reporting systems, and spreadsheets recognize and process tagged information. Some issuers already file loan schedules on EDGAR as part of the pooling and servicing exhibit or a free writing prospectus. However, the data is currently filed on EDGAR in ASCII or HTML, both of which do not facilitate data analysis. *See* the 2010 ABS Proposing Release at 23374.

[127] *See* proposed Item 1(a)(4) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

[128] Mortgage Electronic Registration Systems, Inc. (MERS) is affiliated with the Mortgage Industry Standards Maintenance Organization (MISMO), a not-for profit subsidiary of the Mortgage Bankers Association. MERS has developed a unique numbering system and reporting packages to capture and report data at different times during the life of the underlying residential or commercial loan.

[129] *See* proposed Items 2(a)(11) and (12) of Schedule L of Regulation AB in the 2010 ABS Proposing Release. In 2008, Congress passed The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the ''SAFE Act'') which required the creation of a Nationwide Mortgage Licensing System and Registry and unique identifiers for loan originators and company (NMLS numbers). The SAFE Act is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage industry. The SAFE Act was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110–289, Division A, Title V, sections 1501–1517, 122 Stat. 2654, 2810–2824 (July 30, 2008), codified at 12 U.S.C. 5101–5116.

[130] In contrast, note that for purposes of Regulation AB, we have generally interpreted an originator to be the person or entity that extends the

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Therefore, we believe that our proposal to require NMLS numbers would implement the requirements of Section 7(c) with respect to mortgages by requiring a unique numerical identifier for a loan broker.

We are unaware of any standardized unique identifying system used for the purpose of identifying brokers or originators of other asset classes, across all asset classes or within an asset class.[131] Further, we believe that asset classes, other than RMBS and CMBS, do not typically use brokers to originate loans; however we request comment on whether brokers are used in other asset classes. We are also requesting comment on whether unique identifiers for loan brokers and originators exist for other asset classes (or a system of unique identifiers could reasonably be established), and if so, whether the data is necessary to independently perform due diligence for other asset classes.

Section 7(c) also requires that we require issuers to disclose asset-level data on the nature and extent of the compensation of the broker or originator of the assets backing the security, if such data are necessary for investors to independently perform due diligence. The 2010 ABS Proposals did not include requirements to provide asset-level data regarding fees to brokers or originators. However, with respect to RMBS, our proposal did include an asset-level disclosure requirement to indicate whether a broker originated a loan.[132] In addition, disclosure of the origination channel for each loan is also required under the 2010 ABS Proposals (*i.e.,* was the loan originated through a bank's own retail operation, a broker, a correspondent lender, *etc.*).[133] We are not proposing asset-level disclosure requirements for broker's compensation at this time because we believe that the proposed data points may provide the information necessary to perform due diligence on an RMBS pool with respect to broker involvement because investors can analyze the method in which a loan was underwritten based on these data points. We request comment on whether the specific compensation paid to brokers or originators would be useful in performing due diligence for RMBS and for other asset classes and should be required under our final rules. In light of the fact that compensation may be paid in many different forms and calculated in different ways we are requesting comment about the forms of compensation. We also request comment on how to define these data points so that the information provided is standardized and comparable across asset classes or within an asset class.

In addition, Section 7(c) requires that we require issuers to disclose asset-level data related to the amount of risk retention by the originator and securitizer of such assets, if such data are necessary for investors to independently perform due diligence. The 2010 ABS Proposals include a requirement to disclose any interest the sponsor has retained in the transaction, including the amount and nature of that interest.[134] Also, as discussed above, the joint regulators proposed risk retention requirements as required by Section 15G of the Exchange Act and that proposal also includes disclosure requirements concerning the risk retention option selected.[135] The outstanding Risk Retention Proposals do not require originators to retain risk in individual assets of the pool.[136] In light of the outstanding Risk Retention Proposals and 2010 ABS Proposal for sponsor risk retention disclosure, at this time we are not proposing additional disclosure requirements but we are requesting comment on whether risk retention disclosure on an asset-level basis is necessary for investors to independently perform due diligence.

Requests for Comment

68. Do the 2010 ABS Proposals implement Section 7(c) effectively? Are there any changes or additions that would better implement Section 7(c)?

69. Is the proposed XML format an adequate standard for the format of data that, to the extent feasible, facilitates the comparison of data across securities in similar types of asset classes? If not, how could it be improved?

70. Are unique identifiers for loan brokers and/or originators necessary to permit investors to independently perform due diligence for asset classes other than RMBS or CMBS? If so, is there a unique system of identifiers for brokers and originators for other asset classes?

71. Do asset classes other than RMBS or CMBS use brokers?

72. Would it be appropriate to require an originator's tax ID number, RSSD ID number, FDIC Certificate Number or Routing Transit Number (RTN) as a unique identifier?[137] Would any of these identifiers be an appropriate unique identifier across asset classes? Do originators have multiple tax ID numbers, RSSD IDs, FDIC Certificate Numbers, or RTNs? If so, how should we specify which one to use? With respect to tax ID numbers, should we specify that social security numbers should not be provided? Are there any other existing unique identifiers that would be appropriate for these purposes? Should new identification systems be developed? If so, by whom?

73. Is asset-level disclosure related to the nature and extent of the compensation of the broker or originator necessary to independently perform due diligence across all asset classes?

74. How are the brokers and originators compensated? Should we require the fee to be expressed as a dollar amount, a percentage or both? If percentage, what should be the basis for calculating the percentage? Is it appropriate for RMBS or CMBS only? Any other asset classes?

75. How should the asset-level data points for broker or originator compensation be defined so that the information provided will be standardized and comparable across asset classes or within an asset class?

76. Is it more useful if the broker or originator compensation disclosure is provided in a format other than at the asset-level?[138] Could it be provided in

credit to the borrower. *See* the 2004 Adopting Release at 1538.

[131] *See also* Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives (April 7, 2011), available at *http://www.sec.gov/news/studies/2011/719b-study.pdf* (also concluding that before mandating the use of standardized descriptions for all derivatives a universal entity identifier and product or instrument identifiers, among other things, are needed).

[132] *See* proposed Item 2(a)(9) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

[133] *See* proposed Item 2(a)(10) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

[134] *See* proposed Item 1104(e) of Regulation AB in the 2010 ABS Proposing Release.

[135] *See* fn. 12.

[136] *See* the Risk Retention Proposing Release at 24114.

[137] A tax ID number is a unique number assigned by the Internal Revenue Service. An RSSD ID is a unique identifying number assigned by the Federal Reserve for all financial institutions, main offices, as well as branches. An FDIC Certification Number is a unique number assigned by the FDIC used to identify institutions and to issue insurance certificates. An RTN, or a routing transit number, is a nine-digit unique bank identifier originally designed by the American Bankers Association.

[138] The Federal Deposit Insurance Corporation (''FDIC'') recently amended its ''safe harbor'' rule from the FDIC's statutory authority to disaffirm or repudiate contracts of an insured depository institution (''IDI'') with respect to transfers of financial assets by an IDI in connection with a securitization or a participation (the ''FDIC Safe Harbor Rule''). Under the FDIC Safe Harbor Rule the securitization documents must require disclosure to investors of the nature and amount of compensation paid to any mortgage or other broker, noting that this disclosure should enable investors to assess potential conflicts of interests and how the compensation structure affects the quality of the assets securitized or the securitization as a whole. We note, however, that the FDIC Safe Harbor Rule requires disclosure of compensation for RMBS only. *See* Federal Deposit Insurance Corporation, Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010 (Sep. 27, 2010) [70 FR 60287].

the prospectus in narrative form or some other tabular format?

77. Is the amount of risk retention, on an asset-level basis, necessary to independently perform due diligence? If so, how should we require it be calculated in light of the outstanding Risk Retention Proposal requiring risk retention in the securities and not the asset? Should we require the amount of risk retention be expressed as a dollar amount, a percentage or both? If percentage, what should be the basis for calculating the percentage?

78. Is it more useful to provide disclosure regarding risk retention in a format other than asset-level? Could it be provided in the prospectus in a narrative form or some other tabular format? Is the 2010 ABS Proposal to require disclosure of any interest the sponsor has retained in the transaction, sufficient to address the purpose of the asset-level risk retention disclosure requirements in Section 7(c)?

79. In light of the joint Risk Retention Proposals, and the servicing standards included in the proposal, we are requesting comment on whether additional data points related to loss mitigation and RMBS should be required.[139] In the case of borrower default, most pooling and servicing agreements require a servicer, among other things, to take loss mitigation actions in the event the net present value (NPV) of loss mitigation exceeds the estimated NPV of recovery through foreclosure. Should the estimated NPV in both cases be required to be disclosed as an asset-level data point? Should the method of calculation be required to be disclosed as an asset-level data point? Are there standard methods of calculating NPV? Are the formulas for calculating NPV included in the underlying transaction agreements? If not, who determines the method used and should that method be required to be disclosed? Should the assumptions used be required to be disclosed? If not, how can an investor evaluate the NPV? Is it appropriate to require disclosure of the method of calculation and assumptions on an asset-level with Schedule L? Or is it more appropriate to require the disclosure in some other form, such as in narrative form within a periodic report on Form 10–D or Form 8–K?

80. Also related to loss mitigation, should we require additional data points related to compensation paid to servicers related to an individual loan? The 2010 ABS Proposals included certain asset-level data point requirements related to fees earned by the servicer (*e.g.,* servicing fees claimed and performance incentive fees).[140] Are there other ways that servicers are compensated with respect to loss mitigation? Are there any fees that servicers or their affiliates may earn related to loss mitigation of a particular asset? Are there any fees paid to any other parties related to loss mitigation of a particular asset? If so, should we require disclosure of those fees, even if the fees are not paid directly through the issuing entity? Should that disclosure be provided on Schedule L–D, or within the Form 10–D in a narrative form, or both? Would it be appropriate to require this type of disclosure across asset classes? Or should it only be required for certain asset classes, such as RMBS and CMBS?

As we noted in the 2010 ABS Proposing Release, we are sensitive to the possibility that certain asset-level disclosure may raise concerns about the personal privacy of the underlying obligors. In particular, we noted that data points requiring disclosure about the geographic location of the obligor or the collateralized property, credit scores, income and debt may raise privacy concerns. However, information about credit scores, employment status and income would permit investors to perform better credit analysis of the underlying assets. In light of privacy concerns, instead of requiring issuers to disclose a specific location, credit score, or exact income and debt amounts, we proposed ranges, or categories of coded responses.[141] Several commentators noted that our asset-level requirements, as proposed, would still raise privacy concerns.[142] Those commentators were generally concerned that asset-level disclosures, despite our attempts to require that certain information be provided in ranges (instead of exact amounts), would not mitigate the possibility that information, including ''personally identifiable financial information'' or information that would constitute a ''consumer report''[143] could be linked to an obligor on an underlying asset.[144] On the other hand, several commentators suggested that asset-level data should be required, and some commentators specifically noted that exact data points, instead of ranges, are needed to evaluate risk and appropriately price the securities.[145] In light of comment letters received and the requirements of new Section 7(c) of the Securities Act, we are soliciting additional comment on privacy concerns raised by the proposed asset-level disclosure requirements.

Request for Comment

81. How should we require asset-level data, both initially and on an ongoing basis, to implement Section 7(c) effectively, yet also address commentators' privacy concerns?

82. What particular data elements could be revised or eliminated for each particular asset class in order to address commentator's privacy concerns, yet still enable an investor to independently perform due diligence? For instance, if we do not require information about an obligor's credit score and income, while still requiring the other proposed asset data points, are concerns about obligor privacy alleviated while also

[139] *See* the Risk Retention Proposing Release at 24127.

[140] *See* proposed Item 2(m)(1)(iii) and Item 2(m)(1)(xvi) of Schedule L–D for RMBS in the 2010 ABS Proposing Release.

[141] For instance, instead of exact zip code, we proposed that issuers provide an MSA code, a regional geographic locator. For asset-level disclosure data points that require disclosure of obligor credit scores, we proposed coded responses that represent ranges of credit scores (*e.g.,* 500–549, 550–599, *etc.*). The ranges were based on the ranges that some issuers already provide in pool-level disclosure. For monthly income and debt ranges, we developed the ranges based on a review of statistical reporting by other governmental agencies (*e.g.,* $1,000–$1,499, $1500–$1,999, *etc.*). *See* 2010 ABS Proposing Release at 23357.

[142] *See, e.g.,* letters from ABA, Consumers Union, MBA, Vehicle ABS Group, and World Privacy Forum.

[143] Personally identifiable financial information generally means any information: that a consumer provides to obtain a financial product or service; about a consumer resulting from any transaction involving a financial product or service; or is otherwise obtained about a consumer in connection with providing a financial product or service to that consumer. *See* Rule 3(u)(1) of Regulation S–P [17 CFR 248.3(u)(1)]. A consumer report, as defined in the Fair Credit Reporting Act, in general means any information about a consumer bearing on his/her credit or other personal characteristics which will be used to establish a consumer's eligibility for credit, employment and other authorized purposes under the statute. [15 U.S.C. 1681a].

[144] Commentators were also concerned that it may be possible to identify an individual obligor by matching asset-level data about the underlying property or asset with data available through other public or private sources about assets and their owners (a process known as ''reverse engineering''). If an obligor was identified, then the obligor's non-public personal financial status would be discoverable. *See, e.g.,* letter from ABA on the 2010 ABS Proposing Release (explaining concerns related to the goals of the Gramm-Leach-Bliley Act to limit disclosure of personal financial information for marketing purposes without giving individuals an opportunity to opt out of the use of such information).

[145] *See* letters on the 2010 ABS Release from ASF (requesting disclosure of exact credit score and noting that requiring ranges would be a step back in terms of transparency), Interactive Data (noting that asset-level granularity is essential for robust evaluation of loss, default and prepayment risk associated with RMBS); Prudential (suggesting that ranges of FICO score bands are not sufficient to appreciate the linkages between collateral characteristics); and Wells Fargo (expressing concern that restricting information available to investors could result in substantially lower pricing for new RMBS offerings).

implementing the requirements of Section 7(c)?

83. Would it be appropriate to require an obligor's credit score and income be provided on a grouped basis in a format similar to our credit card proposal in the 2010 ABS Proposing Release,[146] in addition to requiring all of the other proposed asset-level data points with the prospectus? What would be appropriate groupings (*i.e.,* should the columns or ranges be different than our credit card proposal)? Would that approach alleviate privacy concerns and also implement the requirements of Section 7(c)?

84. Would any of these approaches be appropriate for RMBS, as well as other asset classes?

85. Are there other ways to present data that is useful to investors but helps to address privacy concerns? How else can we implement Section 7(c) and also address commentators' privacy concerns related to asset-level reporting?

2. Additional Requests for Comment on Asset-Level Data

As discussed above, in the 2010 ABS Proposing Release, we proposed to require asset-level disclosures for ABS backed by residential mortgages; commercial mortgages; automobile loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations. For ABS backed by credit and charge card receivables we proposed requiring disclosure of grouped account data in lieu of asset-level data. We received many helpful and detailed suggestions regarding many of the proposed asset data points. We received a mixed response to our proposal, with some commentators supporting asset-level disclosure across asset classes and some commentators suggesting that asset-level data would not be appropriate. For several asset classes we received various recommendations for either grouped account disclosures or grouped account and pool-level disclosures in lieu of asset-level disclosures.[147] Some of the letters included detailed suggestions for group data. We will consider these letters along with all the letters on the original proposal. We have at this time made no determination regarding the final rules for any asset class. However for two discrete asset classes, namely Equipment ABS[148] and Equipment Floorplan ABS,[149] we are requesting more information on possible data points.

For Equipment ABS, our proposal to require asset-level disclosure, like other asset classes, received a mixed response from commentators. Some commentators supported asset-level data for Equipment ABS, while others suggested that asset-level data was not appropriate.[150] The Captive Equipment ABS Issuer Group, CNH, ELFA and Navistar each suggested that asset-level data would create privacy issues, risk dissemination of competitively sensitive information and increase costs. The Captive Equipment ABS Issuer Group, CNH and ELFA also suggested that asset-level data goes beyond what investors need or require for Equipment ABS. Some commentators individually recommended that Equipment ABS issuers should be permitted to present grouped account disclosure similar to what we proposed for credit and charge card issuers. CNH and Navistar also suggested that some of the proposed asset-level data points are inapplicable to Equipment ABS.

We appreciate that Equipment ABS may share some characteristics with other asset classes for which commentators have suggested grouped account data may be appropriate. For example, commentators for the Auto ABS asset class[151] suggested grouped data was more appropriate due to the privacy and competition concerns, and other concerns, raised by asset-level disclosures,[152] and one of these commentators submitted a grouped data and pool-level disclosure format for the Commission to consider as an alternative to asset-level reporting.[153] Our proposal did not include grouped account data for Equipment ABS, and it is unclear whether the suggestions we received on a possible grouped account approach for this asset class continued to be supported by commentators based on the comments received.[154] A group of issuers through a trade association submitted a suggestion for standardized pool-level disclosures, but we preliminarily believe that more granular disclosure—either asset-level or grouped account data—is appropriate at the time of offering and on an ongoing basis for Equipment ABS than provided by only pool-level disclosures.[155] In order to better analyze comments received and formulate the appropriate disclosure requirements for Equipment ABS, we request additional comment below.

Request for Comment

86. Is it possible to require asset-level data, both initially and on an ongoing

[146] The 2010 ABS Proposals proposed that issuers of ABS backed by credit cards provide disclosure more granular than pool-level disclosure by creating ''grouped account data.'' As we explain the 2010 ABS Proposing Release, grouped account data would be created by compressing the underlying asset-level data into combinations of standardized distributional groups using asset-level characteristics and providing specified data about these groups. Like the asset-level data proposals, the grouped account data would be provided in XML to facilitate data analysis. *See* the 2010 ABS Proposing Release at 23372.

[147] *See, e.g.,* letters on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investor members (submitting a recommendation for grouped account and pool-level disclosures for ABS backed by auto loans and leases); ASF issuer and investor members (submitting a recommendation for grouped account disclosures for auto floorplan ABS); Sallie Mae (submitting an ''aggregated and grouped representative line'' proposal for ABS backed by student loans).

[148] For purposes of this discussion, we refer to ABS backed by equipment loans and leases as ''Equipment ABS.''

[149] For purposes of this discussion, we refer to ABS backed by equipment floorplan financings as ''Equipment Floorplan ABS.''

[150] *See, e.g.,* letters on the 2010 ABS Proposing Release from MetLife and SIFMA (investors) (each letter suggesting support for asset-level disclosures and revisions to the Commission's asset-level proposal for Equipment ABS); CalPers (expressing general support for asset-level disclosures for Equipment ABS). *But see* letters on the 2010 ABS Release from CNH, Navistar Financial Corporation (Navistar) and Equipment Leasing and Financing Association (ELFA) and from a group of five captive equipment ABS issuers (Captive Equipment ABS Issuer Group) (each suggesting that asset-level data was not appropriate for Equipment ABS).

[151] For purposes of this discussion, we refer to ABS backed by auto loans and leases as ''Auto ABS.''

[152] *See* letters from Americredit, ASF (auto ABS issuers), Vehicle ABS Group on the 2010 ABS Proposing Release.

[153] *See* letter on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investors members. The auto ABS issuer members and certain investor members submitted a recommendation for grouped account and pool-level disclosures for ABS backed by auto loans and leases. The recommendation suggested that at the time of an Auto ABS offering and monthly thereafter an issuer would provide statistical information about the underlying pool in the form of grouped-asset representative data lines and prescribed stratification tables.

[154] Navistar submitted a grouped account disclosure proposal for Equipment ABS, but Navistar subsequently was a signatory to a standardized pool-level format submitted by the Captive Equipment ABS Issuer Group. *See* letters about the 2010 ABS Proposing Release from Navistar and the Captive Equipment ABS Issuer Group (located in the memorandum to file dated March 8, 2011 covering the staff's meeting with members of the Financial Services Roundtable). It is unclear in light of their participation in the Captive Equipment ABS Issuer Group letter whether Navistar's grouped account suggestion still stands. Also, the Captive Equipment ABS Issuer Group submitted in their letter dated December 13, 2010 (located in the memorandum to filed dated December 15, 2010 covering the staff's meeting with members of the Roundtable) a grouped data proposal. However, as noted above, in March 2011 the Captive Equipment ABS Issuer Group later recommended standardized pool-level disclosures.

[155] *See* letter regarding the 2010 ABS Proposing Release from members the Captive Equipment ABS Issuer Group contained in the memorandum to file dated March 8, 2011 (suggesting that their recommended pool-level disclosure format was based on feedback they received from investors. However, we did not receive any comment letters from investors that supported this position).

basis, and address commentators' privacy and competitive concerns applicable to the Equipment ABS sector? What particular data elements would need to be revised or eliminated?

87. Is asset-level data necessary for investors to independently perform due diligence for Equipment ABS? [156] Or would a grouped account disclosure requirement along with pool-level disclosures be sufficient for investors to independently perform due diligence and also address commentators' privacy and competition concerns? If so, would it be appropriate to require for Equipment ABS similar disclosure requirements that were recommended by commentators for Auto ABS? [157]

88. Could the grouped account and pool-level disclosures that commentators recommended for initial and ongoing reporting of Auto ABS be used for Equipment ABS? Would commentators' recommended disclosure requirements for Auto ABS need to be altered to fit the Equipment ABS sector? If so, how would it need to change? Is there a more appropriate grouped account format for Equipment ABS? Please be specific in your response.

For Equipment Floorplan ABS, some commentators suggested that asset-level data was not appropriate.[158] We recognize that Equipment Floorplan ABS, as revolving assets, may share some characteristics with other asset classes for which grouped account data may be appropriate; for instance, credit cards are typically structured as revolving asset master trusts and Equipment Floorplan ABS are also typically structured as revolving asset master trusts. Like Equipment ABS, however, we did not receive a recommendation for a grouped account data approach.[159] A group of issuers through a trade association recommended that we require standardized pool-level disclosures, but we preliminarily believe that more granular disclosure is appropriate at the time of offering and on an ongoing basis than is provided by only pool-level disclosures.[160] In order to better analyze comments and formulate the appropriate disclosure requirements for Equipment Floorplan ABS, we request additional comment below.

Request for Comment

89. Is it possible to require asset-level data, both initially and on an ongoing basis, and address commentators' privacy and competitive concerns applicable to the Equipment Floorplan ABS sector? What particular data elements would need to be revised or eliminated?

90. Is asset-level data necessary for investors to independently perform due diligence for Equipment Floorplan ABS? Or would a grouped account disclosure requirement be sufficient for investors to independently perform due diligence and also address commentator's privacy and competition concerns? If so, would it be appropriate to require for Equipment Floorplan ABS [161] similar disclosure requirements that were recommended for Auto Floorplan ABS? [162] Would it resolve commentators' privacy and competitive concerns?

91. Could the grouped account disclosures that commentators recommended for initial and ongoing reporting for Auto Floorplan ABS also be used for Equipment Floorplan ABS? Would commentators' recommended disclosure requirements for Auto Floorplan ABS need to be altered to fit the Equipment Floorplan ABS sector? If so, how would it need to change? Is there a more appropriate grouped account format for Equipment Floorplan ABS? Please be specific in your response.

3. Additional Requests for Comment on When to Require Schedule L

In our 2010 ABS Proposing Release under our proposed requirements for when asset-level data would be required in a prospectus, we proposed to require that issuers provide for each asset in the pool all of the asset-level data points enumerated in proposed Schedule L of Regulation AB as of a recent practicable date, defined as the ''measurement date,'' at the time of a Rule 424(h) prospectus.[163] We also proposed that an updated Schedule L, as of the cut-off date for the securitization, be provided with the final prospectus under Rule 424(b). Finally, we proposed that if issuers are required to report changes to the pool under Item 6.05 of Form 8–K, then an updated Schedule L would be required.[164]

Under our proposed revisions to Item 6.05 of Form 8–K, however, we proposed that a new Schedule L be required to be filed if any material pool characteristic of the actual asset pool at the time of issuance of the asset backed securities differs by 1% or more than the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424.[165] In our discussion of asset-level ongoing reporting requirements, we stated that if assets are added to the pool during the reporting period, either through prefunding periods, revolving periods or substitution, disclosure would be required under our proposed revisions to Item 6.05 on Form 8–K along with the Schedule L data contained in proposed Item 1111A of Regulation AB.[166]

One investor, in response to our 2010 ABS Proposing Release, recommended that if assets are added to the pool through prefunding periods or revolving periods during the month a new

[156] *See* Section 7(c) of the Securities Act.

[157] *See* letter on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investors members (submitting a recommendation for grouped account and pool-level disclosures for ABS backed by auto loans and leases.)

[158] *See* letters from Captive Equipment ABS Issuer Group, CNH and Navistar on the 2010 ABS Proposing Release (expressing concerns that asset-level reporting for floorplan receivables ABS was not appropriate due to obligor privacy concerns, concerns over the release of proprietary information and increased costs.)

[159] Navistar expressed support in their comment letter for the floorplan grouped data disclosure proposal proposed in a letter from the Vehicle ABS Group. *See* letters from Navistar and the Vehicle ABS Group about the 2010 ABS Proposing Release. However, the Vehicle ABS Group later withdrew support for their recommendation in favor of the grouped account disclosure recommended by ASF's issuer and investor members for ABS backed by auto floorplans. *See* letter from the Vehicle ABS Group about the 2010 ABS Release dated November 8, 2010. ASF submitted a grouped account recommendation for vehicle floorplan ABS, but it was not clear that this proposal covered Equipment Floorplan ABS. *See* the letter on the 2010 ABS Proposing Release from ASF issuer and investor members (submitting a recommendation for grouped account disclosures for auto floorplan ABS).

[160] *See* letter regarding the 2010 ABS Proposing Release from members the Captive Equipment ABS Issuer Group contained in the memorandum to file dated March 8, 2011 (suggesting that their recommended pool-level disclosure format was based on feedback they received from investors. However, we did not receive any comment letters from investors that supported this position).

[161] *See* letter from ASF on the auto sector setting forth the alternative disclosure regime recommended by ASF's auto ABS grouped-asset investor members and issuer members.

[162] For purposes of this discussion, we refer to ABS backed by auto floorplans as ''Auto Floorplan ABS.''

[163] *See* proposed Item 1111A of Regulation AB and the 2010 ABS Proposing Release at 23356.

[164] In footnote 235 of the 2010 ABS Proposing Release we stated that if a new asset is added to the pool during the reporting period, an issuer would be required to provide the asset-level information for each additional asset as required by our proposed revisions to both Item 1111 of Regulation AB and Item 6.05 of Form 8–K. *See* the 2010 ABS Proposing Release at 23356.

[165] *See* the 2010 ABS Proposing Release at 23392. As proposed, if any material pool characteristic of the actual asset pool at the time of issuance of the asset backed securities differs by 1% or more than the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 an issuer would be required to file an Item 6.05 of Form 8–K and provide the disclosures required under Item 1111 and Item 1112 of Regulation AB. Under the proposed Item 1111(h) of Regulation AB issuers would be required to provide a Schedule L. In addition, the item, as proposed to be revised, also requires a description of the changes that were made to the asset pool, including the number of assets substituted or added to the asset pool.

[166] *See* the 2010 ABS Proposing Release at 23368.

Schedule L should be provided.[167] This commentator suggested that such a requirement will allow investors to evaluate the risk layering introduced by any new collateral that is added to securitizations after issuance. This comment seemed to indicate that it was not clear an Item 6.05 Form 8–K was required when prefunding or revolving assets increased or changed the pool by 1% or more, although that was the intention of the language in the proposal. Therefore, we are requesting additional comment to determine whether we should clarify this proposed requirement by specifying in Item 6.05 that the filing of a Schedule L is required when assets are added to the pool after the issuance of the securities, either through prefunding periods, revolving periods or substitution and the triggers in that item are met.

Request for Comment

92. Should we specify in Item 6.05 of Form 8–K that a new Schedule L must be filed when assets are added to the pool after issuance, either through prefunding periods, revolving periods or substitution and the triggers in that item are met?

93. Instead, should we require that filing of a new Schedule L be triggered when assets are added to the pool during a month, distribution period or some other timeframe?

94. Rather than require that Schedule L be filed with or as an exhibit to a current report on Form 8–K, under Item 6.05, should it be required to be filed under a new requirement as an exhibit to Form 10–D? Please be specific in your response.

95. Should the Schedule L data include information about all assets in the pool, including the new assets? If so, should we clarify in an instruction this will just be repeating the original schedule or should we require that it be updated? Could any of the information be updated? If so, should we require that? Or should Schedule L data only be required for the assets added during the reporting period?

96. Could investors evaluate risk layering introduced by new assets if a new Schedule L is required only for the new assets added during the relevant period?

97. Current disclosure requirements under Item 1121(b) of Regulation AB require that during a prefunding or revolving period, or if there has been a new issuance of asset-backed securities backed by the same pool under a master trust, during the fiscal year of the issuing entity, updated pool composition information in the Form 10–D report is required to be provided in the last required distribution report of the fiscal year of the issuing entity in accordance with Items 1110, 1111 and 1112 of Regulation AB.[168] If, as proposed in the 2010 ABS Proposing Release, updated asset-level information would be required to be provided with an Item 6.05 Form 8–K when prefunding or revolving assets change the pool by 1% or more, would the information required by Item 1121(b) be necessary? Should Item 1121(b) be revised to specifically require updated asset-level information be provided in the last required distribution report of the fiscal year of the issuing entity?

4. Additional Requests for Comment on Privately-Issued Structured Finance Products

In the 2010 ABS Proposing Release, we proposed amendments to our safe harbors for exempt offerings and resales and new related rules regarding the information that must be made available to investors in privately-issued asset-backed securities.[169] We proposed to require that, in order for a reseller of a ''structured finance product,'' as proposed to be defined,[170] to sell a security in reliance on Securities Act Rule 144A,[171] or in order for an issuer of a structured finance product to sell a security in reliance on Rule 506 of Regulation D,[172] certain conditions had to be met.[173]

For sales of structured finance products made in reliance on Rule 144A or Rule 506, first, under our proposal the underlying transaction agreement of the issuer would have to grant any purchaser, any security holder and any prospective purchaser of the securities designated by the holder the right to obtain, upon request of the purchaser or security holder, information that would be required if the offering were registered on Form S–1 or proposed Form SF–1 under the Securities Act and any ongoing information regarding the securities that would be required by Section 15(d) of the Exchange Act, if the issuer were required to file reports under that section. Second, the issuer would have to represent that it would provide such information to the purchaser, security holder, or prospective purchaser upon request of the purchaser or security holder.[174]

As discussed above, in the 2010 ABS Proposing Release, we also proposed an amendment to Regulation AB that would require issuers of registered ABS offerings to disclose in the prospectus asset-level information in a standardized format.[175] Thus, together with the proposed asset-level requirements, the proposed amendments for privately issued structured finance products would require that issuers in offers and sales of structured finance products in reliance on Rule 144A or Rule 506 would need to provide, upon request, asset-level disclosures, along with other disclosures required by Regulation AB.

In the 2010 ABS Proposing Release, we requested comment on whether we should provide more specificity in the rules for privately issued structured finance products covering what disclosure would be required to be provided and, if so, what types of disclosure we should specifically require and whether the required disclosures should differ by type of security and, if so, in what way. We also requested comment on whether our proposal with respect to ongoing information regarding the securities was appropriate.

In response to our 2010 ABS Proposals, several commentators expressed concern regarding the disclosure standards for privately issued structured finance products.[176] Commentators noted that there are not clear information requirements for certain types of ABS that are not typically offered under Regulation AB, such as CDOs, CLOs, asset-backed commercial paper or synthetic ABS.[177] Commentators expressed concerns

[167] *See* letter from Prudential (suggesting that for securitizations with prefunding periods or revolving transactions a new Schedule L should be filed monthly when new collateral is added.)

[168] Also, updated information is required in the first Form 10–D report for the period in which the prefunding or revolving period ends (if applicable).

[169] *See* the 2010 ABS Proposing Release at 23393.

[170] The 2010 ABS Proposals would apply to any ''structured finance product,'' which would be more broadly defined than in the Regulation AB Item 1101(c) definition of ''asset-backed security'' in order to reflect the wide range of securitization products that are sold in the private markets.

[171] 17 CFR 230.144A.

[172] 17 CFR 230.506.

[173] *See* proposed revisions toRule 144A(a)(8), Rule 192, Rule 501 and Rule 502 in the 2010 ABS Proposing Release.

[174] *See* the 2010 ABS Proposing Release at 23396

[175] *See* the ABS 2010 ABS Proposing Release at 23355.

[176] *See* letters from ABA, ABAASA, Association of Financial Markets in Europe/European Securitisation Forum (AFME/ESF), ASF, Cleary Gottlieb Steen and Hamilton (Cleary), PPM America (PPM), Sallie Mae, SIFMA (dealers and sponsors), Wells Fargo on the 2010 ABS Proposing Release.

[177] *See* letters from ABA, ASF and SIFMA on the 2010 ABS Proposing Release. The ASF suggested that the proposed disclosure regime would be untenable because the safe harbor for securities that fall outside of the current Regulation AB definition would be subject to a hybrid of the corporate and Regulation AB disclosure requirements, without the benefit of detail on how those disclosure requirements would apply.

regarding the standards for disclosure and noted that any novel asset type or structure would face uncertainty regarding their disclosure obligations.[178] In addition, some commentators asked the Commission to recognize the unique characteristics of different asset classes.[179]

In light of these comments, we are requesting comment on whether we should only require asset-level disclosures where the ''structured finance product'' being sold in reliance on Rule 144A, or Rule 506 of Regulation D, is backed by or collateralized by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB. As proposed, this would include: residential mortgage backed securities; commercial mortgage backed securities; automobiles loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations.

Request for Comment

98. Should we only require that the transaction agreements underlying structured finance products sold in reliance on Rule 144A or sold pursuant to Rule 506 be required to provide for asset-level disclosures if the particular asset class of the securities are of an asset class where asset-level disclosures are prescribed in Regulation AB (*i.e.,* residential mortgage backed securities; commercial mortgage backed securities; automobiles loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations)? Should securities where the asset class is not of an asset class where asset-level disclosure is required under Regulation AB be exempted from providing asset-level disclosure?

99. Is there any reason that we should not require structured finance product issuers that utilize the safe harbors to comply with the proposed asset-level disclosure requirements for initial and/or ongoing information if asset-level disclosure for the particular asset class underlying the transaction is required under Regulation AB?

100. For securities that fall outside the Regulation AB definition of ''asset-backed securities,'' how can the Commission address commentators' concern that those securities would be subject to a hybrid of the corporate and Regulation AB disclosure requirements? [180]

101. If we do not require asset-level disclosures for certain ''structured finance products'' or ''novel asset types or structures'' that fall outside the Regulation ABS definition of ''asset-backed securities,'' are there other types of disclosure that we should require the issuer to provide to investors or prospective purchasers? How should ''novel asset types or structures'' be defined? Is there any guidance that the Commission should provide for structured finance products that fall outside of Regulation AB's definition of ABS?

### *C. Waterfall Computer Program*

In the 2010 ABS Proposing Release, we proposed to require that most ABS issuers file a computer program that gives effect to the flow of funds, or ''waterfall,'' provisions of the transaction. The proposal was designed to make it easier for an investor to analyze the ABS offering at the time of its initial investment decision and to monitor ongoing performance of the ABS. In this way, market participants would be able to better conduct their own evaluations of ABS. Although several commentators supported the proposal because it would promote transparency and enable investors to make better decisions,[181] several commentators opposed the proposal for various reasons, such as the lack of clarity of the requirements of our proposal,[182] the cost burden on issuers and/or investors,[183] and concern about liability under the federal securities laws.[184] We received many helpful and detailed suggestions regarding the proposed waterfall computer program requirement, and plan to re-propose the requirement separately from adopting requirements for ABS shelf eligibility, offering process and disclosures, including asset-level disclosures. We believe these requirements could be adopted and implemented together, separately from any waterfall disclosure component.

## IV. Transition Period

As we explained in the 2010 ABS Proposing Release, we believe that compliance dates should not extend past a year after adoption of the new rules. We are considering the appropriate timing for implementation of the 2010 ABS Proposals and today's re-proposals, if adopted.

Request for Comment

102. Should implementation of any proposals be phased-in? If so, explain why and provide a reasonable timeframe for a phase-in (*e.g.,* six months, one or two years)?

103. Should implementation be based on a tiered approach that relates to a characteristic other than the size of the sponsor? Is there any reason to structure implementation around the asset class of the securities?

[178] *See* letters from AFME/ESF, SIFMA (dealers and sponsors), and Wells Fargo on the 2010 ABS Proposing Release. SIFMA (dealers and sponsors) suggested that the uncertainty over disclosure requirements could affect the ability of insurance-linked securities, whole business securitizations, future flow securitizations, securitizations of film rights, franchise fees, IP licensing fees, charged-off assets, leases exceeding the limits of the Reg. AB definition of ABS and non-revolving assets exceeding a year to rely upon Rule 144A. Wells Fargo expressed concern regarding the uncertainty in determining the applicable reporting requirements for future flow, film rights, franchise fees, patent royalties, certain lease transactions and novel asset classes and structures.

[179] *See* letters from ABASA, AFME/ESF and Cleary on the 2010 ABS Proposing Release. AFME/ESF suggested that it would be inappropriate to apply Regulation AB to UK mortgage master trust issuers without adjustment. Cleary urged the Commission to ''acknowledge that some of the detailed, asset-level disclosure mandated by the Proposed Rules will simply not be possible for some issuers, in some asset classes, to compile without expending levels of time and expense that are simply not warranted.'' Cleary recommended revising the proposal to require ''issuers to provide (in connection with the initial placements) the information that would be required if the offering were registered on Form S–1 or Form SF–1 under the Securities Act, and to provide (on an ongoing basis) the information that would be required by Section 15(d) of the Exchange Act, in each case if requested, *only to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense.''* Cleary also suggested that ''such required information in each case may differ as to format, presentation, or specific loan-level data points from the requirements of Regulation AB, and that loan-level information may be omitted for one or more portfolio components not exceeding a specified percentage of the relevant portfolio individually and a specified percentage of the relevant portfolio in the aggregate.''

[180] *See* letter from ASF on the 2010 ABS Proposing Release (expressing that the array of structured finance products offered and sold in the private placement market may technically fall outside the Regulation AB definition of ''asset-backed securities,'' which would by default subject them to the corporate disclosure regime, together with some elements of the Regulation AB disclosure regime).

[181] *See* comment letters from AMI; Bank of New York Mellon; CalPERS; Keith G. Cascio; CoStar Group; Council of Institutional Investors; Knowledge Decision Securities; Risk Management Association/Securitization Risk Roundtable; and XBRL US on the 2010 ABS Proposing Release.

[182] *See* comment letters from ABA; BOA; Discover; FSR; Vehicle ABS Group; JP Morgan; and Sallie Mae on the 2010 ABS Proposing Release.

[183] *See* comment letters from ABASA; ABA; American Financial Services Association (AFSA); BOA; Business Software Alliance; Capital One Financial; Citigroup Global Markets (Citi); CREFC; Discover; FSR; Vehicle ABS Group; Intex Solutions; IPFS Corp; JP Morgan; MathWorks; MBA; Navistar; PPM; PricewaterhouseCoopers LLP; Sallie Mae; SIFMA; Trepp; UBmatrix; Wells Fargo; and Wyndham Worldwide on the 2010 ABS Proposing Release.

[184] *See* comment letters from ABASA; ABA; AFSA; AmeriCredit Corp; BOA; (Citi); Discover; Intex Solutions; JP Morgan; MBA; Sallie Mae; SIFMA; Vehicle ABS Group; Wells Fargo on the 2010 ABS Proposing Release.

**V. General Request for Comment**

We request comment on the specific issues we discuss in this release, and on any other approaches or issues that we should consider in connection with the proposed amendments. We seek comment from any interested persons, including investors, asset-backed issuers, sponsors, originators, servicers, trustees, disseminators of EDGAR data, industry analysts, EDGAR filing agents, and any other members of the public.

**VI. Paperwork Reduction Act**

*A. Background*

Certain provisions of the proposed rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[185] The Commission is submitting these proposed amendments and proposed rules to the Office of Management and Budget (OMB) for review in accordance with the PRA.[186] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are: [187]

(1) ''Form S–3'' (OMB Control No. 3235–0073);

(2) ''Form 10–D'' (OMB Control No. 3235–0604);

(3) ''Regulation S–K'' (OMB Control No. 3235–0071); and

(4) ''Form SF–3'' (a proposed new collection of information).

The forms listed in Nos. 1 through 3 were adopted under the Securities Act and the Exchange Act and set forth the disclosure requirements for registration statements and periodic reports filed with respect to asset-backed securities and other types of securities to inform investors. The form listed in No. 4 is a newly proposed collection of information under the Securities Act. Form SF–3, if adopted, would represent the registration form for offerings that meet certain shelf eligibility conditions and can be offered on a delayed basis under Rule 415.

Compliance with the proposed amendments would be mandatory, and responses to the information collections would not be kept confidential and there would be no mandatory retention period for proposed collections of information.

*B. Revisions to PRA Reporting and Cost Burden Estimates*

Our PRA burden estimate for the existing collection of information on Form S–3 is based on an average of the time and cost incurred by all types of public companies, not just ABS issuers, to prepare the collection of information. In contrast, Form 10–D is a form that is only prepared and filed by ABS issuers. In 2004, we codified requirements for ABS issuers in these regulations and forms, recognizing that the information relevant to asset-backed securities differs substantially from that relevant to other securities.

Our PRA burden estimates for the proposed amendments are based on information that we receive on entities assigned to Standard Industrial Classification Code 6189, the code used with respect to asset-backed securities, as well as information from outside data sources.[188] When possible, we base our estimates on an average of the data that we have available for years 2004 through 2010. In some cases, our estimates for the number of asset-backed issuers that file Form 10–D with the Commission are based on an average of the number of ABS offerings in 2006 through 2010.[189]

1. Form S–3 and Form SF–3

Our current PRA burden estimate for Form S–3 is 243,927 annual burden hours. This estimate is based on the assumption that most disclosures required of the issuer are incorporated by reference from separately filed Exchange Act reports. However, because ABS issuers using Form S–3 often present all of the relevant disclosure in the registration statement rather than incorporate relevant disclosure by reference, our current burden estimate for ABS issuers using Form S–3 under existing requirements is similar to our current burden estimate for ABS issuers using Form S–1. During 2004 through 2010, we received an average of 90 Form S–3 filings annually related to asset-backed securities.

We are proposing to move the requirements for asset-backed issuers into new forms that would be solely for the registration by offerings of asset-backed securities. Under the proposal, proposed Form SF–3 would be the ABS shelf equivalent form of existing Form S–3. For purposes of our calculations, we estimate that the proposals relating to shelf eligibility would cause a 5% movement in the number of filers (*i.e.,* a decrease of five registration statements) out of the shelf system due to the new requirements which include the proposed executive officer certification, the proposed transaction requirement for the credit risk manager, the proposed transaction requirement related to investor communications, and the proposed annual evaluations of compliance with timely Exchange Act reporting and timely filing of transaction agreements and certifications.[190] On the other hand, we estimate the number of shelf registration statements for ABS issuers would increase by five as a result of the outstanding proposal from the 2010 ABS Proposing Release to eliminate the practice of providing a base prospectus and a prospectus supplement for these issuers.[191] Thus, we estimate that the annual number of shelf registration statements concerning ABS offerings would remain the same. Accordingly, since the proposals would shift all shelf eligible ABS filings from Form S–3 to Form SF–3, we estimate that the proposals would cause a decrease of 90 ABS filings on Form S–3 and a corresponding number of 90 ABS filings on Form SF–3s filed annually.[192]

In 2004, we estimated that an ABS issuer, under the 2004 amendments, would take an average of 1,250 hours to prepare a Form S–3 to register ABS.[193] Additionally, in the January 2011 ABS Issuer Review Release, we estimated that the requirements described in that release would increase the annual incremental burden to ABS issuers by 30 hours per form.[194] Therefore, we currently estimate that it would take an average of 1,280 hours to prepare a Form S–3 to register ABS. For registration statements, we estimate that 25% of the burden of preparation is

[185] 44 U.S.C. 3501 *et seq.*

[186] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[187] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S–K.

[188] We rely on two outside sources of ABS issuance data. We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC).

[189] Form 10–D was not implemented until 2006. Before implementation of Form 10–D, asset-backed issuers often filed their distribution reports under cover of Form 8–K.

[190] We calculated the decrease of five Form SF–3s by multiplying the average number of Form S–3s filed (90) by 5 percent.

[191] *See* Section II.D. of the 2010 ABS Proposing Release. Based on staff reviews, we believe it is very unusual to see ABS registration statements with multiple unrelated collateral types such as auto loans and student loans. There are occasionally multiple related collateral types such as HELOCs, subprime mortgages and Alt-A mortgages in ABS registration statements.

[192] This is based on the number of registration statements for ABS issuers filed on Form S–3 and the four changes due to our rule proposal.

[193] *See* 2004 ABS Adopting Release and 2004 ABS Proposing Release.

[194] *See* January 2011 ABS Issuer Review Release at 4239.

carried by the company internally and that 75% of the burden is carried by outside professionals retained by the registrant at an average cost of $400 per hour.[195]

We are proposing new and revised disclosure requirements for ABS issuers that, if adopted, would be a cost to filing on Form SF–3. In particular, we are proposing to add a shelf eligibility condition that the registrant file a certification at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization. We are also proposing a shelf eligibility condition that the underlying transaction agreement must provide for the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events and provisions related to repurchase request dispute resolution. Additionally, we are proposing to require that registrants include disclosures concerning the credit risk manager in the prospectus in the registration statement. Lastly, we are proposing a shelf eligibility condition that the underlying transaction agreement include a provision requiring that the party responsible for making periodic filings on Form 10–D include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security.

We are also proposing changes to Form 10–D relating to disclosure regarding credit risk managers.

If the proposals are adopted, we estimate that the incremental burden for ABS issuers to complete the disclosure requirements in Form SF–3, prepare the information, and file it with the Commission would be 100 burden hours per response on Form SF–3. As a result, we estimate that each Form SF–3 would take approximately 1,380 hours to complete and file.[196] We estimate the total internal burden for Form SF–3 to be 31,050 hours and the total related professional costs to be $37,260,000.[197] This would result in a corresponding decrease in Form S–3 burden hours of 28,800 and $34,560,000 in professional costs.[198]

2. Form 10–D

In 2004, we adopted Form 10–D as a new form for only asset-backed issuers. This form is filed within 15 days of each required distribution date on the asset-backed securities, as specified in the governing documents for such securities. The form contains periodic distribution and pool performance information. We estimate that the yearly average number of Form 10–D filings is 10,000[199] and that the proposed new Regulation AB disclosure requirements that would be included in Form 10–D related to investor communications (Item 1121(g)) and credit risk managers (Item 1121(f)) would result in an additional burden of five hours per filing to prepare. Consistent with our estimate in 2004, we estimate that it currently takes 30 hours to complete and file a Form 10–D. Therefore, we estimate that the proposals would increase the number of hours to prepare, review, and file a Form 10–D to 35 burden hours; thus, increasing the total burden hours for all annual Form 10–D responses to an estimate of 350,000 hours.[200]

We allocate 75% of those hours (262,500 hours) to internal burden and the remaining 25% to external costs totaling $35,000,000 using a rate of $400 per hour.

3. Regulation S–K

Regulation S–K, which includes the item requirements in Regulation AB, contains the requirements for disclosure that an issuer must provide in filings under both the Securities Act and the Exchange Act. We assign one burden hour to Regulation S–K for administrative convenience to reflect that the changes to the regulation did not impose a direct burden on companies.

4. Summary of Proposed Changes to Annual Burden Compliance in Collection of Information

Table 1 illustrates the changes in annual compliance burden in the collection of information in hours and costs for existing reports and registration statements and for the proposed new registration statement for asset-backed issuers. Bracketed numbers indicate a decrease in the estimate.

| Form | Current annual responses | Proposed annual responses | Current burden hours | Decrease or increase in burden hours | Proposed burden hours | Current professional costs | Decrease or increase in professional costs | Proposed professional costs |
|---|---|---|---|---|---|---|---|---|
| S–3 | 2,065 | 1,075 | 243,927 | [28,800] | 215,127 | $292,711,500 | [$34,560,000] | $258,151,500 |
| SF–3 | .................. | 90 | .................. | 31,050 | 31,050 | ............................ | 37,260,000 | 37,260,000 |
| 10–D | 10,000 | 10,000 | 225,000 | 37,500 | 262,500 | 30,000,000 | 5,000,000 | 35,000,000 |

5. Solicitation of Comments

We request comments in order to evaluate: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information

[195] *See, e.g., Credit Ratings Disclosure,* Release No. 33–9070 (Oct. 7, 2009) [74 FR 53086].

[196] The total burden hours to file Form SF–3 are calculated by adding the existing burden hours of 1,280 that we estimate for Form S–3 and the incremental burden of 100 hours imposed by our proposals for a total of 1,380 total burden hours.

[197] To calculate these values, we first multiply the total burden hours per Form SF–3 (1,380) by the number of Form SF–3s expected under the proposal (90), resulting in 124,200 total burden hours. Then, we allocate 25 percent of these hours to internal burden, resulting in 31,050 hours. We allocate the remaining 75 percent of the total burden hours to related professional costs and use a rate of $400 per hour to calculate the external professional costs of $37,260,000.

[198] To calculate these values, we first multiply the total burden hours per Form S–3 (1,280) by the average number of Form S–3s over the period 2004–2010 (90), resulting in 115,200 total burden hours. Then, we allocate 25 percent of these hours to internal burden, resulting in 28,800 hours. We allocate the remaining 75 percent of the total burden hours to related professional costs and use a rate of $400 per hour to calculate the external professional costs of $34,560,000.

[199] *Our estimate is based on 1,000 respondents per year multiplied by 10 filings per respondent.*

[200] The burden hours are calculated by multiplying 10,000 Form 10–Ds by the 35 burden hours required to complete the form for a total of 350,000 hours.

technology.[201] We also specifically request comment regarding:

104. Whether and to what extent the proposed shelf eligibility requirements would cause a movement in filers that are currently eligible for shelf registration on Form S–3 out of shelf registration to proposed Form SF–3.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–08–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–08–10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

## VII. Economic Analysis

### *A. Background*

In April 2010, we proposed rules that would revise the disclosure, reporting and offering process for ABS.[202] Among other things, in the 2010 ABS Proposing Release we proposed eligibility requirements to replace the current credit rating references in shelf eligibility criteria for asset-backed security issuers (*i.e.,* a certification by the chief executive of the depositor, risk retention, third party opinion relating to representations and warranties, and ongoing Exchange Act reporting). We also proposed to require that, with some exceptions, prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool in a standardized tagged data format. Further, we proposed to require asset-backed issuers to provide investors with more time to consider transaction-specific information about the pool assets.

In this release, we are re-proposing certain requirements for ABS shelf eligibility and filing deadlines for exhibits in ABS shelf offerings. We are also proposing new Form 10–D disclosure requirements related to investor communications and credit risk managers. Section 23(a) of the Exchange Act[203] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act[204] and Section 3(f) of the Exchange Act[205] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. We have considered and discussed below the effects of the proposed rules on efficiency, competition, and capital formation, as well as the benefits and costs associated with the Commission's decisions in the proposed rulemaking. Except as noted below, our benefit-cost analysis included in the 2010 ABS Proposing Release remains unchanged and outstanding.

### *B. ABS Shelf Eligibility Proposals*

We are re-proposing the registrant and transaction requirements for ABS shelf registration because two of the proposed transaction requirements in the April 2010 Proposing Release—risk retention and continued Exchange Act reporting—will be required for most registered ABS offerings as a result of changes mandated by provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Further, our re-proposals for ABS shelf registration eligibility are also made in connection with Section 939A of that Act which generally requires that we modify our regulations to remove any references to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness that we determine as appropriate for such regulations. Therefore, instead of the investment grade ratings requirement, under our re-proposal, taking into account the context and purposes of the affected rules, we are proposing a CEO or executive officer certification, provisions in the transaction agreements requiring the appointment of an independent credit risk manager under certain conditions and certain dispute resolution provisions, and provisions in the transaction agreements related to investor communications for any offering off the Form SF–3 shelf registration statement, which we believe would be indicative of a higher quality security.

We are also proposing to require that, in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to conduct an annual evaluation of compliance with the transaction requirements for shelf offerings conducted during the past year as well as compliance with timely Exchange Act reporting. Further, as re-proposed, issuers would be allowed to cure any failure to timely file the required certification or transaction agreements with required provisions. Specifically, under the re-proposal, the depositor would be deemed to satisfy the registrant requirements related to timely filing the certifications and transaction agreements 90 days after the date all required filings are filed.

1. Benefits

We believe a benefit of the re-proposed ABS shelf eligibility requirements is that they would replace the current investment grade rating condition while providing improved investor protections that would be indicative of a higher quality security. We believe that our proposal to require a certification by the depositor's chief executive officer or executive officer in charge of securitization may cause these officials to review more carefully the disclosure, and in this case, the transaction, and would encourage better oversight of the securitization process. As a result, certifiers may provide a more accurate review of the registration statement disclosures and the transaction. To the extent that a more careful review improves the securitization quality in the presence of such a certification, the proposed certification would be an appropriate eligibility requirement for shelf registration.

We believe that our proposal requiring provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to

[201] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

[202] *See* the 2010 ABS Proposing Release.

[203] 15 U.S.C. 78w(a).

[204] 15 U.S.C. 77b(b).

[205] 15 U.S.C. 78c(f).

review assets upon the occurrence of certain trigger events, requiring that the credit risk manager provide a report to the trustee of the findings and conclusions of the reviews of the assets, and requiring repurchase dispute resolution procedures should help the enforceability of contract terms surrounding representations and warranties regarding the pool assets. We are proposing to require that the transaction agreements require, at a minimum, review by the credit risk manager (1) when the credit enhancement requirements, as specified in the underlying transaction agreements, are not met; and (2) at the direction of investors pursuant to the process provided in the transaction agreement and disclosed in the prospectus. We believe specifying these two minimum trigger requirements should facilitate the ability of transaction parties to pursue transaction remedies, which we believe would be a feature of a higher quality security, while at the same time providing flexibility to transaction parties to develop more robust trigger requirements as they deem appropriate.

The requirement that the credit risk manager not be affiliated with the sponsor, depositor, or servicer helps assure investors that the review of assets is impartial. By not prescribing specific procedures for the review and repurchase process, we are providing the credit risk manager and ABS investors with the flexibility to determine the most appropriate and efficient procedures for each ABS transaction. We believe that taken together our transaction requirements related to the appointment of a credit risk manager would better strengthen the enforceability of contract terms surrounding the representations and warranties regarding the pool assets for ABS shelf transactions and incentivize obligated parties to better consider the characteristics and quality of the assets underlying the securities, thus making them appropriate criteria for shelf eligibility.

We believe that our proposal requiring a provision in an underlying transaction agreement to require the party responsible for making periodic filings on Form 10–D include in the Form 10–D any request from an ABS investor to communicate with other ABS investors related to investors exercising their rights under the terms of the asset-backed security would benefit ABS investors because facilitating communication among ABS investors enables them to exercise the rights included in the underlying transaction agreements. In this regard, as previously discussed in Part II.B.1(c) of this release, we are aware that ABS investors have had difficulty enforcing rights contained in transactions agreements, and in particular, those relating to the repurchase of underlying assets for breach of representations and warranties. We also believe the disclosure would benefit investors by helping solve collective action problems related to communication between investors and issuers. By decreasing the costs of communication among investors, this proposed requirement helps investors exercise the rights included in the underlying transaction agreements.

The above three shelf eligibility requirements are designed to improve the quality of the securities being offered by strengthening investor protections, so that the offerings may appropriately be conducted quickly. To the extent that better investor protection increases investors' trust in the fairness and security of the ABS markets, the result could be lower cost of capital and increased investor participation in ABS markets, which should facilitate capital formation.

We believe that requiring an annual evaluation of compliance with the registrant requirements in order to continue using an effective shelf registration statement would benefit investors because it would encourage issuers to file their Exchange Act reports and transaction documents in connection with prior offerings at the required time, and therefore, enhance informed investment decisions. We also believe that a 90-day cure period strikes an appropriate balance between monitoring issuers' compliance with the proposed shelf transaction requirements and commentator's concerns that the one-year penalty was too costly.

2. Costs

We believe that the certification transaction requirement could impose additional review and oversight costs, potential litigation costs, and disclosure costs on ABS issuers. First, since the intent of the certification is to enhance the accountability and oversight of the ABS transaction, if effective, it will result in additional costs related to further verifying the characteristics of the asset pool, the payment and rights allocations, the distribution priorities and other structural features of the transactions. We note that these costs could be lessened to the extent that the certifier could rely in part on the review that would already be required in order for an issuer to comply with recently adopted Rule 193.[206] Ultimately, we believe that for shelf offerings the benefit of improving the accuracy of securitization disclosures and enhancing the accountability and oversight of the ABS transaction justifies these additional review and oversight costs incurred by the ABS issuers.

We have considered that the certification transaction requirement might also result in litigation costs for those signing the certification with the magnitude of the costs dependent on the scope of the certification. We received several comment letters indicating that the certification language included in our 2010 ABS Proposing release could be interpreted as a guarantee of the future performance of the assets underlying the ABS.[207] We realize that unexpected losses incurred by security holders may be the result of misrepresentation by the securitization parties but may also be the outcome of a negative realization. Since the distinction is typically difficult to discern, a certification misinterpreted as a guarantee could have increased the likelihood of litigation, and therefore expected litigation costs to the certifier. In an attempt to mitigate these costs, we are proposing revised certification language, which we believe reduces a certifier's exposure to unnecessary litigation and limits litigation costs that the certification may create.

The proposed transaction requirements for shelf eligibility related to the credit risk manager would increase costs of securitization to ABS issuers to the extent a credit risk manager would not have otherwise been appointed in the transaction because they would be required to hire an additional participant in the transaction in order to maintain shelf eligibility. We have attempted to mitigate these costs by requiring that a credit risk manager be involved in the transaction only upon the occurrence of certain triggering events. We also recognize that not prescribing specific procedures for the review and repurchase process may impose a cost to investors if the transaction parties do not select

[206] Rule 193 implemented Securities Act Section 7(d), as added by Section 945 of the Act, by requiring that any issuer registering the offer and sale of an ABS perform a review of the assets underlying the ABS.

[207] *See* letters from ASF (issuer members), ABASA, CREFC and Wells Fargo on the 2010 ABS Proposing Release. Several commentators offered, as an alternative, that the CEO of the depositor certify to the adequacy and accuracy of the disclosure in the offering documents. *See* letters from ABA; ABASA; ASF; AusSF; BOA; CNH; FSR; JP Morgan; MBA; SIFMA (dealers and sponsors); Sallie Mae; and Wells Fargo.

appropriate procedures for such process. This transaction requirement would also result in some additional disclosure costs as information about the credit risk manager will have to be provided in the ABS prospectus.

The proposed disclosure requirements related to investor communications in distribution reports on Form 10–D would increase the disclosure costs of preparing these respective filings for ABS issuers. We also expect this requirement would impose additional costs on ABS issuers because the person responsible for making periodic filings on Form 10–D would need to design systems to receive investor requests to communicate and verify the identity of the investor making the request.

We believe that requiring an annual evaluation of compliance with the registrant requirements would impose additional costs on ABS issuers because of any systems needed to ensure and check compliance with the reporting and filing requirements. However, we believe these costs should be minimal because these issuers should already have in most instances systems designed to ensure that reports and transaction agreements are being filed timely in accordance with rules under the Exchange Act or Securities Act, respectively.

We recognize that some of the new shelf registration costs may be passed down the chain of securitization and ultimately to borrowers. The ability to pass costs on to borrowers would be constrained by competition from non-securitizing lenders, which would weaken the competitive ability of firms that solely rely on securitization for funding relative to other financial firms that have other sources of funding.

Finally, if ABS sponsors are forced to bear all or some of these new costs and if these new costs exceed the costs of obtaining a credit rating, then ABS sponsors might choose to avoid the shelf registration process by registering their ABS on the proposed Form SF–1. Alternatively, they might choose to bypass SEC registration altogether and issue in private markets instead. This will have the effect of reduced efficiency and impeded capital formation. We seek comments and empirical data to help us assess the macroeconomic impact of the costs associated with the new shelf registration requirements.

*C. Disclosure Requirements*

In addition to the shelf eligibility proposals, we are also proposing a disclosure requirement that would require disclosure in the prospectus concerning any party selected as a credit risk manager. We are also proposing to require ABS issuers to file copies of the underlying transaction agreements, including all attached schedules, and other agreements that are referenced (such as those containing representations and warranties regarding the underlying assets), at the same time as a preliminary prospectus that would be required under proposed Rule 424(h). We are also proposing to require in distribution reports filed on Form 10–D disclosure related to the review of pool assets by credit risk managers during the relevant distribution period as well as events involving a change in the credit risk manager.

1. Benefits

We believe that providing disclosure concerning credit risk managers will facilitate an informed assessment by investors as to the appropriateness of the selected credit risk manager. We also believe that providing in distribution reports disclosure related to the credit risk manager's review of assets and any change in the credit risk manager would be beneficial to investors because it would provide them material information concerning such matters on a timely basis. Finally, requiring underlying transaction agreements to be filed in substantially final form at the same time as the preliminary prospectus should benefit investors by allowing them necessary time to analyze the actual underlying agreements containing the specific structure, assets, and contractual rights regarding each transaction. To the extent that additional time for investment analysis results in investors making better informed decisions on how to allocate capital, this requirement could improve economic efficiency and facilitate capital formation.

2. Costs

The proposed disclosure requirements related to credit risk managers in prospectuses and distribution reports would increase the disclosure costs of preparing these filings for ABS issuers. The proposed requirement that ABS issuers file copies of the underlying transaction agreements at the same time as a preliminary prospectus that would be required under proposed Rule 424(h) may increase the costs associated with conducting an offering to the extent that such filing requirement exposes issuers to the risk of changing market conditions; however, such uncertainty is similar to that faced by other issuers of underwritten initial public offerings of debt whose final offer prices are not set for weeks or months after filing. To the extent the requirement requires that documents be completed earlier in the offering process, ABS issuers may face additional costs to accelerate drafting of the required documents. As noted earlier, for purposes of the PRA, we estimate that the incremental burden for ABS issuers to complete the disclosure requirements in Form SF–3, prepare the information, and file it with the Commission would be 100 burden hours per response on Form SF–3.

*D. Requests for Comment*

We seek comments on all aspects of this Economic Analysis including identification and quantification of any additional costs and benefits. We also request comments on whether our proposals would promote efficiency, competition, and capital formation. Commentators are requested to provide empirical data and other factual support for their views, if possible.

We further ask the following specific questions:

105. Would the proposed credit risk manager and certification transaction requirement for shelf eligibility impose costs in addition to those identified above? How much would a credit risk manager be compensated for these services? Would insurance costs increase for those providing credit risk manager services or providing a certification? If so, by how much? Are there other measurable costs associated with these proposed requirements?

106. Could the costs associated with the proposed shelf registration requirements be passed down the securitization chain? Would these costs affect an ABS issuer's choice between registering securities on proposed Form SF–3 or registering them on proposed Form SF–1? Would these costs affect an ABS issuer's willingness to register the securities altogether rather than issuing in the private markets?

107. Do you believe that the proposed disclosure requirements will impose costs on other market participants?

## VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[208] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposed amendments would be a

[208] Public Law 104–121, Title II, 110 Stat. 857 (1996).

''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

**IX. Regulatory Flexibility Act Certification**

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposals contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposals relate to the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act and the Exchange Act. Securities Act Rule 157 [209] and Exchange Act Rule 0–10(a) [210] defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. As the depositor and issuing entity are most often limited purpose entities in an ABS transaction, we focused on the sponsor in analyzing the potential impact of the proposals under the Regulatory Flexibility Act. Based on our data, we only found one sponsor that could meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[211] Accordingly, the Commission does not believe that the proposals, if adopted, would have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We request in particular that commentators describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

**X. Statutory Authority and Text of Proposed Rule and Form Amendments**

We are proposing the new rules, forms and amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a), and 28 of the Securities Act, Sections 13, 23(a), and 36 of the Exchange Act.[212]

**List of Subjects in 17 CFR parts 229, 230, 239, and 249**

Advertising, Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

**PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K**

1. The authority citation for part 229 continues to read in part as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.601 by:

a. Amending the exhibit table in paragraph (a) by adding an entry for ''(36)''; and

b. Adding paragraph (b)(36).

The additions read as follows:

**§ 229.601 (Item 601) Exhibits.**

(a) * * *

**Exhibit Table**

* * * * *

EXHIBIT TABLE

| | Securities Act forms | | | | | | | | Exchange Act forms | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | S–1 | S–3 | SF–1 | SF–3 | S–4[1] | S–8 | S–11 | F–1 | F–3 | F–4[1] | 10 | 8–K[2] | 10–D | 10–Q | 10–K |
| * * * | * | | | | * | | | * | | | | * | | | |
| (36) Depositor Certification for shelf offerings of asset-backed securities | | | | X | | | | | | | | | | | |
| (37) through (98) [Reserved] | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |

* * * * *

(b) * * *

(36) *Certification for shelf offerings of asset-backed securities.* For any offering of asset-backed securities (as defined in § 229.1101) made on a delayed basis under § 230.415(a)(1)(vii), provide the certification required by General Instruction I.B.i.(a) of Form SF–3 (referenced in § 239.45) exactly as set forth below:

*Certification*

I, [identify the certifying individual,] certify as of [the date of the final prospectus under Securities Act Rule 424 (17 CFR 239.424)] that:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] and am familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization;

2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus; and

4. Based on my knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to

[209] 17 CFR 230.157.

[210] 17 CFR 240.0–10(a).

[211] This is based on data from Asset-Backed Alert.

[212] 15 U.S.C. 777aaa *et.seq.*

produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement

Date: ______________________________

______________________________

[Signature]

______________________________

[Title]

The certification should be signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor, as required by General Instruction I.B.1(a) of Form SF–3.

* * * * *

3. Amend § 229.1100 by revising paragraph (f) as follows:

**§ 229.1100 (Item 1100) General.**

* * * * *

(f) *Filing of required exhibits.* Where agreements or other documents in this Regulation AB are specified to be filed as exhibits to a Securities Act registration statement, such agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8–K in the case of offerings registered on Form SF–3 (§ 239.45 of this chapter). Exhibits, including agreements in substantially final form, must be filed and made part of the registration statement by the date the prospectus is required to be filed under Securities Act Rule 424(h) (§ 230.424 of this chapter). Final agreements must be filed and made part of the registration statement no later than the date the final prospectus is required to be filed under Securities Act Rule 424 (§ 230.424 of this chapter).

4. Amend § 229.1101 by adding paragraph (m) to read as follows:

**§ 229.1101 (Item 1101) Definitions.**

* * * * *

(m) *Credit risk manager* means any person appointed by the trustee to review the underlying assets for compliance with the representations and warranties on the underlying pool assets and is not affiliated with any sponsor, depositor, or servicer.

5. Revise § 229.1109 to read as follows:

**§ 229.1109 (Item 1109) Trustees and other transaction parties.**

(a) *Trustees.* Provide the following information for each trustee:

(1) State the trustee's name and describe the trustee's form of organization.

(2) Describe to what extent the trustee has had prior experience serving as a trustee for asset-backed securities transactions involving similar pool assets, if applicable.

(3) Describe the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the trustee, including whether notices are required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant and any required percentage of a class or classes of asset-backed securities that is needed to require the trustee to take action.

(4) Describe any limitations on the trustee's liability under the transaction agreements regarding the asset-backed securities transaction.

(5) Describe any indemnification provisions that entitle the trustee to be indemnified from the cash flow that otherwise would be used to pay the asset-backed securities.

(6) Describe any contractual provisions or understandings regarding the trustee's removal, replacement or resignation, as well as how the expenses associated with changing from one trustee to another trustee will be paid.

*Instruction to Item 1109(a).* If multiple trustees are involved in the transaction, provide a description of the roles and responsibilities of each trustee.

(b) *Credit risk manager.* Provide the following for each credit risk manager:

(1) State the credit risk manager's name and describe its form of organization.

(2) Describe to what extent the credit risk manager has had prior experience serving as a credit risk manager for asset-backed securities transactions involving similar pool assets.

(3) Describe the credit risk manager's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the credit risk manager, including whether notices are required to investors, rating agencies or other third parties, and any required percentage of a class or classes of asset-backed securities that is needed to require the credit risk manager to take action.

(4) Disclose the manner and amount in which the credit risk manager is compensated.

(5) Describe any limitations on the credit risk manager's liability under the transaction agreements regarding the asset-backed securities transaction.

(6) Describe any contractual provisions or understandings regarding the credit risk manager's removal, replacement or resignation, as well as how the expenses associated with changing from one credit risk manager to another credit risk manager will be paid.

6. Amend § 229.1119 by adding paragraph (a)(7) to read as follows:

**§ 229.1119 (Item 1119) Affiliations and certain relationships and related transactions.**

* * * * *

(a) * * *

(7) Credit risk manager.

* * * * *

7. Amend § 229.1121 by adding reserved paragraphs (d) and (e) and adding paragraphs (f) and (g) to read as follows:

**§ 229.1121 (Item 1121) Distribution and pool performance information.**

* * * * *

(d) [Reserved].

(e) [Reserved].

(f) *Credit risk manager.* (1) *Review by credit risk manager.* If during the distribution period a credit risk manager is required to review the underlying assets for compliance with the representations and warranties on the underlying assets, provide the following information, as applicable:

(i) A description of the event(s) that triggered the review by the credit risk manager during the distribution period.

(ii) If the credit risk manager provided to the trustee during the distribution period a report of the findings and conclusions of its review of assets, file the full report as an exhibit to the Form 10–D.

(2) *Change in credit risk manager.* If during the distribution period a credit risk manager has resigned or has been removed, replaced or substituted, or if a new credit risk manager has been appointed, state the date the event occurred and the circumstances surrounding the change. If a new credit risk manager has been appointed, provide the disclosure required by Item 1109(b) (17 CFR 229.1109(b)), as applicable, regarding such credit risk manager.

(g) *Investor communication.* Disclose any request received from an investor to communicate with other investors during the reporting period received by the party responsible for making the Form 10–D filings on or before the end date of a distribution period. The disclosure regarding the request to communicate is required to include the name of the investor making the request, the date the request was received, and a description of the method by which other investors may contact the requesting investor.

*Instruction to paragraph (g).* An investor would not be permitted to use the ability to request to communicate with other investors as a mechanism to communicate for purposes other than those related to investors exercising their rights under the terms of the asset-backed security.

## PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

8. The authority citation for Part 230 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

9. Amend § 230.401 by:

a. Revising in paragraph (g)(1) the phrase ''and (g)(3)'' to read '', (g)(3), and (g)(4)''; and

b. Adding paragraph (g)(4).

The addition reads as follows:

### § 230.401 Requirements as to proper form.

* * * * *

(g) * * *

(4) Notwithstanding that the registration statement may have become effective previously, requirements as to proper form under this section will have been violated for any offering of securities where the requirements of General Instruction I.A. of Form SF–3 has not been met as of ninety days after the end of the depositor's fiscal year end prior to such offering.

10. Amend § 230.415 by revising paragraph (a)(1)(vii):

### § 230.415 Delayed or continuous offering and sale of securities.

(a) * * *

(1) * * *

(vii) Asset-backed securities (as defined in 17 CFR 229.1101) registered (or qualified to be registered) on Form SF–3 (§ 239.45 of this chapter) which are to be offered and sold on an immediate or delayed basis by or on behalf of the registrant;

*Instructions to paragraph (a)(1)(vii):* The requirements of General Instruction I.B.1 of Form SF–3 (§ 239.45 of this chapter) must be met for any offerings of an asset-backed security (as defined in 17 CFR 229.1101) registered in reliance on paragraph (a)(1)(vii).

* * * * *

## PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

11. The authority citation for Part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

12. Add § 239.45 to read as follows:

### § 239.45 Form SF–3, for registration under the Securities Act of 1933 of asset-backed securities offered pursuant to certain types of transactions.

This form may be used for registration under the Securities Act of 1933 (''Securities Act'') of offerings of asset-backed securities, as defined in 17 CFR 229.1101(c). Any registrant which meets the requirements of paragraph (a) of this section may use this Form for the registration of asset-backed securities (as defined in 17 CFR 229.1101(c)) under the Securities Act which are offered in any transaction specified in paragraph (b) of this section provided that the requirement applicable to the specified transaction are met. Terms used have the same meaning as in Item 1101 of Regulation AB.

(a) *Registrant requirements.* Registrants must meet the following conditions in order to use this Form for registration under the Securities Act of asset-backed securities offered in the transactions specified in paragraph (b) of this section:

(1) To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form required to comply with the transaction requirements in paragraphs (b)(1)(i) through (iii) of this section with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements shall apply:

(i) Such depositor and each such issuing entity must have filed on a timely basis all certifications required by paragraph (b)(1)(i) of this section; and

(ii) Such depositor and each such issuing entity must have filed on a timely basis all transaction agreements containing the provisions that are required by paragraphs (b)(1)(ii) and (iii) of this section.

(iii) If such depositor and issuing entity fail to meet the requirements of paragraphs (a)(1)(i) and (ii) of this section, such depositor and issuing entity will be deemed to satisfy such requirements for purposes of this Form 90 days after the date it files the information required by paragraphs (a)(1)(i) and (ii).

*Instruction to (a)(1).* The registrant must provide disclosure in a prospectus that is part of the registration statement that it has met the registrant requirements of paragraph (a)(1) of this section.

(2) To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, or 6.03 of Form 8–K (17 CFR 249.308). If Rule 12b-25(b) (17 CFR 240.12b-25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in Securities Act Rule 405 (17 CFR 230.405).

(b) *Transaction Requirements.* If the registrant meets the registrant requirements specified in paragraph (a) above, an offering meeting the following conditions may be registered on Form SF–3:

(1) Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash where the following have been satisfied:

(i) *Certification.* The registrant files a certification in accordance with Item 601(b)(36) of Regulation S–K (§ 229.601(b)(36)) signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor with respect to each offering of securities that is registered on this form.

(ii) *Appointment of a credit risk manager and repurchase request dispute resolution provisions.* With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, must provide for the following:

(A) The selection and appointment by the trustee of the issuing entity of a credit risk manager that is not affiliated with any sponsor, depositor, or servicer of the transaction;

(B) The credit risk manager shall have authority to access copies of the underlying documents related to the pool assets;

(C) The credit risk manager shall be responsible for reviewing the underlying assets for compliance with the representations and warranties on the underlying pool assets. Reviews shall be required, at a minimum, when the requirments of either paragraphs (b)(1)(ii)(C)(*1*) or (*2*) of this section are met:

(*1*) The credit enhancement requirements, as specified in the underlying transaction agreements, are not met; or

(*2*) At the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.

(C) The credit risk manager shall provide a report to the trustee of the findings and conclusions of the review of the assets.

(D) If an asset subject to a repurchase request, pursuant to the terms of the transaction agreements, is not repurchased by the end of a 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.

(iii) *Investor communication provision.* With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, contains a provision requiring that the party responsible for making periodic filings on Form 10–D (§ 249.312) include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security. The request to communicate, would be required to include the name of the investor making the request; the date the request was received; and a description of the method by which other investors may use to contact the requesting investor.

*Instruction to (b)(1)(iii)* If an underlying transaction agreement contains procedures in order to verify that an investor is, in fact, a beneficial owner, the verification procedures may require no more than the following:

(1) If the investor is a record holder of the securities at the time of a request to communication, then the investor would not have to provide verification of ownership, and

(2) If the investor is not the record holder of the securities, then the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, that the investor beneficially holds the securities.

(iv) *Delinquent assets.* Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(v) *Residual value for certain securities.* With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(2) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (b)(1) of this section where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

59. Add Form SF–3 (referenced in § 239.45) to read as follows:

**Note:** The text of Form SF–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM SF–3**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

______________________________

(Exact name of registrant as specified in its charter)

______________________________

(State or other jurisdiction of incorporation or organization)

______________________________

(I.R.S. Employer Identification Number)

Commission File Number of depositor: ______________________________

Central Index Key Number of depositor: ______________________________

______________________________

(Exact name of depositor as specified in its charter)

Central Index Key Number of sponsor (if available): ______________________________

______________________________

(Exact name of sponsor as specified in its charter)

______________________________

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

______________________________

(Name, address, including zip code, and telephone number, including area code, of agent for service)

______________________________

(Approximate date of commencement of proposed sale to the public)

If any of the securities being registered on this Form SF–3 are to be offered on a delayed basis pursuant to Rule 415 under the Securities Act of 1933, check the following box: [ ]

If this Form SF–3 is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering: [ ]

If this Form SF–3 is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering: [ ]

CALCULATION OF REGISTRATION FEE

| Title of each class of securities to be registered | Amount to be registered | Proposed maximum offering price per unit | Proposed maximum aggregate offering price | Amount of registration fee. |
| --- | --- | --- | --- | --- |

**Notes to the ''Calculation of Registration Fee'' Table (''Fee Table''):**

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§ 230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(r) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and must provide that the issuer is relying on Rule 456(b) and Rule 457(r). If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(ii) (§ 230.456(b)(1)(ii) of this chapter), the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering or offerings and the applicable registration fee.

3. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

**GENERAL INSTRUCTIONS**

**I. Eligibility Requirements for Use of Form SF–3.**

This instruction sets forth registrant requirements and transaction requirements for the use of Form SF–3. Any registrant which meets the requirements of I.A. below (''Registrant Requirements'') may use this Form for the registration of asset-backed securities (as defined in 17 CFR 229.1101(c)) under the Securities Act of 1933 (''Securities Act'') which are offered in any transaction specified in I.B. below (''Transaction Requirement'') provided that the requirement applicable to the specified transaction are met. Terms used in this form have the same meaning as in Item 1101 of Regulation AB.

**A. Registrant Requirements.** Registrants must meet the following conditions in order to use this Form SF–3 for registration under the Securities Act of asset-backed securities offered in the transactions specified in I.B. below:

1. To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form required to comply with the transaction requirements in General Instructions I.B.1(a), I.B.1(b), and I.B.1(c) of this form with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements shall apply:

(a) Such depositor and each such issuing entity must have filed on a timely basis all certifications required by I.B.1(a); and

(b) Such depositor and each such issuing entity must have filed on a timely basis all transaction agreements containing the provisions that are required by I.B.1(b) and I.B.1(c);

If such depositor and issuing entity fail to meet the requirements of I.A.1(a) and I.A.1(b), such depositor and issuing entity will be deemed to satisfy such requirements for purposes of this Form SF–3 90 days after the date it files the information required by I.A.1(a) and I.A.1(b).

*Instruction to General Instruction I.A.1:* The registrant must provide disclosure in a prospectus that is part of the registration statement that it has met the registrant requirements of I.A.1.

2. To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form SF–3 subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such. In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, or 6.03 of Form 8–K (17 CFR 249.308). If Rule 12b–25(b) (17 CFR 240.12b–25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in Securities Act Rule 405 (17 CFR 230.405).

**B. Transaction Requirements.** If the registrant meets the Registrant Requirements specified in I.A. above, an offering meeting the following conditions may be registered on this Form:

1. Offerings for cash where the following have been satisfied:

(a) **Certification.** The registrant files a certification in accordance with Item 601(b)(36) of Regulation S–K (§ 229.601(b)(36)) signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor with respect to each offering of securities that is registered on this form.

(b) **Appointment of a credit risk manager and repurchase request dispute resolution provisions.** With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, must provide for the following:

(A) The selection and appointment by the trustee of the issuing entity of a credit risk manager that is not affiliated with any sponsor, depositor, or servicer of the transaction;

(B) The credit risk manager shall have authority to access copies of the underlying documents related to the pool assets;

(C) The credit risk manager shall be responsible for reviewing the underlying assets for compliance with the representations and warranties on the underlying pool assets. Reviews shall be required, at a minimum, when either (a) or (b) are met:

(a) The credit enhancement requirements, as specified in the underlying transaction agreements, are not met; or

(b) At the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.

(D) The credit risk manager shall provide a report to the trustee of the findings and conclusions of the review of the assets.

(E) If an asset subject to a repurchase request, pursuant to the terms of the transaction agreements, is not repurchased by the end of a 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.

(c) **Investor Communication Provision.** With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, contains a provision requiring that the party responsible for making periodic filings on Form 10–D (§ 249.312) include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security. The request to communicate would be required to include the name of the investor making the request, the date the request was received, and a description of the method other investors may use to contact the requesting investor.

*Instruction to I.B.1(c)* If an underlying transaction agreement contains procedures in order to verify that an investor is, in fact, a beneficial owner, the verification procedures may require no more than the following: (1) if the investor is a record holder of the securities at the time of a request to communication, then the investor would not have to provide verification of ownership, and (2) if the investor is not the record holder of the securities, then the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, that the investor beneficially holds the securities.

(d) **Delinquent assets.** Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(e) **Residual value for certain securities.** With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

2. Securities relating to an offering of asset-backed securities registered in accordance with General Instruction I.B.1. where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

**II. Application of General Rules and Regulations.**

A. Attention is directed to the General Rules and Regulations under the Securities Act, particularly Regulation C thereunder (l7 CFR 230.400 to 230.494). That Regulation contains general requirements regarding the preparation and filing of registration statements.

B. Attention is directed to Regulation S–K (17 CFR part 229) for the requirements applicable to the content of the non-financial statement portions of registration statements under the Securities Act. Where this Form SF–3 directs the registrant to furnish information required by Regulation S–K and the item of Regulation S–K so provides, information need only be furnished to the extent appropriate. Notwithstanding Items 501 and 502 of Regulation S–K, no table of contents is required to be included in the prospectus or registration statement prepared on this Form SF–3. In addition to the information expressly required to be included in a registration statement on this Form SF–3, registrants also may provide such other information as they deem appropriate.

C. Where securities are being registered on this Form SF–3, Rule 456(c) permits, but does not require, the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(s) permits, but does not require, the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in an offering or offerings off the registration statement. If a registrant elects to pay all or a portion of the registration fee on a deferred basis, the Fee Table in the initial filing must identify the classes of securities being registered and provide that the registrant elects to rely on Rule 456(c) and Rule 457(s), but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(c)(1)(ii), the amended Fee Table must include either the dollar amount of securities being registered if paid in advance of or in connection with an offering or offerings or the aggregate offering price for all classes of securities referenced in the offerings and the applicable registration fee.

D. Information is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430D. Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430D, a post-effective amendment to the registration statement, or a periodic or current report under the Exchange Act incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed, as required by Rule 430D, pursuant to Rule 424(h) or Rule 424(b) (§ 230.424(h) or § 230.424(b) of this chapter).

**III. Registration of Additional Securities Pursuant to Rule 462(b).** With respect to the registration of additional securities for an offering pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any price-related information omitted from the earlier registration statement in reliance on Rule 430A that the registrant chooses to include in the new registration statement. The information contained in such a Rule 462(b) registration statement shall be deemed to be a part of the earlier registration statement as of the date of effectiveness of the Rule 462(b) registration statement. Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See

Rule 411(c) and Rule 439(b) under the Securities Act.

**IV. Registration Statement Requirements.** Include only one form of prospectus for the asset class that may be securitized in a takedown of asset-backed securities under the registration statement. A separate form of prospectus and registration statement must be presented for each country of origin or country of property securing pool assets that may be securitized in a discrete pool in a takedown of asset-backed securities. For both separate asset classes and jurisdictions of origin or property, a separate form of prospectus is not required for transactions that principally consist of a particular asset class or jurisdiction which also describe one or more potential additional asset classes or jurisdictions, so long as the pool assets for the additional classes or jurisdictions in the aggregate are below 10% of the pool, as measured by dollar volume, for any particular takedown.

## PART I

## INFORMATION REQUIRED IN PROSPECTUS

### Item 1. Forepart of the Registration Statement and Outside Front Cover Pages of Prospectus

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S–K (17 CFR 229.501) and Item 1102 of Regulation AB (17 CFR 229.1102).

### Item 2. Inside Front and Outside Back Cover Pages of Prospectus

Set forth on the inside front cover page of the prospectus or, where permitted, on the outside back cover page, the information required by Item 502 of Regulation S–K (17 CFR 229.502).

### Item 3. Transaction Summary and Risk Factors

Furnish the information required by Item 503 of Regulation S–K (17 CFR 229.503) and Item 1103 of Regulation AB (17 CFR 229.1103).

### Item 4. Use of Proceeds

Furnish the information required by Item 504 of Regulation S–K (17 CFR 229.504).

### Item 5. Plan of Distribution

Furnish the information required by Item 508 of Regulation S–K (17 CFR 229.508).

### Item 6. Information with Respect to the Transaction Parties

Furnish the following information:

(a) Information required by Item 1104 of Regulation AB (17 CFR 229.1104), Sponsors;

(b) Information required by Item 1106 of Regulation AB (17 CFR 229.1106), Depositors;

(c) Information required by Item 1107 of Regulation AB (17 CFR 229.1107), Issuing entities;

(d) Information required by Item 1108 of Regulation AB (17 CFR 229.1108), Servicers;

(e) Information required by Item 1109 of Regulation AB (17 CFR 229.1109), Trustees;

(f) Information required by Item 1110 of Regulation AB (17 CFR 229.1110), Originators;

(g) Information required by Item 1112 of Regulation AB (17 CFR 229.1112), Significant Obligors;

(h) Information required by Item 1117 of Regulation AB (17 CFR 229.1117), Legal Proceedings; and

(i) Information required by Item 1119 of Regulation AB (17 CFR 229.1119), Affiliations and certain relationships and related transactions.

### Item 7. Information with Respect to the Transaction

Furnish the following information:

(a) Information required by Item 1111 of Regulation AB (17 CFR 229.1111), Pool Assets and Item 1111A of Regulation AB (17 CFR 229.1111A), Asset-level information, and Item 1111B of Regulation AB (17 CFR 229.1111B), Grouped account data for credit card pools;

(b) Information required by Item 202 of Regulation S–K (17 CFR 229.202), Description of Securities Registered and Item 1113 of Regulation AB (17 CFR 229.1113), Structure of the Transaction;

(c) Information required by Item 1114 of Regulation AB (17 CFR 229.1114), Credit Enhancement and Other Support;

(d) Information required by Item 1115 of Regulation AB (17 CFR 229.1115), Certain Derivatives Instruments;

(e) Information required by Item 1116 of Regulation AB (17 CFR 229.1116), Tax Matters;

(f) Information required by Item 1118 of Regulation AB (17 CFR 229.1118), Reports and additional information; and

(g) Information required by Item 1120 of Regulation AB (17 CFR 229.1120), Ratings.

*Instruction:* All registrants are required to file the information required by Item 1111A of Regulation AB (17 CFR 229.1111A), Asset-level information; Item 1111B of Regulation AB (17 CFR 229.1111B), Grouped account data for credit card pools; and Item 1113(h) of Regulation AB (17 CFR 229.1113(h)), Waterfall Computer Program; as exhibits to Form 8–K (17 CFR 249.308) that are filed with the Commission pursuant to Item 6.06 and Item 6.07, respectively, of that form. Incorporation by reference must comply with Item 11 of this Form SF–3.

### Item 8. Static Pool

Furnish the information required by Item 1105 of Regulation AB (17 CFR 229.1105).

*Instruction:* Registrants may elect to file the information required by this item as an exhibit to Form 8–K (17 CFR 249.308) that is filed with the Commission pursuant to Item 6.08 of that form. Incorporation by reference must comply with Item 11 of this Form SF–3.

### Item 9. Interests of Named Experts and Counsel

Furnish the information required by Item 509 of Regulation S–K (17 CFR 229.509).

### Item 10. Incorporation of Certain Information by Reference.

(a) The prospectus shall provide a statement that all current reports filed pursuant to Items 6.06, 6.07 and if applicable, 6.08 of Form 8–K pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

(b) If the registrant is structured as a revolving asset master trust, the documents listed in (1) and (2) below shall be specifically incorporated by reference into the prospectus by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10–K (17 CFR 249.310) filed pursuant to Section 13(a) or 15(d) of the Exchange Act that contains financial statements for the registrant's latest fiscal year for which a Form 10–K was required to be filed; and

(2) all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report referred to in (1) above.

(c) The prospectus shall also provide a statement regarding the incorporation of reference of Exchange Act reports prior to the termination of the offering pursuant to one of the following two ways:

(1) a statement that all subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus; or

(2) a statement that all current reports on Form 8–K filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

*Instruction.* Attention is directed to Rule 439 (17 CFR 230.439) regarding consent to use of material incorporated by reference.

(d)(1) You must state

(i) that you will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the information that has been incorporated by reference in the prospectus but not delivered with the prospectus;

(ii) that you will provide this information upon written or oral request;

(iii) that you will provide this information at no cost to the requester; and

(iv) the name, address, and telephone number to which the request for this information must be made.

*Note to Item 11(c)(1).* If you send any of the information that is incorporated by reference in the prospectus to security holders, you also must send any exhibits that are specifically incorporated by reference in that information.

(2) You must:

(i) identify the reports and other information that you file with the SEC; and

(ii) state that the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, NE., Washington, DC 20549, between the hours of 10:00 a.m. and 3:00 p.m. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*). You are encouraged to give your Internet address, if available.

**Item 11. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.**

Furnish the information required by Item 510 of Regulation S–K (17 CFR 229.510).

**PART II—INFORMATION NOT REQUIRED IN PROSPECTUS**

**Item 12. Other Expenses of Issuance and Distribution.**

Furnish the information required by Item 511 of Regulation S–K (17 CFR 229.511).

**Item 13. Indemnification of Directors and Officers.**

Furnish the information required by Item 702 of Regulation S–K (17 CFR 229.702).

**Item 14. Exhibits.**

Subject to the rules regarding incorporation by reference, file the exhibits required by Item 601 of Regulation S–K (17 CFR 229.601).

**Item 15. Undertakings.**

Furnish the undertakings required by Item 512 of Regulation S–K (17 CFR 229.512).

**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form SF–3 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of ________________, State of ________________, on ____________,

_______________________________________

(Registrant)

By _______________________________________

(Signature and Title)

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

_______________________________________

(Signature)

_______________________________________

(Title)

_______________________________________

(Date)

**Instructions**

1. The registration statement shall be signed by the depositor, the depositor's principal executive officer or officers, its principal financial officer, its senior officer in charge of securitization and by at least a majority of its board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement shall also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement.

2. The name of each person who signs the registration statement shall be typed or printed beneath his signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs the registration statement. Attention is directed to Rule 402 concerning manual signatures and to Item 601 of Regulation S–K concerning signatures pursuant to powers of attorney.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

13. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.,* 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

14. Amend Form 10–D (referenced in § 249.312) by reserving Item 1A in Part I and adding Item 1B in Part I as follows:

**Note:** The text of Form 10–D does not, and this amendment will not, appear in the Code of Federal Regulations.

* * * * *

**Item 1A. (Reserved)**

**Item 1B. Credit Risk Manager and Investor Communication.**

For any transaction that included the provisions required by General Instructions I.B.1(b) and I.B.1(c) on Form SF–3 (referenced in § 239.45), provide the information required by Item 1121(f) and (g) of Regulation AB (17 CFR 229.1121(f) and (g)), as applicable.

* * * * *

Dated: July 26, 2011.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–19300 Filed 8–4–11; 8:45 am]

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**Federal Register**

Vol. 76, No. 151

Friday, August 5, 2011

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**H.R. 1383/P.L. 112–26**

Restoring GI Bill Fairness Act of 2011 (Aug. 3, 2011; 125 Stat. 268)

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